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## Home Rule in New York: The Need For a Change

By Michael A. Cardozo & Zachary W. Klinger\*

### I. Introduction

Throughout the twelve years that one of the authors served as the Corporation Counsel for the city of New York under Mayor Michael R. Bloomberg, the Law Department litigated thousands of cases involving issues ranging from taxation to transportation to the proper scope of governmental activity. As often arises from city politics, some of these matters resulted from disputes between Mayor Bloomberg and the State while many others involved disagreements with the New York City Council.<sup>1</sup> In fact, during Mayor Bloomberg's first term alone, a recalcitrant City Council overrode his vetoes a record thirty-five times.<sup>2</sup> Regardless of the subject of contention, one issue manifested itself repeatedly—involving the power of municipalities to self-govern without state intervention—Home Rule.<sup>3</sup> The clashes with the City Council often implicated the State (and thus Home Rule) regardless of whether the litigation involved gay rights, procurement standards, collective bargaining, or even taxis. The author's twelve years of experience as corporation counsel afforded him an inside look into the practicalities and nuances of the Home Rule debate and provided him with a greater understanding of Home Rule's benefits as well as its flaws.

This article is intended to provide a practical lens into how these Home Rule issues unfold in complex matters involving the

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1. See Winnie Hu, *Mayor Need Not Enforce Certain Laws, Court Rules*, N.Y. TIMES (Feb. 15, 2006), <http://www.nytimes.com/2006/02/15/nyregion/may-or-need-not-enforce-certain-laws-court-rules.html>.

2. *Id.*

3. N.Y. CONST. art. IX, § 2 (commonly referred to as the "Home Rule" provision).

City, and to suggest how a much-needed Home Rule constitutional amendment could re-shape or, at the very least, clarify Home Rule standards. Section II will provide some historical and legal background on Home Rule; Section III will analyze some of the more well-known Home Rule cases that the Law Department litigated during the Bloomberg Administration; and Section IV will discuss insights gleaned with respect to, and will offer several recommendations for, the future of Home Rule in New York.

## II. Legal Background

Adopted in 1963<sup>4</sup> with the intended purpose, in the words of former Governor Rockefeller, of “strengthen[ing] the governments closest to the people so that they may help meet the present and emerging needs of [the] time,”<sup>5</sup> article IX, section 2 of the New York State Constitution (commonly referred to as the “Home Rule” provision) allocates power between the state and local governments.<sup>6</sup> Under section 2(c), the “center of home rule powers,”<sup>7</sup> every local government is empowered:

- (1) To adopt or amend local laws relating to its “property, affairs or government” which are not inconsistent with the provisions of the Constitution or any general law; and
- (2) To adopt or amend local laws, not inconsistent with the Constitution or any general law,

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4. While the New York State Constitution has always carved out limited spheres of local autonomy, a full Home Rule constitutional amendment was not adopted until 1923. *See Note, Home Rule and the New York Constitution*, 66 COLUM. L. REV. 1145, 1147-48 (1966). At that time, local legislative powers were delegated to municipalities in only nine specific areas. *Id.* at 1147. A 1928 statute permitted local governments to act, consistent with general law, in matters relating to their “property, affairs or government,” but local authority remained weak. *Id.* at 1147-48. The basic form and substance of the 1923 amendment would remain in effect until the adoption of new Home Rule provisions in 1963. *Id.*

5. ROBERT B. WARD, *NEW YORK STATE GOVERNMENT* 547 (2d ed. 2006).

6. *See id.* at 547-49.

7. PETER J. GALIE, *ORDERED LIBERTY: A CONSTITUTIONAL HISTORY OF NEW YORK* 290 (1996).

relating to ten enumerated subjects,<sup>8</sup> whether or not they relate to its “property, affairs, or government” subject, however, to the power of the Legislature, under Section 2(b)(3), to restrict the adoption of such a local law not relating to property, affairs or government.<sup>9</sup>

Under section 2(b)(2), this means that the state legislature is specifically prohibited from acting with respect to the “property, affairs or government of any local government,” except by general law or by special law enacted at the request of two-thirds of the membership of a local legislative body, or at the “request of its chief executive officer concurred in by a majority” of the legislative body, or except in the case of New York City, by a two-thirds vote of each house upon receiving a “certificate of necessity from the governor.”<sup>10</sup>

While the “rights, powers, privileges and immunities” afforded to local governments by article IX are to be “liberally construed,”<sup>11</sup> section 3(a) explicitly states that the aforementioned limitations on the State’s power do not “restrict or impair any power of the legislature” with regard to: (1) the public school system or any retirement system pertaining to

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8. The “ten enumerated subjects” being:

(1) The powers, duties, qualifications, number, mode of selection and removal, terms of office, compensation, hours of work, protection, welfare and safety of [local] officers and employees. (2) In the case of a city, town or village, the membership and composition of the local legislative body. (3) The transaction of its business; (4) The incurring of its obligations. (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 [its] taxes . . . . (9) The wages or salaries, the hours of work or labor, and the protection, welfare and safety of persons employed by any contractor or sub-contractor performing work, labor or services for it. (10) The government, protection, order, conduct, safety, health and well-being of its people and property.

N.Y. CONST. art. IX, §§ 2(c)(ii)(1)-(10).

9. *Id.* art. IX, § 2(c).

10. *Id.* art. IX § 2(b)(2).

11. N.Y. MUN. HOME RULE LAW § 51 (McKinney 1994).

such, (2) the courts, and (3) matters outside the scope of the property, affairs or government of a local government.<sup>12</sup>

Briefly, general laws apply to all localities in the state while special laws apply to “one or more, but not all,” localities.<sup>13</sup> There are no constitutional limits on the power of the legislature to pass general laws. However, for the legislature to pass a special law that would affect only a particular locality’s property, affairs or government, it must receive a Home Rule message (i.e., a formal request from the locality for the State to intervene).<sup>14</sup>

There are two important limitations on the restrictions imposed on the legislature in enacting what would appear to be special laws. First, in the case of New York City, under the classification doctrine, a law is considered general even if it applies only to a limited number of localities (e.g., “cities having a population of 1,000,000 or more,”)<sup>15</sup> so long as the law is based upon characteristics reasonably related to the subject of the law, and it does not serve merely to designate and identify the places to be affected.<sup>16</sup>

The second limitation on the restriction of the State’s authority to enact what would appear to be a special law lies in a doctrine, first articulated in Chief Judge Cardozo’s concurring opinion in *Adler v. Deegan*.<sup>17</sup> Under *Adler*, when the State possesses a substantial interest in the subject matter, and the enactment bears a reasonable relationship to the legitimate accompanying substantial state concern, the State may legislate on what would otherwise be a local matter.<sup>18</sup> In *Adler*, the court of appeals found constitutional a state-enacted multiple dwelling law—applicable only to cities of more than eight-

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12. N.Y. CONST. art. IX, § 3(a).

13. *Id.* art. IX, §§ 3(d)(1), (4).

14. *Id.* art. IX, § 2(b)(2)(a).

15. *See generally*, *Farrington v. Pinckney*, 133 N.E.2d 817, 831 (N.Y. 1956) (holding classification based on population to be a general law that did not violate N.Y. CONST. art. III, § 17). While beyond the focus of this article, the classification doctrine, though long accepted, in practice allows for the curtailment of Home Rule authority; its impact may also merit re-thinking.

16. N.Y. CONST. art. III, § 17.

17. *Adler v. Deegan*, 167 N.E. 705, 709-14 (N.Y. 1929) (Cardozo, J., concurring).

18. *Id.* at 713-14.

hundred thousand inhabitants<sup>19</sup> and promulgated to combat hazardous and unsanitary living conditions in city tenements—notwithstanding that it had been enacted without a Home Rule message.

Such a request would ordinarily be required for state legislation applicable only to a particular locality. In upholding the law, and articulating what would become known as the substantial state concern doctrine, Chief Judge Cardozo wrote: “[w]here the area sought to be legislated implicates concerns that overlap and intermingle between the State and the locality, but involves a substantial State concern, the State may freely legislate notwithstanding the fact that the concern of the State may also touch upon local matters.”<sup>20</sup> While the *Adler* opinion was issued more than thirty years before the adoption of the present Home Rule constitutional provisions, it remains, as discussed below, a guiding principle of Home Rule today.

