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CONSTITUTIONAL HOME RULE IN NEW YORK: “THE GHOST OF HOME RULE”

JAMES D. COLE*

I. INTRODUCTION

Effective home rule has two basic components. One is an affirmative grant of power to local governments to manage their affairs. The other restricts the state legislature from intruding upon matters of local, rather than state, concern. The seeds of home rule were planted around the turn of the century, with a restriction on state legislation affecting the “property, affairs or government” of cities. This ubiquitous term soon became the subject of litiga-

* Assistant Attorney General in Charge of Opinions. This Article reflects only the views of the author and does not necessarily represent those of the Attorney General or of the Department of Law. The author thanks Milton Kaplan, Professor of Law, State University at Buffalo, and George Braden, former Associate Professor of Law at Yale University and a recognized authority on constitutional law, for their helpful review of an earlier draft of this Article.

1 Although there is considerable confusion concerning the precise definition of “home rule,” see Note, Home Rule and the Sherman Act After Boulder: Cities Between a Rock and a Hard Place, 49 BROOKLYN L. REV. 259, 261 (1983) [hereinafter cited as Note, Home Rule and the Sherman Act], “home rule” can be described as a method by which a state government can transfer a portion of its governmental powers to a local government, id. (citing J. McGOLDRICK, LAW AND PRACTICE OF MUNICIPAL HOME RULE 1916-1930, at 2 (1933)). This power transfer provides local governments with autonomy in the management of their local affairs. See Comment, Home Rule: Constitutionally Granted Planning and Zoning Powers vs. State Concern for Preservation of the Adirondacks, 16 URB. L. ANN. 389, 393 (1979). The objective of this transfer of authority “is a more equitable and efficient allocation of duties and rights between the state and its cities.” Note, Municipal Home Rule in New York, 20 BROOKLYN L. REV. 201, 202 (1954).

2 See Hyman, Home Rule in New York 1941-1965: Retrospect and Prospect, 15 BUDA\L. REV. 335, 337 (1965). The affirmative grant of local power can be placed into three basic categories: 1) power over the local governmental structure; 2) regulation of conduct within the locality; and 3) power over quasi-governmental enterprises (i.e., transit, public utilities). See id. at 338. Each of these categories will present different problems to a locality with regard to the proper use of its home rule powers. See id. In general, local governments have successfully resolved local problems by using the powers granted under home rule. See Comment, Home Rule: A Fresh Start, 14 BUDA\L. REV. 484, 498 (1965).

3 See Hyman, supra note 2, at 337-38. The permissible range of legislative interference in matters of local concern continues to be the primary controversy affecting home rule in New York City. See id.

4 “Property, affairs or government” first appeared in the 1894 home rule constitutional amendment, N.Y. Const. art. XII, § 2 (1894), and also was included in the 1907 amendment
tion and was construed narrowly to expand the area within which the state could freely legislate. The landmark case of Adler v. Deegan,\(^5\) handed down during the early development of home rule powers for cities, established a domain in which the state legislature could act without restriction. These “matters of state concern” could be carved out by showing a “substantial” state interest in the subject.\(^6\) Thus, the roots of home rule had barely taken hold
to the state constitution, see N.Y. Const. art. XII, § 2 (1894) (amended 1907). The 1907 amendment, however, deliberately changed “property, affairs or government” to “property, affairs of government.” See Richland, Constitutional City Home Rule in New York, 54 Colum. L. Rev. 311, 324 (1954). The intent behind this change is not clear from the history of the amendment. \(\text{Id.}\) In subsequent home rule provisions, however, the old standard “property, affairs or government” appeared. See \(\text{id.}\) at 327. The mysterious surfacing of this term in 1907, while an interesting footnote in the history of home rule, had no impact on the development of the law. See \(\text{id.}\) at 324.

During the nineteenth century, home rule gradually developed throughout the various states, primarily as a result of political struggles between the states and their cities. See Note, Home Rule and the Sherman Act, supra note 1, at 281-82. As the cities grew and the need for public services increased, state legislatures began to assert greater influence in the governing of cities. See Sandalow, The Limits of Municipal Power Under Home Rule: A Role for the Courts, 48 Minn. L. Rev. 643, 647 (1964). As a result of this type of legislative interference, cities and other localities sought and gradually developed the political power to acquire some form of local autonomy. \(\text{Id.}\) at 648.

In New York, home rule was an outgrowth of the nineteenth century political struggle between New York City, dominated by one political party, and the rural areas of the state, dominated by another political party. Richland, supra, at 316. Although New York City contained over fifty percent of the population of the state, its representation in the legislature was considerably less than this percentage. See \(\text{id.}\). This divergence resulted in representatives of the state intervening in many of the local affairs of the city. See \(\text{id.}\) at 318. As a result of this increased legislative interference, the popularity of home rule expanded within the city and even within the state. See \(\text{id.}\). But see Comment, supra note 2, at 484 (belief that local governments were easily corruptible resulted in doubts concerning ability of local government to govern its population).

Despite the efforts of such mid-nineteenth century home rule advocates as Governor Tilden, the state legislators of rural areas in New York were able to prevent a home rule amendment to the constitution until 1894. See Richland, supra, at 318-21. The 1894 amendment to the state constitution (Article XII, § 2) provided the first constitutional basis of home rule in New York. See Comment, supra note 2, at 485. Subsequent legislatures have continued to enact home rule statutes and constitutional amendments. In New York, home rule retains considerable support in the legislature but has consistently been restricted by the judiciary. See \(\text{id.}\) at 489.

\(^5\) 251 N.Y. 467, 167 N.E. 705 (1929).

\(^6\) See \(\text{id.}\) at 485, 167 N.E. at 711 (Cardozo, C.J., concurring). Although Chief Judge Cardozo wrote only the concurring opinion, his focus on the doctrine of “state concern” has received the most attention in subsequent interpretations by cases and commentaries. See Hyman, supra note 2, at 343. Cardozo stated that the legislature is not restrained by the constitutional home rule provisions when the subject of the legislation is a matter of “state concern.” 251 N.Y. at 490, 167 N.E. at 713 (Cardozo, C.J., concurring). Cardozo’s test for deciding if a particular piece of legislation would be incorporated within the “state concern” doctrine is not whether there is a predominant state interest, \(\text{id.}\) (Cardozo, C.J., concurring),
when the state’s highest court established a rubric for the expansion of state powers at the expense of local authority." The term "property, affairs or government" continues to define the area supposedly protected from arbitrary state interference. It also defines, in part, the affirmative grant of powers to local governments. This has resulted in the continued incursion of state authority into areas that might reasonably be considered primarily local concerns. The recent trend toward a more precipitous contraction of home rule powers is crumbling the foundation of effective home rule in New York. The balance between state and local powers has tipped away from the preservation of local authority toward a presumption of state concern. The foundation, "property, affairs or government," has come to embody "the ghost of home rule."

This article will discuss the recent New York cases and their effect on home rule, beginning with the court of appeals decision in the seminal case of Adler v. Deegan.

but whether there is a "matter of state concern" to a "substantial degree," id. at 491, 167 N.E. at 714 (Cardozo, C.J., concurring).

Proponents of home rule assert that local governments are in the best position to resolve their own local problems. See Note, Home Rule and the New York Constitution, 66 COLUM. L. REv. 1145, 1145-46 (1966); see also Baldwin v. City of Buffalo, 6 N.Y.2d 168, 172, 160 N.E.2d 443, 445, 189 N.Y.S.2d 129, 132 (1959) ("it is the thought that local problems, in which the State has no concern, can best be handled locally"). Local governments have superior knowledge and interest with regard to the opinions and needs of the local community. See Note, Home Rule and the Sherman Act, supra note 1, at 262. State legislatures lack this knowledge and also are less prepared to fulfill community needs. See Note, supra, at 1146. Furthermore, home rule would allow state legislatures increased time for state concerns, as well as for promoting civic responsibility among the citizens of a locality. Note, Home Rule and the Sherman Act, supra note 1, at 262. Finally, home rule would prevent abusive legislative interference in local affairs while providing local governments with the authority to commence local legislation without waiting for state legislative action. See id. at 262.

Article IX of the New York State Constitution was amended in 1963, with the "desired objective" of obtaining the benefits of "local self-government." Kelley v. McGee, 57 N.Y.2d 522, 535, 443 N.E.2d 908, 912, 457 N.Y.S.2d 434, 438 (1982). While the delegation of authority to local governments in the amendment is very expansive, see Comment, supra note 1, at 395; see generally Comment, supra note 2, at 490-97 (discussing changes and effects caused by 1963 home rule constitutional amendment), subsequent judicial interpretations of the constitutional home rule provisions have virtually emasculated the home rule amendment, see Note, supra, at 1148-49.

Hyman, supra note 2, at 340; see also Kelley v. McGee, 57 N.Y.2d 522, 537, 443 N.E.2d 908, 913, 457 N.Y.S.2d 434, 439 (1982) (legislature restricted in enacting laws relating to "property, affairs or government" of locality; term defines parameters in which local government has power to legislate); Board of Educ. v. City of New York, 41 N.Y.2d 535, 551, 362 N.E.2d 948, 959, 394 N.Y.S.2d 148, 160 (1977) (Cooke, J., dissenting) ("property, affairs or government" is term that grants affirmative power to local governments while confining legislative power in area).
II. MATTERS OF STATE CONCERN

In Adler v. Deegan, the state Multiple Dwelling Law was challenged as violative of early provisions of the state constitution that granted home rule powers to cities. Under article XII, section 2 of the state constitution (adopted in 1923), the legislature was required to act in relation to the property, affairs or government of any city only by general laws, defined as laws that in terms and in effect applied alike to all cities. A special or local law, applicable in terms and in effect to fewer than all cities could be enacted only upon a message from the governor declaring that an emergency existed and upon the concurrent vote of two-thirds of each house of the legislature. This provision represented one of the essential aspects of home rule — a restriction on the state legislature in dealing with matters that are of local, rather than of state concern.

The Adler holding is familiar to practitioners of local government law. The Multiple Dwelling Law, although general in form, was limited in effect to the City of New York and to any other cities or villages that might have adopted it by local law. As a special law under the home rule article, it was attacked as unconstitutional because it was passed without an emergency message from the governor. The court of appeals decided, however, that matters of health in the City of New York, dealt with in the Multiple Dwelling Law, affected not only the health and welfare of the City of New York but also the welfare of the state as a whole. Thus, the court held that the Multiple Dwelling Law concerned matters of the state and was therefore properly passed through the regular course of legislative action, unhampered and unrestrained by the home rule provisions of the state constitution.

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9 See N.Y. Const. art. XII, § 2 (1924) (general laws are laws that are not special or local “either in [their] terms or in [their] effect”). The use of the phrase “special or local either in its terms or in its effect” was designed to prevent the legislature from enacting general laws that were in essence special laws. See Richland, supra note 4, at 327.

10 N.Y. Const. art. XII, § 2 (1924). Special laws were defined as laws that were special or local in “terms or effect” to prevent “the judicial fiction that a law is a general law merely because it is not aimed at a specific city.” Comment, supra note 2, at 486. The requirement that a special law could be enacted only by the legislature upon emergency message from the governor and two-thirds vote of each house of the legislature was added as another safeguard against possible legislative circumvention of home rule. See Richland, supra note 4, at 327.


12 Id. at 477-78, 167 N.E. at 708-09. Judge Crane asserted that the determinative issue regarding the power of the legislature over New York City’s affairs is the scope of the “property, affairs or government” clause within the constitutional home rule provision. Id. at 471,
these home rule restrictions, the legislature could pass laws applicable to one or more cities in the state, as long as the cities covered constituted a reasonable class.\textsuperscript{13}

In a concurring opinion, Chief Justice Cardozo discussed the three categories into which various subjects might fall: subjects exclusively of state concern; subjects exclusively within the property, affairs or government of a locality; and subjects including elements of both state and local interest.\textsuperscript{14} Subjects exclusively of state concern include the laws of domestic relations, wills, inheritance, crimes not essentially local, and the organization of and procedure in courts.\textsuperscript{15} Matters strictly of local concern include the laying out of parks, building of recreation piers, and the provision for public

\textsuperscript{13} See Adler, 251 N.Y. at 483-84, 167 N.E. at 710-11 (Pound, J., concurring).

\textsuperscript{14} See id. at 489-90, 167 N.E. at 713 (Cardozo, C.J., concurring). One commentator has asserted that the Adler court “unwittingly opened a path for the potential dilution of home rule.” Note, supra note 7, at 1151. Adler introduced the doctrine of “state concern” into the home rule field, resulting in the exemption of legislation from the constitutional home rule requirements if any “state concern” existed in that area. See Richland, supra note 4, at 331.

