

**NEW YORK STATE BAR ASSOCIATION**

**REPORT AND RECOMMENDATIONS**

**CONCERNING**

**CONSTITUTIONAL HOME RULE**

**ADOPTED BY**

**THE COMMITTEE ON THE NEW YORK STATE  
CONSTITUTION**



Approved by the House of Delegates on April 2, 2016

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## **INTRODUCTION AND EXECUTIVE SUMMARY**

The New York State Constitution mandates that every 20 years voters are asked the following question: “Shall there be a convention to revise the constitution and amend the same?”<sup>1</sup> The next such mandatory referendum will be held on November 7, 2017. What follows is a report and recommendations of the New York State Bar Association’s (“State Bar”) Committee on the New York State Constitution (“the Committee”) concerning Constitutional Home Rule.

In New York State, local government has a greater impact on the day-to-day lives of the public than any tier of government. Our thousands of towns, villages, counties, cities, boroughs, school districts, special districts, authorities, commissions and the like play a vital governance role. They are responsible for drinking water, social services, sewerage, zoning, schools, roads, parks, police, courts, jails, trash disposal — and more. Without local government, public services often taken for granted would not be delivered.

Befitting its stature and importance, local government is a longstanding constitutional concern.<sup>2</sup> Indeed, since the 19th Century, “Home Rule” — the authority of local governments to exercise self-

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<sup>1</sup> N.Y. CONST. art. XIX, § 2 (“At the general election to be held in the year nineteen hundred fifty-seven, and every twentieth year thereafter, and also at such times as the legislature may by law provide, the question ‘Shall there be a convention to revise the constitution and amend the same?’ shall be submitted to and decided by the electors of the state; and in case a majority of the electors voting thereon shall decide in favor of a convention for such purpose, the electors of every senate district of the state, as then organized, shall elect three delegates at the next ensuing general election, and the electors of the state voting at the same election shall elect fifteen delegates-at-large. The delegates so elected shall convene at the capitol on the first Tuesday of April next ensuing after their election, and shall continue their session until the business of such convention shall have been completed. . . .”).

<sup>2</sup> Richard Briffault, *Local Government and the New York State Constitution*, 1 HOFSTRA L. & POL’Y SYMP. 79, 79 (1996) (“A longstanding constitutional concern in New York is local government and the relations between local governments and the State.”).

government — has been a matter of constitutional principle in New York.<sup>3</sup> The continuing dilemma has been to strike the right balance of furthering strong local governments but leaving the State strong enough to meet the problems that transcend local boundaries.<sup>4</sup> The competing considerations were aptly summarized by the commission tasked with preparing for the last Constitutional Convention held in New York in 1967:

On the one hand, there is the question of how to leave a legislature free to cope with possible problems of state-wide concern and to intervene in local affairs when, in the judgment of the legislature, they reach a point of state-wide concern. On the other, is the question of how to determine the responsibilities appropriate for local governments, the powers needed for carrying out those responsibilities and the kind of protection from state legislative intervention that should be provided to permit and sustain responsive and responsible local self-government.<sup>5</sup>

Article IX, the so-called “Home Rule” article, contains protections for local government that are more extensive than those in many other states.<sup>6</sup> Constitutional Home Rule is established by granting local governments affirmative lawmaking powers, while carving out a sphere of local autonomy free from State interference.

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<sup>3</sup> See *Kamhi v. Town of Yorktown*, 74 N.Y.2d 423, 428, 548 N.Y.S.2d 144, 146, 547 N.E.2d 346, 348 (1989) (declaring that “[m]unicipal home rule in this State has been a matter of constitutional principle for nearly a century”).

<sup>4</sup> *Id.* at 428, 548 N.Y.S.2d at 146, 547 N.E.2d at 348.

<sup>5</sup> N.Y. STATE TEMP. STATE COMM’N ON CONST. CONVEN., LOCAL GOVERNMENT 11 (Mar. 31, 1967) [hereinafter LOCAL GOVERNMENT].

<sup>6</sup> See ROBERT B. WARD, NEW YORK STATE GOVERNMENT 545 (2d ed. 2006) (“New York’s constitutional and statutory provisions regarding home rule are more extensive than those in many states.”).

Despite Article IX's intent to expand the authority of local governments, Home Rule in practice has produced only a modest degree of local autonomy. The powers of local governments have been significantly restricted by two legal doctrines developed through decades of litigation ("preemption" and "State concern"). Local governments must also follow mandates enacted by the State Legislature.

The preemption doctrine is a fundamental limitation on the power of local governments to adopt local laws. Under the preemption doctrine, a local law is unenforceable when it collides with a State statute; that is, the local law prohibits what a State statute allows, or the State statute prohibits what the local law allows. But even in the absence of an outright conflict between State and local law, a local government may not act where the State has acted comprehensively in the same area.

The State concern doctrine represents an exception to the constitutional limitations on the State Legislature's authority to enact special laws targeted at one or more, but not all local governments. Under this doctrine, the State Legislature is empowered to regulate local matters, yet which also relate to State concerns, such as waste disposal on Long Island, sewers in Buffalo, and taxicabs in New York City.

Home Rule is further limited by the State Legislature's imposition of mandates that compel local governments to provide specific services and meet minimum State standards, often without providing fully supporting funds necessary to comply with such mandates. New York imposes more unfunded mandates on localities than any other state in the nation.<sup>7</sup>

Blue ribbon panels and local government scholars have called for revisions to Article IX's Home Rule provisions. Nevertheless, a half-century has passed since the State has had a serious discussion on this subject. The time to do so again is long overdue. This is especially so, given the myriad challenges facing local government today.

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<sup>7</sup> PETER J. GALIE & CHRISTOPHER BOPST, THE NEW YORK STATE CONSTITUTION 279 (2d ed. 2012) [hereinafter THE NEW YORK STATE CONSTITUTION].

This report is divided into four sections. Part I summarizes the background of the Committee on the New York State Constitution and the issuance of this report. Part II provides an overview of Constitutional Home Rule. Part III describes legal doctrines and laws that restrict the ambit of Home Rule. Part IV concludes that New Yorkers would benefit from a thorough consideration of Constitutional Home Rule and potential reforms that would strengthen and clarify it.

## **I. BACKGROUND OF THE REPORT**

On July 24, 2015, State Bar President David P. Miranda announced the creation of The Committee on the New York State Constitution. The Committee's function is to serve as a resource for the State Bar on issues and matters relating to or affecting the State Constitution; make recommendations regarding potential constitutional amendments; provide advice and counsel regarding the mandatory referendum in 2017 on whether to convene a State Constitutional Convention; and promote initiatives designed to educate the legal community and public about the State Constitution.

On October 8, 2015, the Committee issued its first report and recommendations, entitled "*The Establishment of a Preparatory State Commission on a Constitutional Convention.*"<sup>8</sup> The Committee recommended that, in advance of the 2017 referendum on a Constitutional Convention, the State should establish a non-partisan preparatory commission, as it has done in the past. The commission's duties should include: (a) educating the public about the State Constitution and the constitutional change process; (b) making a comprehensive study of the Constitution and compiling recommended proposals for change and simplification; (c) researching the conduct of, and procedures used at, past Constitutional Conventions; and (d) undertaking and directing the

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<sup>8</sup> N.Y. STATE BAR ASSN. COMM. ON THE N.Y. STATE CONST., REPORT AND RECOMMENDATIONS CONCERNING THE ESTABLISHMENT OF A PREPARATORY STATE COMM'N ON A CONSTITUTIONAL CONVENTION (2015), *available at* <http://www.nysba.org/nysconstitutionreport/> (last visited on Mar. 6, 2016).

preparation and publication of impartial background papers, studies, reports and other materials for the delegates and public prior to and during the Convention, if one is held.

On November 7, 2015, the State Bar's House of Delegates unanimously adopted the Committee's report and recommendations.<sup>9</sup> Two months later, during his State of the State Address, Governor Andrew M. Cuomo proposed as part of his Executive Budget the creation of a preparatory commission on a Constitutional Convention. The Governor proposed investing \$1 million to create the commission to develop a blueprint for a convention. The commission would also be authorized to recommend fixes to the current Convention delegate selection process.<sup>10</sup>

The Committee has now turned its attention to the subject of Constitutional Home Rule. At its meeting on December 17, 2015, the Committee heard a presentation from Professor Richard Briffault, the Joseph P. Chamberlin Professor of Legislation at Columbia Law School, and a nationally respected authority on local government. At its next meeting, on January 27, 2016, the Committee heard from another eminent authority on local government, Michael A. Cardozo, a partner at the law firm of Proskauer Rose and the former Corporation Counsel for the City of New York from 2002 through 2013. As the City's 77th and longest serving Corporation Counsel, Mr. Cardozo was the City's chief legal officer, headed the City's Law Department of more than 700 lawyers, and served as legal counsel to Mayor Michael Bloomberg, elected officials, the City and its agencies.