Courts focus on the stated purpose and legislative history of the act in question to assess whether a substantial state interest exists. For an act to bear a reasonable relationship to the substantial state interest, it must advance the asserted state interest.<sup>21</sup>

In addition to the substantial state concern doctrine, preemption principles also bear heavily on the analytic framework of Home Rule. Preemption can be either express or implied.<sup>22</sup> Express preemption occurs when a state statute is explicitly intended to preempt local law,<sup>23</sup> while implied preemption exists when a local law either conflicts with a state statute (i.e., conflict preemption) or intrudes on an area for which the State has “assumed full regulatory responsibility” or

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19. *See id.* at 709. While Justice Pound, in concurrence, recognized that the Multiple Dwelling Law could be upheld under the classification doctrine discussed above, the law was ultimately found constitutional on other grounds (i.e., the State’s police power). *Id.* at 709-10 (Pound, J., concurring).

20. *City of New York v. Patrolmen’s Benevolent Ass’n of N.Y., Inc.*, 642 N.Y.S.2d 1003, 1010 (Sup. Ct. 1996) (citing *Adler v. Deegan*, 167 N.E. 705, 713 (N.Y. 1929)).

21. *See Greater N.Y. Taxi Ass’n v. State (Green Cabs)*, 993 N.E.2d 393, 400 (N.Y. 2013).

22. *See DJL Rest. Corp. v. City of New York*, 749 N.E.2d 186, 190 (N.Y. 2001).

23. *Id.*

has demonstrated a need for statewide uniformity (i.e., field preemption).<sup>24</sup> As the court of appeals has explained:

Where it is determined that the State has preempted an entire field, a local law regulating the same subject matter is deemed inconsistent with the State's overriding interests because it either (1) prohibits conduct which the State law, although perhaps not expressly speaking to, considers acceptable or at least does not proscribe or (2) imposes additional restrictions on rights granted by State law.<sup>25</sup>

The substantial state concern and preemption doctrines have had a dramatic impact on the power dynamic between the legislature and local authorities. In practice, both doctrines have effectively curbed the autonomy of local governments—even though, as the court of appeals has written, “the 1963 home rule amendment was intended to expand and secure the powers enjoyed by local governments.”<sup>26</sup> The next section will address the formidable role the preemption and substantial state concern doctrines played in the Home Rule cases litigated during the Bloomberg years.

### III. Home Rule and the Bloomberg Administration

#### A. *Express Preemption*

The earliest Home Rule problems faced by the Bloomberg Administration were unsolvable at the local level because of express preemption. First, in the wake of the devastating attacks of September 11, 2001, the City found itself in the midst of a deep financial crisis.<sup>27</sup> Facing a potential six billion dollar deficit, the City needed substantial additional revenue but

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24. *Id.*

25. *Jancyn Mfg. Corp. v. Suffolk*, 518 N.E.2d 903, 905 (N.Y. 1987) (internal citations omitted).

26. *Wambat Realty Corp. v. State*, 362 N.E.2d 581, 585 (N.Y. 1977).

27. Glenn Pasanen, *Analysis: The Bloomberg Fiscal Legacy*, *GOTHAM GAZETTE* (Nov. 24, 2013), <http://www.gothamgazette.com/index.php/opinion/4739-the-bloomberg-fiscal-legacy>.

lacked the power to raise taxes on city residents.<sup>28</sup> This was because the City's taxing authority,<sup>29</sup> with few exceptions such as property taxes, is subject to approval by the legislature and the governor.<sup>30</sup> Therefore, notwithstanding the mayor and City Council's agreement on the need for increased taxes to meet the City's post-September 11th financial challenges, the City was expressly preempted from doing so because the power to tax is explicitly reserved to the State.<sup>31</sup> Eventually, with Albany's approval, the City was able to implement a package of property,

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28. *Id.*

29. *See* N.Y. CONST. art. VIII, § 1.

30. *See id.* art. XVI, § 1. *See also* Expedia, Inc. v. City of N.Y. Dep't of Fin., 3 N.E.3d 121, 124-25 (N.Y. 2013) ("In New York, local governments lack an independent power to tax. The State Constitution vests the taxing power in the state legislature and authorizes the legislature to delegate that power to local governments." (internal citations omitted)). Conversely, the State can eliminate a City tax without the City's consent, as it did with the City's controversial "commuter tax." *See* City of New York v. State (*Commuter Tax*), 730 N.E.2d 920, 926-27 (N.Y. 2000). In *Commuter Tax*, the New York Court of Appeals unanimously upheld the State's elimination of the City's previously imposed tax on commuters on state law grounds. *Id.* Notwithstanding the fact that the repeal was "concededly a special law applying only to New York City," the court held that the State did not require a Home Rule message in order to implement the law eliminating the tax (even though the legislature had requested one when the enabling law was initially enacted). *Id.* at 925. The court's reasoning was twofold: it explained that "[t]he power to tax, of course, rests solely with the Legislature," and further that the State maintained a substantial interest in regulating a tax policy affecting hundreds of thousands of state residents who worked, but did not live, in the city. *Id.* at 925-26. Without opining on the political motivations behind the repeal, these findings were sufficient to support the court's conclusion that a Home Rule message was not required to repeal the previously imposed tax. *Id.* at 926.

31. *See* N.Y. CONST. art. XVI, § 1. A post-Bloomberg decision highlights the constraints placed on local governments in the wake of the State's taxing authority. N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y. City Dep't of Health & Mental Hygiene (*Sugary Drinks*), 16 N.E.3d 538 (N.Y. 2014). In *Sugary Drinks*, the City Board of Health, at Mayor Bloomberg's urging, promulgated an amendment to the City Health Code prohibiting food service establishments in the city from serving certain drinks in sizes larger than 16 ounces (the "Sugary Drinks Portion Cap Rule" or "Rule"). *Id.* at 541. This regulation was the preferred alternative to a "soda tax," since a tax, rather than a size limit, would require state approval. However, even this approach was ultimately found impermissible after a coalition of interest groups successfully challenged the constitutionality of the Sugary Drinks Portion Cap Rule. *Id.* at 549. The New York Court of Appeals ruled the regulation invalid, holding that, in imposing the Rule, the City Board of Health had exceeded the scope of its regulatory authority and infringed on the legislative powers of the City Council. *Id.*

personal income and sales tax increases that amounted to roughly three billion dollars in additional revenues for the City.<sup>32</sup>

In a similar example of express preemption, Mayor Bloomberg had vigorously campaigned on the promise of reforming the City's deteriorating public education system.<sup>33</sup> Again, the City Council was largely in agreement with the mayor's plan to increase local control of the city schools.<sup>34</sup> However, similar to its taxing power, the City's authority in the education arena is expressly limited by the New York State Constitution (specifically article XI, section 1), which places the maintenance and support of the State's public schools solely within the province of the State.<sup>35</sup> Therefore, the mayor once again found the City expressly preempted from taking control of its public schools. Fortunately, the mayor was able to persuade the legislature to grant his administration broader control over the City's public school system than the previous administration.<sup>36</sup> This authority, known as mayoral control, allowed the mayor to make decisions, without seeking state legislative approval, directly affecting the City's public school system, such as appointing members to the New York City Board of Education, hiring or firing the city schools chancellors, and closing failing schools.<sup>37</sup> As events during the de Blasio Administration highlight, this debate over mayoral control continues.<sup>38</sup>

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32. Pasanen, *supra* note 27.

33. See *Seven Years of Mayoral Control*, GOTHAM GAZETTE [hereinafter *Seven Years*], <http://www.gothamgazette.com/index.php/archives/377-seven-years-of-mayoral-control> (last visited Sept. 23, 2017).

34. *Id.*

35. N.Y. CONST. art. XI, § 1.

36. *Seven Years*, *supra* note 33.