\textsuperscript{15} See id. at 491, 167 N.E. at 714 (Cardozo, C.J., concurring). While the power of the city is subordinate to the power of the state in such cases, the city may act without limitation when the two interests can work in harmony. Id. (Cardozo, C.J., concurring).
concerts. A subject including elements of state and local concern will be classified as a matter of state concern if it is to a substantial degree a matter of state concern. 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. The line of cases relying on Adler is predicated upon the continuation in the home rule provisions of the category “property, affairs or government” with respect to both the restriction of state legislative action and the affirmative grant of powers to local governments. Continuation of the so-called “court of appeals definition” however, has facilitated the gradual, and recently precipitous, contraction of this category.

State Concern Does Not Mean Preemption

For proponents of liberal home rule powers, there are, nevertheless, some positive aspects of Adler. In his concurring opinion, Chief Justice Cardozo noted that classification of a subject as a matter of state concern does not completely eliminate the affirmative grant of home rule powers with respect to the subject. While laws such as the Multiple Dwelling Act established minimum standards, local regulations could be adopted to add additional pro-

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16 Id. at 489, 167 N.E. at 713 (Cardozo, C.J., concurring). Chief Justice Cardozo noted that matters of local concern are so closely connected with the exercise by the city of its corporate functions that they are considered city concerns exclusively. However, even when the matter to be regulated does not involve a corporate activity of the city, but does involve a matter of local interest, it is considered a matter of local concern. Id. at 485, 167 N.E. at 711 (Cardozo, C.J., concurring).

17 Id. at 489-91, 167 N.E. at 713-14 (Cardozo, C.J., concurring).


19 See 251 N.Y. at 485-86, 167 N.E. at 711-12 (Cardozo, C.J., concurring). The state's interest in a particular subject does not preclude the city from affirmative action as long as the city's involvement is consistent with the powers of the state. See id. at 486, 167 N.E. at 711-12 (Cardozo, C.J., concurring).

20 See id. at 485-86, 167 N.E. at 711-12 (Cardozo, C.J., concurring). The purpose of the Multiple Dwelling Act was to eradicate the evils of urban living by setting forth minimum standards, including specifications for the height and area of buildings. See id. at 484-85,
tions, as long as the city's involvement is consistent with the powers of the State.  

III. GENERAL AND SPECIAL LAWS

Chief Justice Cardozo clearly defined a "general law," as used in article XII, section 2 of the 1923 state constitution, as a law that in terms and in effect applied alike to all cities. Under the constitutional provision, the legislature was restricted from acting with regard to the property, affairs, or government of cities except by general laws. This definition of "general law" is in sharp contrast with its predecessor in the constitution of 1894, which permitted

167 N.E. at 711 (Cardozo, C.J., concurring).

21 Id. at 486, 167 N.E. at 712 (Cardozo, C.J., concurring). The city may vary the standards established by the Multiple Dwelling Act providing it does not "deny to its inhabitants the light and the air, the sanitary safeguards, and the protection against fire, without which healthy human beings cannot live to be the mainstay of the state, the source and the pledge of its prosperity and power." Id. (Cardozo, C.J., concurring).

22 See id. at 486-87, 167 N.E. at 112 (Cardozo, C.J., concurring). Article XII, § 2 of the New York Constitution provided:

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

N.Y. Const. art. XII, § 2 (1923) (repealed 1962).

The purpose of the provision was to provide cities with increased control over their own property, affairs, and government, see City of New York v. Village of Lawrence, 250 N.Y. 429, 435, 165 N.E. 836, 837 (1929), and "some measure of protection to a city from possible danger of ill-considered interference by the Legislature in its local affairs," id. at 439, 165 N.E. at 839.

A number of courts have interpreted Article XII, § 2. See, e.g., Holland v. Bankson, 290 N.Y. 267, 271, 49 N.E. 2d 16, 17-18 (1943) (statute regarding duty and hours of off-duty firemen which does not apply to cities that have already adopted local laws, is not general law); Osborn v. Cohen, 272 N.Y. 55, 60, 4 N.E. 2d 289, 290 (1936) (law providing for submission of issue of firemen's hours to referendum in cities of one million or more inhabitants not general law); Gaynor v. Marohn, 268 N.Y. 417, 425, 198 N.E. 13, 16 (1935) (statute providing for erection and operation of light and power plants for Albany, Cohoes and Watervliet cities does not violate home rule provisions).

In re Mayor, 246 N.Y. 72, 158 N.E. 24 (1927), involved a statute authorizing payment of a condemnation award. Id. at 73, 158 N.E. at 24. The court held that the act violated the home rule provision. Id. at 73, 158 N.E. at 24. Although the statute was general, in that it applied to any city that met the requisite conditions, the conditions were so narrow that it was unlikely the statute would apply to any city other than the one (New York City) in the instant case. Id. at 77, 158 N.E. at 26. Chief Justice Cardozo noted, "we are no longer confined to the inquiry whether an act is general or local 'in its terms.' We must go farther and inquire whether it is general or local 'in its effect.'" Id. at 76, 158 N.E. at 25.
The definition of a “general law” under the current constitution and state laws is basically the same as it was in 1923. With the extension in 1963 of comparable grants of home rule powers to other units of government, however, the term “general law” is now applicable to towns, villages, and counties as well. A law applicable to one or more but not all villages or towns, for example, is a special rather than a general law.

Although the constitutional definitions of “general” and “special” laws for home rule purposes seem clear, and were construed in Adler during the early days of home rule, considerable confusion continues to exist regarding the distinction between the two terms. Perhaps the confusion has resulted from the different definition of these terms outside the home rule context.

First, let us further examine the definition in the home rule context. Article IX, section 11, the predecessor of the present home law, classifies cities based upon population.

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23 See N.Y. Const. art. XII, § 2 (1894) (repealed 1923). The provision of the 1894 constitution is generally recognized as the first home rule provision in New York State. It was a restriction on actions by the state legislature. Laws relating to the property, affairs or government of cities were either general or special laws. General laws were those relating to cities of one or more of three classes defined in the constitution. Special laws were defined as those relating to a single city or less than all the cities of a particular class. A bill that was "special" under this provision was subject to a "suspensive" veto. It was submitted to the mayor of the affected cities who would then indicate whether the city accepted the proposal. Once accepted, the proposal was subject to action by the governor and if rejected by the city, the state legislature could pass the bill a second time and send it to the governor for action.

24 N.Y. Const. art. IX, § 3(d)(1) defines a general law as "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." N.Y. Const. art. IX, § 3(d)(1).

25 N.Y. Const. art. IX, § 3(d)(4). A special law is defined as: "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." Id.

26 See Adler, 251 N.Y. at 486-87, 167 N.E. at 712 (Cardozo, C.J., concurring)

27 Compare In re Mayor, 246 N.Y. 72, 77, 158 N.E. 24, 26 (1927) (state law general in terms but special in effect violates home rule provision) with Radich v. Council of Lackawanna, 93 App. Div. 2d 559, 564, 462 N.Y.S.2d 928, 932 (4th Dep't 1983) (class created not including every city in state not special law).

28 See, e.g., Rainey v. Michel, 6 Cal. 2d 259, 262, 57 P.2d 932, 935 (1936). Rainey involved a constitutional provision for the formation, organization, and regulation of corporations. The Rainey court held that a legislative act that related to one class, but was reasonably subject to classifications, was a general law. Id. In Russell v. Graham, 301 Ill. 446, 440, 134 N.E. 57, 62 (1922), which involved a statute authorizing consolidated school districts, the court stated, "[l]aws are general and uniform, not because they operate on every person or municipal corporation in this state, for they do not, but because they operate on every person who or municipal corporation which is brought within the relations and circumstances for which the act provides." Id.
rule provision of the constitution, provided that the legislature could act in relation to the property, affairs or government of a city only by general laws which, in terms and in effect, applied alike to all cities, or upon a home rule request by the affected city. In Johnson v. Etkin, the court of appeals construed this provision and decided that the Optional City Government Law then in effect was a special rather than a general law for home rule purposes because it gave to all cities the option of choosing one of several forms of government. Therefore, in terms and in effect the law applied only to cities opting to come under it.

Current article IX uses similar language to define a general law but applies it to all units of local government; it also includes a restriction on state legislation affecting the property, affairs or government of towns, villages, cities and counties. In Town of Smithtown v. Howell, the court of appeals construed sections

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29 279 N.Y. 1, 17 N.E.2d 401 (1938).
30 Id. at 6, 17 N.E.2d at 402. The court stated:
This is not a general law, immediately effective and operative in all cities alike. It may operate in one city when adopted and not in another. Its effectiveness as a law—its force as a law is not general; it would only become general in effect when adopted by all cities in one form or another.
Id.
31 See supra note 24; N.Y. Const. art. IX § 2(b)(2). Under this section of the state constitution, the legislature is restricted to general laws when enacting legislation that affects local governments, however, special laws may be enacted under limited circumstances. Article IX, section 2(b)(2) provides that the legislature:
Traditionally the court planning commission disapproved of the zoning change and attempted to veto the move pursuant to § 1330 of the Suffolk County Charter, id., which gave the county commission veto power over zoning changes near the town borders, id. at 371, 292 N.E.2d at 12, 339 N.Y.S.2d at 953. The town asserted that the county charter was superseded by section 239-m of the General Municipal Law. Id.; see N.Y. Gen. Mun. Law § 239-m (McKinney 1969) (amended 1983). As a result the commission did not have the power to veto the zoning change. See Howell, 31 N.Y.2d at 371, 292 N.E.2d at 13, 339 N.Y.S.2d at 952. The court found that § 1330 of the county charter validly superseded §
239-1 and 239-m of the General Municipal Law, which dealt with county planning board review of zoning and planning decisions. The court cited a legislative committee report indicating that the legislature was aware that with the decision to broaden sections 239-1 and 239-m of the General Municipal Law to include Nassau and Suffolk Counties, these provisions became general laws. Inconsistent local laws could no longer be enacted. The committee

239-m of the General Municipal Law since it became effective through a double referendum. Id. at 376, 292 N.E.2d at 955, 339 N.Y.S.2d at 956. Despite this determination however, the court held that the veto of the zoning change by the commission was not effective for procedural reasons. Id. at 376, 292 N.E.2d at 15, 339 N.Y.S.2d at 957.

31 N.Y.2d at 395, 292 N.E.2d at 14-15, 339 N.Y.S.2d at 956. Judge Breitel, writing for the court in Howell, noted that Nassau and Suffolk Counties were originally excepted from § 239-m of the General Municipal Law because both counties had county planning review of local zoning changes. Id. The exception of these two counties had the effect of making § 239-m a special law. Id. However, these exceptions were dropped in 1968. Id. at 375, 292 N.E.2d at 15, 339 N.Y.S.2d at 956.

31 N.Y.2d at 395, 292 N.E.2d at 14-15, 339 N.Y.S.2d at 956. The court cited the 1968 Report of the Joint Legislative Committee on Metropolitan and Regional Areas Study (N.Y. Leg. Doc., 1968 No. 33), which acknowledged that by eliminating the Nassau and Suffolk County exceptions to §§ 239-1 and 239-m, these laws were transformed from special laws to general laws. Id. As a result of the amendment, these provisions applied in full force to all counties in New York. Any inconsistent county charters would be superseded. Id.