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<sup>9</sup> Press Release, N.Y. State Bar Assn., *New York State Bar Association Calls on State Government to Prepare Now for Statewide Vote on State Constitution in 2017* (Nov. 13, 2015), available at <http://www.nysba.org/NYSConstitutionVote/> (last visited on Mar. 6, 2016).

<sup>10</sup> Press Release, N.Y. State Div. of Budget, *Governor Cuomo Outlines 2016 Agenda: Signature Proposals Ensuring That New York is — and Will Continue to Be Built to Lead* (Jan. 13, 2016), available at [http://www.budget.ny.gov/pubs/press/2016/pressRelease16\\_eBudget.html](http://www.budget.ny.gov/pubs/press/2016/pressRelease16_eBudget.html) (last visited on Mar. 6, 2016).

After further discussion and review, the Committee concluded that the public and legal profession would be well served to have a serious conversation about, and debate over, whether the Home Rule provisions in Article IX of the State Constitution should be clarified and strengthened. This position is set forth and elaborated on in this report, which was unanimously approved by the Committee at a meeting held on March 10, 2016.

## **II. CONSTITUTIONAL HOME RULE — GENERALLY**

Home rule — the right of localities to exercise control over matters of local concern<sup>11</sup> — has long “been a matter of constitutional principle”<sup>12</sup> in New York State. Beginning in the 19th Century, the home rule movement represented a determined effort to provide local governments with autonomy over local affairs and freedom from State legislative interference.<sup>13</sup> The path of home rule has been “unsettled and tortuous” through the years, reflecting “the difficult problem of furthering strong local governments but leaving the

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<sup>11</sup> See *People ex. rel. Metropolitan St. Ry. Co. v. State Board of Tax Comm’rs*, 174 N.Y. 417, 431, 67 N.E. 69, 70 (1903), *aff’d*, 199 U.S. 1 (1905) (“The principle of home rule, or the right of self-government as to local affairs, existed before we had a constitution.”); see also John R. Nolon, *The Erosion of Home Rule Through The Emergence of State-Interests in Land Use Control*, 10 PACE ENVTL. LAW REV. 497, 505 (1993) (“[Home Rule’s] purpose is to permit local control over matters that are best handled locally and without state interference.”); James D. Cole, *Constitutional Home Rule in New York: “The Ghost of Home Rule,”* 59 ST. JOHN’S L. REV. 713, 713 n.1 (1985) (“‘home rule’ can be described as a method by which a state government can transfer a portion of its governmental power to a local government”) [hereinafter *Ghost of Home Rule*].

<sup>12</sup> See *Kamhi*, 74 N.Y.2d at 428, 548 N.Y.S.2d at 146, 547 N.E.2d at 348 (declaring that “[m]unicipal home rule in this State has been a matter of constitutional principle for nearly a century”).

<sup>13</sup> Note, *Home Rule and the New York Constitution*, 66 COLUM. L. REV. 1145, 1145 (1966).

State just as strong to meet the problems that transcend local boundaries, interests and motivations.”<sup>14</sup>

New York’s basic system of local governance is set forth in Article IX of the State Constitution. Adopted in 1963 with high hopes,<sup>15</sup> Article IX was intended to expand and secure the powers enjoyed by local governments.<sup>16</sup> Governor Nelson A. Rockefeller predicted at the time that Article IX and its implementing legislation would “strengthen the governments closest to the people so that they may meet the present and emerging needs of our times.”<sup>17</sup>

Article IX declares “[e]ffective local self-government and intergovernmental cooperation are purposes of the people of the state”;<sup>18</sup>

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<sup>14</sup> *Kamhi*, 74 N.Y.2d at 428, 548 N.Y.S.2d at 146, 547 N.E.2d at 348 (internal quotation marks & citations omitted).

<sup>15</sup> See GALIE & BOPST, THE NEW YORK STATE CONSTITUTION, *supra* note 7, at 266 (Article IX was “meant to embody a new concept in state-local relationships by constitutionally recognizing that the ‘expansion of powers for effective local self-government’ is a purpose of the people of the state.”) (citation omitted).

<sup>16</sup> See *Wambat Realty Corp. v. State of New York*, 41 N.Y.2d 490, 496, 393 N.Y.S.2d 949, 953, 362 N.E.2d 581, 585 (1977) (“Undoubtedly the 1963 home rule amendment was intended to expand and secure the powers enjoyed by local governments.”); *Matter of Town of E. Hampton v. State of New York*, 263 A.D.2d 94, 96, 699 N.Y.S.2d 838, 839 (3d Dep’t 1999) (“The unquestioned purpose behind the home rule amendment was to expand and secure the powers enjoyed by local governments.”) (internal quotation marks omitted); James L. Magavern, *Fundamental Shifts Have Altered the Role of Local Government*, N.Y. ST. B.J., Jan. 2001, at 52, 53 (the Home Rule Amendments to the State Constitution were “presented as ‘a significant new contribution to the principle that local problems can best be solved by those familiar with them and most concerned with them’”) (quoting N.Y. STATE OFFICE FOR LOCAL GOVERNMENT, NEWSLETTER, No. 15, Sept. 18, 1963).

<sup>17</sup> WARD, THE NEW YORK STATE GOVERNMENT, *supra* note 6, at 547 (quoting Governor Rockefeller’s memorandum of approval of Article IX’s implementing legislation, the Municipal Home Rule Law (L. 1963, ch. 843 & 844), upon its adoption on Apr. 30, 1963).

<sup>18</sup> N.Y. CONST. art. IX, § 1. “Local government” is defined in Article IX to consist of counties, cities, towns, and villages. *Id.* § 3(d)(2).

creates a “Bill of Rights” for local governments to secure certain enumerated “rights, powers, privileges and immunities”;<sup>19</sup> and vests in the State Legislature the power to create and organize local governments.<sup>20</sup>

Constitutional home rule is established through two assertions of local government power in Article IX.<sup>21</sup> One is affirmative grants of power to local governments to manage their affairs through the adoption of local laws. The other restricts the State Legislature from intruding upon matters of local, rather than State, concern, except as provided in the Constitution.<sup>22</sup> Each is described more fully in turn.

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<sup>19</sup> *Id.* § 1. The local government Bill of Rights sought to lay the groundwork for stronger and more effective local government. See *Town of Black Brook v. State of New York*, 41 N.Y.2d 486, 488-89, 393 N.Y.S.2d 946, 362 N.E.2d 579, 581 (1977). It lists various rights, amongst which are: the right to have an elective body with authority to adopt local laws; the right to elect and appoint local residents or officers; the power to agree, as authorized by the Legislature, with the federal government, a State or other government to provide cooperatively governmental services and facilities; the power of eminent domain; the power to make a fair return on the value or property used in the operation of certain utility services, and the right to use the profits therefrom for refunds or any other lawful purpose; and the power to apportion costs of governmental services of functions upon portions of local areas as authorized by the Legislature. N.Y. CONST. art. IX, §§ (1)(a)-(b), (c), (e)-(g).

<sup>20</sup> *Id.* § 2(a) (“The legislature shall provide for the creation and organization of local governments in such manner as shall secure to them the rights, powers, privileges and immunities granted to them by this constitution.”).

<sup>21</sup> See James D. Cole, *Local Authority to Supersede State Statutes*, N.Y. ST. B.J., Oct. 1991, 34, 34 (“Under Article IX of the State Constitution, home rule in New York has two basic components.”).

<sup>22</sup> See *City of New York v. Patrolmen’s Benevolent Assn. of City of New York*, 89 N.Y.2d 380, 385-86, 654 N.Y.S.2d 85, 87, 88, 676 N.E.2d 847, 849 (1996) (“Article IX, § 2 of the State Constitution grants significant autonomy to local governments to act with respect to local matters. Correspondingly, it limits the authority of the State Legislature to intrude in local affairs. . . .”); *Kamhi*, 74 N.Y.2d at 428-29, 548 N.Y.S.2d at 146, 547 N.E.2d at 348 (“two-part model for home rule: limitations on State intrusion into matters of local concern and affirmative grants of power to local governments”).

## A. Grants of Lawmaking Authority

Section 1 of Article IX declares that “[e]very local government shall have power to adopt local laws as provided by this article.”<sup>23</sup> Section 2(c) — the “center of home rule powers”<sup>24</sup> — elaborates on the lawmaking power, by providing that local governments “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.”<sup>25</sup>

Section 2 also confers on local governments the power to adopt local laws regarding ten specified areas, regardless of whether or not they relate to the local government’s property, affairs or government.<sup>26</sup> These ten areas include: membership and composition of the local legislative body;<sup>27</sup> powers, duties, qualifications, number, mode of selection, and removal of officers and employees;<sup>28</sup> transaction of the local government’s business;<sup>29</sup>

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<sup>23</sup> N.Y. CONST. art. IX, § 1(a).