37. *Id.*

38. *Id.* Although Mayor de Blasio had initially requested a seven-year extension of mayoral control, the legislature has only agreed, after contentious debate on three separate occasions, to two one-year extensions and one two-year extension. See Kate Taylor, *De Blasio Keeps Control of City's Schools, but Only for a Year*, N.Y. TIMES (June 18, 2016), <https://www.nytimes.com/2016/06/19/nyregion/de-blasio-keeps-control-of-citys-schools-but-only-for-a-year.html>; Jesse McKinley & Lisa W. Foderaro, *Assembly Approves 2-Year Deal on Mayoral Control of New York City Schools*, N.Y. TIMES (June 28, 2017), [https://www.nytimes.com/2017/06/28/nyregion/potential-deal-in-albany-on-mayoral-control-of-schools.html?\\_r=0](https://www.nytimes.com/2017/06/28/nyregion/potential-deal-in-albany-on-mayoral-control-of-schools.html?_r=0). See

Another example of express preemption can be found in Mayor Bloomberg's effort to reduce traffic in the city, while simultaneously addressing the City's future environmental sustainability. The mayor sought to introduce a congestion pricing system that would impose a fee on drivers entering and leaving Manhattan's central business district during peak hours.<sup>39</sup> However, because the City had pursued federal funding for the program, it needed the legislature to grant it pricing authority and agree to implement the program within a two-year period—both pre-requisites to receiving the federal funds.<sup>40</sup> Despite support from the legislature's Traffic Congestion Mitigation Commission, the City Council, then-Governor Paterson and a broad coalition of advocacy groups, the legislature failed to vote on the plan before the deadline for federal funding expired.<sup>41</sup>

There is a plausible argument that if federal funds had not been involved, the City had the authority to impose fees on city drivers, like congestion pricing, even without the legislature's approval.<sup>42</sup> Section 1642(a)(4) of the New York Vehicle and Traffic Law ("VTL") provides that cities with over one million residents (i.e., the City) may impose "tolls, taxes, [and] fees . . . for the use of the highway or any of its parts, *where the*

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also Elizabeth A. Harris, *Chancellor Praises de Blasio's Education Gains as Debate to Control Schools Nears*, N.Y. TIMES (May 2, 2017), [https://www.nytimes.com/2017/05/02/nyregion/carmen-farina-bill-de-blasio-public-school-control.html?\\_r=0](https://www.nytimes.com/2017/05/02/nyregion/carmen-farina-bill-de-blasio-public-school-control.html?_r=0).

39. See Gail Robinson, *Breaking the Gridlock on Congestion Pricing*, GOTHAM GAZETTE (Mar. 24, 2008), <http://www.gothamgazette.com/index.php/transportation/3922-breaking-the-gridlock-on-congestion-pricing>.

40. *Id.*

41. *New York City Congestion Pricing Program Case Study*, NATIONAL COOPERATIVE HIGHWAY RESEARCH PROGRAM 5 (Sept. 2009), [http://www.transpiration-finance.org/pdf/featured\\_documents/nchrp\\_20\\_24\\_62\\_nyc.pdf](http://www.transpiration-finance.org/pdf/featured_documents/nchrp_20_24_62_nyc.pdf).

42. This position is currently being advanced by groups, such as Move NY, which has recently proposed a \$2.75 congestion pricing fee on cars entering Manhattan's central business zone during peak hours. See Paul Berger, *Proposal for Congestion Charge on New York City Motorists*, WALL ST. J. (June 4, 2017, 7:48 PM), [https://www.wsj.com/article\\_email/proposal-for-congestion-charge-on-new-york-city-motorists-1496581200-1MyQjAxMTE3MDA2NTYwOTUzWj](https://www.wsj.com/article_email/proposal-for-congestion-charge-on-new-york-city-motorists-1496581200-1MyQjAxMTE3MDA2NTYwOTUzWj; Roderick M. Hills, NYC Doesn't Need Albany's Permission to Enact Congestion Pricing); Roderick M. Hills, *NYC Doesn't Need Albany's Permission to Enact Congestion Pricing*, STREETS BLOG NYC (July 16, 2012), <http://nyc.streetsblog.org/2012/07/16/nyc-doesnt-need-albanys-permission-to-enact-congestion-pricing>.

*imposition thereof is authorized by law.*<sup>43</sup> This provision has been understood by some to mean that the City may impose fees on drivers' use of city streets only when these fees are authorized by a separate state law. However, construing VTL section 1642(a)(4) to authorize fees only when some other state statute also authorizes such fees would render the italicized section redundant and meaningless. A more reasonable reading of the provision would hold that the City is authorized to impose fees on city drivers as long as these fees are authorized by *either* state or local law.<sup>44</sup>

### B. Implied Preemption

In addition to the express preemption examples, where the Home Rule answers were so clear it would have been futile to litigate them, there are a number of implied preemption cases that were litigated during the Bloomberg Era, such as those discussed below, which highlight the lack of clarity in the Home Rule law as it exists today.

#### *The "Peace Officers" Case*

The first case involving Home Rule litigated by the Law Department after Mayor Bloomberg's election was a holdover from the Giuliani Administration. In *New York City Health and Hospitals Corp. v. Council of New York*, the New York City Health and Hospitals Corporation ("HHC") had sued the City Council seeking to invalidate Local Law 16 of 2001 that mandated that city-funded hospitals utilize peace officers as

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43. N.Y. VEH. & TRAF. LAW § 1642(a)(4) (McKinney 2011) (emphasis added).

44. As another example of state control, the VTL also governs city traffic control initiatives and violation-monitoring systems. Almost thirty years ago, the legislature enacted VTL § 1111-a which permitted the installation of red light cameras in cities with a population of one million or more (i.e. the City). N.Y. VEH. & TRAF. LAW § 1111-a (McKinney 2011). The City then used this authorization to launch the nation's first Red Light Camera program. See N.Y. CITY DEP'T OF TRANSP., NEW YORK CITY RED LIGHT CAMERA PROGRAM: PROGRAM REVIEW 1994-2015 at 2 (2016). Since 1994, the legislature has extended the duration of the City's program seven times. *Id.*

security guards.<sup>45</sup> In an effort to preserve resources, HHC had begun to replace peace officers with private security guards (who lacked peace officer status and who were paid a lower salary).<sup>46</sup> Employing its broad police power with regard to the public welfare,<sup>47</sup> and maintaining that the law would promote the safety of patients, staff, and visitors of the City's hospitals, the City Council enacted Local Law 16 over then-Mayor Giuliani's veto.<sup>48</sup> HHC then challenged the city legislation, arguing that it conflicted with, and was preempted by, the HHC Act—the state law that governs HHC.<sup>49</sup> The City and the affected union, Local 237, subsequently intervened as plaintiff and defendant, respectively.<sup>50</sup>

The First Department held the law preempted, finding that through the HHC Act, “the Legislature [had] both impliedly and expressly evinced an intent to preempt” the area of the City's hospital system.<sup>51</sup> More specifically, the court determined that the local law was inconsistent with the HHC Act's provisions affording HHC complete autonomy over personnel qualifications and outsourcing, and that the State had demonstrated an intent to preempt the entire health care field thereby precluding any further local regulation.<sup>52</sup> The court also noted that the law did not fall within the narrow preemption exception, which allows for “‘generally applicable’ local laws that only ‘incidentally infringe’ upon the powers of state created entities.”<sup>53</sup> Here, the court explained, the local law was not one of general applicability since it applied only to HHC's facilities and not to all of the City's hospitals. Further, the enactment had more than a tangential or incidental impact because it affected only security guards who were not health care personnel and

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45. See *N.Y. City Health & Hosps. Corp. v. Council of N.Y. (Peace Officers)*, 752 N.Y.S.2d 665, 667-68 (App. Div. 2003).

46. *Id.* at 667.

47. See N.Y. MUN. HOME RULE LAW § 10 (McKinney 2011); N.Y.C. Charter ch. 2, § 28.

48. *Peace Officers*, 752 N.Y.S.2d at 667.

49. *Id.* at 668.

50. *Id.*

51. *Id.* at 671.

52. *Id.* at 671-72.

53. *Peace Officers*, 752 N.Y.S.2d at 673.

intruded on HHC's autonomy concerning personnel decisions.<sup>54</sup> While the court's decision was essentially later nullified by a 2003 state law requiring peace officers to perform security functions at HHC facilities,<sup>55</sup> the court's analysis demonstrated its deference to state preemption—a proclivity that would recur in the administration's subsequent legal clashes with the City Council.

