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Constitutional Law—Unconstitutionality of New York City Minimum Wage Law—A Limitation on Municipal Home Rule Police Powers

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through representatives of their own choosing, in the absence of Congressional consent. Although *DeVeau* might be part of a growing willingness on the part of the federal courts to permit greater state regulation of labor unions, in the face of growing public concern over abuses. It is the due process aspect of *Bradley* that is significant, if any one is, and disturbing. The Court quotes *DeVeau* for the proposition that the disqualification of convicted "felons" from representing labor unions is a "reasonable means for achieving a legitimate state aim."[38] Then the Court points out that the aim of the present amendment is the same, elimination of corruption from the waterfront, and closes its discussion of the issue. It would appear that only the question of legitimacy of aim is considered—not reasonableness of means. The Court ignores the fact that Justice Frankfurter, writing the opinion in *DeVeau*, expressed concern over the drastic nature of the means employed therein—disqualification of ex-felons; but was able to find support for such measures in comparable federal legislation.[39] The disqualifications of the present statute are even more drastic, and the argument based on comparable federal legislation does not apply, and yet the Court of Appeals gives the matter scant attention in the opinion. One feels that when a court deprives a class of persons of "the right to . . . work . . . the most precious liberty that man possesses,"[40] a careful elaboration of the court's reasoning is warranted. Of course the states have wide powers to deal with interests basic to the well being of their people, they may set standards and requirements for entrance or practice of any field of occupation without elaborate review procedure. However, it is quite another thing to permit the deprivation of a man's livelihood on grounds not related to his fitness for the occupation involved. It is difficult to perceive how conviction for certain misdemeanors involving moral turpitude would be indicative of a man's fitness or lack of it, for employment as union representative. The Court leaves this question in doubt.

Albert Dolata

UNCONSTITUTIONALITY OF NEW YORK CITY MINIMUM WAGE LAW—A LIMITATION ON MUNICIPAL HOME RULE POLICE POWERS

In 1960 the New York State Legislature enacted a state-wide minimum wage law covering virtually all occupations.[1] It required an hourly minimum of $1.00 in 1960, $1.15 in 1962, and $1.25 in 1964. For the implementation of the law, the act provided an Industrial Commissioner and Wage Boards empowered to make necessary upward adjustments. In 1962, New York City adopted a similar law requiring minimum hourly rates of $1.25 in 1962, and

38. Instant case at 280, 189 N.E.2d at 603, 239 N.Y.S.2d at 100.
39. De Veau v. Braisted, 363 U.S. 144 (1960).
40. Dissenting opinion of Justice Douglas in Linehan v. Waterfront Comm'r, 116 F. Supp. 683, 684 (1953).

1. N.Y. Labor Law, §§ 550-565.

$1.50 in 1964.[2] Employer-plaintiffs then brought two actions for declaratory judgments contending that the city law was invalid and prayed for injunctions pendente lite. Plaintiff's contention was based on the theory that the subject matter was not within the scope of the city's power granted by the New York Constitution and City Home Rule Law, and that the ordinance was inconsistent with the state's minimum wage law. The New York County Supreme Court, Special Term, denied plaintiff's motions; the Appellate Division reversed.[3] In the Court of Appeals the city argued that the local law was constitutional because other judicial precedents had allowed cities to impose greater restrictions than state standards and that the ordinance, by extending the state's policy of a base wage, did not prohibit anything affirmatively permitted by the state. *Held,* affirmed on the opinion below, three judges dissenting. A city minimum wage law, prohibiting wage rates provided for by state law, was unconstitutional. *Wholesale Laundry Bd. of Trade, Inc. v. City of New York*, 12 N.Y.2d 998, 189 N.E.2d 623, 239 N.Y.S.2d 128 (1963) (memorandum decision).

It is the police power which gives a state the right to enact such social welfare legislation as a minimum wage law.[4] Municipalities have a similar police power which may be defined briefly as the power to regulate persons and property for the purpose of securing the public health, safety, welfare, comfort, peace and prosperity.[5] The permissible scope of the exercise of this municipal police power has been extended in the past to the protection and regulation of certain economic activities.[6] Although the state's police power is inherent in the concept of sovereignty, it is generally stated that municipalities do not have any inherent police power[7] but that such power is impliedly granted to every municipal corporation by virtue of its organization as a state governmental subdivision.[8] The concept of home rule, though closely analogous to the power of the municipality to legislate under state conferred police power, is based on a constitutional concept. It is the right of cities to enact ordinances relating to their affairs, property and government;[9] the state may regulate these areas only by general laws applicable to all cities.[10] The concept of home rule is preconstitutional,[11] but it is defined by the New York Constitution, article IX,

2. N.Y.C. Administrative Code § 903, § 1113; New York City Local Law No. 59 (1962).

3. 17 A.D.2d 327, 234 N.Y.S.2d 862 (1st Dep't 1962).