<sup>24</sup> PETER J. GALIE, ORDERED LIBERTY: A CONSTITUTIONAL HISTORY OF NEW YORK 290 (1996) [hereinafter ORDERED LIBERTY].

<sup>25</sup> N.Y. CONST. art. IX, § 2(c)(i). The phrase “property, affairs or government” was first codified in the 1894 State Constitution, and has been at the center of the Home Rule dialogue ever since. “Although, literally construed, it might cover an extremely broad area, it has never been accorded its literal significance but has been treated as excluding all matters of state concern.” N.Y. STATE TEMP. STATE COMM’N ON CONST. CONVEN., LOCAL GOVERNMENT, *supra* note 5, at 67. *See also Adler v. Deegan*, 251 N.Y. 467, 473, 167 N.E. 705, 707 (1929) (“When the people put these words in . . . the Constitution, they put them there with a Court of Appeals’ definition, not that of Webster’s Dictionary.”).

<sup>26</sup> RICHARD BRIFFAULT, *Intergovernmental Relations* [hereinafter *Intergovernmental Relations*], in DECISION 1997: CONSTITUTIONAL CHANGE IN NEW YORK 156-57 (Gerald Benjamin & Hendrik N. Dullea eds., 1997); GALIE, ORDERED LIBERTY, *supra* note 24, at 290.

<sup>27</sup> N.Y. CONST. art. IX, § 2(c)(ii)(2).

<sup>28</sup> *Id.* §§ 2(c)(ii)(1).

<sup>29</sup> *Id.* § 2(c)(ii)(3).

the incurring of obligations;<sup>30</sup> presentation, ascertainment and discharge of claims against the local government;<sup>31</sup> acquisition, care, management and use of highways, roads, streets, avenues and property;<sup>32</sup> acquisition of transit facilities and the ownership and operation thereof;<sup>33</sup> levying and collecting local taxes;<sup>34</sup> 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 the local government;<sup>35</sup> and the government, protection, order, conduct, safety, health and well-being of persons or property therein.<sup>36</sup>

Outside of the ten enumerated subjects, the State government retains all power otherwise delegated to it by law.<sup>37</sup> Unlike the State government, local governments are not sovereigns in their own right.<sup>38</sup> Accordingly,

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<sup>30</sup> *Id.* § 2(c)(ii)(4).

<sup>31</sup> *Id.* § 2(c)(ii)(5).

<sup>32</sup> *Id.* § 2(c)(ii)(6).

<sup>33</sup> *Id.* § 2(c)(ii)(7).

<sup>34</sup> *Id.* § 2(c)(ii)(8).

<sup>35</sup> *Id.* § 2(c)(ii)(9).

<sup>36</sup> *Id.* § 2(c)(ii)(10).

<sup>37</sup> *See id.* § 3(a)(3) (“Except as expressly provided, nothing in this article shall restrict or impair any power of the legislature in relation to: . . . [m]atters other than the property, affairs or government of a local government.”).

<sup>38</sup> *See* GALIE & BOPST, THE NEW YORK STATE CONSTITUTION, *supra* note 7, at 265 (“In American constitutional theory, there is no inherent right of local self-government. Local Government units are creatures of the state.”).

local governments have only the lawmaking powers delegated by the State Constitution and Legislature.<sup>39</sup>

Article IX requires the State Legislature to enact a “statute of local governments” granting local governments additional powers “including but not limited to” matters of local legislation and administration.<sup>40</sup> A power granted in such statute has quasi-constitutional protection against challenge, because it can be “repealed, diminished, impaired or suspended” only by a law passed and approved by the Governor in each of two successive calendar years.<sup>41</sup> In 1964, the Legislature complied with the constitutional directive and enacted a Statute of Local Government,<sup>42</sup> as well as the Municipal Home Rule Law,<sup>43</sup> both of which are to be liberally construed.<sup>44</sup>

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<sup>39</sup> See *Kamhi*, 74 N.Y.2d at 427, 548 N.Y.S.2d at 145, 547 N.E.2d at 347 (“In general, towns have only the lawmaking powers the Legislature confers on them . . . . Without legislative grant, an attempt to exercise such authority is ultra vires and void.”).

<sup>40</sup> See N.Y. CONST. art. IX, § 2(b)(1) (“Subject to the bill of rights of local governments and other applicable provisions of this constitution, the legislature: . . . (l) Shall enact, and may from time to time amend, a statute of local governments granting to local governments powers including but not limited to those of local legislation and administration in addition to the powers vested in them by this article.”).

<sup>41</sup> *Id.* § 2(b)(1) (“A power granted in such statute [of local governments] may be repealed, diminished, impaired or suspended only by enactment of a statute by the legislature with the approval of the governor at its regular session in one calendar year and the re-enactment and approval of such statute in the following calendar year.”); see also *Wambat Realty Corp.*, 41 N.Y.2d at 496, 393 N.Y.S.2d at 953-54, 362 N.E.2d at 586 (“In particular, the direction to enact a Statute of Local Government, including the innovative double enactment procedure to impede encroachment on the granted local powers, was expressly aimed at ‘proving a reservoir of selected significant powers.’”) (citations omitted); GALIE, ORDERED LIBERTY, *supra* note 24, at 290 (“although it was not feasible to grant the home rule powers contained in the statute constitutional status, the statute provided quasi-constitutional protection for these powers”).

<sup>42</sup> *Wambat Realty Corp.*, 41 N.Y.2d at 490, 393 N.Y.S.2d at 951, 362 N.E.2d at 583. The powers in the Statute of Local Governments include the ability to acquire real and personal property, adopt, amend, and repeal ordinances, resolutions, etc., acquire, construct, and operate recreational facilities, and levy, impose, collect, and administer rents, charges and fees. N.Y. STAT. LOCAL GOV. § 10. The Legislature also made certain reservations, and if State legislation which impinged on a power granted to local

The Legislature may confer on local governments powers not relating to their property, affairs or government and not limited to local legislation and administration “in addition to those otherwise granted by or pursuant to this article” and may withdraw or restrict such additional powers.<sup>45</sup>

Other constitutional provisions authorize the Legislature to grant additional powers to local governments.<sup>46</sup> For example, the Legislature may grant the power to apportion the cost of a government service or function upon any portion of the area within the local government’s jurisdiction and exercise of eminent domain outside local boundaries.<sup>47</sup> The

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governments by the statute is within the ambit created by those reservations, the change can be achieved by ordinary legislative process. *Id.* § 11. In the view of an eminent constitutional scholar, the powers granted local governments by the Legislature in the Statute of Local Governments are not significant. GALIE, ORDERED LIBERTY, *supra* note 24, at 290.

<sup>43</sup> See *DJL Rest. Corp. v. City of New York*, 96 N.Y.2d 91, 94, 725 N.Y.S.2d 622, 625, 749 N.E.2d 186, 189 (2001) (“To implement Article IX, the Legislature enacted the Municipal Home Rule Law.”). The Municipal Home Rule Law put in one place and organized, for the first time, the statutory provisions relating to Home Rule for various types of local government. This replaced Home Rule provisions previously contained in the City Home Rule Law, the Village Home Rule Law, the Town Law, the County Law and a number of other laws. N.Y. STATE TEMP. STATE COMM’N ON CONST. CONVEN., LOCAL GOVERNMENT, *supra* note 5, at 68; see also N.Y. MUN. HOME RULE L. § 10 (describing general powers of local governments to adopt and amend local laws).

<sup>44</sup> See N.Y. MUN. HOME RULE LAW § 51 (providing that home rule powers “shall be liberally construed”); N.Y. STAT. LOCAL GOV. § 20(5) (same).

<sup>45</sup> N.Y. CONST. art. IX, § 2(b)(3) (“Subject to the bill of rights of local governments and other applicable provisions of this constitution, the legislature: . . . (3) Shall have the power to confer on local governments powers not relating to their property, affairs or government including but not limited to those of local legislation and administration, in addition to those otherwise granted by or pursuant to this article, and to withdraw or restrict such additional powers.”).

<sup>46</sup> Briffault, *Intergovernmental Relations*, *supra* note 26, at 158.