*The “Predatory Lending” Case*

Mayor Bloomberg again prevailed over the City Council the following year in *Mayor of New York v. Council of New York (“Predatory Lending”)*.<sup>56</sup> In *Predatory Lending*, the mayor challenged the validity of a local law, passed over his veto, prohibiting city agencies from doing business with, depositing funds with, or providing financial assistance to, financial institutions that engaged in “predatory” lending practices.<sup>57</sup> The *Predatory Lending* Court declared the law void on both conflict and field preemption grounds.<sup>58</sup> The court found provisions of the local ordinance to be “in substantial conflict” with the state banking law, with the potential to “disrupt the operation” of the state statute.<sup>59</sup> In addition, the court explained, the state banking law “contains a comprehensive regulatory scheme” that provides “uniform regulation of the residential mortgage lending process.”<sup>60</sup> In the court's view, this was sufficient to manifest the legislature's intent to occupy the entire field of financial lending.<sup>61</sup> Therefore, the City Council's contention that the law was permissive because the legislature failed to include express preemption language in the law proved unavailing; the exhaustive provisions of the state statute evinced the State's desire to preclude local legislation in the predatory lending

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54. *Id.* at 673-74.

55. Act of October 15, 2003, ch. 671, 2003 N.Y. Laws 671 (codified as amended at N.Y. CRIM. PROC. LAW § 2.10 (McKinney 2003)).

56. *Mayor of N.Y. v. Council of N.Y. (Predatory Lending)*, 780 N.Y.S.2d 266 (Sup. Ct. 2004).

57. *See id.* at 269.

58. *See id.* at 273-74.

59. *Id.* at 275.

60. *Id.* at 273-74.

61. *See Predatory Lending*, 780 N.Y.S.2d at 274-75.

arena.<sup>62</sup>

*The “Domestic Partners” Case*

In *Council of New York v. Bloomberg* (“*Domestic Partners*”), another preemption case, the court of appeals, by a four to three vote, again ruled in the mayor’s favor.<sup>63</sup> The dispute arose from the City Council’s 2004 passage over the mayor’s veto of an equal benefits law (“EBL”) that prohibited city agencies from contracting with businesses that failed to provide its employees’ domestic partners with employment benefits equal to those of employees’ spouses.<sup>64</sup> The mayor initially filed a declaratory judgment action, asserting that the EBL was preempted by both state law requiring government agencies to engage in competitive bidding practices and federal law prescribing the terms of the Employee Retirement Income Security Act of 1974 benefit plans.<sup>65</sup> When the mayor’s application for a temporary restraining order was denied, he declared that he would not enforce the EBL until its validity had been decided, citing his right and duty not to execute unlawful ordinances.<sup>66</sup> In response, the City Council commenced an Article 78 proceeding to compel the mayor to enforce the EBL. The supreme court granted the City Council’s petition, relying on what the court deemed “the presumption of validity.”<sup>67</sup> The appellate division, however, unanimously reversed and the court of appeals affirmed.<sup>68</sup>

In sustaining the mayor’s actions, the state’s highest court first explained that the validity of the EBL could be raised as a defense by the mayor in an Article 78 proceeding and that he had acted properly in refusing to enforce a law he believed invalid.<sup>69</sup> On the question of Home Rule, the *Domestic Partners*

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62. *See id.* at 274-75.

63. *Council of N.Y. v. Bloomberg (Domestic Partners)*, 846 N.E.2d 433 (N.Y. 2006).

64. *Id.* at 435.

65. *Id.* at 435-46.

66. *Id.* at 436.

67. *Id.*

68. *See Domestic Partners*, 846 N.E.2d at 435-37.

69. *See id.* at 436.

Court held that despite the City Council's social policy intentions, the EBL would violate the purpose of the state's competitive bidding statute.<sup>70</sup> By way of example, the court pointed out that contract specifications could be drafted in such a manner as to favor contractors who provided particular benefits to its employees (e.g., for domestic partners).<sup>71</sup> The court found this potential outcome undermined the purpose of the state's competitive bidding statute, which was to save municipalities money as well as "to prevent 'favoritism, improvidence, fraud and corruption in the awarding of public contracts.'"<sup>72</sup> While acknowledging that local governments maintain the power to legislate in the area of employee welfare and safety,<sup>73</sup> the court noted that this power is curtailed by contrary state legislation—the state's competitive bidding statute is one such law.<sup>74</sup> Thus, once again, a local law was struck down on preemption grounds.

#### *The "Uniformed Service Members" Case*

In 2007, the mayor's win streak in suits against the City Council came to an end. The case involved the validity of legislation passed over former Mayor Giuliani's veto that gave the New York City Fire Department's alarm dispatchers and emergency medical technicians the status of uniformed fire service members for collective bargaining purposes.<sup>75</sup> The former mayor had sued to have the law declared invalid,<sup>76</sup> arguing that the local law was preempted by the state's Taylor Law governing public sector labor relations.<sup>77</sup> In affirming the

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70. *See id.* at 439.

71. *See id.* at 438.

72. *Id.* at 438 (quoting *In re N.Y. State Chapter, Inc.*, 666 N.E.2d 185, 190 (N.Y. 1996)).

73. *Domestic Partners*, 846 N.E.2d at 439-40. Specifically, for those individuals performing work, labor, or services for the municipality. *See* N.Y. CONST. art. IX, § 2(c)(ii)(9); N.Y. MUN. HOME RULE § 10(1)(ii)(a)(10).

74. *Domestic Partners*, 846 N.E.2d at 440 ("[w]here the two conflict, as they do here, the legislative restriction on the municipality's power prevails.").

75. *Mayor of N.Y. v. Council of N.Y. (Uniformed Service Members)*, 874 N.E.2d 706, 707 (N.Y. 2007).

76. *See id.*

77. *See id.* at 710.

lower courts, the court of appeals held that the local law was not preempted, finding that localities were permitted to exercise discretion regarding the procedures by which bargaining units are determined, meaning the local law was consistent with—and not preempted by—the Taylor Law.<sup>78</sup>

Although the administration was largely successful in litigating these implied preemption cases,<sup>79</sup> each highlight considerable uncertainty surrounding whether a particular local law is, or is not, preempted. The cases reviewed above illustrate that relying on the courts rather than the legislature to determine the legislature's preemptive intent can be problematic. In the absence of an explicit declaration by the legislature, asking the courts to resolve the preemption issue has frequently resulted in a presumption in favor of preemption in the Home Rule context.<sup>80</sup> In the concluding section of this article, we discuss the benefits of imposing a greater burden on the legislature to demonstrate its intent to preempt local legislation. Imposing such a burden would, we believe, simplify

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78. *See id.* at 709-10. The court also determined that the City Council did not require a referendum to enact the local law since it did not improperly encroach on the mayor's role in city government. *Id.* at 711. Generally, a referendum is required for legislation that "curtails any power of an elective officer." N.Y. MUN. HOME RULE § 23(2)(f) (McKinney 1994).

79. While decided after Mayor Bloomberg left office, *Patrolmen's Benevolent Association of the City of New York, Inc. v. City of New York (Discriminatory Policing)*, 35 N.Y.S.3d 314 (App. Div. 2016) also involved implied preemption issues in the context of Home Rule. In *Discriminatory Policing*, the City Council enacted a local law over Mayor Bloomberg's veto which provided a civil cause of action to individuals who claimed to have been subject to discriminatory law enforcement practices by the City. *Id.* at 316-17. Unions representing the City's police officers and sergeants challenged the law as preempted by the state's Criminal Procedure Law ("CPL"). *Id.* at 317. The court of appeals upheld the law, finding it to be one of anti-discrimination and not criminal procedure (and thus not preempted by the CPL), and also determined that there was no conflict with state law. *Id.* at 319-20.

80. This has caused some scholars to argue for a judicial presumption against preemption. For instance, Professor Roderick Hills has posited that because the Home Rule powers are to be "liberally construed," this requires "a qualified presumption against preemption: Unless statutory text manifestly and unambiguously supersedes local law, courts should presume that state law does not preempt local laws. [But the presumption] can be overcome where local laws encroach on some substantial state interest that local residents are likely to ignore." Roderick M. Hills, Jr., *Hydrofracking and Home Rule: Defending and Defining an Anti-Preemption Canon of Statutory Construction in New York*, 77 ALB. L. REV. 647, 648 (2014).

the preemption analysis, give somewhat more authority to local governments, and provide more clarity to both localities and the State.

