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County Home Rule: Freedom from Legislative Interference

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COMMENT

COUNTY HOME RULE: FREEDOM FROM LEGISLATIVE INTERFERENCE

INTRODUCTION

It is a generally accepted proposition that, in New York at least, there is no inherent right of municipal home rule; that in the absence of constitutional provision to the contrary, municipalities are mere instrumentalities of the state, created by the state for administrative purposes. As such they are subject in every respect to the regulation of the legislature.[1] Although there were early constitutional restrictions on special laws,[2] and local offices were protected from legislative usurpation,[3] it was not until 1935 that New York first adopted a serious attempt to confer effective home rule powers upon its counties. The 1915 Constitutional Convention had adopted a proposed county home rule amendment authorizing the legislature to provide different forms of country government, to become effective in any county upon approval by the electors thereof, and prohibiting special legislation relating to counties except upon request of the counties affected.[4] But the people rejected the proposed constitution submitted to them by the Convention.

In 1935, however, they approved the Fearon Amendment, which was a purely home rule measure.[5] It directed the legislature to provide alternative forms of government which could be adopted by the counties upon approval by a split referendum.[6] It also furnished further protection to elective officers of

1. For a complete statement of this theory see *MacMullen v. City of Middletown,* 187 N.Y. 37, 79 N.E. 863 (1907). See also *City of New York v. Lawrence* 250 N.Y. 429, 165 N.E. 836 (1929), and *Cort v. Smith,* 249 App.Div. 1, 291 N.Y. Supp. 54 (4th Dep't), *aff'd,* 273 N.Y. 481, 6 N.E.2d 414 (1936). *But see People ex rel. Met. St. Ry. Co. v. Tax Comrs.,* 174 N.Y. 417, 67 N.E. 69 (1903), *aff'd,* 199 U.S. 1 (1905).

This theory is dominant in this country. See 1 MCQUILLIN, MUNICIPAL CORPORATIONS §4.82 (3d ed. 1949). A leading Supreme Court expression of this theory may be found in *Trenton v. New Jersey,* 262 U.S. 182 (1923).

The advantages of strong and independent local government need not be discussed here. See Diamond, *Some Observations on Local Government in New York State,* 8 BUFFALO L. REV. 27.

2. See N.Y. CONST. art. VII, §9 (1821); N.Y. CONST. art. I, §9, art. III, §16 (1846); N.Y. CONST. art. III, §§18,23 (1874); N.Y. CONST. art. III, §§16,18,20,27 (1894); N.Y. CONST. art. III, §§15,17, art. IX, §4.

3. See N.Y. CONST. §29 (177); N.Y. CONST. art. IV, §§8,9,11,15 (1821); N.Y. CONST. art. X, §§1,2,5 (1846); N.Y. CONST. art. X, §9 (1874); N.Y. CONST. art. III, §26, art. X, §§1,2,5.

For a discussion of the origins and history of such provisions see *People ex rel. Met. St. Ry. Co. v. Tax Comrs., supra* note 1, which traces the right of local selection of officers back to Magna Carta.

4. NEW YORK STATE CONSTITUTIONAL CONVENTION 1915, 2 PROPOSED AMENDMENTS, No. 822.

5. N.Y. CONST. art. III, §26 (1935).

6. To become effective such a form of government had to receive a majority of votes not only in the county but also both in every city containing more than twenty-five per cent of the population of the county and in that part of the county outside the cities.

counties adopting alternative forms, requiring approval of the voters for any change impairing their powers, and imposed restrictions on special legislation to be discussed later. This basic scheme was modified somewhat by the 1938 Convention and appeared in the first few sections of article 9 of the present Constitution. The important changes were in the restrictions on special legislation, and in the referendum requirement, so as to allow an alternative form to be adopted upon a majority vote in the county unless a transfer of function from the smaller municipalities were involved, in which case a majority would also be required in such municipalities. A 1945 amendment allowed a county request to be made by a two-thirds vote of the legislative body if the executive refused to approve it. In the amendment approved by the people last November much of the language was modified, and the legislature was directed to confer upon the counties the power to prepare their own forms of government. But the split referendum was restored, and in order to become operative an alternative form now requires a majority in the cities, in the area outside the cities, and if there is a transfer of functions from the villages, in all the villages so affected considered as one unit. There is still no direct constitutional grant of powers of local legislation to the counties,[7] unless the addition by the amendment of the word "any," in the provision that an alternative form may provide for the exercise by the elective governing body "of any powers of local legislation and administration," be considered to have such effect. From this outline of its development, it may be seen that county home rule in New York is based upon the right of the county to choose or develop a form of government suited to its own needs, the protection of its offices and officers, and the freedom from unrequested legislative interference in its affairs by special laws. In this note only the last of these constitutional assurances of county self-government will be considered.