4. People *ex rel.* Siegel v. Weingrad, 26 N.Y.S.2d 841 (Ct. Spec. Sess. 1941).

5. Village of Carthage v. Frederick, 122 N.Y. 268, 25 N.E. 480 (1890).

6. See People v. Calvar Corp., 69 N.Y.S.2d 272 (Nassau County Ct. 1940), *aff'd*, 286 N.Y. 419, 36 N.E.2d 644 (1941); People v. Gerus, 69 N.Y.S.2d 283 (County Ct. 1942); People v. Conlides, 148 Misc. 29, 265 N.Y. Supp. 765 (Broome County Ct. 1933).

7. 11 Am. Jur. *Constitutional Law* § 256 (1937).

8. Carollo v. Town of Smithtown, 20 Misc. 2d 435, 190 N.Y.S.2d 36 (Sup. Ct. 1959); Borough of Sayre v. Phillips, 14 Pa. 482, 24 A. 76 (1892); 11 Am. Jur. *Constitutional Law* § 256 (1937).

9. N.Y. City Home Rule Law § 11; 11 Op. St. Compt'r 613 (1955); N.Y. Const. Art. IX, § 12.

10. N.Y. Const. art. IX; See generally Richland, *Statutory and Practical Limitations Upon New York City's Legislative Powers*, 24 Fordham L. Rev. 326 (1955).

11. People *ex rel.* Metropolitan St. Ry. v. State Bd. of Tax Comm'rs., 174 N.Y. 417, 67 N.E. 69 (1903).

and by the state legislature in the Municipal Home Rule Law. In New York, the home rule police power may be limited in the same two ways that it is established: constitutional provision and legislative grant. The grants of this power to home rule local governments take on two forms—general and specific grants. A general grant is illustrated by the general welfare clauses[12] and the New York City Home Rule Law section 11. It gives a broad authority to deal with a particular subject such as local streets or the regulation of certain businesses and occupations.[13] A specific grant authorizes a local ordinance on a single subject while defining its details and mode of enforcement.[14] Where an ordinance, passed pursuant to a general grant of police power is challenged, the test of validity is whether the ordinance is reasonable.[15] An ordinance enacted pursuant to a specific statutory grant may not be challenged for lack of authority since it is deemed to have the same force as a legislative enactment. This is similarly true where the local enactment is pursuant to a constitutional grant of police power.[16] Beyond the constitutional and statutory home rule provisions conferring general and specific powers upon home rule cities, the scope of their powers is a subject of varying judicial decision.[17] Even if a city apparently possesses both home rule and statutory authority, the city may not have the right to exclusively deal with a seemingly internal matter. Under the judicial doctrine of "state concern" the state legislature may pass laws regulating a specific matter within an individual city, if it can be shown that the matter has potential state-wide ramifications.[18]

The sources of municipal home rule authority are also their limits. Laws adopted by a municipal legislative body must be consistent with constitutional provisions, state statutes, and its charter.[19] Generally, most jurisdictions,[20] including New York[21] hold that consistency means that a local law may not prohibit what a state has permitted or allow what the state forbids.[22] Thus, a