### *C. Substantial State Concern*

In addition to preemption, the substantial state concern doctrine played a major role in the Home Rule issues litigated during the Bloomberg Administration. Before discussing those cases, it is important to first discuss a court of appeals decision pre-dating the Bloomberg Era, which foreshadowed issues the administration would face in the Home Rule context and helped shape the strategy the Law Department would employ to advance the Bloomberg Agenda.

#### *“PBA I” and “PBA II”*

In *City of New York v. Patrolmen’s Benevolent Association of the City of New York, Inc.* (“PBA I”)<sup>81</sup> the City brought a declaratory judgment action challenging a state law<sup>82</sup> which provided the Public Employment Relations Board (“PERB”) exclusive jurisdiction over negotiation impasses between the city police and firefighter unions and the City.<sup>83</sup> The dispute arose out of legislation, passed at the behest of the Patrolmen’s Benevolent Association (“PBA,”)<sup>84</sup> which shifted jurisdiction over resolving such impasses from the locally-created city Board of Collective Bargaining (“BCB”) to the state-created PERB.<sup>85</sup> In

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81. *See City of New York v. Patrolmen’s Benevolent Ass’n of the City of N.Y. Inc.* (PBA I), 676 N.E.2d 847, 849 (N.Y. 1996).

82. Act of February 12, 1996, ch. 13, 1996 N.Y. Laws 50.

83. PBA I, 676 N.E.2d at 848.

84. The PBA believed PERB to be a more favorable forum at the time. *See id.* at 849. After voting in favor of the law, the legislature was forced to override then-Governor Pataki’s veto in order for the law to take effect. *Id.*

85. *See id.* at 849. PERB was created under the Taylor Law to facilitate the resolution of labor disputes between public employers and employees. *Id.* at 848. The Taylor Law also allows municipalities to create local bodies, often referred to as mini-PERBs, to resolve disagreements. *Id.* Although at one time there were as many as thirty-five mini-PERBs, as of 2011, the BCB was one of only four remaining in the state. *See Jurisdiction to Resolve an Impasse in Collective Bargaining Under the Taylor Law*, N.Y. PUB. PERSONNEL LAW (Aug. 11, 2011), <https://publicpersonnellaw.blogspot.com/2011/08/jurisdiction-to->

upholding both the trial court and the appellate division, the court of appeals found the state statute unconstitutional because “this ‘special law,’ which relate[d] to the ‘property, affairs, or government’ of New York City, was not enacted to further a matter of ‘sufficient importance to the State generally’ [such that] its enactment without a home rule message from New York City render[ed] the chapter law unconstitutional and unenforceable.”<sup>86</sup>

In a dramatic lesson as to how the State could constitutionally pass close to identical legislation, the legislature, two years later, passed another law setting out practically the same terms but curing the constitutional defects of the previously overturned law.<sup>87</sup> In contrast to the earlier legislation, the revised law, Chapter 641 of the Laws of 1998, extended PERB’s jurisdiction to all police and firefighter unions in the state.<sup>88</sup> After negotiations stalled in the collective bargaining between the City and PBA in 2000 (the first collective bargaining since the enactment of the new law), the City sued to have that law declared unconstitutional.<sup>89</sup> The law was a special law, the City argued, in violation of the Home Rule provisions because it “singl[ed] out the City of New York and its three neighboring counties by establishing a new system for them totally at odds with the rest of the State.”<sup>90</sup> The appellate division, affirming the supreme court, upheld the new law finding it to be a general law of statewide application, which therefore did not require a Home Rule message as a precondition for its enactment.<sup>91</sup> The court of appeals also affirmed, although on different grounds, holding that:

[B]ecause chapter 641 is a “special law” that *serves a substantial State concern*, the home rule requirements were not implicated and thus the statute is constitutional and enforceable even

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resolve-impasse-in.html.

86. See PBA I, 676 N.E.2d at 848 (internal citations omitted).

87. See *Patrolmen’s Benevolent Ass’n of N.Y. v. City of New York (PBA II)*, 767 N.E.2d 116 (N.Y. 2001).

88. Act of December 18, 1998, ch. 13, 1996 N.Y. Laws 641.

89. See *PBA II*, 767 N.E.2d at 119.

90. *Id.* at 119.

91. See *id.* at 119.

absent a home rule message. We further hold that once a police or fire union opts to seek impasse resolution by PERB and PERB declares an impasse, chapter 641 gives PERB exclusive jurisdiction to resolve such an impasse.<sup>92</sup>

Notably, while the court “agree[ed] with the courts below that by its terms, chapter 641 applie[d] to all local governments,” it explained that since the City and three surrounding suburbs were the only affected localities, “the actual effect of chapter 641 [was] a restriction targeted at [the] four localities,” which continued to exercise the preexisting local option that, but for the challenged law, permitted the creation of mini-PERBs to address collective bargaining impasses.<sup>93</sup> As such, Chapter 641 was declared a special law and not a general law.<sup>94</sup> Nonetheless, a Home Rule message was not required because the legislature “expressly stat[ed] the substantial State concern sought to be addressed [by Chapter 641] and ensur[ed] that the legislation [was] rationally related to that concern.”<sup>95</sup>

Despite the court of appeals’ substantial effort to demonstrate consistency in its decision-making, *PBA I* and *PBA II* illustrate the ease with which an apparent Home Rule violation can be reframed as one of substantial state concern. By inserting a purported state interest into a piece of state legislation previously found illegal because it only dealt with a single local entity, and ensuring that the law was “rationally related” to that stated purpose, the legislature had—and continues to enjoy—tremendous flexibility in avoiding the Home Rule requirements. Including such language in a proposed law is a fairly simple drafting task and constitutional scholars would likely agree that setting out a “rational relationship” is relatively easy to accomplish. In these cases, two virtually identical laws

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92. *Id.* at 117-18 (emphasis added).

93. *Id.* at 121.

94. *See PBA II*, 767 N.E.2d at 124.

95. *Id.* at 122. The court explained that Chapter 641 is intended “to foster [the] ‘orderly resolution of collective bargaining disputes involving police and fire bargaining units . . . to enhance public safety and prevent the loss or interruption of vital public services,’” and determined that “fulfillment of this legislative purpose is rationally served by chapter 641, which mandates that all local governments allow their police and fire unions access to PERB impasse procedures in resolving public sector labor disputes.” *Id.* at 122.

resulted in two very different constitutional determinations even though both sought identical outcomes.

An optimistic assessment would maintain that this type of legal analysis forces the legislature to be clear about the intended state purpose of the proposed legislation and to tailor it in such a way as to actually further that identified state interest. A more pessimistic analysis would be that merely introducing state concern language into a law's preamble—even if merely pretextual—results in a court deferring to the legislature and finding a substantial state concern even when one was not intended. This problem is compounded by the fact that “[i]n determining a substantial State concern, [the court] ‘rel[ies] upon the stated purpose and legislative history of the act in question’ . . . as the Supreme Court aptly noted, the ‘wisdom of that determination is not for court review here.’”<sup>96</sup> Regardless of these diverging points of view, the teachings of *PBA I* and *PBA II* would become particularly clear in the most publicized Home Rule case litigated during the Bloomberg Administration—the “Green Cabs” case.<sup>97</sup>

#### *The “Green Cabs” Case*

Seeing a need to increase the availability of taxis (i.e., yellow taxis and livery service vehicles) in certain underserved areas of the city (particularly northern Manhattan and the outer boroughs), and stymied by the City Council's refusal to issue a Home Rule message that would allow passage of local legislation dealing with the issue, Mayor Bloomberg turned to the state legislature to pass the HAIL Act.<sup>98</sup> The HAIL Act allowed for the sale of eighteen thousand new medallions for livery vehicles to pick up curbside passengers in those underserved areas, and another two thousand medallions for wheelchair-accessible yellow taxis.<sup>99</sup> The Act was projected to generate over one billion

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96. See *PBA II*, 767 N.E.2d at 122.