Article IX, § 2(c), requires that local laws be consistent with the constitution and with general state laws. N.Y. CONST. art. IX, § 2(c); see Consolidated Edison Co. v. Town of Red Hook, 60 N.Y.2d 99, 107, 456 N.E.2d 487, 491, 468 N.Y.S.2d 596, 600 (1983); Davis Const. Corp. v. Suffolk County, 95 App. Div. 2d 819, 820, 464 N.Y.S.2d 519, 521 (2d Dep't 1983); cf. U.S. CONST. art. VI, cl. 2 (states cannot enact laws that are inconsistent with federal law). But cf. Gless v. City of New York, 121 Misc. 2d 1030, 1039, 470 N.Y.S.2d 527, 534 (Sup. Ct. N.Y. County 1983) (mere differences between state and local laws do not render them inconsistent). In addition to any powers granted to local governments by law, article IX, § 2(c), affirmatively provides local governments with the power to adopt and amend local laws not inconsistent with the Constitution and any general laws relating to their “property, affairs or government.” N.Y. CONST. art IX, § 2(c)(i). Local governments are further empowered to adopt and amend local laws not inconsistent with the Constitution and general laws in specified areas, “whether or not they relate to the property, affairs or government of such local government, except to the extent that the legislature shall restrict the adoption of such a local law relating to other than the property, affairs or government of such local government . . . .” Id. at § 2(c)(ii). The provision then lists ten subject areas, id. at § 2(c)(ii)(1)-(10), implemented and supplemented by § 10 of the Municipal Home Rule Law, see N.Y. Mun. HOME RULE LAW § 10 (McKinney 1969 & Supp. 1984). The language of article IX, § 2(c)(ii) suggests broad home rule powers in those enumerated subject areas outside the category “property, affairs of government” unless the legislature expressly restricts the lawmaking activity of local government. See N.Y. CONST. art. IX, § 2(c). Yet, New York courts have severely limited the scope of home rule even in the absence of specific restrictions by the legislature, reasoning that many state acts deal with “matters of state concern.” See infra notes 54-95 and 100-124 and accompanying text. But see Procaccino v. Board of Elections, 73 Misc. 2d 462, 469, 341 N.Y.S.2d 810, 818 (Sup. Ct. N.Y. County 1973) (dictum) (authority of local government to supersede state statute in question could be abrogated only by legislative restriction or constitutional limitation). Of course, article IX, § 3(a)(3) states that
report noted, however, that a county, by enacting a charter law, could establish a different system for review of zoning decisions or could exempt itself entirely from the provisions of these statutes. Thus, Howell supports the express definition of general law in the home rule article as a law, which in terms and effect applies alike to all counties or to all counties other than those included in a city.

Outside the home rule provisions, "general" and "special" laws take on a different meaning. Consequently, to determine whether a state law has been properly enacted or whether a local law may be inconsistent with a state law, it is necessary to distinguish between laws subject to home rule restrictions and laws subject to other restrictions of the constitution. For example, in Farrington v. Pickney, a state law that established a reasonable classification of counties by population for purposes of jury selection was held to be a general law because it was governed by article III, section 17 of the constitution. Under this provision, which prohibits the

"nothing in [the] 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," reserving unrestricted power of the legislature to act with respect to matters of state concern when local "property, affairs or government" are not involved. N.Y. Const. art. IX, § 3(a)(3) (emphasis added); see also Consolidated Edison, 60 N.Y.2d at 105, 456 N.E.2d at 490, 468 N.Y.S.2d at 599 (state legislature may impliedly preempt local legislation in an area); Ames v. Smoot, 98 App. Div. 2d 216, 217-18, 471 N.Y.S.2d 128, 131 (2d Dep't 1983) (same). But cf. Consolidated Edison, 60 N.Y.2d at 105, 456 N.E.2d at 490, 468 N.Y.S.2d at 599 (implied preemption of local legislation by state legislature, in contravention of local government's powers under section 2(c) of article IX, may be manifested by a declaration of state policy by legislature or comprehensive regulatory scheme by legislature in given area). According to Adler and its progeny, "matters of state concern" can be established through judicial construction of legislative intent or through judicial fiat, rather than by a specific restriction. See infra notes 54-93 and 100-124 and accompanying text.

Read together, another construction of §§ 2(c) and 3(a)(3) is conceivable. Perhaps there are three categories under article IX: "property, affairs or government"; matters of state concern; and areas in which local laws are permitted although outside of "property, affairs or government," unless expressly restricted by the legislature. This is largely an academic question, since the courts have not recognized the third category, existing outside of the categories "property, affairs or government" and "matters of state concern." However, if it did exist, it would provide a means whereby "special" state laws in this third category could be upheld without a home rule request or message of necessity or without a finding of "state concern." Further, absent a restriction by the legislature, local governments would be free to modify or supercede state laws in this third category through the adoption of local laws. This line of reasoning might have been considered by the courts in Kelley, see infra notes 76-85, Firefighters, see infra notes 108-118, and Lackawanna, see infra notes 121-130.

35 Id. at 81, 133 N.E.2d at 822, 150 N.Y.S.2d at 593. The court of appeals stated that under article III, § 17, of the state constitution, an act that does not apply to all parts of the state can still be a general law if it creates a class based on population. Id. at 80, 133 N.E.2d at 822, 150 N.Y.S.2d at 593.
passage of "private or local" bills relating to certain subjects such as jury selection, classifications are justified if population differences create conditions that establish a need for varying the applicability of laws to certain areas of the state. The *Farrington* court concluded that the jury selection law in question was a general law since the financial condition of some of the smaller counties provided a reasonable basis for the population classification. *Farrington*, however, is not precedent for the definition of a general law under the home rule article.

In *Hotel Dorset Company v. Trust for Cultural Resources*, the court of appeals relied on the *Farrington* decision in ruling that a statute dealing with tax exemptions, which reasonably classified municipalities, was a general law. Article XVI, section 1 of the constitution provides that the power to tax is a state power that may be specifically delegated in limited circumstances and that exemptions from taxation may be granted only by general law.

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37 Id. at 81, 133 N.E.2d at 822, 150 N.Y.S.2d at 593. The *Farrington* court cautioned that a law will be declared local if the reference to population serves only to disguise a special law as a general one. *Id.* at 81, 133 N.E.2d at 822-23, 150 N.Y.S.2d at 593.

38 Id. at 91-92, 133 N.E.2d at 829, 150 N.Y.S.2d at 602. In addressing a challenge to the act under the home rule article, see N.Y. Const. art. IX, the *Farrington* court further concluded that its finding that the jury selection law was general under article III, § 17, made the law general under article IX, § 1(b), see 1 N.Y.2d at 95, 133 N.E.2d at 831, 150 N.Y.S.2d at 604-05 (dictum). Jury selection laws are unconstitutional if they are declared to be local, and as a consequence any valid jury selection law will be a general law and will not require home rule approval. *Id.*

The finding under article IX, § 1(b), of the 1956 Constitution cannot be sustained under the current provision, article IX, § 3(d)(1). While the language of the 1956 Constitution permits the conclusion in *Farrington* that a state law reasonably classifying counties may be "general," the current provision specifically defines general laws as those which apply "alike to all counties other than those wholly included within a city, all cities, all towns or all villages." N.Y. Const. art. IX, § 3(d)(1). Thus, the statute in issue in *Farrington* would be "local" under the current home rule article. See *id.*

39 46 N.Y.2d 358, 385 N.E.2d 1284, 413 N.Y.S.2d 357 (1978). In *Hotel Dorset*, the court of appeals considered the constitutionality of a state statute providing for the establishment of cultural trusts, through tax exemptions, to assist participating institutions. *Id.* at 365-66, 385 N.E.2d at 1286-87, 413 N.Y.S.2d at 359-60. Only certain institutions were eligible in cities with a certain population and specified average annual admissions. *Id.* In upholding the legislation, the court rejected the plaintiff's contention that the statute was a special law designed only for the benefit of a particular museum, in violation of article IX, § 2(b)(2), of the constitution. *Id.* at 369, 385 N.E.2d at 1289, 413 N.Y.S.2d at 362. The court held that absent a showing that other institutions could not in the future meet the requirements of the statute, the statute was a general law applicable to a reasonable class of institutions. *Id.* at 368, 373, 385 N.E.2d at 1288, 1291, 413 N.Y.S.2d at 361, 364. The court further noted that because the maintenance of such institutions is a state concern, the Legislature could act on the matter without a home rule message. *Id.* at 372-73, 385 N.E.2d at 1291, 413 N.Y.S.2d at 364.
Thus, since there is no home rule power to tax, the home rule definition of general and special laws does not apply to a delegation of taxing power by the state legislature.

The legislature routinely enacts laws applicable in terms or in effect to less than all members of a category of local governments. When a state law, however, deals with the property, affairs or government of a local government, the home rule provision mandates that it be enacted only upon a home rule request, or outside New York City, by a message of necessity from the governor.\(^4\) Numerous special state laws, not based on other constitutional provisions, have been attacked as intruding upon local matters without the requisite home rule request or message of necessity. In response, courts have strained to find a "substantial" state interest that would make the subject a matter of state concern. Several of these cases have dealt with local enactments of counties.

IV. COUNTY HOME RULE

A brief history of county home rule is necessary to establish the backdrop for discussion of recent cases affecting counties. The first step toward the granting of home rule to county governments was the Fearon amendment to the state constitution, adopted in 1935.\(^41\) The legislature was thereby directed to provide alternative forms of county government and carried out this mandate by enacting chapter 862 of the Laws of 1937, the Optional County Government Law.\(^42\) That law authorized counties to adopt one of four specified forms of government. These options provided various forms for county administration.\(^43\) The Optional County Govern-

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\(^4\) See supra notes 16, 22. This constitutional requirement of a home rule message or a gubernatorial certificate of necessity is frequently raised as a ground for invalidating a state statute touching on local matters. The courts often have had to determine if the contested law does indeed deal with the "property, affairs or government" of the affected municipality. See 241 East 22nd Street Corp. v. City Rent Agency, 33 N.Y.2d 134, 305 N.E.2d 760, 350 N.Y.S.2d 631 (1973). In making such a determination, the courts have increasingly upheld the particular state law as dealing with a matter of state concern. See supra notes 19-21 and accompanying text.


\(^43\) Under the Optional County Government Law, "Plan A" provided for a county mayor elected for a four year term as the administrative head of the county government, with veto power over the board of supervisors. See id. § 201. "Plan B" designated a county manager as the county's administrative head, appointed by the board to serve at its pleasure. See id. § 202. "Plan C" provided for a county director to serve in a similar fashion as a county man-
ment Law was, for the most part, repealed and superseded by the Alternative County Government Law, which became effective in 1954. This law provided greater power to county governments over local offices and included the power to designate these offices as elective or appointive.

In 1963 current article IX of the constitution was adopted. Under section 1(h), the legislature is required to authorize counties to adopt, amend or repeal alternative forms of county government. This provision has been implemented by the legislature through the adoption of article 4 of the Municipal Home Rule Law, referred to as the “county charter law.” Subject to limited restrictions, a county is empowered to adopt, amend or repeal a county charter setting forth the structure of county government and the

ager, except that the director’s power to appoint department heads was subject to the board’s confirmation. See id. § 203. “Plan D” simply called for a county board, with no specific administrative head. Id. § 204. Generally, under the first three plans, the counties were obligated to establish, at the very least, a department of finance and a department of law, neither of which, along with the office of district attorney or any other departments headed by an elected official, could be abolished. See id. §§ 401, 403.

Alternative County Government Law, ch. 834, [1952] N.Y. Laws 1816. As did its predecessor, see supra note 43, the Alternative County Government Law provided for four alternative forms of county government. Discarding the mayor and county board forms, the Legislature added two new types of county executives, a county administrator and a county president. Id. §§ 50, 53. The county president most closely resembled the former county mayor, as both were elected to a four year term, with the power to veto the board’s actions. See id. § 53. The county administrator was to be appointed for the board’s term, with such powers as the board granted him. Id. § 50. The latter form was intended to suit the needs of smaller counties. See Association of Towns Memoranda (S.I. 2523, Pr. 2690, Greenberg), reprinted in [1952] N.Y. LEGIS. ANN. 229, 230. The manager and director forms were similar to those of the previous act, except that the director was now appointed for a definite term, rather than serving at the board’s pleasure. Ch. 834, §§ 51, 52, [1952] N.Y. Laws 1819. This legislation provided for more mandatory departments to be established, most notably a department of audit and control, headed by officials appointed by the particular form of county executive chosen. Id. §§ 200, 202.