12. See N.Y. Const. art. IX § 12.
13. See Safee v. City of Buffalo, 204 App. Div. 561, 198 N.Y. Supp. 646 (4th Dep't 1923).
14. Safee v. City of Buffalo, *supra note* 12; Matter of Stubbe v. Adamson, 220 N.Y. 459, 116 N.E. 372 (1917).
15. *Cf.* Safee v. Buffalo, 204 App. Div. 561. 198 N.Y. Supp. 646 (4th Dep't 1923); Stubbe v. Adamson, supra note 14.
16. Matter of Mooney v. Cohen, 272 N.Y. 33, 4 N.E.2d 73 (1936); See Larkin, *The Police Power* 46 (Proceedings—Municipal Law Seminar, New York State Office for Local Gov't 1963).
17. Antieu, *The Powers of Municipal Corporations*, 16 Mo. L. Rev. 118, 119 (1951).
18. Adler v. Deegan, 251 N.Y. 467, 167 N.E. 705 (1929); Schlobohm v. Municipal Housing Authority, 188 Misc. 318, 62 N.Y.S.2d 71, *rev'd on other grounds, mem.*, 270 App. Div. 1022, 62 N.Y.S.2d 541 (2d Dep't 1946), *aff'd mem.*, 297 N.Y. 911, 79 N.E.2d 742 (1948). See Salzman v. Impellitteri, 305 N.Y. 414, 113 N.E.2d 543 (1953) (city taxing indebtedness powers); Whalen v. Wagner, 4 N.Y.2d 575, 152 N.E.2d 54, 176 N.Y.S.2d 616 (1958) (the means of access to and from New York City).
19. Evans v. Berry, 262 N.Y. 61, 186 N.E. 203 (1933); *cf.* Matter of Molnar v. Curtin, 273 App. Div. 322, 77 N.Y.S.2d 553 (1st Dep't 1948), *aff'd*, 297 N.Y. 967, 80 N.E.2d 356 (1948); Baldwin v. City of Buffalo, 6 N.Y.2d 168, 160 N.E.2d 443, 189 N.Y.S. 129 (1959).
20. See generally *Municipal Law—Conflict Between Ordinance and State Law*, 29 Miss. L.J. 232 (1958).
21. Matter of Kress & Co. v. City of New York, 283 N.Y. 55, 27 N.E.2d 431 (1940).
22. *Cf. ibid.*

local ordinance is valid even though it provides a greater penalty than a similar state law.[23] But an ordinance directly conflicting with a state statute must yield.[24] Judicial pronouncements exist to the effect that a state policy cannot be ignored by a municipality unless the statute specifically provides an exemption.[25] It is nevertheless conceded that local and state laws dealing with the same subject matter are not necessarily incompatible because they are not identical.[26] Another limitation on local action is the judicial doctrine of "state concern"[27] which allows the state legislature to act in areas which do not directly affect the internal affairs of the city or the function of its officers, but which at the same time deal with the welfare of the general public as well as the residents of the city.[28] City action under its general police power is equally restricted once a local matter is labeled by the courts as one of "state concern." Some of these matters are expressly reserved to the legislature by the state constitution and municipal statute.[29] A further limitation on municipal power is the doctrine of pre-emption, by which subordinate legislation is held to be precluded once the state has exclusively occupied the field by its own legislation.[30] However, the single fact that the legislature has enacted statutes in an area does not warrant the conclusion of pre-emption.[31] And, the fact that the state has enacted comprehensive regulations governing an area does not prohibit a municipality from enacting supplemental legislation.[32] Thus even where state minimums or maximums are created, local ordinances increasing or lowering them have been upheld[33] on the following grounds: that the minimum was not the only applicable standard;[34] that the municipality may enact further

23. Wood v. City of Brooklyn, 14 Barb. 425 (N.Y. Sup. Ct. 1852); City of Brooklyn v. Toynbee, 31 Barb. 282 (N.Y. Sup. Ct. 1857); People v. Samsell, 248 N.Y. 157, 161 N.E. 454 (1928); People v. Lewis, 295 N.Y. 42, 64 N.E.2d 702 (1945); 3 McQuillan, Municipal Corporations § 924 (2d ed. rev.).

24. People *ex rel.* Oltarsh v. Levy, 266 N.Y. 523, 195 N.E. 182 (1935).

25. People *ex rel.* Elkind v. Rosenblum, 184 Misc. 916, 54 N.Y.S.2d 295 (Sup. Ct. 1945); *aff'd mem.*, 299 App. Div. 559, 56 N.Y.S.2d 526 (2d Dep't 1945). *But cf.* Bareham v. City of Rochester, 246 N.Y.140, 158 N.E. 51 (1927).

26. City of Hudson v. Wortman, 255 App. Div. 241, 7 N.Y.S.2d 631 (3d Dep't 1938), *aff'd*, 279 N.Y. 711, 18 N.E.2d 325 (1938).

27. Adler v. Deegan, 251 N.Y. 467, 167 N.E. 705 (1929). See generally Richland, *Property, Affairs, and Government* 35 (Proceedings—Municipal Law Seminar, New York State Office for Local Gov't, 1963).

28. City of New York v. Village of Lawrence, 250 N.Y. 429, 165 N.E. 836 (1929). See County Securities v. Seacord, 278 N.Y. 34, 15 N.E.2d 179 (1938) (taxation); Salzman v. Impellitteri, 305 N.Y. 414, 113 N.E.2d 543 (1953) (indebtedness); People *ex rel.* Elkind v. Rosenblum, 295 N.Y. 929, 68 N.E.2d 34 (1946) (education); Board of Supervisors v. Water Power & Control Comm'n, 255 N.Y. 531, 175 N.E. 300 (1930) (water); Robertson v. Zimmerman, 268 N.Y. 52, 196 N.E. 740 (1935) (health). See generally Diamond, *Some Observations on Local Government in New York State*, 8 Buffalo L. Rev. 27 (1958).