97. Greater N.Y. Taxi Ass'n v. State (*Green Cabs*), 993 N.E.2d 393, 400 (N.Y. 2013).

98. Hail Accessible Inter-borough License Act, ch. 602, § 1, 2011 N.Y. Sess. Laws (McKinney) [hereinafter HAIL Act].

99. See *Green Cabs*, 993 N.E.2d at 398. The medallions were to be distributed in increments of six thousand over a three-year period. One-fifth

in revenue for the City.<sup>100</sup> A group of medallion owners, in alignment with members of the City Council and then public advocate and future Mayor Bill de Blasio, challenged the Act as violative of the Home Rule and other provisions of the state constitution.<sup>101</sup>

After the lower court had ruled in the plaintiffs' favor, the state's highest court, on direct appeal, reversed.<sup>102</sup> The court upheld the constitutionality of the law because it was designed to further a substantial state concern—namely, improved access to street-hail transportation throughout the five boroughs<sup>103</sup> (and, in particular, for disabled individuals and those who reside or work in areas outside of Manhattan's central business district). Judge Pigott, on behalf of a unanimous court, wrote:

We conclude that the HAIL Act addresses a matter of substantial state concern. This is not a purely local issue. Millions of people from within and without the State visit the City annually. Some of these visitors are disabled, and will undoubtedly [sic] benefit from the increase in accessible vehicles in the Manhattan central business district and in the outer boroughs. The Act is for the benefit of all New Yorkers, and not merely those residing within the City. Efficient transportation service in the State's largest city and international center of commerce is important to the entire State. The Act plainly furthers all of these significant goals.<sup>104</sup>

Similar to *PBA I* and *PBA II*, the *Green Cabs* Court pointed to the HAIL Act's preamble to support its interpretation of the

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of the first six thousand vehicles would need to be handicap-accessible. *Id.* at 398. The remaining twelve thousand would also be subject to the twenty percent accessibility requirement unless a different percentage was recommended by the Taxi and Limousine Commission after investigation. *Id.* at 399.

100. Michael M. Grynbaum, *Deal Struck to Broaden Taxi Service in the City*, N.Y. TIMES (Dec. 20, 2011), <http://www.nytimes.com/2011/12/21/nyregion/deal-is-struck-to-broaden-taxi-service-in-new-york-city.html>.

101. See *Green Cabs*, 993 N.E.2d at 399.

102. *Id.* at 405.

103. *Id.* at 401.

104. *Id.* at 401.

Act as one that furthered a substantial state interest.<sup>105</sup> The opinion suggests that the legislature had anticipated the plaintiffs' challenge, as the Act's preamble clearly states "that the public health, safety and welfare of the residents of the state of New York traveling to, from, and within the city of New York *is a matter of substantial state concern*, including access to safe and reliable mass transportation such as taxicabs."<sup>106</sup> The court neither confronted this statement nor did it explain why the purported state concern was actually substantial. Instead, as in *PBA II*, the court merely endorsed the legislature's position and used it to support its conclusion; again, implying that legislation's mere articulation of a state concern and a rational relationship are sufficient for the State to intrude in local affairs.

#### IV. The Home Rule Problem and How It Should Be Solved

##### A. Background

Under our federal system, the federal government may only act consistently with the specific powers enumerated in the Federal Constitution. While the Supremacy Clause ensures that the Federal Constitution and federal laws generally take precedence over state constitutions and state laws,<sup>107</sup> the federal government and those of the fifty states share power in countless ways.<sup>108</sup> By contrast, the localities in each of the fifty states exist solely because the State allows them to exist. It is the State that sets the geographic boundaries of the localities and prescribes their powers. In New York, this means that a locality may only adopt a law that is not inconsistent with the state constitution or any state general law when that local law is either (i) related to its property, affairs or government;<sup>109</sup> (ii) listed in the bill of

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105. *Id.*

106. HAIL Act, ch. 602, § 1.

107. U.S. CONST. art. VI, § 2.

108. These shared powers are referred to as concurrent powers. See Robert Longley, *Federalism: A Government System of Shared Powers*, THOUGHT CO. (Mar. 7, 2017), <https://www.thoughtco.com/federalism-powers-national-and-state-governments-3321841>.

109. N.Y. CONST. art. IX, § 2(c)(i).

rights;<sup>110</sup> (iii) listed in article IX as an additional power (i.e., one not related to a locality's property, affairs or government) unless restricted by the State;<sup>111</sup> (iv) granted by the statute of local governments<sup>112</sup> or the Municipal Home Rule Law;<sup>113</sup> or (v) conferred by the State as an additional power (i.e., one not related to a locality's property affairs or government, and in addition to those listed above). Most of these laws can always be nullified or restricted by subsequent state legislation.<sup>114</sup>

Given this dynamic, some commentators have questioned whether the arguments advanced by the Law Department in the cases discussed above were in the long-term best interests of the City.<sup>115</sup> They contend that by emphasizing preemption and state

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110. N.Y. CONST. art. IX, § 1.

111. N.Y. CONST. art. IX, § 2(c)(ii).

112. N.Y. STAT. LOCAL GOV. § 10 (McKinney 1994) (enacted pursuant to N.Y. CONST. art. IX, § 2).

113. N.Y. MUN. HOME RULE LAW § 10 (McKinney 1994).

114. N.Y. CONST. art. IX, § 2(b)(3).

115. See Richard Briffault, *Bloomberg's Legal Legacy – Closing Remarks*, CITY SQUARE (Dec. 4, 2012), <http://urbanlawjournal.com/bloomberg-symposium-closing-remarks/> (closing remarks at the Fordham Urban Law Journal Symposium: Bloomberg's Legal Legacy). The speaker commented:

[A] particularly striking feature of the Bloomberg Administration's approach to home rule (although it is one shared with the Giuliani Administration) . . . is the attempt to blunt home rule by invoking state law, and on at least one occasion actually securing a state law, to limit the scope of the City's legal authority.

. . . .

. . . [A]s a teacher of local government law, and a believer in the importance of home rule, I find it a little unsettling when New York City's Mayor argues before the state courts that a state law preempts a City initiative. It is even more unsettling when, in order to win a policy dispute, the Mayor asks the state to turn what had long been a field of City regulation into a matter of state concern and a subject for state legislative determination. Once a state has taken over a subject, it may be hard for the City - and for future Mayors - to get it back. Perhaps naively, I think the Mayor ought to be fighting to expand City power, not seeking laws and court rulings that would limit it.

*Id.* See also Roberta A. Kaplan & Jacob H. Hupart, *Can New York City Govern Itself? The Incongruity of the Court of Appeals' Recent Cases Regarding Regulation of New York City by New York City*, 78 ALB. L. REV. 105, 109 (2015).

interest to further the administration's more immediate agenda, the Law Department may have compromised future local authority.<sup>116</sup> However, even critics would likely agree that crafting creative arguments and invoking persuasive precedent to achieve the desired outcome for one's client is the goal and obligation of any lawyer. Many of the cases discussed above, such as *Green Cabs*, involved important and long desired social initiatives. A lawyer for the government should certainly advise the mayor of the potential long-term downsides of taking a particular legal position that might create a troublesome precedent. However, if the client decides that he or she wants to push forward because of the importance of the proposed legislation, a responsible lawyer cannot avoid making those arguments because of a theoretical concern that the precedent established might, at some indeterminable time in the future, be cited against the client.<sup>117</sup>

In any event, the discussion above clearly illustrates the significant problems with the manner in which the Home Rule

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“Similarly, another commentator noted that “[j]udicial acceptance of the lack of need for such a home rule message might weaken the city’s long-term interest in resisting interference from future state legislatures in the operations of New York City, to the dismay of future mayors and corporation counsels.” *Id.*

116. See Briffault, *supra* note 115.

Court decisions reading state laws broadly to occupy a field and bar local regulation or that treat local additions to or departures from state law as in conflict with local measures become precedents for future challenges to City laws which can wind up curbing future Mayors. There may be a conflict here between the immediate political and policy needs of any mayoral administration, with a willingness to use whatever legal tools are at hand, including state preemption, to advance its goals, and the long-term interest of the City in being able to chart its own destiny with less interference from the state.