<sup>47</sup> See N.Y. CONST. art. IX, §§ 1(e) (“The legislature may authorize and regulate the exercise of the power of eminent domain and excess condemnation by a local government outside its boundaries.”), (g) (“A local government shall have power to

Legislature is also authorized to grant various powers to cities, towns and villages for the financing of low-rent housing and nursing home accommodations for persons of low income.<sup>48</sup>

Article IX, Section 3(c) provides that the “[r]ights, powers, privileges and immunities granted to local governments by this article shall be liberally construed.”<sup>49</sup>

## **B. Immunity from Legislative Interference**

At the same time that Article IX authorizes local governments to adopt local laws in a wide range of fields, it also sets procedural limits on the ability of the State Legislature to impinge on local authority. Specifically, Section 2(b)(2) of Article IX — the so called “Home Rule clause” — limits the State Legislature’s power to enact laws regulating matters that fall within the purview of local government. The Home Rule clause states as follows:

[T]he legislature . . . [s]hall have the power to act in relation to the property, affairs or government of any local government only by general law, or by special law only (a) on request of two-thirds of the total membership of its legislative body or on request of its chief executive officer concurred in by a majority of such membership, or (b) except in the case of the city of New York, on certificate of necessity from the governor reciting facts which in the judgment of the governor constitute an emergency requiring enactment of such law and, in such latter

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apportion its cost of a governmental service or function upon any portion of its area, as authorized by act of the legislature.”).

<sup>48</sup> BRIFFAULT, *Intergovernmental Relations*, *supra* note 26, at 158 (citing N.Y. CONST. art. XVIII).

<sup>49</sup> N.Y. CONST. art. IX, § 3(c).

case, with the concurrence of two-thirds of the members elected to each house of the legislature.<sup>50</sup>

Under this provision, the State Legislature may freely regulate the property, affairs or government of local governments through the enactment of a “general law” that “in its terms and in effect applies to all counties . . . [,] all cities, all towns or all villages.”<sup>51</sup> However, if the Legislature seeks to enact a special law that would apply to one or more, but not all local governments,<sup>52</sup> it must follow one of two procedures intended to protect the Home Rule powers of the affected localities.<sup>53</sup> The State Legislature must receive either (1) a request of two-thirds of the total membership of the local legislative body or of the local chief executive officer concurred in by a majority of the membership of the local legislature; or (2) a certificate of necessity from the Governor reciting facts that constitute an emergency requiring enactment of such law and the concurrence of two-thirds of each house of the State legislature.<sup>54</sup> The first option’s directives are commonly referred to as the “Home Rule message” requirement “because whenever a special law is enacted it should be at the locality’s request.”<sup>55</sup> “The second

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<sup>50</sup> CONST. art. IX, § 2(b)(2).

<sup>51</sup> *See id.* § 3(d)(1) (“‘General law.’ A law which in terms and in effect applies alike to all counties, all counties other than those wholly included within a city, all cities, all towns or all villages.”).

<sup>52</sup> *See id.* § 3(d)(4) (“‘Special law.’ A law which in terms and in effect applies to one or more, but not all, counties, counties other than those wholly included within a city, cities, towns or villages.”).

<sup>53</sup> *Id.* § 2(b)(2).

<sup>54</sup> BRIFFAULT, *Intergovernmental Relations*, *supra* note 26, at 158 (construing Home Rule clause).

<sup>55</sup> *Greater N.Y. Taxi Assn. v. State of New York*, 21 N.Y.3d 289, 301, 993 N.E.2d 970 N.Y.S.2d 907, 914, 993 N.E.2d 393, 400 (2013).

option — the Governor’s emergency message and legislative super-majority — is unavailable for special laws concerning New York City.”<sup>56</sup>

A particularly striking example of special laws enacted pursuant to either Home Rule message or Gubernatorial message of necessity are State legislative enactments establishing emergency financial control boards for distressed municipalities, which effectively allow the State government to temporarily assume control of these municipalities’ finances and daily operations.<sup>57</sup>

### **III. RESTRICTIONS ON HOME RULE**

While Home Rule is provided for in Article IX, it has been left to the State’s judiciary to interpret the constitutional Home Rule provisions. Drawing lines between what is properly the domain of local government under Home Rule and the State’s ability to legislate has been a recurring role for the courts.<sup>58</sup> Home rule “reflects a far-flung effort over more than a century’s time” to find meaning in the ambiguous phrases “property, affairs or government” and “matters of state concern.”<sup>59</sup> “The result of these efforts has been a highly developed, and still developing, case law . . . .”<sup>60</sup>

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<sup>56</sup> BRIFFAULT, *Intergovernmental Relations*, *supra* note 26, at 158-59 (citing N.Y. CONST. art. IX, § 2(b)(2)).

<sup>57</sup> *See, e.g.*, City of Yonkers Financial Emergency Act, L. 1975, ch. 871, § 5 (legislation passed on both message of necessity and Home Rule message establishing emergency financial control board for City of Yonkers).

<sup>58</sup> Lynn A. Baker & Daniel B. Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, 86 DENVER L. REV. 1337, 1338 (2009) [hereinafter *Constitutional Home Rule*]; *see also* N.Y. STATE TEMP. STATE COMM’N ON CONST. CONVEN., LOCAL GOVERNMENT, *supra* note 5, at 67 (“The duty of determining whether particular matters pertain to the property, affairs or government of local governments or are matters of state concern has devolved upon the judiciary with, at least to many persons, unsatisfactory results.”).

<sup>59</sup> Baker & Rodriguez, *Constitutional Home Rule*, *supra* note 58, at 1338.

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

Indeed, the current status of Home Rule in New York has been largely shaped by the judicial development of two legal doctrines: (1) the State preemption doctrine and (2) the State concern doctrine. The former represents a fundamental limitation on local government's lawmaking powers; the latter carves out an exception to the constitutional limitations on the State Legislature's authority to enact special laws. The impact of each on the relationship between the State and local governments cannot be overstated. The same can be said for the stresses placed on local governments by unfunded State mandates.

### **A. The Preemption Doctrine**

As noted, the State preemption doctrine is a "fundamental limitation on home rule powers."<sup>61</sup> Although Article IX vests local governments with substantial lawmaking powers by affirmative grant, "the overriding limitation" of the preemption doctrine embodies "the untrammelled primacy of the Legislature to act with respect to matters of State concern."<sup>62</sup>

In general, preemption occurs in one of two ways; first, when a local government adopts a law that directly conflicts with a State statute; and second, when a local government legislates in a field for which the State legislature has assumed full regulatory responsibility.<sup>63</sup> Conflict preemption

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<sup>61</sup> *Albany Area Builders Assn. v. Town of Guilderland*, 74 N.Y.2d 372, 377, 547 N.Y.S.2d 627, 629 546 N.E.2d 920, 922 (1989).

<sup>62</sup> *Id.*; see also *Jancyn Mfg. Corp. v. County of Suffolk*, 71 N.Y.2d 91, 96, 524 N.Y.S.2d 8, 10, 518 N.E.2d 903, 905 (1987) ("although the constitutional home rule provision confers broad police powers upon local governments relating to the welfare of its citizens, local governments may not exercise their police power by adopting a law inconsistent with the Constitution or any general law of the State"); BRIFFAULT, *Intergovernmental Relations*, *supra* note 26, at 171 ("The sources of home rule authority generally provide that local enactments must not be inconsistent with the Constitution or general laws. In other words, although a subject may fall within the grant of home rule authority, local action may be preempted by state law.").

<sup>63</sup> *DJL Rest. Corp.*, 96 N.Y.2d at 95, 725 N.Y.S.2d at 625, 749 N.E.2d at 190 (internal quotations omitted).

represents an outright conflict or “head-on collision” between a local law and State statute.<sup>64</sup> A local law is unenforceable if it prohibits what a State statute explicitly allows, or if the State statute prohibits what the local law explicitly allows.<sup>65</sup>

But even in the absence of an outright conflict, a local law is preempted if the State Legislature “has evidenced its intent to occupy the field.”<sup>66</sup> Field preemption occurs when “a local law regulating the same subject matter as a state law is deemed inconsistent with the State’s transcendent interest, whether or not the terms of the local law actually conflict with a State-wide statute.”<sup>67</sup> “Such local laws, were they permitted to operate in a field preempted by State law, would tend to inhibit the operation of the State’s general law and thereby thwart the operation of the State’s overriding policy concerns.”<sup>68</sup>

Field preemption may be express or implied. Express field preemption occurs when a State statute explicitly provides that it preempts all local laws on the subject.<sup>69</sup> Field preemption is implied when “either the purpose and scope of the regulatory scheme will be so detailed or the nature of the subject of regulation will be such that the court may infer a legislative

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<sup>64</sup> See *Lansdown Entertainment Corp. v. N.Y.C. Dep’t of Cons. Affairs*, 74 N.Y.2d 761, 764, 545 N.Y.S.2d 82, 83, 543 N.E. 2d 725, 726 (1989).

<sup>65</sup> *Sunrise Check Cashing & Payroll Servs., Inc.*, 91 A.D.3d 126, 134, 933 N.Y.S.2d 388, 395 (2d Dep’t 2011) (internal quotation marks and citations omitted).

<sup>66</sup> *Albany Area Builders Assn.*, 74 N.Y.2d at 377, 547 N.Y.S.2d. at 629, 546 N.E.2d at 922.

<sup>67</sup> *Id.* (internal quotation marks, alteration, and citations omitted).