29. Redmond, *Restrictions on Local Powers* 58 (Proceedings—Municipal Law Seminar, New York State Office for Local Gov't, 1963).

30. Tenny v. Sainsbury, 7 A.D.2d 514, 184 N.Y.S.2d 185 (4th Dep't 1959).

31. *Ex parte* Iverson, 199 Cal. 582, 250 Pac. 681 (1926). See generally 11 Kan. L. Rev. 182 (1962).

32. Vest v. Kansas City, 335 Mo. 1, 194 S.W.2d 38 (1946); People v. Lewis, 295 N.Y. 42, 64 N.E.2d 702 (1945). *But see In re* Lane, 18 Cal. Rptr. 33, 367 P.2d 673 (1961).

33. See 29 Miss. L.J. 232 (1958).

34. Kansas City v. Henre, 96 Kan. 794, 153 Pac. 548 (1915).

reasonable regulations applicable to its community;[35] or that the legislature intended either expressly or impliedly that extra local legislation might be desirable.[36] It should be noted that although these cases allowed increases in certain state imposed minimums, yet in every one the scope and character of the coverage of the ordinances was confined to the community itself and in fact touched on matters traditionally considered as being basically local in nature. The question of legislative intent is also significant to determine whether there is pre-emption.[37] This legislative intent to pre-empt may be difficult to ascertain,[38] but certain elements must be looked to: the legislative purpose (is the statute capable of being locally supplemented or is it exclusive), the scope of the statute, the elaborateness of enforcement machinery, and the apparent legislative policy discerned from other statutes dealing with the same general subject matter.[39]

The Court of Appeals adopted in full the opinion of the Appellate Division. It reasoned that the New York City law was invalid because it effectively prohibited payment of the state hourly minimums of $1.15 in 1962, and $1.25 in 1964.[40] The ordinance did this by requiring hourly wage scale of $1.25 and $1.50 respectively.[41] Secondly, the Appellate Division held that the City Home Rule Law section 11(4), which forbids amendment or repeal of any state labor law by a city, denied New York City the authority to legislate in this area.[42] In the court's view a constitutional grant of police power to a chartered city which might allow certain concurrent legislation was immaterial when the state statute in question was meant to exclusively occupy the field.[43] Finally, the opinion stated that this statutory limitation, together with the legislative creation of broad enforcement machinery to deal with particular wage problems in the state, including New York City, made clear the legislative intent to occupy the field exclusively, thus barring parallel local laws.[44] The Court of Appeals dissenters reasoned basically that the city law was not contradictory to the state law, but, rather, supplemental and therefore it did not "supercede," "amend," or "repeal" a state labor law as prohibited by the City Home Rule Law.[45] Secondly, it was argued that in dealing with conditions peculiar to New York City the ordinance was a proper exercise of the city's constitutional

35. City of Beloit v. Lamborn, 182 Kan. 280, 321 P.2d 177 (1958); Sternall v. Strand, 76 Cal. App. 2d 432, 172 P.2d 921 (4th Dist. Ct. App. 1946).

36. City of Lafayette v. Elias, 232 La. 700, 95 So. 2d 281 (1957); Western Pa. Ry. Ass'n v. City of Pittsburgh, 336 Pa. 374, 77 A.2d 616 (1951).

37. Shaw v. Norfolk, 167 Va. 346, 189 N.E. 335 (1937). See generally Antieu, *The Powers of Municipal Corporations*, 16 Mo. L. Rev. 118 (1951).

38. See Antieu, *supra* note 37.

39. See 23 Ohio S.L.J. 557 (1962).

40. Wholesale Laundry Bd. of Trade, Inc. v. City of New York, 17 A.D.2d 327, 329, 234 N.Y.S.2d 862, 864 (1st Dep't 1962).

41. *Id.* at 330, 234 N.Y.S.2d at 865.

42. *Ibid.*

43. Wholesale Laundry Bd. of Trade, Inc. v. City of New York, 17 A.D.2d 327, 330, 234 N.Y.S.2d 862, 864 (1st Dep't 1962).