*Id.* See also Roberta A. Kaplan, *New York City Taxis and the New York State Legislature: What is Left of the State Constitution’s Home Rule Clause After the Court of Appeals Decision in the HAIL Act Case?*, 77 ALB. L. REV. 113, 115-16 (2014) (“[i]n a move that challengers to the law characterized as “an end-run” around constitutional safeguards, Mayor Bloomberg instead urged the New York State Legislature to pass the [HAIL Act].”) [hereinafter *Home Rule After the Hail Act Decision*].

117. Michael A. Cardozo, *The Conflicting Ethical, Legal, and Public Policy Obligations of the Government’s Chief Legal Officer*, 22 PROF. LAW. 4, 5-6 (2014).

provisions are interpreted today. Highlighting that issue is the legislature's recent passage of a bill to halt the implementation of the City's "bag tax."<sup>118</sup> The bill was a direct response to the City Council's passage—intended to reduce the use of carryout bags as part of a broader effort to address the City's environmental concerns—of a law, which, with limited exceptions, imposed a five-cent fee on the use of plastic or paper bags at retail, convenience, and grocery stores.<sup>119</sup> In response, the recent state law prohibits "any local law or ordinance, or any rule or regulation, by a city with a population of one million or more, related to charging a fee for carryout merchandise bags ('carryout bags') or a fee of similar effect."<sup>120</sup> While the legislation does not explicitly refer to the City, its intended application is clear—there are no other municipalities in New York with more than one million people.<sup>121</sup> In fact, other localities, including Suffolk County and parts of Westchester, have similar bag tax laws which are not prohibited by the state legislation.<sup>122</sup>

Given the targeted nature of the bill, it would seem to be a special law, which would require a Home Rule message from the City in order to take effect. Since there was no such request from the City, the state law, on its face, appears unconstitutional.

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118. See S. 4158, 2017-2018, Reg. Sess. (N.Y. 2017) (opposing implementation of 2016 N.Y.C. Local Law No. 63). Notwithstanding the preferred terminology of the bill's sponsors, the five-cent charge is not a tax but rather a fee since the funds are earmarked for store owners and not the government. Some, like Governor Cuomo, have suggested that the fee would be more appropriate as a statewide tax so that the government could direct the funds to support environmental welfare initiatives. See Jesse McKinley, *Cuomo Blocks New York City Plastic Bag Law*, N.Y. TIMES (Feb. 14, 2017), [https://www.nytimes.com/2017/02/14/nyregion/cuomo-blocks-new-york-city-plastic-bag-law.html?\\_r=0](https://www.nytimes.com/2017/02/14/nyregion/cuomo-blocks-new-york-city-plastic-bag-law.html?_r=0). Because the City cannot impose a tax without the legislature's approval, the City, to avoid having to ask the legislature for permission to impose a bag tax, instead proved that users of plastic bags would pay a fee to the store owners. See N.Y. CONST. art. XVI, § 1; see also *supra* text accompanying notes 8-11.

119. See 2016 N.Y.C. Local Law No. 63.

120. S. 4158, 2017-2018, Reg. Sess. (N.Y. 2017).

121. *New York Cities by Population*, NEW YORK DEMOGRAPHICS BY CUBIT, [http://www.newyork-demographics.com/cities\\_by\\_population](http://www.newyork-demographics.com/cities_by_population) (last visited Mar. 5, 2017).

122. See S. Walter Packaging, *New York – Bag Legislation*, BAGLAWS.COM, <http://www.baglaws.com/legislation.php?state=New+York> (last visited Sept. 4, 2017).

However, because the bill technically refers to an “open class” of municipalities (i.e., *any and all* cities with a population of one million people or more), it would likely survive constitutional challenge. Indeed, similar “classification” laws have long been upheld by the courts.<sup>123</sup>

But should the legislature be so readily able to override a local law that was validly enacted and impacts only the locality itself? That was the question posed by Senator Liz Krueger in opposition to the legislature’s bill eliminating the “bag tax”<sup>124</sup> and one that lies at the heart of the Home Rule debate.

When the present Home Rule provisions were adopted more than fifty years ago, they were heralded as “strengthen[ing] the governments closest to the people.”<sup>125</sup> Given the manner in which those provisions have been interpreted, that goal clearly has not been met. Certainly, it would seem that those city representatives, not persons elected from localities throughout the entire state, should be able to decide whether to allow the use of plastic bags, or how disputes with their unions should be resolved, or whether red light cameras to apprehend speeding drivers on city streets should be installed.<sup>126</sup> In addition, local legislatures should not be left to guess whether, under the guise of “implied preemption,” a court will determine that the local legislature lacks the power to legislate in a particular area, such as safety for a public hospital, or the rules to be followed when entering into a municipal contract.

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123. See, e.g., *Farrington v. Pinckney*, 133 N.E.2d 817 (N.Y. 1956) (upholding classification by counties based on populations of one hundred thousand); *Hotel Dorset Co. v. Trust for Cultural Res. of N.Y.*, 385 N.E.2d 1284, 1290-92 (N.Y. 1978) (finding that an act allowing tax and condemnation rights through a set of criteria only applying, in effect, to the Museum of Modern Art was a general law because, in the future, the criteria could possibly apply to other similar institutions).

124. Liz Krueger, *Statement from Senator Krueger on Governor Signing Plastic Bag Preemption Bill*, N.Y. ST. SENATE (Feb. 14, 2017), <https://www.nysenate.gov/newsroom/press-releases/liz-krueger/statement-senator-krueger-governor-signing-plastic-bag>.

125. See Ward, *supra* note 5, at 547.

126. See generally Danielle Furfaro & Kirstan Conley, *Bill for More Speed Cameras Stops in Senate*, N.Y. POST (June 22, 2017, 1:28 AM) [http://nypost.com/2017/06/22/legislators-vote-to-double-the-citys-number-of-speed-cameras/?mc\\_cid=27966076b1&mc\\_eid=84a564f8a5](http://nypost.com/2017/06/22/legislators-vote-to-double-the-citys-number-of-speed-cameras/?mc_cid=27966076b1&mc_eid=84a564f8a5) (although the assembly voted to nearly double the number of cameras in the City’s speed camera program from 140 to 290, the senate failed to vote on the measure).

There are clearly important benefits weighing in favor of state intervention in certain local affairs. Cities are, by nature, “creatures of the state,” and their authority to self-govern is similarly state-derived.<sup>127</sup> Municipalities throughout New York, particularly upstate, depend on the State to oversee necessities like water supply and roadways, and to intervene when local measures prove inadequate or conflict with the legitimate interests of an adjoining locality. However, there are also important benefits to local control (i.e., Home Rule). Local officials presumably know their constituents best and have their finger on the pulse of the needs and concerns of the communities they govern. Instances such as the legislature’s overturning the bag tax epitomize why Home Rule in New York has largely vanished and has even been referred to as a “ghost.”<sup>128</sup>

As discussed above, preemption has frequently been applied by the courts to invalidate local legislation which directly conflicts or is otherwise inconsistent with state law. This may include subject matter which the State has expressly preempted (e.g., by statute) or where such preemption may be inferred (e.g., comprehensive state regulation).<sup>129</sup> The problem with this framework is the uncertainty faced by local governments in the face of the State’s position of dominance. As referenced above, a local law may be preempted by state legislation if it is found: (i) to place additional restrictions on state law or (ii) vary from state procedure.<sup>130</sup> This is why the court of appeals found the City Council’s enactment of the *Domestic Partner* legislation to be an undue restriction on the state’s competitive bidding statute even though the regulation of contractors is reserved to municipalities (and notwithstanding

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127. See generally 1 JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS (5th ed. 1911) (explaining that Dillon’s Rule maintains that municipalities only have the powers that are: (1) expressly granted to them by the state legislature; (2) necessarily implied or necessarily incident to the powers expressly granted; and (3) absolutely essential to the declared objects and purposes of the municipality—not simply convenient but indispensable).

128. See James D. Cole, *Constitutional Home Rule in New York: “The Ghost of Home Rule,”* 59 ST. JOHN’S L. REV. 713, 715 (1985).

129. See *Consol. Edison Co. v. Red Hook*, 456 N.E.2d 487, 490 (N.Y. 1983) (“[t]he intent to pre-empt need not be express. It is enough that the [l]egislature has impliedly evinced its desire to do so.”).