<sup>68</sup> *Id.* at 377, 547 N.Y.S.2d. at 629, 546 N.E.2d at 922.

<sup>69</sup> See *Consol. Edison Co. v. Town of Red Hook*, 60 N.Y.2d 99, 105, 468 N.Y.S.2d 596, 599 456 N.E.2d 487, 490 (1983).

intent to preempt, even in the absence of an express statement of preemption.”<sup>70</sup>

Examples of local laws that have been found to be impliedly preempted include the following activities:

- Residency restrictions for sex offenders;<sup>71</sup>
- Minimum wage laws;<sup>72</sup>
- Regulating local taxation for roadway construction;<sup>73</sup>
- Hours of operations of taverns and bars;<sup>74</sup>

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<sup>70</sup> Laura D. Hermer, *Municipal Home Rule in New York: Tobacco Control at the Local Level*, 65 BROOKLYN L. REV. 321, 349 (1999) (citations omitted).

<sup>71</sup> See *People v. Diack*, 24 N.Y.3d 674, 681, 3 N.Y.S.3d 296, 26 N.E.3d 1151 (2015) (holding that design and purpose of State laws regulating registered sex offenders evidenced intent to preempt subject of sex offender residency restriction legislation and to “occupy the entire field” so as to prohibit local governments from doing so).

<sup>72</sup> See *Wholesale Laundry Bd. of Trade, Inc. v. City of New York*, 17 A.D.2d 327, 329, 234 N.Y.S.2d 862, 865 (1st Dep’t 1962), *aff’d*, 12 N.Y.2d 998, 239 N.Y.S.2d 128, 189 N.E.2d 623 (1963) (invalidating New York City minimum wage law which set a rate higher than that set in the State minimum wage law; “it is entirely clear that the state law indicates a purpose to occupy the entire field”).

<sup>73</sup> *Albany Area Builders Assn.*, 74 N.Y.2d at 377-78, 547 N.Y.S.2d at 629, 546 N.E.2d at 922 (invalidating local law regulating taxation for roadway construction, where State’s “elaborate budget system” provided for how towns were to budget for roadway improvements and repairs, and the State explicitly regulated at local level amount of taxes collectible for roadway improvements and the expenditure of such funds).

<sup>74</sup> *People v. DeJesus*, 54 N.Y.2d 465, 468-70, 446 N.Y.S.2d 207, 210, 430 N.E.2d 1260, 1263 (1981) (holding that State’s Alcohol Beverage Control Act was “exclusive and statewide in scope, thus, no local government could legislate in field of regulation of establishments which sell alcoholic beverages”). Cf., *Vatore v. Commissioner of Consumer Affairs of City of New York*, 83 N.Y.2d 645, 650, 612 N.Y.S.2d 357, 359, 634 N.E.2d 958, 960 (1994) (upholding City of New York’s ability to regulate the location of tobacco vending machines, including within taverns).

- Regulating where abortions may be performed;<sup>75</sup> and,
- Power plant siting.<sup>76</sup>

Implied preemption has provided a fertile ground for litigation. By no means are all challenges to local laws based on implied preemption successful.<sup>77</sup> However, because the dispositive inquiry turns on interpreting the State Legislature’s intent, it is often difficult to predict whether a given local law will or will not withstand judicial scrutiny. As one commentator has explained:

The Legislature rarely makes a clear declaration of policy. The courts therefore have no clear standard for determining whether

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<sup>75</sup> See *Robin v. Village of Hempstead*, 30 N.Y.2d 347, 350-351 285 N.E.2d 285, 287, 334 N.Y.S.2d 129, 132 (1972) (holding that State law preempted local law regulating where abortions may be performed because of the scope and detail of State medical and hospital regulation).

<sup>76</sup> See *Consolidated Edison Co.*, 60 N.Y.2d at 105, 468 N.Y.S.2d at 599, 456 N.E.2d at 490 (holding that a local zoning ordinance was preempted partially based on State law’s establishment of a Siting Board that “is required to determine whether any municipal laws or regulations governing the construction or operation of a proposed generating facility are unreasonably restrictive, and has the power to waive compliance with such municipal regulations”).

<sup>77</sup> See, e.g., *Eric M. Berman, P.C. v. City of New York*, 25 N.Y.3d 684, 691-92, 16 N.Y.S.3d 25, 30, 37 N.E.3d 82, 87 (2015) (finding “no express conflict between the broad authority accorded to [New York] courts to regulate attorneys under the [New York] Judiciary Law and the licensing of individuals as attorneys who are engaged in debt collection activity falling outside of the practice of law,” and further finding that the “authority to regulate attorney conduct does not evince an intent to preempt the field of regulating non-legal services rendered by attorneys”); *Matter of Wallach v. Town of Dryden*, 23 N.Y.3d 728, 992 N.Y.S.2d 710, 16 N.E.2d 1188 (2014) (holding that State Oil and Gas Law did not preempt town zoning ordinances banning hydrofracking); *New York State Club Assn. v. New York*, 69 N.Y.2d 211, 221-22, 513 N.Y.S.2d 349, 354, 505 N.E.2d 915, 920 (1987) (upholding New York City law prohibiting discrimination in private clubs; State’s Human Rights Law’s failure to define “distinctly private” suggested “an intent to allow local government to act”); *People v. Judiz*, 38 N.Y.2d 529, 531-32, 381 N.Y.S.2d 467, 469, 344 N.E.2d 399, 401 (1976) (upholding a local ordinance prohibiting possession of an “imitation pistol” despite a State statute covering the same subject area).

the extent and nature of state regulation of an area is “comprehensive,” and therefore preemptive, or “piecemeal,” and therefore not preemptive. The result is ad hoc judicial decision making and considerable uncertainty as to when state legislation will be considered preemptive of local action.<sup>78</sup>

The implied preemption doctrine has drawn its share of critics. Local government scholars have cautioned that the ever-present, seemingly inchoate possibility that a court may find implied preemption “casts a shadow over local autonomy, often leading local governments to question whether they have the authority to act,”<sup>79</sup> and, therefore, imposing “severe constraints on local policy innovation and choice.”<sup>80</sup>

In 2008, the New York State Commission on Local Government Efficiency and Competiveness, chaired by former Lieutenant Governor Stanley N. Lundine, noted that the implied preemption doctrine does not appear in the State Constitution,<sup>81</sup> and has created “confusion and uncertainty” for local governments when exercising their home rule powers.<sup>82</sup> The Lundine Commission called for a constitutional amendment

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<sup>78</sup> Briffault, *Intergovernmental Relations*, *supra* note 26, at 173.

<sup>79</sup> See Briffault, *Local Government and the New York State Constitution*, *supra* note 2, at 90. See also Paul Diller, *Intrastate Preemption*, 87 BOSTON UNIV. L. REV. 1113, 1133 (2007) (arguing that field preemption can be a “tool of interest groups,” through which particular focused groups “seek relief from the local laws they dislike by turning to the courts, rather than — or in addition to — pursuing other options to further their interests.”).

<sup>80</sup> See Daniel B. Rodriguez, *Localism and Lawmaking*, 32 RUTGERS L.J. 627, 639-40 (2001).

<sup>81</sup> N.Y. STATE COMM’N ON LOCAL GOVT. EFFICIENCY & COMPETITIVENESS, 21<sup>ST</sup> CENTURY LOCAL GOVERNMENT 36 (Apr. 2008), available at <http://www.greaterohio.org/files/policy-research/new-york-final-report.pdf>.

<sup>82</sup> *Id.* at 37.

prohibiting the judicial application of implied preemption.<sup>83</sup> Such an amendment, the Lundine Commission explained, “would allow local governments to act except where state law has expressly declared state authority in the area to be exclusive or has specifically limited local governments’ ability to act in that area or field.”<sup>84</sup>

In a similar vein, one local government scholar has called for the establishment in New York of a judicial presumption against preemption.<sup>85</sup> And, a court of last resort in another state has adopted a default rule that the state legislature has not occupied the field unless it has said so explicitly.<sup>86</sup>

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<sup>83</sup> *Id.* at 3, 36-37.

<sup>84</sup> *Id.* at 36. The State of Illinois is an example of a State that has followed this approach. The Home Rule provision in the Illinois State Constitution allows for preemption only when the Legislature expressly so provides in legislation. *See* ILL. CONST. 1970, art. VII, § 6(i) (“Home rule units may exercise and perform concurrently with the State any power or function of a home rule unit to the extent that the General Assembly by law does not specifically limit the concurrent exercise or specifically declare the State’s exercise to be exclusive.”). *See also* Alaska CONST. art X, § 11 (“A home rule borough or city may exercise all legislative powers not prohibited by law or by charter.”).

<sup>85</sup> *See* 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) (“Article IX, section 3(c) of the New York Constitution requires that the home rule powers of municipalities be ‘liberally construed.’ Such liberal construction, this article suggests, 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. This presumption is not irrebuttable: it can be overcome where local laws encroach on some substantial state interest that local residents are likely to ignore.”).