Compare ch. 834, § 58, [1952] N.Y. Laws 1822 with ch. 862, §§ 501-508, [1937] N.Y. Laws 1890-93. The major difference between the Optional County Government Law and the Alternative County Government Law lies in the respective county governments’ authority to make the various county offices elective or appointive through a vote of the electorate. Under the Optional County Government Law, the county government was given a limited number of variations that it could make in its organization, depending upon which plan it adopted. See ch. 862, §§ 501-508, [1937] N.Y. Laws 1890-93. Such offices as the district attorney, coroner, sheriff, comptroller and county clerk were subject to these variations. See id. On the other hand, the Alternative County Government Law provided for a choice between election and appointment of all county officials, including those elective offices provided for in the constitution, except the positions of a supervisor and a judicial officer. See ch. 834, § 58, [1952] N.Y. Laws 1822. Such a change or variation was to be submitted to a vote by the people of the county before it could be adopted. Id.
manner in which it is to function.\textsuperscript{46} Neither the constitution nor the county charter law require that charter laws be consistent with general state laws. This contrasts with local laws, which must be consistent with general state laws.\textsuperscript{47} The courts have recognized this by upholding the validity of charter laws that are inconsistent with general state laws.\textsuperscript{48}

The county charter law established certain limitations and restrictions on the power to adopt or amend county charters.\textsuperscript{49} A charter law may not supersede certain enumerated general or special laws enacted by the legislature.\textsuperscript{50} Aside from the enumerated limitations and restrictions, there is no general requirement that a charter law be consistent with all general state laws.\textsuperscript{51} For example, in dealing with the structure of county government or the manner in which it is to function, including the details of administration of county government, a charter law need not be consistent with general state laws.\textsuperscript{52} If such consistency were invariably re-

\textsuperscript{46} N.Y. MUN. HOME RULE LAW § 33(1)-(2) (McKinney 1969).
\textsuperscript{47} See N.Y. CONST. art. IX, § 2(c); N.Y. MUN. HOME RULE LAW § 10 (McKinney 1969 & Supp. 1984-85).
\textsuperscript{50} See id. § 34(3). In an attempt to avoid further intergovernmental conflicts, § 34(3) of the Municipal Home Rule Law restricts the county from superseding state legislation relating to the educational system or functions of the local government units unless there has been an official transfer of functions. Id. § 34(3)(b)-(c). The county is also restricted in legislating with regard to a “function, power or duty of the state” or one carried on by state officials or through state financing. Id. § 34(3)(d). In addition, there can be no superseding Charter laws relating to “actions or proceedings against the county,” public benefit corporations, or several other chapters of state law, such as civil service, election, judiciary and workers’ compensation laws, all of which are traditionally areas of state involvement. See id. § 34(3)(e)-(g).
\textsuperscript{52} See N.Y. MUN. HOME RULE LAW §§ 33(1)-(2), 34(3) (McKinney 1969); see also Heimbach v. Mills, 67 App. Div. 2d 731, 732, 412 N.Y.S.2d 668, 670 (2d Dep't 1979) (power to set real property tax equalization rates); Nickerson v. Mandeville, 52 Misc. 2d 394, 396, 275 N.Y.S.2d 906, 908 (Sup. Ct. Nassau County 1966) (charter law, granting county executive...
quired, "every charter provision would have to conform to every applicable general law and there could never be . . . an alternative form of [county] government or effective home rule in the localities." 53

A major test of county charter power occurred in Westchester County Civil Service Employees Association, Inc. v. Del Bello. 54 Westchester County, under article IX, section 1(h) of the constitution, enacted a charter law that created a new Department of Public Safety Services for the county by merging the functions of the Westchester County Sheriff and the Parkway Police. 55 The charter law established the appointive position of commissioner/sheriff to head the department. At the time, under article XIII, section 13, of the constitution, sheriffs were to be elected for a three-year term of office. Plaintiffs contended that the term of office set forth in the constitution could not be truncated by abolishing the office prior to its natural expiration date.56

Justice O'Connor traced the history of home rule for counties by noting that traditionally counties had been closely connected with the state and, in many respects, were simply regional agents of the state government.57 As a result, many details relating to power to appoint members of county Vocational Education and Extension Board, was valid, though inconsistent with Education Law granting such power to board of supervisors). 58

The permitted inconsistency between a charter law and a general law was noted in the New York County Law. See N.Y. Country Law § 2(b) (McKinney 1972). There, the Legislature expressly provided that a county charter provision of any alternative form of county government, or even a local law thereafter adopted under an optional or alternative form of county government, will prevail if it conflicts with provisions of the County Law, unless the latter expressly states to the contrary. See id; Davis Constr. Corp. v. County of Suffolk, 95 App. Div. 2d 819, 820, 464 N.Y.S.2d 519, 521 (2d Dep't 1983) (local law, delegating to District Attorney jurisdiction and duties in excess of those prescribed in County Law, held invalid because County Law expressly precluded such supersession). The section was intended to recognize those "instances of different alternative and charter forms of structural county government." Note of Commission on Uniform County Law, ch. 691, [1950] N.Y. Laws 1580 n.2. A similar provision allowing for this inconsistency is found in N.Y. County Law § 1001(3) (McKinney 1972).


55 Id. at 605, 418 N.Y.S.2d at 914-15 (O'Connor, J., dissenting).

56 Id., 418 N.Y.S.2d at 914 (O'Connor, J., dissenting).

57 See id. at 606, 418 N.Y.S.2d at 915-16 (O'Connor, J., dissenting). Justice O'Connor cited the New York State Constitutional Convention Committee as representative of the legislative history of the article. See id. at 605-06, 418 N.Y.S.2d at 915 (O'Connor, J., dissenting). In its analysis, the Committee observed that the idea that counties could form independent local governments was new:
their structure were incorporated in the state constitution. It was the purpose of the county home rule amendment to change the nature of county government by placing decisions regarding organization and structure into the hands of the voters of the county. By authorizing alternative forms of government, the county could provide for appointment or election to, or abolition of any county office. Thus, Justice O'Connor argued that article IX, section 1(h) of the constitution authorized a county to abolish the office of sheriff. The county charter law freed counties from the constitutional mandate of a three-year elective term of office for the sheriff.

In *Nydick v. Suffolk County Legislature*, the issue was whether a vacancy in the office of Suffolk County Legislator was to be filled by the governor under section 400(7) of the County Law or in accordance with the Suffolk County Charter, which provided

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The conception of home rule for counties is a relatively new one. Even more than cities, the counties have been by tradition closely connected with the State. They have been, in a sense, the direct regional agents of the State government. Hence, the idea of county home rule was somewhat anomalous, for by very definition counties were from one viewpoint useful only in so far as they did not possess home rule.

11 NEW YORK STATE CONSTITUTIONAL CONVENTION COMMITTEE, PROBLEMS RELATING TO HOME RULE AND LOCAL GOVERNMENT 10 (1938).

68 Del Bello, 70 App. Div. 2d at 606, 418 N.Y.S.2d at 916 (O'Connor, J., dissenting).

69 See id. (O'Connor, J., dissenting) (quoting 11 NEW YORK STATE CONSTITUTIONAL CONVENTION COMMITTEE, supra note 56, at 11). Section 1 of Article IX, entitled “Bill of rights for local governments” empowered the counties to “adopt, amend, or repeal alternative forms” of county government. N.Y. Const. art. IX, § 1. The New York State Constitutional Convention Committee, in its analysis of the problems concerning growing local governments that were shackled by the legislature, stated that “The County Home Rule Amendment attempted to remedy these faults by taking the details of county organization out of the Constitution and putting them into the hands of the State Legislature and the voters of the county.” 11 NEW YORK STATE CONSTITUTIONAL CONVENTION COMMITTEE, supra note 56, at 11.

70 See Del Bello, 70 App. Div. 2d at 607-08, 418 N.Y.S.2d at 917 (O'Connor, J., dissenting). Besides permitting a county to adopt its own form of government, the County Home Rule amendment also enabled the local government to exercise a greater degree of control over county officers. See 11 NEW YORK STATE CONSTITUTIONAL CONVENTION COMMITTEE, supra note 57, at 11. The Committee noted that since the transfer of functions to or from the county is authorized, “protections surrounding constitutional offices no longer operate with regard to a form of government adopted under the County Home Rule Amendment.” Id.

71 See Del Bello, 70 App. Div. 2d at 607-08, 418 N.Y.S.2d at 917 (O'Connor, J., dissenting).

for the filling of a vacancy by the county legislature. The court reviewed the history of home rule for counties and concluded that since the legislature through the County Charter Law had specifically permitted charter counties to provide for the appointment of any county officers, section 400 of the County Law was not a general law within the home rule definition. Since section 400 was not a general law, the provision of the Suffolk County Charter was effective to place the power to fill the vacancy in the county legislature.

In one of the most encouraging decisions for proponents of home rule, the court of appeals extended the holding of Nydick to a non-charter county. The question in Resnick v. County of Ulster was whether a non-charter county, in carrying out its home rule functions, was authorized to enact a local law providing that a vacancy in the office of county legislator was to be filled by the remaining members of the legislature instead of by the governor under section 400(7) of the County Law. The court noted that the idea that local officials should be chosen by their local constituencies has deep roots in our history. The court referred to

63 Id. at 787, 367 N.Y.S.2d at 634.
64 See id. at 789, 367 N.Y.S.2d at 635-36.
65 Id. at 790-91, 367 N.Y.S.2d at 637.
67 See id. at 283, 376 N.E.2d at 1272, 405 N.Y.S.2d at 626. In Resnick, the Ulster County Board of Supervisors, acting as that county's legislature, adopted, for the year 1976, local law 1 which provided that any vacancy in a term of County legislator, except by expiration, is to be filled by the County Legislature. See id. at 289 n.3, 376 N.E.2d at 1275 n.3, 405 N.Y.S.2d at 629 n.3. In upholding the Special Term's decision, the Appellate Division distinguished the Court of Appeals decision in Nydick v. Suffolk County Legislature, 36 N.Y.2d 951, 335 N.E.2d 858, 373 N.Y.S.2d 554 (1975), by noting that Nydick dealt with a county government established by charter while Ulster County's government was nonchartered, See Resnick v. County of Ulster, 5 App. Div. 2d 222, 224, 390 N.Y.S.2d 247, 249 (3d Dep't 1976), rev'd, 44 N.Y.2d 279, 376 N.E.2d 1271, 405 N.Y.S.2d 625 (1978). The Appellate Division, Third Department, chose to read the State Constitution's language that "the legislature shall provide for filling vacancies in office," N.Y. Const. art. XIII, § 3, as prohibiting the county legislature from adopting laws for filling vacancies in local office, barring express authorization by the State legislature, see Resnick, 44 N.Y.2d at 284, 376 N.E.2d at 1273, 405 N.Y.S.2d at 626.

The court of appeals rejected the Appellate Division's contention that a county must be chartered to be authorized to fill vacancies: "it would be contrary to the spirit of home rule to allow the issue of whether county legislatures may adopt provisions relating . . . to their 'affairs or government' to turn on the existence or nonexistence of county charters." Id. at 287, 376 N.E.2d at 1274, 405 N.Y.S.2d at 628.

the bill of rights introducing article IX of the state constitution, which provides that "[a]ll officers of [every] local government, whose election or appointment is not provided for by this constitution shall be elected by the people of the local governments . . . or appointed by such officers of the local government as may be provided by law." 68

The court further noted that, with the 1963 home rule amendments to the constitution, municipalities were accorded great autonomy in determining the manner in which their local officers, including legislative officers, were to be chosen. 70 While article XIII, section 3 of the Constitution states that the legislature will provide for filling vacancies in office, the court determined that this provision did not limit the power of local governments to devise their own solutions for filling interim vacancies in office. 71 Furthermore, the court reasoned that to allow the issue of whether county legislatures may adopt provisions relating to their "affairs or government" to turn on the existence or nonexistence of county charters would be contrary to the spirit of home rule. 72 With this significant

Metropolitan, Judge Vann traced the history of home rule. 174 N.Y. at 431, 67 N.E. at 70-71 ("principle of home rule, or the right of self-government as to local affairs, existed before we had a constitution").

68 See Resnick, 44 N.Y.2d at 285, 376 N.E.2d at 1273, 405 N.Y.S.2d at 627 (quoting N.Y. Const. art. IX, § 1(b)).

70 Id. (quoting N.Y. Const. art. IX, § 1(b)). On November 5, 1963, the former article IX was repealed. The current article IX became effective January 1, 1964. The purpose of the section was to secure local self-government by providing that local officials whose appointments or elections are not governed by the constitution should be elected locally or appointed according to the authorities designated by the legislature. See N.Y. Const. art. IX (historical note).

71 See Resnick, 44 N.Y.2d at 288, 376 N.E.2d at 1275, 405 N.Y.S.2d at 629.

72 Id. at 237, 376 N.E.2d at 1274, 405 N.Y.S.2d at 628. In the Resnick decision, the court of appeals noted that "[t]hose critical of the local laws assert these words [property, affairs or government] should be construed as limiting the power of local governments, unless authorized by the State Legislature, to devise their own solutions for filling interim vacancies in office." Id. The argument continues that for counties that operate under county charters, the authorization necessary to permit the filling of vacancies by the county is implicit in the State Legislature's approval of the charter itself. There is no such implicit authorization for non-chartered counties. See Id.