130. See *Jancyn Mfg. Corp. v. Suffolk*, 518 N.E.2d 903, 905-06 (N.Y. 1987).

the absence of an explicit state law to the contrary).<sup>131</sup> While applying the preemption doctrine may certainly be nuanced at times, it is often employed to strike down local laws and has consequently undermined the efficacy of Home Rule. The court of appeals conceded as much in observing that “[t]he preemption doctrine represents a fundamental limitation on home rule powers.”<sup>132</sup>

Any solution to these problems by way of constitutional amendment of the Home Rule provisions must, therefore, address both the preemption and substantial state concern doctrines.

### B. Preemption

To address the preemption problem, the constitution should be amended to make clear that local laws should not be found preempted unless the language in the particular state law makes explicit the legislature’s intent for the state law to be controlling. Not only would this allow localities to act with a clearer understanding of whether a proposed local law would be found preempted, but it would incentivize clarity in the legislature’s lawmaking process. If the legislature wants to ascribe preemptive effect to a particular law or to an entire regulatory field, it should be required to make that intention abundantly clear in the text of the applicable provision. This would limit instances of preemption to circumstances where either the legislature plainly forbade a local enactment or where such an enactment would render it impossible to comply with analogous state law.

A constitutional amendment requiring this type of clarity would eliminate much of the local uncertainty surrounding Home Rule as well as reinvigorate local control. In Illinois, for example, the state constitution affords home rule powers to municipalities equivalent to those of the state, unless the state law asserts its exclusive authority.<sup>133</sup> This structure serves to

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131. Council of N.Y. v. Bloomberg, 846 N.E.2d 433, 439-40 (N.Y. 2006).

132. Albany Area Builders Ass’n v. Guilderland, 546 N.E.2d 920, 922 (N.Y. 1989) (citations omitted).

133. ILL. CONST. art. VII, § 6(i). Similarly, in Alaska, the state’s highest court has held that the state legislature cannot occupy a field unless it

preserve the state's power to preempt local law while simultaneously supporting local autonomy.<sup>134</sup> It also forces the state legislature to declare its intent to preempt when it believes such to be necessary.<sup>135</sup> Further, it undoubtedly limits instances where the judiciary might find a local law preempted when the state legislature did not so intend.<sup>136</sup> Therefore, the proposed amended Home Rule provision must clearly state that if a clear conflict exists between a local law and state statute containing explicit preemption language, the local law should be deemed preempted; but if the State's intent to preempt is not clear, the local law should be found valid. In addition, to avoid the possibility that the legislature might then include express preemption language in all applicable legislation, the proposed amended Home Rule provision should carve out certain areas where localities' Home Rule powers may not be limited or denied.

### C. Substantial State Concern

The substantial state concern doctrine must also be dealt with through amendment of the constitution's Home Rule language. As detailed above, while the constitution provides that the legislature may not enact a special law concerning the "property, affairs or government" of a particular locality without first securing the affected locality's permission via a Home Rule message,<sup>137</sup> this provision has been weakened considerably by courts consistently ruling that this limitation is not applicable where the State itself maintains an interest in the subject matter of the legislation.<sup>138</sup> Since there are few topics today in

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explicitly states such an intent. See *Municipality of Anchorage v. Repasky*, 34 P.3d 302, 311 (Alaska 2001) ("[i]n general, for state law to preempt local authority, it is not enough for state law to occupy the field. Rather, 'if the legislature wishes to "preempt" an entire field, [it] must so state.'").

134. Richard Briffault, "Mind the Gap" *The Promise and Limits of Home Rule in New York*, in *NEW YORK'S BROKEN CONSTITUTION: THE GOVERNANCE CRISIS AND THE PATH TO RENEWED GREATNESS* 161, 174-76 (Peter J. Galie, Christopher Bopst, & Gerald Benjamin eds., 2016).

135. *Id.* at 186-87.

136. *Id.*

137. N.Y. CONST. art. IX, § 2(b)(2).

138. See *Adler v. Deegan*, 167 N.E. 705 (N.Y. 1929).

which the State does not have at least an arguable interest, this “exception” has largely become the rule. While there are certainly areas where local and state interests overlap, and at times where there may be a legitimate need for state intervention with (or even without) local consent, the substantial state concern doctrine has almost completely eviscerated article IX’s Home Rule protections.<sup>139</sup>

To address this circumvention of Home Rule, the constitution should be amended to clarify when a Home Rule message is not required; that is, to delineate the subject areas where the State could act on matters that affect localities because they may, in fact, be matters of substantial state concern. Like education and the courts, areas already listed in the constitution as ones subject to state control,<sup>140</sup> the constitution could list additional topics which should predominantly, but not necessarily exclusively, lie within the State’s purview, including subjects like transportation and the environment. This would provide localities with a measure of predictability currently lacking in the Home Rule context as well as delineate which areas should be subject to the substantial state concern test.

However, the State’s authority over these enumerated subject areas should not be as unfettered as it is for the school and judicial systems. The identified topics of potential state concern should be labeled “state interests,” but the State would still have to make clear in the particular legislation, and be subject to a much more rigorous standard of judicial review than has been applied to date, that the specific issue at hand is in fact of substantial state concern. This should be done by including language in the constitution (i) requiring a detailed legislative finding that the matter constitutes or relates to a specific, substantial state interest, and (ii) requiring, in order for the preemption to be found valid, a more compelling connection than a mere rational relationship between the law and the specific substantial state interest.

First, the constitution should specifically describe the factors to be considered in determining whether a state interest

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139. See Cole, *supra* note 128, at 713-15.

140. N.Y. CONST. art. IX, § 3.

risers to the level of potentially being “substantial.” These should include: the importance of state uniformity in the implicated subject matter (e.g., due to the State’s expertise in that particular field); the impact of the local legislation on individuals or municipalities outside the affected municipality (e.g., if it would negatively or unreasonably interfere with daily life or essential services); and the manner in which localities and the State had managed past control over the topic (e.g., which entity had primarily been responsible for or supervised activity within that domain).<sup>141</sup> While none of these elements would be outcome determinative, each factor would serve an instructive role in the court’s analysis.<sup>142</sup>

Second, and most importantly, the largely deferential rational basis standard used in applying the state concern test today, which, similar to the equal protection context, is employed to validate measures reasonably related to any conceivable legitimate state interest, should be abandoned as not appropriate for Home Rule analysis. That is, the rational basis standard is not designed to achieve the sensitive balancing of local and state interests required to resolve Home Rule disputes.<sup>143</sup> Instead, just as the identified state interest should be required to be “substantial,” so, too, should the relationship between the proposed legislation and that state interest be required to be “substantial.” This is because of the basic reasons behind the Home Rule provisions—to recognize the important role played by local government. Therefore, the constitution should require the application of a standard of review more consistent with the intermediate level of judicial scrutiny so that the challenged state law must be *substantially* related to the purported state interest.<sup>144</sup> This would increase the State’s burden to demonstrate how the enactment would actually advance the identified substantial state interest, as well as prevent the legislature from merely declaring as much in the

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141. See Kaplan, *supra* note 116, at 125.

142. *Id.*

143. See *City of New York v. Patrolmen’s Benevolent Ass’n Inc.*, 676 N.E.2d 847, 850-52 (N.Y. 1996).

144. See *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (“[t]o withstand intermediate scrutiny, a [challenged law] must be substantially related to an important governmental objective.”).

language of the law itself. Thus, a reviewing court would need to be convinced that (i) the legislation falls within one of the delineated subject areas identified as a state interest; (ii) the state interest expressed in the legislation is indeed substantial due, for instance, to the State's prior control over that topic or credible need to maintain uniformity in the field; and (iii) the legislation substantially relates to that substantial state interest as demonstrated by statistical or other empirical evidence.

#### V. Conclusion

Home Rule in New York in its current form is, at best, tenuous and, at worst, inconsequential. Home Rule is a vital concept and one in dire need of remediation. Although the recommendations proposed above may not cure all of the maladies currently afflicting Home Rule in New York, they are suggested with the hope that they may provide some of the treatment necessary to revive Home Rule.