The experience of the City of New York under a narrowly interpreted restriction on special legislation relating to cities serves clearly to establish the necessity to the preservation of home rule of an effective freedom from such legislative interference.[8] In what has been called "the coup de grace to constitutional city home rule,"[9] the courts sustained a series of laws by which that city was required by economic coercion, involving manipulations of its taxation and indebtedness powers, to turn over to a State authority its vital transit facilities. Although the experience of the counties has not been so unfortunate, the growing importance of county government and changing political patterns could lead to similar results.

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7. On the significance of this fact see *Cort v. Smith, supra* note 1. See also PROBLEMS RELATING TO HOME RULE AND LOCAL GOVERNMENT, XI NEW YORK STATE CONSTITUTIONAL CONVENTION COMMITTEE 1938, pp. 87-92.

8. For a thorough and critical review of this experience see Richland, *Constitutional City Home Rule in New York*, 54 COLUM. L. REV. 311 (1954), 55 COLUM. L. REV. 598 (1955).

9. Richland, *supra* note 7, 55 COLUM. L. REV. at 620.

THE FEARON AMENDMENT

Under the original Fearon Amendment[10] a governor's emergency message and a two-thirds legislative majority were required for the passage of any special law relating to the "property, affairs or government" of any county which had adopted an alternative form of government.[11] The language was substantially identical to that of the city home rule amendment,[12] the importance of this fact lying in the narrow interpretation that was being given by the courts to the phrase "property, affairs, or government."[13] Only two counties, Westchester and Nassau, were able successfully to take advantage of the original amendment, however, and by 1938 there had been no cases presented to the courts requiring its interpretation.[14]

THE 1938 CONSTITUTION

The 1938 Constitutional Convention modified the Fearon Amendment's restriction on special legislation by making it applicable to all counties, whether or not they should adopt an alternative form of government, and by eliminating its "property, affairs or government" formulation. Thus it was provided in section 1(b) of article IX:

> The legislature shall provide by law for the organization and government of counties. No law which shall be special or local in its terms or in its effect, or which shall relate specially to one county only, shall be enacted by the legislature unless [upon request of the county or a certificate of necessity by the governor and the concurrence of two-thirds of each house of the legislature].

The only change in this section until the 1958 Amendment was the provision, approved by the people in 1945, that the county request need not have the approval of the county executive (under an alternative form of government) if upon reconsideration it should be passed by two-thirds of the members of the governing body.

As may be seen, the language of this restraint on special legislation was too broad to be of much guidance to the courts. The state must often act in specific

10. Salzman v. Impelliteri, 203 Misc. 486, 124 N.Y.S.2d 369 (Sup.Ct.), *aff'd without opinion*, 281 App.Div. 1023, 1024, 122 N.Y.S.2d 787 (1st Dep't), *aff'd per curiam*, 305 N.Y. 414, 113 N.E.2d (1953).

11. N.Y. CONST. art. III, §26(4) (1935).

12. N.Y. CONST. art. XII, §2 (1924) (now N.Y. CONST. art. IX, §11 with only the nature of the home rule message changed).

13. See Adler v. Deegan, 251 N.Y. 467, 167 N.E. 705 (1929); Richland, *supra* note 8.

14. See PROBLEMS RELATING TO HOME RULE AND LOCAL GOVERNMENT, *supra* note 7 at 13. One case involving the pre-1938 language did reach the Court of Appeals in 1940, however. Lane v. Johnson, 283 N.Y. 244, 28 N.E.2d 705 (1940).

parts of its territory. Any specific public works project, for instance, must take place in a locality, and yet the constitutional prohibition obviously was not intended to encompass such matters. But the drawing of the line between those matters properly subject to home rule and those to remain subject to state regulation was left entirely to the courts. In the exercise of this responsibility the courts have developed, at least tentatively, three main doctrines. These are: (1) that reasonable classification of counties is permissible; (2) that the restraint relates only to laws providing for the organization and government of counties; and (3) that the legislature remains unfettered with respect to subjects of state concern.