<sup>86</sup> *See Municipality of Anchorage v. Repasky*, 34 P.3d 302, 311 (Alaska 2001) (“In 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.”) (internal quotation marks, citation & brackets omitted). *See also, e.g., City of Ocala v. Nye*, 608 So.2d 15, 17 (Fla. 1992) (implying in dicta that Florida does not recognize field preemption); *Cincinnati Bell Tel. Co. v. City of Cincinnati*, 693 N.E.2d 212, 218 (Ohio 1998) (“(T)here is no constitutional basis that supports the continued application of the doctrine of implied preemption.”).

Whatever one may think of such proposals, the fact remains that implied preemption is a significant constraint on local authority, even when a local government acts well within the sphere of specific Home Rule powers.<sup>87</sup> It has also generated considerable litigation, with often unpredictable results, creating confusion and uncertainty for local governments.

## **B. The State Concern Doctrine**

Article IX's Home Rule clause carves out a sphere of autonomy for local governments over their "property, affairs or government" by limiting the State Legislature's power to act with respect to such local matters through special legislation. However, the Home Rule clause is subject to a significant limitation — the "State concern" doctrine — derived from the case of *Adler v. Deegan*<sup>88</sup> in 1929.

In *Adler*, the New York Court of Appeals addressed the power of the Legislature to enact the Multiple Dwelling Law,<sup>89</sup> which required housing to comply with minimum standards for fire-prevention, light, air and sanitation.<sup>90</sup> This salutary act applied, in effect, only to New York City, but did not conform to the Home Rule requirements for special legislation.<sup>91</sup> Nevertheless, the Court found the subject matter of the Multiple Dwelling Law addressed a "state concern" and on that ground upheld its enactment as a valid exercise of State legislative power.<sup>92</sup>

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<sup>87</sup> See *Jancyn Mfg. Corp.*, 71 N.Y.2d at 97, 524 N.Y.S.2d at 11, 518 N.E.2d at 905.

<sup>88</sup> 251 N.Y. 467, 167 N.E. 705 (1929).

<sup>89</sup> L. 1929, ch. 713, § 3.

<sup>90</sup> *Adler*, 251 N.Y. at 491-92, 167 N.E. at 714 (Lehman, J., dissenting).

<sup>91</sup> *Adler*, 251 N.Y. at 470, 167 N.E. at 706-08 (Pound, J. concurring).

<sup>92</sup> *Id.* at 473-78, 167 N.E. at 706-09.

In a seminal concurring opinion, then-Chief Judge Benjamin Cardozo argued that, if a subject, like slum clearance, “be in a substantial degree a matter of State concern, the Legislature may act, though intermingled with it are concerns of the locality.”<sup>93</sup> Thus, even if legislation relates to the property, affairs, or government of a local government, if the legislation is also a matter of substantial state concern, the Home Rule clause is inoperative and the Legislature may act through ordinary legislative processes.<sup>94</sup>

Although *Adler* predated the adoption of Article IX by over 30 years, the Court of Appeals has continuously and expansively interpreted the “state concern” doctrine.<sup>95</sup> Time and again, the Court has upheld legislation

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<sup>93</sup> *Id.* at 491, 167 N.E. at 714 (Cardozo, Ch. J., concurring). See *Patrolmen’s Benevolent Assn. of City of New York*, 97 N.Y.2d at 386, 740 N.Y.S.2d at 663, 767 N.E.2d at 120 (“A recognized exception to the home rule message requirement exists when a special law serves a substantial State concern.”).

<sup>94</sup> Eliot J. Kirshnitz, *Recent Developments: City of New York v. State of New York: The New York State Court of Appeals, in Declaring the Repeal of the Commuter Tax Unconstitutional, Strikes Another Blow Against Constitutional Home Rule*, 74 ST. JOHN’S L. REV. 935, 947 (2000) [hereinafter *Strikes Another Blow*]. See also *Empire State Ch. of Associated Bldrs. & Contrs., Inc. v. Smith*, 21 N.Y.3d 309, 313, 970 N.Y.S.2d 724, 726, 992 N.E.2d 1067, 1069 (2013) (holding that “where the Legislature has enacted a law of state-wide impact on a matter of substantial State concern but has not treated all areas of the State alike, the Home Rule section of the State Constitution does not require an examination of the reasonableness of the distinctions the Legislature has made”). See also *Matter of Town of Islip v. Cuomo*, 64 N.Y.2d 50, 52, 484 N.Y.S.2d 528, 529, 473 N.E.2d 756, 757 (1984) (Article’s IX limitations on special laws “applies only to a special law which is directly concerned with the property, affairs or government of a local government and unrelated to a matter of proper concern to State government”). See, e.g., *Osborn v. Cohen*, 272 N.Y. 55, 59-60, 4 N.E.2d 289, 290 (1936) (striking down a statute that provided for submission of issue of firemen’s hours to referendum in cities of one million or more inhabitants; no “foundation in the record” that the establishment and control of fire departments are matters of state concern).

<sup>95</sup> See *Wambat Realty Corp.*, 41 N.Y.2d at 494, 393 N.Y.S.2d at 952, 362 N.E.2d at 584 (terming *Adler* a “decisively enlightening case”); Cole, *Ghost of Home Rule*, *supra* note 11, at 718 (“In virtually every subsequent judicial decision dealing with these matters, *Adler* has been cited for the proposition that as to matters of state concern, the legislature may act through the ordinary legislative process, unrestricted by the home rule provisions of the constitution.”); GALIE, ORDERED LIBERTY, *supra* note 24, at 291 (“In

relating to local property, affairs, or governments, yet which also related to a State concern, despite the failure of those laws to conform to Home Rule requirements.

For example, the Court has found the following local matters to also be matters of state concern sufficient to sustain the Legislature's power to address them by special law, without either a Home Rule or Gubernatorial message or legislative supermajority:

- Waste disposal in Nassau and Suffolk Counties;<sup>96</sup>
- Municipal sewers in Buffalo;<sup>97</sup>
- Protection of the Adirondack Park's resources;<sup>98</sup>
- Salaries of District Attorneys in certain counties;<sup>99</sup>

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general, the Court of Appeals has followed decisions made prior to the adoption of the article, giving 'matters of state concern' an expansive reading.") (citation omitted).

<sup>96</sup> See *Matter of Town of Islip*, 64 N.Y.2d at 56-58, 484 N.Y.S.2d at 531-33, 473 N.E.2d at 759-61 (upholding special law regulating waste disposal in Nassau and Suffolk counties; state interest in pollution protection).

<sup>97</sup> See *Robertson v. Zimmerman*, 268 N.Y. 52, 61, 196 N.E. 740, 743 (1935) (upholding special law establishing a sewage authority for the City of Buffalo through an act which imposed restrictions and obligations on one particular municipality; state concern for the life and health of communities taking water supply from Lake Erie, the Niagara River and Lake Ontario).

<sup>98</sup> See *Wambat Realty Corp.*, 41 N.Y.2d at 494-95, 393 N.Y.S.2d at 952-53, 362 N.E.2d at 584-85 (upholding special law, the Adirondack Park Agency Act, in which State set up a zoning and planning program for all public and private lands within the park despite the zoning and planning powers of local government; statute addressed subject of state concern).

<sup>99</sup> See *Matter of Kelley v. McGee*, 57 N.Y.2d 522, 536-39, 457 N.Y.S.2d 434, 439-41, 443 N.E.2d 908 913-15 (1992) (holding that section in Judiciary Law which required district attorneys in counties with a certain population to be paid the same salary as county court judges did not conflict with Home Rule provisions of State Constitution; statutory classification was reasonable and related to an area of state concern).

- Local taxation;<sup>100</sup>
- Housing projects exempt from zoning laws;<sup>101</sup>
- Rent controls;<sup>102</sup>
- Serial bonds issued to cover pension and retirement liabilities;<sup>103</sup>
- Dispute-resolution mechanisms for local public employees;<sup>104</sup>
- Cultural institutions;<sup>105</sup>

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<sup>100</sup> See *New York Steam Corp. v. City of New York*, 268 N.Y. 137, 143, 197 N.E. 172, 173 (1935) (upholding statute authorizing cities with a population over one million to pass local tax laws for unemployment relief; state concern given law was designed to combat high unemployment during an unstable time period).

<sup>101</sup> See *Floyd v. New York State Urban Dev. Corp.*, 33 N.Y.2d 1, 7, 347 N.Y.S.2d 161, 164, 300 N.E.2d 704, 706 (1973) (upholding statute under which New York State Urban Development Corporation (“UDC”) could acquire land in urban core areas by purchase or condemnation and undertake the development of projects, exempt from local restrictions; State interest in allowing UDC to solve housing problems).