In rejecting this argument, the court of appeals deemed it not only contrary to the spirit of the home rule, but also unpersuasive that "an aspect of government organization as limited as the method of filling legislative vacancies" could be prohibited while other statutes endow a county with "considerable latitude to choose that structure of local government which is best tailored to serve particular community needs." Id. The Resnick court noted that "[n]owhere in the statutory guidelines . . . [concerning] county charters is there any reference to filling vacancies in office." Id. at 288, 376 N.E.2d at 1274, 405 N.Y.S.2d at 629. On the basis of this fact, the court determined that there is no reason "to believe that
statement, the court of appeals held that the procedure for filling vacancies in the local legislature is within the "property, affairs or government" of a local government and that article XIII, section 3 of the constitution did not vest in the state legislature exclusive authority to fill vacancies.\textsuperscript{73} Article IX, the later enactment, provided the necessary authority for a county to establish its own procedure for filling a vacancy in a county legislature.\textsuperscript{74}

Thus, after Resnick a county possessed broad power to determine the structure of its government, including whether local offices were to be elective or appointive and the procedure for filling vacancies; to restructure departments and the functions and duties of local officers; and to abolish or consolidate local offices.\textsuperscript{76} Subject to limited restrictions, counties were not required to be consistent with general state laws in exercising this power.\textsuperscript{77} The future indeed looked bright for proponents of county home rule. Recent cases, however, have diminished the reason for optimism.

\textsuperscript{73} Resnick, 44 N.Y.2d at 286-88, 376 N.E.2d at 1275, 405 N.Y.S.2d at 628-29.

\textsuperscript{74} Id. at 287, 376 N.E.2d at 1274, 405 N.Y.S.2d at 628.

\textsuperscript{75} See id. at 288, 376 N.E.2d at 1275, 405 N.Y.S.2d at 629. Before the 1964 amendment of article IX, there was no well defined allocation of authority to decide how a vacancy could be filled. See id at 286, 376 N.E.2d at 1273, 405 N.Y.S.2d at 627. The older home rule provisions applied essentially to cities and villages. See id. "Counties were left largely to a choice among alternative forms of chartered or unchartered local government organization outlined by the State Legislature . . . ." Id. The procedure by which a county might alter its structure was described by the Resnick court as "cumbersome and discouraging." Id.; see supra notes 43-45. "The now almost universally accepted philosophy of local home rule is essentially the expression of a municipality's right to be different, if it so chooses. There is no magic formula of governmental forms applicable to all cities, all counties, all towns or all villages." Diamond, Some Observations on Local Government in New York State, 8 Buffalo L. Rev. 27, 38 (1959). Various policy reasons have been cited for allowing county government to be inconsistent with State government; among them are population disparity and development disparity. See id.

\textsuperscript{76} The scope of a local government's authority to legislate on matters concerning local affairs had achieved a broad definition. See, e.g., People v. Judiz, 38 N.Y.2d 529, 531, 344 N.E.2d 399, 401, 381 N.Y.S.2d 467, 469 (1976) (mere fact that local law may deal with some matters touched upon by state law does not render local law invalid); People v. Lewis, 295 N.Y. 42, 51, 64 N.E.2d 702, 704 (1946) (local laws that do not prohibit what state law forbids are not inconsistent); Belle v. Town Bd., 61 App. Div. 2d 352, 357, 402 N.Y.S.2d 677, 680 (4th Depl't 1978) (local law not inconsistent if not contradictory, incompatible, or inharmonious with state law).
V. RECENT COUNTY HOME RULE DECISIONS

In *Kelley v. McGee*, the validity of section 183-a of the Judiciary Law was in issue. Section 183-a required the payment of specified salaries to full-time district attorneys and allowed for mid-term increases. The statute was attacked on two grounds. First, article XIII, section 7 of the state constitution prohibits mid-term increases or decreases in the compensation of state officers named in the constitution. The court of appeals noted the increased grant of home rule power to counties beginning with the Fearon amendment in 1935 and culminating in the broad grant of power to adopt county charters by the constitutional amendment of 1963. Citing *Westchester County Civil Service Association, Inc. v. Del Bello*, the court stressed that significant powers were granted to counties to determine the nature and functions of local offices, including the power to abolish these offices or to make them appointive or elective. In view of these broad powers, the court concluded that the district attorney is a local officer and, as such, could receive a mid-term increase in compensation.

The second challenge in *Kelley* was based upon a claimed violation of the constitution. Section 183-a established a classification of counties based on population. It was argued that the legislature may act in relation to the property, affairs or government of a local government only by general law or by special law with a home rule request or a message of necessity from the governor.

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78 Id. at 533-34, 443 N.E.2d at 911, 457 N.Y.S.2d at 437.
79 Id. at 534-36, 443 N.E.2d at 912-13, 457 N.Y.S.2d at 437-38.
81 *Kelley*, 57 N.Y.2d at 536, 443 N.E.2d at 912-13, 457 N.Y.S.2d at 438.
82 Id. at 537, 443 N.E.2d at 913, 457 N.Y.S.2d at 439.
83 N.Y. Jud. Law § 183-a (McKinney 1983). Section 183-a created three groups of counties—one with populations greater than 500,000; another with populations between 100,000 and 500,000; and a third including those counties that have designated the office of district attorney as full-time pursuant to § 700(8) of the County Law. Counties with populations of 40,000 and under, as well as those with 40,000 to 100,000 which opt not to make the position of district attorney full-time, remain unaffected by the salary requirements of § 183-a. See ch. 1049, § 3, [1974] N.Y. Laws 2693.

84 *Kelley*, 57 N.Y.2d at 537, 443 N.E.2d at 913, 457 N.Y.S.2d at 439.
The court of appeals decided, however, that the salaries of district attorneys are a matter of state concern and that the legislature could therefore act through the normal legislative procedure, unrestricted by the home rule provisions. It was only necessary that the classifications established be reasonable. The court held that district attorneys, with their responsibilities to enforce the penal laws of the state and represent the people of the state in criminal matters, act in areas of state concern. The court of appeals reasoned that the legislature recognized the inequity of requiring full-time district attorneys to forego private practice while having their salaries frozen at inadequate levels. Section 183-a served the state's interest by guaranteeing reasonable salaries that would attract the best available attorneys to serve as district attorneys.

In Carey v. Oswego County Legislature, the question was whether the governor had the authority to fill a vacancy in the office of district attorney under section 400(7) of the County Law or whether the county legislature had this authority under the provisions of a local law. The defendant claimed that granting the authority to the governor would violate article IX of the state constitution by rendering ineffective a duly enacted local law that vested power of appointment in the county legislature. Not surprisingly, the defendant relied on Resnick and Nydick, in which the courts held that local provisions for the filling of vacancies in the office of county legislator would take precedence over section 400(7) of the County Law. However, the Oswego court, citing Kelley, held that just as preserving district attorney's salaries promoted the security, independence, competence and integrity of persons serving as district attorneys, so would a state statute gov-

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88 Id. at 538-40, 443 N.E.2d at 913-15, 457 N.Y.S.2d at 439-41.
88 Id. at 539, 443 N.E.2d at 914, 457 N.Y.S.2d at 440-41.
88 Id. at 63, 458 N.Y.S.2d at 284. In Oswego, the Governor brought a declaratory judgment action to compel a declaration that he had the exclusive right to appoint an interim district attorney to the vacancy existing in Oswego County due to the resignation of the incumbent. Id. The Supreme Court, Special Term, was compelled by § 400(7) of the N.Y. County Law to rule for the Governor. Id. Section 400(7) provides: "[e]xcept as hereinafter provided, a vacancy in an elective county office, shall be filled by the governor by appointment." N.Y. COUNTY LAW § 400(7) (McKinney Supp. 1984-1985).
89 See supra notes 66-76 and accompanying text.
90 See supra notes 62-65 and accompanying text.
91 See supra notes 79-90 and accompanying text.
erning the filling of a vacancy in this office.\textsuperscript{92} The court distinguished Resnick and Nyydick, pointing to the significant differences between the state concerns in the office of district attorney and those in the office of county legislator, and to the fact that district attorneys are constitutional officers not subject to article IX, section 1(b) of the constitution.\textsuperscript{93} Since the filling of the vacancy in the office of district attorney was a matter of state concern, the legislature was free to act without restriction by the home rule provisions of the constitution.

\textsuperscript{92} Oswego, 91 App. Div. 2d at 64-65, 458 N.Y.S.2d at 285-86.

\textsuperscript{93} See id. at 65-66, 458 N.Y.S.2d at 286. While both Oswego and Kelley are examples of state law superseding home rule law, the court's holding in Oswego is inconsistent with Kelley and Del Bello. The court of appeals stated in Kelley that the home rule provisions of article IX were not restricted by the provision of article XIII from which the state law in issue in Oswego is derived. See 57 N.Y.2d at 537, 443 N.E.2d at 912, 457 N.Y.S.2d at 438.

The constitutional provision from which the State derives its power to fill vacancies is set forth in Kelley: "except as authorized in section one of article nine of this constitution, sheriffs, clerks of counties and district attorneys [and registers in counties having registers], shall be chosen by the electors of the respective counties once in every three years [and whenever the occurring of vacancies shall require]." Id. at 536 n.11, 443 N.E.2d at 912 n.11, 457 N.Y.S.2d at 438 n.11 (quoting N.Y. Const. art. XIII, § 13(a) (1963) (amended 1972)). Referring to this as the "exception clause," because an exception is made for the home rule provisions of article IX, the court of appeals noted that the provision "reinforces the broad grant of authority in counties over their local offices." Id.

Similarly, in Del Bello, Justice O'Connor referred to the exception clause, stating that "article XIII, by its own terms, is made subject to article IX." Westchester County Civil Serv. Employees Assoc. v. Del Bello, 70 App. Div. 2d 604, 610, 418 N.Y.S.2d 914, 919 (2d Dep't) (O'Connor, J., dissenting), rev'd, 47 N.Y.2d 886, 93 N.E.2d 488, 419 N.Y.S.2d 494 (1979). In Del Bello, the court held that the state office of sheriff could be abolished due to an amendment of a county charter merging the functions of sheriff and parkway police and established a new position of commissioner-sheriff. See supra notes 54-61 and accompanying text.

The court of appeals noted in Kelley that while the district attorney was originally among the offices listed in the exception clause of article XIII, a 1972 amendment removed it and added a separate sentence providing that district attorneys shall be chosen by the electors once every three or four years as the legislature shall direct. See 57 N.Y.2d at 536 n.11, 443 N.E.2d at 912 n.11, 457 N.Y.S.2d at 438 n.11. From this, it could be argued that the state's appointive power with respect to district attorneys is no longer subject to the home rule exception of article IX. The court of appeals implied that the legislature's intent behind this amendment was unclear; nevertheless, the court stated that "[w]hatever may have been its purpose . . . we do not read it to restrict the grant of authority contained in section 1 of Article IX." Id.

Thus, the court of appeals in Kelley made it clear that the home rule power granted to counties in article IX extends to the office of district attorney. Therefore, in upholding the abolishment of the office of sheriff, Del Bello is precedent for the county's right, through adoption of a county charter, to appoint, elect or abolish an office such as district attorney as well. If county officers may abolish such office as well as appoint to an office such as district attorney for a full term, it makes no sense that they cannot temporarily fill a vacancy until an election can be conducted. See infra note 100 and accompanying text.
The issues were similar in Cuomo v. Chemung County Legislature,94 except that the vacancy to be filled was in the office of sheriff and the county was attempting to act under a provision of its county charter to fill the vacancy. The county argued that this case was distinguishable from Oswego because a county charter rather than a local law was in issue.95 Relying on Del Bello, which held that a county through its charter could abolish the office of sheriff and replace it with a new appointive position, the defendant argued that a grant of power to abolish and transfer the duties of sheriff necessarily included the more limited power to provide for the filling of a vacancy in this office through local appointment.96 The court concluded that in light of the duties of sheriff in relation to the enforcement of the penal laws of the state, the operation of correctional facilities and the exercise of civil authority under state law, the office of sheriff is one of sufficient state-wide concern to warrant state regulation of the filling of vacancies.97 The court thought it was constrained to follow Oswego and held that the governor's authority under section 400(7) of the County Law super-

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95 Id. at 43, 469 N.Y.S.2d at 870. The terms of power granted to local governments by article IX are not equivalent to those granted by article IX to county governments. "[L]ocal government shall have power to adopt and amend local laws _not inconsistent with_ the provisions of this constitution or any general law." N.Y. CONST. art. IX, § 2(c)(ii) (emphasis added). This resulted in the enactment of article 2, § 10, subd. 1(i) of the Municipal Home Rule Law, which states that "every local government shall have power to adopt and amend local laws _not inconsistent with_ the provisions of the constitution or _not inconsistent with_ any general law." N.Y. MUN. HOME RULE LAW § 10(1)(i) (McKinney 1969 & Supp. 1985) (emphasis added).