44. *Ibid.*

45. Instant case at 1001, 189 N.E.2d at 624, 239 N.Y.S.2d at 130.

and legislative police power.[46] Thirdly, the dissenters thought state-wide application of the minimum wage law did not necessarily indicate pre-emption where there is no express statutory prohibition against concurrent municipal legislation.[47]

One weakness of this decision lies in its failure to recognize the proper economic role of a minimum wage law—to establish a base wage, not the only wage. In the majority's view the state standards could not be altered except by the statute's own procedures. An important distinction should have been made between wage rates by contract and wage rates by statute. Private efforts can legally increase the statutory minimums without changing the statute itself. Under this analysis a different view of the effect of the local law could have been justified, and a different decision could have followed. Another weakness was in the court's unwillingness to consider New York City's unique position in the state picture—its high population density, inherently greater living costs, and difficult welfare problems—requiring specialized treatment with a minimum wage law by the city under its charter powers. In this way the city could have been sustained as having validly used its charter powers to deal with a local problem. The court stated that the state legislature had created an appropriate means for dealing with New York City through its statutory wage adjustment procedures, making municipal action unnecessary. But a close reading of the section in point[48] does not show the means to be as explicit as the court said. The main weakness of the dissent was its inability to overcome the majority's cogent argument of state pre-emption. Despite these criticisms, however, the result in the instant case seems correct. Even in the absence of a state wage law, the city could probably not act because of the lack of either general or specific constitutional or statutory authority which is required to allow municipal legislation in a given area not usual for city action. Labor policy has been historically a state concern, and the state's intention to occupy the field may have been found in other existing state labor legislation. From the economic viewpoint the decision appears sound, for certainly local minimum wage laws would necessarily have serious effects on the entire state economy. Such laws could cause intra-state movements of marginal industries to localities which had set lower minimum wage scales, possibly resulting in communal competition. The paramount state interest in uniformity in this field seems clear, and a judicial policy to protect it seems justified. Although the instant decision struck down a local attempt to deal with a local problem, it does not warrant an inference of any new state influences in purely local affairs. The principle of home rule remains intact. This decision only elaborates on what home rule is not by saying, in effect, that at present, municipal minimum wage laws are not a proper function of the home rule police power. The thrust of the case seems to be that in areas of social welfare commonly considered to be

46. *Id.* at 1000, 187 N.E.2d at 624, 239 N.Y.S.2d at 129.
47. *Ibid.*
48. N.Y. Labor Law § 654.

proper only for state and federal action, municipalities will be on tenuous constitutional ground if they attempt to legislate without express state authorization. It would be desirable to give the decision that limitation since local efforts to supplement state standards in many areas of public interest may be justified, and should not be hindered by unnecessary restrictions theoretically flowing from this case.

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CONTRACTS

ATTORNEY-ACCOUNTANT AGREEMENT TO SPLIT FEE ENFORCEABLE PROVIDED EACH RENDERS SERVICES ONLY IN HIS RESPECTIVE FIELD

In the same written contract, Neubecker, the defendant, retained Glickman, an accountant, and Blumenberg, an attorney to represent him in a tax matter which involved a deficiency pending before a Federal Tax Court. Each was to receive ½ of ⅓ of the difference between the alleged deficiency and the amount of the settlement. There was evidence that each person was to perform services in his respective field. The deficiency was reduced by $625,000 through their efforts. Blumenberg, as the assignee of Glickman and in his own right sued Neubecker on the express contract and in quantum meruit. A judgment on the express contract was rendered for $208,354.69. On defendant's appeal, the Appellate Division reversed and ordered a new trial for only the attorney's quantum meruit count because the express contract contemplated the rendition of legal services by a layman and because the contract was a fee splitting agreement forbidden by the Penal Law.[1] Both parties appealed to the Court of Appeals. Blumenberg, the attorney, claimed that a suit on the express contract was permissible and Neubecker, the taxpayer, claimed that a suit in quantum meruit should not be permitted because the equally guilty attorney should not be benefited from the alleged illegal joint retainer. The Court of Appeals *held*, reversed, new trial ordered for both causes of action. The Court decided that a single agreement whereby a lawyer and an accountant were to receive an equal amount of a contingent sum as their fees was enforceable provided each was to render services in his respective field. *Blumenberg v. Neubecker*, 12 N.Y.2d 456, 191 N.E.2d 269, 240 N.Y.S.2d 730 (1963).

In order to protect the general public, it is necessary that those who practice law in New York State meet minimum qualifications. The State not only regulates licensed attorneys in regard to matters of practice and compensation, but also those who are not licensed. One aspect of the State's policy is to prohibit people who are not attorneys, licensed in New York, from practicing law on another's behalf in New York Courts of record and from holding themselves

1. N.Y. Penal Law § 276.