<sup>102</sup> See *City of New York v State of New York*, 31 N.Y.2d 804, 805, 339 N.Y.S.2d 459, 459, 291 N.E.2d 583, 583 (1972) (affirming lower court ruling decision which held that rent control was a matter of State concern and not within New York City’s “property, affairs and government” powers).

<sup>103</sup> See *Bugeja v. City of New York*, 24 A.D.2d 151, 152, 266 N.Y.S.2d 80, 81, *aff’d*, 17 N.Y.2d 606, 268 N.Y.S.2d 564, 215 N.E.2d 684 (finding no Home Rule impediment to State Legislature’s authorization for the issuance of serial bonds to cover New York City’s pension and retirement liabilities; continuance of sound civil service system matter of State concern).

<sup>104</sup> See *Patrolmen’s Benevolent Assn. of City of New York v. City of New York*, 97 N.Y.2d at 381-389, 740 N.Y.S.2d at 660-65, 767 N.E.2d at 117-22 (2001) (upholding special law implementing dispute resolution mechanisms for disputes between New York City policemen and New York City; law addressed “substantial State concern”).

<sup>105</sup> See *Hotel Dorset Co. v. Trust for Cultural Resources*, 46 N.Y.2d 358, 368-69, 413 N.Y.S.2d 357, 361-62, 383 N.E.2d 1284, 1288 (1978) (upholding statute that had

- Bidding requirements on public contracts;<sup>106</sup>
- Exempting firefighters from local residency requirements.<sup>107</sup>
- Taxes on New York City commuters' incomes;<sup>108</sup> and,
- Regulation of taxicabs in New York City.<sup>109</sup>

The State concern doctrine has narrowed the Home Rule clause's guarantee of a modicum of local legislative autonomy.<sup>110</sup> Today, the line

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specifications resulting in it being applied to only one museum, the Museum of Modern Art).

<sup>106</sup> See *Empire State Ch. of Associated Bldrs. & Contrs., Inc. v. Smith*, 21 N.Y.3d 309, 313, 318-19, 970 N.Y.S.2d 724, 726, 729-31, 992 N.E.2d 1067, 1069, 1072-73 (2013) (upholding amended Wicks law for public contracting that included differing threshold requirements; statute bears “a reasonable relationship to a substantial statewide concern which concern falls within the State Legislature's purview and must be accorded great deference by this court”).

<sup>107</sup> See *Uniformed Firefighters Assn. v. City of New York*, 50 N.Y.2d 85, 90, 428, N.Y.S.2d 197, 198-99, 405 N.E.2d 679, 680 (1980) (upholding State law that eliminated a local requirement that New York City firefighters live in New York City; residency of employees a matter of State concern).

<sup>108</sup> See *City of New York v. State of New York*, 94 N.Y.2d 577, 591-92, 709 N.Y.S.2d 122, 128-29, 730 N.E.2d 920, 926-27 (2000) (upholding special law that repealed New York City's commuter tax; State had a substantial interest in easing burden on non-City residents who work in New York City).

<sup>109</sup> See *Greater N.Y. Taxi Assn.*, 21 N.Y.3d at 302-308, 970 N.Y.S.2d at 914-19, 993 N.E.2d at 400-405 (upholding special law that allowed livery cabs to accept passengers in the outer boroughs of New York City and outside Manhattan's central business district who hail the livery cabs from the street, and also expanded the number of traditional yellow cabs accessible to passengers with disabilities, notwithstanding that it had always been assumed previously that laws regulating New York City taxicabs required a Home Rule message; statute “addresses a matter of substantial state concern” and was “not a purely local issue”).

<sup>110</sup> See *Empire State Ch. of Associated Bldrs. & Contrs., Inc.*, 21 N.Y.3d at 319, 970 N.Y.S.2d at 730, 992 N.E.2d at 1073 (“Home Rule provisions of the Constitution were never intended to apply to legislation” affecting matters of state concern and instead aimed at preventing “unjustifiable state interference in matters of purely local concern”).

between matters of State concern and matters of local concern is increasingly indistinct.<sup>111</sup> Few constraints exist on the Legislature’s ability to interfere in local affairs by special law.<sup>112</sup> The Court of Appeals said as much in 2013 when it observed:

there must be an area of overlap, indeed a very sizable one, in which the state legislature acting by special law and local governments have concurrent powers. . . . A great deal of legislation relates *both* to the property, affairs or government of a local government and to [m]atters other than the property, affairs or government of a local government — i.e., to matters of substantial state concern.<sup>113</sup>

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*See also* Gerald Benjamin & Charles Brecher, *Introduction*, in *THE TWO NEW YORKS: STATE-CITY RELATIONS IN THE CHANGING FEDERAL SYSTEM* 11 (Gerald Benjamin & Charles Brecher eds., 1988) (“[I]n a strictly legal sense the State is able to dominate the City. New York’s State Constitution and its highest court authorize State officials to exercise control over, including intervention in, matters of local government. The concept of home rule has little legal support.”).

<sup>111</sup> *See* N.Y. STATE TEMP. STATE COMM’N ON CONST. CONVEN., LOCAL GOVERNMENT, *supra* note 5, at 68 (“The line between matters of state concern and matters of local concern remains indistinct[.]”); Cole, *Local Authority to Supersede State Statutes*, *supra* note 21, at 34 (“The areas carved out by Article IX of the State Constitution for control by local governments, free from State interference, except by general law — “property, affairs or government” — has been significantly narrowed and lacks identity.”).

<sup>112</sup> *See* BRIFFAULT, *Intergovernmental Relations*, *supra* note 26, at 171 (“as long as the state is able to make a colorable case that it is acting within respect to a matter of state concern, the Home Rule clause provides little restriction on the legislature’s ability to act by special law”).

<sup>113</sup> *Empire State Ch. of Associated Bldrs. & Contrs., Inc.*, 21 N.Y.3d at 316-17, 970 N.Y.S.2d at 728, 992 N.E.2d at 1070 (internal quotation marks & citations omitted; emphasis in original).

As things now stand, the State Legislature decides whether a home rule message is necessary with respect to a given piece of special legislation. And, this legislative judgment has been treated as “effectively unreviewable.”<sup>114</sup>

Proponents of home rule despair over the relative ease with which the State Legislature can overcome constitutional limitations on special legislation.<sup>115</sup> They argue that Article IX’s protections of the rights of localities have been “undermined . . . by the many exceptions for ‘matters of state concern’ with respect to which the Legislature is held free to act without the consent of the local body.”<sup>116</sup> “The Legislature is not better suited, and indeed, may be less well-suited,” goes the argument, “than the local government to deal with essentially local matters such as providing government services, administering the police department and developing new strategies for providing for the homeless.”<sup>117</sup>

On the other hand, advocates for the status quo can point to decades of precedent and a system that, on the whole, has arguably served the State

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<sup>114</sup> Report of the Task Force on the New York Constitutional Convention, 52 RECORD OF THE ASSN. OF THE BAR OF THE CITY OF NEW YORK 522, 619 (1997) [hereinafter “CITY BAR 1997 TASK FORCE REPORT”].

<sup>115</sup> See, e.g., Cole, *Ghost of Home Rule*, *supra* note 11, at 749 (“With the extension of the state concern doctrine into areas that logically should be subject to local determination, there is reason only for gloom.”); 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, 118 (2014) (the “highly deferential” approach the Court of Appeals has taken to claims of state concern “cast[s] a long dark shadow on the future of local government autonomy in New York State”), *id.* (the Court’s jurisprudence “raises red flags about how much (if any) of the constitution’s home rule clause remains in force going forward, making it difficult (if not impossible) for local governments in New York to delineate the appropriate boundaries of autonomous self-rule”).

<sup>116</sup> CITY BAR 1997 TASK FORCE REPORT, *supra* note 114, at 618 (citations omitted).

<sup>117</sup> *Id.* at 619.

well. Home rule is but one of a number of values encompassed by the Constitution, and “the State’s commitment to minimal statewide standards of welfare, safety, health, and the like has taken precedence over the goal of local autonomy.”<sup>118</sup> No less eminent an authority than Benjamin Cardozo was a staunch guardian of State sovereignty, recognizing, at least in close cases, the need for a dominant State, which represents all, over the power of local governments, which represent only a portion of the State.<sup>119</sup>

### C. Unfunded Mandates

Another restriction on Home Rule is State mandates that require local governments to perform certain actions. These can be particularly controversial when unfunded.<sup>120</sup> State mandates cover a wide range of fields, including health care, education and social services. New York imposes more unfunded mandates than any state.<sup>121</sup>

Numerous other states<sup>122</sup> have attempted to resolve the tension between state mandates and Home Rule by adopting constitutional

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<sup>118</sup> GALIE, ORDERED LIBERTY, *supra* note 24, at 292-93.

<sup>119</sup> ANDREW L. KAUFMAN, CARDOZO 378-79 (1998).