There is no requirement, however, that counties make laws consistent with the constitution or general laws. See N.Y. MUN. HOME RULE LAW §§ 33, 34 (McKinney 1969 & Supp. 1984-1985); _see also_ Diamond, _supra_ note 75. The County Charter Law is premised upon the county's authority to form charter laws alternative to existing state laws. Section 34 of the County Charter Law limits a county's power to prepare, adopt and amend county charter laws by setting forth the areas in which county laws may not be inconsistent with state laws. See N.Y. MUN. HOME RULE LAW § 34 (McKinney 1969 & Supp. 1984-1985). This limitation on a county's power indicates that county charter laws are not further required to be consistent with state law. _See supra_ notes 48-50 and accompanying text. Thus, unlike other local laws, county charter laws such as those regarding the appointment to or abolition of an office may be upheld even if inconsistent with state laws. Section 34 of the County Charter Law limits a county's power to prepare, adopt and amend county charter laws by setting forth the areas in which county laws may not be inconsistent with state laws. See N.Y. MUN. HOME RULE LAW § 34 (McKinney 1969 & Supp. 1984-1985).

96 Chemung, 122 Misc. 2d at 43, 469 N.Y.S.2d at 870; _see supra_ notes 54-61 and accompanying text.
97 See 122 Misc. 2d at 44, 469 N.Y.S.2d at 870 (citing Kelley v. McGee, 57 N.Y.2d 522, 443 N.E.2d 908, 457 N.Y.S.2d 434 (1982)).
seded inconsistent provisions of the charter of the County of Chemung.98

A. Questioning the Logic of These Decisions

The Kelley, Oswego, and Chemung decisions have sapped considerable vitality from county home rule. If the state may freely legislate with respect to such peculiarly local concerns as the compensation of local officers and the procedure for filling vacancies in local offices, one might wonder whether any local matters are secure from state interference.99 It is inconsistent to hold that while counties may determine whether local offices are to be elective or appointive, local procedures for filling vacancies in elective offices may be superseded by state law. Indeed, if the local offices were made appointive, they would not be subject to section 400(7) of the County Law.100 Further, since the appointee to a vacancy in an elective office may serve only until that vacancy can be filled by election, 101 it is questionable that a significant state interest is served by requiring the governor, rather than the county legis-

98 See 122 Misc. 2d at 44, 469 N.Y.S.2d at 870. The Chemung court concluded that the state's reservation of the right of the Governor to fill such vacancies in the office of Sheriff is supported by the expression of legislative intent contained in § 205 of the Alternative County Government Law. See id.; see also Oswego, 91 App. Div. 2d at 65, 458 N.Y.S.2d at 286 (Kelley holding that legislature is free to act without restriction in areas of statewide interest compels finding that § 400(7) of County Law supersedes inconsistent local law that provides for filling of vacancies in office of District Attorney).

99 See Comment, Home Rule in Pennsylvania, 81 Dick. L. Rev. 255, 295 (1976) (only when it appears individual efforts are inadequate to solve a common problem or when matter is one of statewide significance should legislature intervene and preempt area of authority). See generally Moore, Powers and Authorities of Idaho Cities: Home Rule or Legislative Control?, 14 Idaho L. Rev. 143, 148 (1977) (under home rule system, local officials theoretically free to govern in matters of local concern without specific legislative grants of power from state for each action taken).


101 See N.Y. Const. art. XIII, § 3 (elective officers appointed to fill vacancies shall not hold office longer than next succeeding election); see also Resnick v. County of Ulster, 44 N.Y.2d 279, 285, 376 N.E.2d 1271, 1272, 405 N.Y.S.2d 625, 627 (1978) (appointments to vacancies terminate with next general election); Roher v. Dinkins, 32 N.Y.2d 180, 188, 298 N.E.2d 37, 40, 344 N.Y.S.2d 841, 846 (1973) (school board members, "elective officers" within constitutional provisions, not to hold office longer than commencement of political year next succeeding annual election).
tue, to make such temporary appointments. Moreover, this policy makes little sense in view of the county home rule provisions permitting a county through charter law to make local offices appointive.\textsuperscript{102} Local officials will then be entrusted to fill such offices for a full term. Certainly a local vacancy filling procedure is less intrusive.

In the Oswego\textsuperscript{103} and Chemung\textsuperscript{104} decisions, there is no mention of section 2 of the County Law, which provides that no section of the County Law applies to a charter county that has enacted an inconsistent charter law or local law unless the section includes a "contrary intent" to restrict action by a charter county.\textsuperscript{105} Absent such intent, the provision would not be a "general law." It would not, by its terms, be applicable to all counties outside the City of New York. If a charter county enacted varying local regulations, the relevant provision of the County Law would not be "general" in its effect. Moreover, the absence of a "contrary intent," would undermine any argument that the provision constitutes a matter of state concern. Variation of such a provision by a charter county by charter law or local law, and by a non-charter county by local law,

\textsuperscript{102} See N.Y. Const. art. IX, § 1(b) (allowing officers of local government to appoint other local officers as provided by law); N.Y. Mun. Home Rule Law § 10(1)(ii)(a)(1) (McKinney 1969 & Supp. 1984-1985) (local government granted power to adopt laws relating to mode of selection of its officers and employees); see also Lanza v. Wagner, 11 N.Y.2d 317, 325, 183 N.E.2d 670, 674, 229 N.Y.S.2d 380, 386 (legislature prohibited from providing for selection of local officers other than through local elections or through appointment by local authorities), cert. denied, 371 U.S. 901 (1962).


\textsuperscript{104} 122 Misc. 2d 42, 469 N.Y.S.2d 868 (Sup. Ct. Chemung County 1983).

\textsuperscript{105} N.Y. County Law § 2 (McKinney 1972) provides:

This chapter shall apply to all counties, except that:

(a) It shall not apply to a county wholly contained within a city, unless specifically so provided;

(b) The provisions of this chapter in so far as they are in conflict with or in limitation of a provision of any alternative form of county government heretofore or hereafter adopted by a county pursuant to section two of article nine of the constitution, or any administrative code, county government law or civil divisions act enacted by the legislature and applicable to such county as now in force or hereafter amended, or in conflict with any local law heretofore or hereafter adopted by a county under an optional or alternative form of county government, shall not be applicable to the county, unless a contrary intent is expressly stated in this chapter.

Id.; see Coyne v. Stack, 63 App. Div. 2d 782, 783, 404 N.Y.S.2d 908, 909 (3d Dep't 1978) (mem.) § 2 of County Law precludes application of provisions of County Law that conflict with local law.
would thus be permitted. No "contrary intent" appears in section 400 of the County Law, which nevertheless was construed in Oswego and Chemung as a matter of state concern. The determination of these cases is therefore irreconcilable with section 2 of the County Law, which is intended to permit counties to develop freely their own alternative forms of government, known as charters, and to enable them to supersede those provisions of the County Law that traditionally provided for county government.

VI. HOME RULE HITS BOTTOM

The validity of a local residency requirement was in issue in Uniformed Firefighters Association v. City of New York. Sections of the Public Officers Law establish liberal residency provisions for members of certain police, fire, correction and sanitation departments, whereby those members may reside outside of the municipality they serve. The provisions apply notwithstanding "any general, special or local law, charter, code, ordinance, resolution, rule or regulation" requiring residency in the municipality as a qualification for holding a local office and providing for forfeiture of office if the occupant ceases to be a resident. New York City enacted a local law making residence in the city a condition of ap-

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106 See Nydick v. Suffolk County Legislature, 81 Misc. 2d 786, 790, 367 N.Y.S.2d 632, 637 (Sup. Ct. Suffolk County) (defines "contrary intent" as express statement that such section or article is to be superior to any alternative county government law), aff'd, 47 App. Div. 2d 241, 366 N.Y.S.2d 472 (2d Dep't), aff'd, 36 N.Y.2d 951, 335 N.E.2d 858, 373 N.Y.S.2d 554 (1975). Local laws must only be consistent with general state laws. See supra note 22.

107 See supra notes 87-98 and accompanying text.

108 See Henry v. Noto, 74 App. Div. 2d 604, 605, 424 N.Y.S.2d 506, 508 (2d Dep't) (Suffolk County Charter overrides County Law when two conflict), modified, 50 N.Y.2d 816, 407 N.E.2d 1329, 430 N.Y.S.2d 32 (1980); Coyne v. Stack, 63 App. Div. 2d 782, 783-84, 404 N.Y.S.2d 908, 909 (3d Dep't 1978) (Section 609 of Albany County Charter, requiring intra-unit transfer of funds by County Executive with prior approval of County Legislature, precluded application of inconsistent section of County Law, which empowered County Legislature to make such transfers); Nickerson v. Mandeville, 52 Misc. 2d 394, 395, 275 N.Y.S.2d 906, 907 (Sup. Ct. Nassau County 1966) (when conflict exists between laws applicable generally throughout state and specific county charter, latter prevails).


111 See id.; Hanlon v. Harrolds, 82 Misc. 2d 839, 842, 371 N.Y.S.2d 223, 226 (Sup. Ct. Onondaga County 1974) (provision limiting appointment to Syracuse Fire Department to city residents would violate § 3(4) of Public Officers Law); Hesselgrave v. King, 45 Misc. 2d 256, 258, 256 N.Y.S.2d 753, 756 (Sup. Ct. Westchester County 1965) (policemen entitled to exemption from residency requirements of local laws as provided by § 30(4) of Public Officers Law).
pointment and continued employment as a member of these departments. The city acted under its authority to enact local laws in relation to its property, affairs or government and other specified subjects. The city argued that the state laws were not "general laws" under the home rule article, and thus could be superseded by local law. The court of appeals held that "while the structure and control of the municipal service departments . . . may be considered of local concern [the residential mobility of civil servants], unrelated to job performance or departmental organization, is a matter of State-wide concern, not subject to municipal home rule." Once it was determined that these provisions of the Public Officers Law constituted matters of state concern, home rule was no longer a factor, and the state legislature was free to pass laws that reasonably classified cities based on population or some other condition, without the need for a home rule request. The Firefighters court determined that the classification established was reasonable and that the city's local residency law was invalid to the extent that it was inconsistent with state provisions. The Firefighters decision was a sad event for proponents of home rule. It was discouraging that such a distinctly local matter as the residence of local officers and employees was held not to be part of the property, affairs or government of the city. Furt

112 See N.Y. ADMIN. CODE ch. 49, §§ B49-4.0, B49-4.1, B49-4.2 (1975), construed in Uniform Firefighters Ass'n v. City of New York, 50 N.Y.2d 58, 90, 405 N.E.2d 697, 980, 428 N.Y.S.2d 197, 198 (1980). The Code provides that all persons entering city service after November 1, 1978, must reside in the city and any person who entered city service prior to that date, who was a resident of the city at that time, must maintain his or her residence within the city, see N.Y. ADMIN. CODE ch. 49, § B49-4.1(b)(1)-(2). Forfeiture of employment is the penalty for failure to maintain the residence as required. Id.

113 See N.Y. Const. art. 9, § 2(c).

114 See Firefighters, 50 N.Y.2d at 90, 405 N.E.2d at 680, 428 N.Y.S.2d at 198. The city conceded that Local Law No. 20, as applicable to members of its police, fire, sanitation, and correction departments, was inconsistent with exemptions from residency requirements in municipalities as contained in § 3(2), (2-a) and (9) and in § 30(4), (4-a) and (5) of the Public Officers Law. See id. However, the city argued that the state laws, although couched in general terms, were not general laws because they affected less than all cities. See id. at 90, 405 N.E.2d at 680, 428 N.Y.S.2d at 199.

115 See id. at 90, 405 N.E.2d at 680, 428 N.Y.S.2d at 199-99.


117 See id. at 90-91, 405 N.E.2d at 680-81, 428 N.Y.S.2d at 199. In Farrington v. Pinckney, 1 N.Y.2d 74, 133 N.E.2d 817, 150 N.Y.S.2d 585 (1956), the court of appeals stated that separate classes based on population are permissible when conditions due to differences in population might reasonably require differentiation in laws applicable to them. Id. at 81, 133 N.E.2d at 822, 150 N.Y.S.2d at 593.
more, the court of appeals failed to indicate what substantial state interest was served by establishing the liberal residency provisions for these officers. The court alluded merely to a state interest of affording residential mobility to members of the civil service, without indicating why that matter is of such substantial interest to the state as to remove it from the home rule arena.\footnote{See Firefighters, 50 N.Y.2d at 90, 405 N.E.2d at 680, 428 N.Y.S.2d at 199. There are powerful interests that may legitimately support the application of a durational residency requirement. See C. RHINE, POLICE AND FIREFIGHTER'S LAW: THE LAW OF MUNICIPAL PERSONNEL REGULATION 46, 51 (1982). Among these interests are the protection of the local labor force, discouragement of transients from seeking public employment when the municipality has a substantial interest in maintaining stable protective services, the creation of strong personal bonds between safety officer and the community, and familiarity of emergency personnel with street plans and resources of the municipality. See id. The courts have acknowledged the significant municipal interest in ensuring the capabilities of these employees to respond to duty in emergency situations during off-duty hours and on short notice. See id. at 58. See generally Note, Municipal Employee Residency Requirements and Equal Protection, 84 YALE L.J. 1684, 1696-1701 (1975) (primary purposes of residency restrictions are to ensure availability of emergency manpower, further public coffer objectives, promote identity with the needs and problems of the city, and to provide incentive for better job performance).}

\footnote{See Firefighters, 50 N.Y.2d at 90, 405 N.E.2d at 680, 428 N.Y.S.2d at 199. Prior to Firefighters the burden of proof was on the state to prove that its interest was substantial. See Resnick v. County of Ulster, 44 N.Y.2d 279, 288, 376 N.E.2d 1271, 1275, 405 N.Y.S.2d 625, 629 (1978) (to invalidate local laws because of rationalizations urged upon court by state would be to take step backward in area of home rule); see also Town of Monroe v. Carey, 96 Misc. 2d 238, 241, 412 N.Y.S.2d 939, 941 (Sup. Ct. Orange County 1977) (mere statement by legislature that subject matter of statute is state concern does not create state concern nor does it afford statute such presumption), aff'd mem., 46 N.Y.2d 847, 386 N.E.2d 1335, 414 N.Y.S.2d 314 (1979). The Firefighter court determined that "while the structure and control of the municipal service departments in issue . . . may be considered of local concern within the meaning of municipal home rule, the residence of their members . . . is a matter of State-wide concern not subject to municipal home rule." 50 N.Y.2d at 90, 405 N.E.2d at 680, 428 N.Y.S.2d at 198-99. It shifted the burden of proof on this matter by noting that the city offered no evidence of the insignificance of the state's concern in affording residential mobility to members of the civil service. See id. at 90, 405 N.E.2d at 680, 428 N.Y.S.2d at 199.}

\footnote{See, e.g., McCarthy v. Philadelphia Civil Serv. Comm'n, 424 U.S. 645, 647 (1976). APPARENTLY for the first time the court placed the burden of proof on the municipality to establish the insubstantiality of the state's interest. This appears to be inconsistent with the direct delegation of home rule powers by article IX of the constitution and the directive therein that the rights, powers, privileges, and immunities granted to local governments should be liberally construed. Moreover, local regulations requiring that municipal employees reside within the territory of the municipality that they serve have been upheld against constitutional challenge.\footnote{Surely local governments have a "powerful interests that may legitimately support the application of a durational residency requirement. See C. RHINE, POLICE AND FIREFIGHTER'S LAW: THE LAW OF MUNICIPAL PERSONNEL REGULATION 46, 51 (1982). Among these interests are the protection of the local labor force, discouragement of transients from seeking public employment when the municipality has a substantial interest in maintaining stable protective services, the creation of strong personal bonds between safety officer and the community, and familiarity of emergency personnel with street plans and resources of the municipality. See id. The courts have acknowledged the significant municipal interest in ensuring the capabilities of these employees to respond to duty in emergency situations during off-duty hours and on short notice. See id. at 58. See generally Note, Municipal Employee Residency Requirements and Equal Protection, 84 YALE L.J. 1684, 1696-1701 (1975) (primary purposes of residency restrictions are to ensure availability of emergency manpower, further public coffer objectives, promote identity with the needs and problems of the city, and to provide incentive for better job performance).}
significant interest in ensuring that members of their fire, police, correction and sanitation departments are readily available to perform vital services. The promotion of the ethnic balance of a community, diminution of absenteeism and tardiness, and general economic benefits are additional interests served by municipal residency requirements.\footnote{121}

The provisions of section 2-a of the General City Law were contested in \textit{Radich v. Council of the City of Lackawanna.}\footnote{122} Under section 2-a, in every city in which the mayor and the president of the legislative body are elected simultaneously for an identical term, upon the resignation of the mayor, the powers and duties of his office devolve upon the president of the legislative body for the remainder of the mayor's term.\footnote{123} This provision, added by

\footnotesize{(per curiam) ("appropriately defined and uniformly applied, bona fide residence requirements" constitutional) (quoting Dunn v. Blumstein, 405 U.S. 330, 342 n.13 (1972)); Wright v. City of Jackson, 506 F.2d 900, 901-02 (5th Cir. 1975) (no fundamental, constitutional right to intrastate travel infringed by residency ordinance) (emphasis added); Mandelkern v. City of Buffalo, 64 App. Div. 2d 279, 281, 409 N.Y.S.2d 881, 882 (4th Dep't 1978) (residency ordinance promotes legitimate local purpose).

\footnote{121} See Wright v. City of Jackson, 506 F.2d 900, 903-04; \textit{see also} Ector v. City of Torrance, 10 Cal. 3d 129, 135, 514 P.2d 433, 436, 109 Cal. Rptr. 849, 852 (1973), \textit{cert. denied}, 415 U.S. 935 (1974). The California Supreme Court, in \textit{Ector}, recognized that a municipal residency requirement serves the legitimate state purposes of improving relations between inner-city minority groups and city employees, instilling a feeling of greater personal stake in the city's progress, and providing general economic benefits which flow from the local expenditures of employees' salaries. \textit{See} 10 Cal. 3d at 135, 514 P.2d at 436, 109 Cal. Rptr. at 852. The court held that the requirement bears a rational relationship to one or more legitimate state purposes, and, therefore, is constitutional under the equal protection clause. \textit{Id}.

Plaintiffs challenging municipal residency requirements generally have sought to invoke the strict scrutiny standard of constitutional review by asserting that their fundamental rights, such as the right to travel, have been curtailed. \textit{See supra} note 120. Most courts have found these arguments to be unpersuasive. \textit{See Ector}, 10 Cal. 3d at 135, 514 P.2d at 436, 109 Cal. Rptr. at 852. However, at least one federal court has applied the stricter standard of constitutional review and held that the residency restrictions are justified by a compelling governmental interest. \textit{See} Krzewinski v. Kugler, 338 F. Supp. 492, 500 (D.N.J. 1972) (identity with community is compelling state interest, sufficient to justify local ordinance requirement concerning public employee position).


\footnote{123} \textit{See} N.Y. GEN. CITY LAW § 2-a (McKinney 1968). An examination of the legislative history of § 2-a shows that the legislature wanted to separate to the "greatest extent possible federal, state and municipal election campaigns." Governor's Memorandum, \textit{reprinted in} [1952] N.Y. LEGIS. ANN. 368. By enacting § 2-a of the General City Law, the Legislature established a method of succession, obviating the need for special interim elections, and achieved the purpose of keeping election issues separate. \textit{Id} in Burns v. Kinley, 60 N.Y.2d 40, 453 N.E.2d 1251, 466 N.Y.S.2d 962 (1983), the court of appeals held that the section providing for the automatic devolution of powers and duties of certain elected municipal officials to avoid vacancy in such offices, and requiring independent action to accomplish
chapter 356 of the laws of 1952, was amended in 1963 and made applicable throughout the state, notwithstanding any inconsistent provisions of any local enactments. In 1978, the City of Lackawanna became subject to section 2-a because of the enactment of a local city law requiring the simultaneous election of the mayor and the president of the city council for the same term. In 1980, however, section 2-a of the General City Law was amended to create an exemption from the succession procedure established therein. The exemption was applicable to any city with a charter provision in effect before November 5, 1975, providing that a vacancy in the office of mayor occurring before September 20 was to be filled at the next general election, while one occurring after September 19 was to be filled at the general election held in the following year.

The Lackawanna dispute arose from the conflicting claims of mayoral succession by the president of the city council, who claimed succession under section 2-a, and by an appointee to the city council, who claimed succession in accordance with the city charter. The appellate division determined that the Lackawanna replacement, did not violate the state constitution. See id. at 44, 453 N.E.2d at 1253, 466 N.Y.S.2d at 964.

124 N.Y. Gen. City Law § 2-a (McKinney 1963). When § 2-a was adopted, the Legislature intended to ensure that the term of a municipal mayor would expire in an odd year. See Governor's Memorandum reprinted in [1963] N.Y. Legis. Ann. 475. As a result, local elections would not be held at the same time as state or national elections. See id. (quoting Governor's Memorandum, supra note 123, at 368). The 1963 amendment was enacted to "make it more definite and certain" that no local law, ordinance or city charter "then in effect or [thereafter adopted]" would take precedence over § 2-a. See Governor's Memorandum, supra, at 475.

125 Radich, 93 App. Div. 2d at 561, 462 N.Y.S.2d at 930. Prior to 1978, the City Council members elected a presiding officer pursuant to a city charter provision enacted in 1909 and amended in 1963. Id. The new law provided that a member of the Lackawanna legislative body, "a Council president," would be elected at large at the same election in which the mayor was elected and for the same four year term. See 1982 Inf. Op. N.Y. Att'y Gen. 232. Hence, beginning with the 1979 election, the City was subject to the constraints of § 2-a with regard to the method of mayoral succession. Id. Subsequently however, the City seemingly fell within the mandate of the 1980 amendment to § 2-a. See infra note 127.


127 N.Y. Gen. City Law § 2-a (McKinney 1968 & Supp. 1984-1985). The Appellate Division in Radich observed that a city charter provision in compliance with the statutory exception "shall prevail over [§ 2-a] and a vacancy in the office of mayor shall be filled as provided in such a charter provision." 93 App. Div. 2d at 561-62, 462 N.Y.S.2d at 930. However, the court further held that the 1980 amendment is a "specific and narrow exception to the general rule of mayoral succession" and the charter provision of the City of Lackawanna did not fall within the mandates of that exception. Id. at 562, 462 N.Y.S.2d at 931.
City Charter provision for filling the vacancy did not conform to the requirements for exemption under section 2-a of the General City Law. Moreover, the court held that the legislative history indicated that the exemption established by the 1980 amendment was tailored for New York City.\textsuperscript{128}

The city council attacked section 2-a as violative of article IX of the constitution on the ground that it was a special law enacted without a home rule request or a message of necessity, and could therefore be superseded by local law. Misconstruing the definition of general law for home rule purposes, the appellate division held that section 2-a established a reasonable classification, and therefore was a general law under article IX.\textsuperscript{129} Section 2-a also furthered the state's interest by providing for executive continuity, by avoiding the expense of unnecessary special elections, and by permitting the orderly presentation of election issues.\textsuperscript{130} Because it related to matters of state concern, it was legitimately enacted

\textsuperscript{128} Redich, 93 App. Div. 2d at 562-63, 462 N.Y.S.2d at 931. An examination of the legislative history and extrinsic evidence support the Appellate Division's conclusion that the 1980 amendment to § 2-a was tailored for New York City. Id. A memorandum written in support of the amendment states that its purpose was "to conform the General City Law to the New York City charter." Memorandum of the Assembly Rules Committee, reprinted in [1980] N.Y. Legis. Ann. 90. The provisions for mayoral succession contained in § 2-a of the General City Laws were inconsistent with § 10 of the New York City Charter. Id. Under § 10 of the City Charter, in the event of a vacancy in the office of the Mayor, the President of the City Council would succeed to the duties of the Mayor only until an election could be held to fill the office for the balance of the unexpired term. Id. Conversely, § 2-a of the General City Law provided that in the event of a vacancy in the office of the Mayor, the City Council President would act as Mayor "for the residue of the term for which the Mayor was elected." Id. Specifically, the 1980 amendment was "to permit the New York City Charter, as approved in the 1975 Charter revision, to provide for mayoral succession." Id. Finally, at the time the 1980 amendment was passed, the legislative representatives acknowledged that while "[i]t [was] necessary to get State law into conformity with the New York City Charter, no other city in the State [would be] effected by this provision." Id.