<sup>120</sup> *See generally*, Robert M. Shaffer, Unfunded State Mandates and Local Governments, 64 U. CINN. L. REV. 1057 (1996).

<sup>121</sup> GALIE & BOPST, THE NEW YORK STATE CONSTITUTION, *supra* note 7, at 278.

<sup>122</sup> *See* BRIFFAULT, *Intergovernmental Relations*, *supra* note 26, at 179-80 (“Prior to and since [the 1967 Constitutional Convention] fourteen states have adopted constitutional provisions limiting or barring some or all unfunded mandates.”); CITY BAR 1997 TASK FORCE REPORT, *supra* note 114, at 620 (“There also is support for a constitutional amendment to restrict unfunded mandates by the legislature on New York’s local governments. We view the debate over unfunded mandates as an extension of the home rule question. Again, New York lags behind other states that have considered and resolved this issue.”); Deborah F. Buckman, *Construction and Application of State Prohibitions of Unfunded Mandates*, 76 A.L.R.6th 543 (2012) (collecting state court cases that construe and apply state prohibitions of unfunded mandates).

provisions prohibiting or limiting unfunded mandates.<sup>123</sup> Notably, too, in 2011 a “Mandate Relief Redesign Team” established by Governor Cuomo

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<sup>123</sup> *See, e.g.*, CAL. CONST. art. 13B, § 6(a) (“Subject to certain exceptions, [w]henever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service.”); FLA. CONST. art. VII, § 18(a) (“No county or municipality shall be bound by any general law requiring such county or municipality to spend funds or to take an action requiring the expenditure of funds unless the legislature has determined that such law fulfills an important state interest and unless: funds have been appropriated that have been estimated at the time of enactment to be sufficient to fund such expenditure.”); HAW. CONST. art. VIII, § 5 (“If any new program or increase in the level of service under an existing program shall be mandated to any of the political subdivisions by the legislature, it shall provide that the State share in the cost.”); LA. CONST. art. VI, § 14(a)(1) (“No law or state executive order, rule, or regulation requiring increased expenditures for any purpose shall become effective within a political subdivision until approved by ordinance enacted, or resolution adopted, by the governing authority of the affected political subdivision or until, and only as long as, the legislature appropriates funds for the purpose to the affected political subdivision and only to the extent and amount that such funds are provided, or until a law provides for a local source of revenue within the political subdivision for the purpose and the affected political subdivision is authorized by ordinance or resolution to levy and collect such revenue and only to the extent and amount of such revenue.”); MICH. CONST. art. IX, § 29 (“A new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the legislature or any state agency of units of Local Government, unless a state appropriation is made and disbursed to pay the unit of Local Government for any necessary increased costs.”); MO. CONST. art. X, § 21 (“A new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the general assembly or any state agency of counties or other political subdivisions, unless a state appropriation is made and disbursed to pay the county or other political subdivision for any increased costs.”); N.H. CONST. pt. I, art. 28-a (“The state shall not mandate or assign any new, expanded or modified programs or responsibilities to any political subdivision in such a way as to necessitate additional local expenditures by the political subdivision unless such programs or responsibilities are fully funded by the state or unless such programs or responsibilities are approved for funding by a vote of the local legislative body of the political subdivision.”); N.J. CONST. art. VIII, § 2, ¶ 5 (“[A]ny provision of . . . law, or of . . . rule or regulation issued pursuant to a law, which is determined . . . to be an unfunded mandate upon boards of education, counties, or municipalities because it does not authorize resources, other than the property tax, to offset the additional direct expenditures required for the implementation of the law or rule or regulation, shall, upon such determination cease to be mandatory in its effect and expire.”); N.M. CONST. art. X, § 8 (“A state rule or regulation mandating any county or city to engage in any new activity, to provide any new service or to increase any current level of activity or to

recommended the adoption of a constitutional ban in New York on unfunded mandates on local governments.<sup>124</sup>

#### IV. CONCLUSION

New York's constitutional and statutory provisions regarding home rule are extensive, evincing a clear intent to protect local autonomy.<sup>125</sup> However, the balance between State and local powers has tipped "away from the preservation of local authority toward a presumption of state concern."<sup>126</sup> Some commentators have even observed that Constitutional Home Rule is a "ghost,"<sup>127</sup> "merely a pleasant myth"<sup>128</sup> and "a near total failure."<sup>129</sup>

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provide any service beyond that required by existing law, shall not have the force of law, unless, or until, the state provides sufficient new funding or a means of new funding to the county or city to pay the cost of performing the mandated activity or service for the period of time during which the activity or service is required to be performed."); TENN. CONST. art. II, § 24 ("No law of general application shall impose increased expenditure requirements on cities or counties unless the General Assembly shall provide that the state share in the cost.").

<sup>124</sup> See NEW YORK STATE MANDATE RELIEF REDESIGN TEAM, MANDATE RELIEF, FINAL REPORT 14 (DEC. 2011), available at [http://www.governor.ny.gov/sites/governor.ny.gov/files/archive/assets/documents/Final\\_Mandate\\_Relief\\_Report.pdf](http://www.governor.ny.gov/sites/governor.ny.gov/files/archive/assets/documents/Final_Mandate_Relief_Report.pdf) (last visited on Mar. 4, 2016).

<sup>125</sup> See WARD, THE NEW YORK STATE CONSTITUTION, *supra* note 6, at 545 (New York's constitutional and statutory provisions are more extensive than those in many states.).

<sup>126</sup> Cole, *Ghost of Home Rule*, *supra* note 11, at 715 (1985); see also Benjamin & Brecher, *Introduction*, *supra* note 110, at 11 ("[I]n a strictly legal sense the State is able to dominate the City. New York's State Constitution and its highest court authorize State officials to exercise control over, including intervention in, matters of local government. The concept of home rule has little legal support.").

<sup>127</sup> Cole, *Ghost of Home Rule*, *supra* note 11, at 715 (1985).

<sup>128</sup> W. Bernard Richland, *Constitutional City Home Rule in New York*, 54 COLUM. L. REV. 311, 326 (1954).

<sup>129</sup> Kirshnitz, *Strikes Another Blow*, *supra* note 94, at 943.

Not since the 1967 Constitutional Convention has the body politic engaged in a serious discussion about Constitutional Home Rule.<sup>130</sup> Intense debates were then waged on this subject, resulting in proposals by the Convention that held the promise for greater local government initiative.<sup>131</sup> But those proposals, along with all others made by the 1967 Convention, failed at the polls.<sup>132</sup>

Today, nearly fifty years later, numerous proposals have been made for constitutional reform in this area. To be sure, “[t]here is no ready solution to the problem of state interference in local government actions.”<sup>133</sup> Home Rule “doctrine has reflected in its structure the inherently difficult nature” of drawing lines between what is properly the domain of local government and the State Legislature’s ability to legislate.<sup>134</sup> That said, many believe “that the home rule provisions of Article IX are clearly in need

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<sup>130</sup> GERALD BENJAMIN & CHARLES BRECHER, *The Political Relationship* 118 in *THE TWO NEW YORKS: STATE-CITY RELATIONS IN THE CHANGING FEDERAL SYSTEM* (Gerald Benjamin & Charles Brecher eds., 1988).

<sup>131</sup> See HENRIK N. DULLEA, *CHARTER REVISION IN THE EMPIRE STATE: THE POLITICS OF NEW YORK’S 1967 CONSTITUTIONAL CONVENTION* 273 (1997) (“Coupled with repeal of the existing constitutional provision allowing the state to enact legislation related to the ‘property, affairs, or government’ of local municipalities — a phrase which over the years had been narrowly construed by the courts to limit local flexibility — and its replacement by new language referring to ‘matters of local concern and the local aspects of matters of state concern,’ the proposed article offered considerable hope for greater local government initiative.”).

<sup>132</sup> *Id.* at 339-41.

<sup>133</sup> Briffault, *Local Government and the New York State Constitution*, *supra* note 2, at 99.

<sup>134</sup> Baker & Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, *supra* note 57, at 1342.

of revision, and given the current state of home rule there is little risk of adverse change.”<sup>135</sup>

In sum, Constitutional Home Rule is a subject ripe for consideration and debate by all concerned. There is a need to weigh the benefits and costs of amendments to Article IX that would restore local autonomy through greater certainty and clarity. At a minimum, if and when the State establishes a preparatory constitutional commission, Constitutional Home Rule should be a subject to which it devotes significant time and attention.

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<sup>135</sup> CITY BAR, 1997 TASK FORCE REPORT, *supra* note 114, at 620; *see also* N.Y. STATE TEMP. STATE COMM’N ON CONST. CONVEN., LOCAL GOVERNMENT, *supra* note 5, at 68 (“Although the recent constitutional and statutory amendments undoubtedly represent great strides forward . . . much work remains to be done.”).