The Radich court reasoned that at the time the Legislature established the statutory exception, it would have been aware of the identity of any city charter meeting the conditions imposed by the exception. See 93 App. Div. 2d at 563, 462 N.Y.S.2d at 931. Thus, while the appellants argued that the exception was not aimed solely at New York City, they failed to support that claim by identifying any other city charter satisfying the conditions to the statutory exception. Id. But see Henry v. Tutunjian, 96 App. Div. 2d 1009, 1010, 467 N.Y.S.2d 102, 103 (3d Dep't 1983) (mem.) (Rensselaer City Charter provisions fall within statutory exception to § 2-a).

\textsuperscript{129} Radich, 93 App. Div. 2d at 564-65, 462 N.Y.S. at 932; see also supra notes 22-40 and accompanying text. The Appellate Division in Radich held that § 2-a of the General City law is a general law notwithstanding the fact that "it applies only to cities which elect the president of their legislative body (1) at-large (2) at the same time and (3) for the same term as their Mayor." 93 App. Div. 2d at 565, 462 N.Y.S.2d at 932.

\textsuperscript{130} Radich, 93 App. Div. 2d at 566, 462 N.Y.S.2d at 933.
through ordinary procedures, unrestricted by home rule provisions of the constitution.\textsuperscript{131}

The court of appeals heard the appeal under its expedited summary procedure\textsuperscript{132} and held that Section 2-a of the "General City Law is a proper exercise of legislative power in an area of State-wide significance and, therefore, does not implicate the home rule provisions of article IX of the Constitution."\textsuperscript{133} The court of appeals initiated its expedited summary procedure in light of its then recent decision in \textit{Burns v. Kinley}\textsuperscript{134} upholding the constitutionality of section 2-a.\textsuperscript{135} However, in \textit{Burns}, the question was whether section 2-a of the General City Law violated article XIII, section 3 of the state constitution, which limits the term of a person appointed to fill a vacancy in an elective office. The \textit{Burns} court distinguished "succession" from the "vacancy" situation and determined that there was no violation of article XIII, section 3.\textsuperscript{136}

\textsuperscript{131} See id. at 567, 462 N.Y.S.2d at 934.
\textsuperscript{132} See [1978] 22 N.Y.C.R.R. § 500.2-500.4 (court may examine merits of selected appeals, on its own motion, by expedited summary procedure).
\textsuperscript{133} See Radich, 61 N.Y.2d 652, 654, 460 N.E.2d 223, 224, 472 N.Y.S.2d 82, 83 (1983) (mem.).
\textsuperscript{134} 60 N.Y.2d 40, 453 N.E.2d 1251, 466 N.Y.S.2d 962 (1983) (per curiam).
\textsuperscript{135} See id. at 44, 453 N.E.2d at 1253, 466 N.Y.S.2d at 964. \textit{Burns} involved a suit by the City Clerk of Albany, who sought to compel the county board of elections to hold elections for the office of Mayor and president of the city council. \textit{Id.} at 41, 453 N.E.2d at 125, 466 N.Y.S.2d at 962. The suit alleged that the statute, General City Law § 2-a, by which those offices devolved on the president and president pro tempore upon the death of the former mayor, was violative of the state constitution. \textit{Id.} at 41, 453 N.E.2d at 1252, 466 N.Y.S.2d at 963. Essentially the statute allowed the new officials to remain in office until the expiration of the deceased mayor's term. \textit{Id.}

Upon examination of legislative policy and intent, as well as the express language of the constitutional and statutory provisions, the court of appeals held that the concept "embodied in the statute [was] markedly different from that of the constitutional provision." \textit{Id.} at 44, 453 N.E.2d at 1253, 466 N.Y.S.2d at 964. The court reasoned that the "constitutional proscription in Section 3 of Article XIII had no relation to the statutory prescriptions of subdivisions 1 and 2 of Section 2(a) of the General City Law," \textit{Id.} at 43, 453 N.E.2d at 1252, 466 N.Y.S.2d at 983, and observed that the constitutional provision concerned the filling of vacancies in public office, while the statute addressed the "automatic and instantaneous devolution of powers and duties to certain public offices . . .," \textit{Id.} at 43, 453 N.E.2d at 1252, 466 N.Y.S.2d at 964. The court further noted that the constitutional provisions concerned the appointment to office through the filling of a vacancy, "a method of selection quite distinct from election." \textit{Id.} at 43-44, 453 N.E.2d at 1253, 466 N.Y.S.2d at 964. It considered this differentiation to be of "very great political and practical significance." \textit{Id.} Hence the court concluded that nothing in its examination lent support to the assertion that § 2-a was unconstitutional. \textit{Id.}

\textsuperscript{136} \textit{Id.} The court observed that filling a vacancy entails appointment to office and thus contemplates a "discretionary choice of a person." \textit{Id.} Accordingly, the official appointed to office under the constitutional provision does not enjoy the "imprimatur of the electorate."
Events related in the appellants' brief in *Radich* shed considerable doubt upon the determination that section 2-a relates to matters of state concern. In 1950 the mayor of the City of New York resigned, creating a vacancy in that office. Under the New York City Charter, upon the occurrence of a vacancy in the office of mayor, the president of the city council was to serve as mayor until the office was filled at the next November election. Soon after this decision, Governor Dewey signed into law section 2-a of the General City Law requiring succession for the balance of the mayor's term. Only a handful of cities came within its provisions, by virtue of simultaneously electing their mayors and presiding legislative officers for an identical term. New York City fell under the provisions of this statute. In 1961, the New York City Charter was amended to provide that, in the event of a vacancy in

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*Id.* Thus it was the legislature's intent to subject that official to a vote of the electorate at the first annual election after the filling of the vacancy. *Id.* Conversely, the election or succession scheme involved in the statute concerns the "devolution or transfer of powers and duties to the present holder of a particular office." *Id.* The official in whom the powers, duties and responsibilities vest under the statutory scheme has already been identified by the process of election. *Id.* The *Burns* court did not address section 2-a in relation to article IX of the state constitution.

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*See* New York City Charter and Admin. Code Ann. § 10 (1942). Section 10 provides in part:

a. The President of the City Council shall act as mayor

(1) Whenever there shall be a vacancy in the office of mayor.

*Id.* The New York City Charter was prepared by the New York City Charter Commission, ch. 897, [1934] N.Y. Laws 1796, was adopted by referendum on November 3, 1936, and became effective January 1, 1938.

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*See* Richland, Statutory and Practical Limitations upon New York City's Legislative Power, 24 Fordham L. Rev. 326, 332 (1955). "This provision was patently adopted to displace the succession provisions of the New York City Charter in order to avoid the situation that took place in 1950 . . . an occurrence which the dominant political party obviously found contrary to its interests and one to be avoided." *Id.* at 332; see Richland, Constitutional City Home Rule in N.Y., 55 Colum. L. Rev. 598, 622 n.201 (1955).
the office of mayor, the council president would succeed in the office of mayor only until the next general election. This was an apparent attempt to avoid succession under section 2-a. Soon after the charter was amended, Governor Rockefeller signed into law the amendment to section 2-a, which specified its provisions would apply, notwithstanding an inconsistent local enactment. In 1980, however, section 2-a was amended again, this time to remove New York City from its purview.

An observer of the history of section 2-a, George Hallett of the Citizens' Union of the City of New York shed considerable light on the intent behind the various versions of this provision. Commenting on the proposed amendment eventually enacted in 1980, he noted:

I enclose the memo used at Albany in support of the Bill. It appears accurate except that the person that wrote it does not remember, as I do, how the General City Law provision came to be enacted. It was not a "historic oversight," as he supposes, but a deliberate attempt to prevent any New York City mayoralty elections in gubernatorial or presidential years, which might bring out an abnormally large vote within New York City.

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141 NEW YORK CITY CHARTER AND ADMIN. CODE ANN. § 10 (1963). The amendment provided that in the case of a mayoral vacancy prior to September 20th the vacancy "shall be filled in the general election in that year, otherwise it shall be filled . . . in the following year." Id. The amendment was prepared by the Charter Revision Commission (Ch. 87, § 31, [1961] N.Y. Laws 107 (McKinney)) adopted by referendum on November 7, 1961 and became effective January 1, 1963. NEW YORK CITY CHARTER AND ADMIN. CODE ANN. Introduction (1963). In its final report the Charter Revision Commission commented: "A vacancy in the office of Mayor will be filled at the next general election, without waiting for an odd-numbered year." FINAL REPORT OF THE CHARTER REVISION COMMISSION OF THE CITY OF NEW YORK 1 (August 4, 1961).


The State Charter Revision Committee proposed to amend the Charter in 1975 by deleting a substantial part of the 1961 Amendment, see supra note 41, which allowed for an even year election to fill a mayoral vacancy, and replaced it with a provision which would allow the City Council President "to serve for the balance of the term pursuant to the General City Law [§ 2-a]." STATE CHARTER REVISION COMMISSION FOR NEW YORK CITY, PROPOSED AMENDMENT TO THE CHARTER OF THE CITY OF NEW YORK 5-6 (1975). The Amendment was not adopted, however, by the referendum vote of 1975. Id. at Introductory Letter from Commission Chairman Roy Goodman.

144 See April 4, 1963, memo from George Hallett, Executive Secretary, Citizens Union
Assuming that Mr. Hallet's observations are correct, it would appear that the 1980 amendment enacted under a state Democratic administration, was designed to permit an even year election to fill a vacancy in the office of the mayor of New York City, thus increasing voter participation during gubernatorial and presidential election years.\(^{145}\)

What substantial state interest could possibly have been served by section 2-a? It applied only to a handful of cities, and its various versions were apparently intended primarily, if not solely, to affect mayoral elections in the City of New York, and to advance the political interests of those controlling the statehouse. Unaffected cities had ample local authority to provide for temporary appointments to fill vacancies in elective offices, subject to article XIII, section 3 of the state constitution which requires an early election to fill the vacancy for the balance of the unexpired term. Accordingly, a state law should not constitute a state concern simply because it includes language restricting local action, nor should home rule depend upon political whim.

VI. CONCLUSION

Home rule is derived from the state constitution. It is not disputed that there are subjects of vital concern to the people of the state that properly should be immune from the home rule provisions, such as protection of the resources of the Adirondack Park\(^{146}\)

of the City of New York to Honorable Sol Neil Corbin, Counsel to the Governor, commenting on Senate Print (Bill) 3981.

\(^{145}\) Letter from George Hallett, Senior Research Associate, State Charter Revision Commission for New York City to Honorable Leon Katz, Chairman of the Council Committee on Charter and Government Affairs (June 10, 1977).


In Wambat the court held that the "Adirondack Park Agency Act, addressed to an issue of substantial State concern, relates to other than the property, affairs or govern-
and preservation of the purity of the Long Island aquifer. The constitution has, however, carved out an area for control by local governments, free from state interference except by general law. This area—"property, affairs or government,"—has been significantly narrowed and lacks identity. In the early days of home rule, when Chief Judge Cardozo stated that a finding of substantial state interest was sufficient to establish a "matter of state concern," there was little reason for optimism among proponents of home rule. The recent cases suggest a presumption of state concern. With the extension of the state concern doctrine into areas that logically should be subject to local determination, there is reason only for gloom.

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147 Town of Islip v. Cuomo, 64 N.Y.2d 50, 473 N.E.2d 756, 484 N.Y.S.2d 528 (1984). The court held that § 27-0704 of the New York Environmental Conservation Law did not violate home rule. Id. at 58, 473 N.E.2d at 761, 484 N.Y.S.2d at 533. The Law provides cut off dates beyond which solid landfilling will be reduced to minimal levels to protect the Long Island Aquifer. Id. at 53-54, 473 N.E.2d at 757-58, 484 N.Y.S.2d at 529-30. The court acknowledged that in application the Law was special because it affected only Nassau and Suffolk counties, but it was nonetheless a subject of general state concern, given the substantial population dependent upon the aquifer. See id. at 56-57, 473 N.E.2d at 760, 484 N.Y.S.2d at 532 (citing Board of Supervisors v. Water Power & Gas Comm., 255 N.Y. 531, 175 N.E.2d 300 (1930) (mem.) (legislation protecting Rochester water supply not violative of home rule because it affected permanent residents of area and all others who may pass through)).

148 See Hyman, supra note 2, at 343; Diamond, supra note 75, at 35 (Adler was "death knell"); Richland, supra note 4, at 315 ("judicial interpretation has reduced [home rule's] effectiveness to a point of virtual extinction").