THE DOCTRINE OF REASONABLE CLASSIFICATION

In the first judicial interpretation of the 1938 restriction on special legislation,[15] the Nassau County Court was confronted with statutes authorizing town boards to enact zoning ordinances regulating the manner of excavation in quarries. These statutes were by their terms applicable only to towns in a county containing not more than three towns and adjoining a city having a population of one million or more. Only Nassau County met this description. The court nevertheless took the untenable position that a statute, by its terms applicable to a class, "does not cease to be general because extrinsic proof would show that it was, in fact, local in its application."[16] In support of this proposition it cited several cases[17] which dealt with early restraints on local laws not explicitly requiring a determination of their effect. It was as a result of such cases that the city home rule amendment of 1924 put the distinction between special and general laws upon the basis of their terms *and effect.* (Section 1(b) similarly defined a special law by its terms and its effect.) The court ignored the leading *Elm St.* case[18] in which this change in the constitutional language was held to establish a new test (the old test being that stated by the court in the present case) and to require the courts to inquire into the effect of the law in question.

Elm St., however, is the leading case in the development of a doctrine which was to be applied to legislation relating to counties as well as to cities. As has been noted, Chief Judge Cardozo held that, under the 1924 Amendment, the special

15. People v. Gerus, 69 N.Y.S.2d 283 (1942).

16. *Id.* at 286. *Accord,* Robinson v. Broome County. 195 Misc. 24, 87 N.Y.S. 2d 501 (Sup.Ct.), *aff'd,* 276 App.Div. 69, 93 N.Y.S.2d 662 (3d Dep't 1949), *aff'd,* 301 N.Y. 525, 93 N.E.2d 77 (1950).

17. People ex rel. New York Electric Lines Co. v. Squire, 107 N.Y. 593, 14 N.E. 820 (1888); Matter of New York Elevated R. Co., 70 N.Y. 327 (1877); Matter of Church, 92 N.Y. 1 (1883); People v. Dunn, 157 N.Y. 528, 52 N.E. 572 (1899); Kitinger v. Buffalo Traction Co., 160 N.Y. 377, 54 N.E. 1081 (1899); City of New York v. Fifth Avenue Coach Co., 247 App.Div. 383, 262 N.Y.Supp. 228 (1st Dep't), *aff'd,* 262 N.Y. 481, 188 N.E. 29 (1933).

18. Matter of Mayor, etc., of New York (Elm St.), 246 N.Y. 72, 158 N.E. 24 (1927).

or general nature of a law must be determined by its effect as well as by its terms, but this holding was limited by the retention of the theory that a law which does not apply to all, but only to a described class of cities, can be nevertheless a general law, if only the classification is reasonable. "An act is not general when the class established by its provisions is at once so narrow and so arbitrary that duplication of its content is to be ranked as an unexpected freak of chance, a turn of the wheel of fortune defying probabilities. . . . 'The marks of distinction on which the class is founded must be such, in the nature of things, as will, in some reasonable degree at least, account for or justify the grouping'—justify it, in other words, as based upon something better than arbitrary preference . . ."[19] This case is one of the few that have declared legislation special and therefore void, and it did depart from the utterly unrealistic approach of the past.[20] Apparently for this reason, it has been widely cited and praised as a step towards effective home rule.[21] But it is subject to objection in that it ignored the further constitutional requirement that a general law "apply alike to all cities."[22] Section 1(b) contained a similar, though narrower, provision in its restraint upon laws "which shall relate specially to one county only" as well as laws "special or local in [their] terms or in [their] effect."

In *Stapleton v. Pinckney*,[23] the Court of Appeals was called upon to determine the validity of "an act relating to jurors and commissioners of jurors in counties having a population of not less than two hundred thousand and not more than two hundred fifty thousand and containing a city with a population of one hundred twenty-five thousand or more."[24] The only such county was Albany. The court below had held the act to be special and thus to violate section 1(b) as well as article III, section 17, which provides: "The legislature shall not pass a private or local bill in any of the following cases: . . . selecting, drawing, summoning or empanelling grand or petit jurors." (Note that nothing is said about terms and effect.) It was argued in support of the act that section 1(b) did not apply to those cases enumerated in article III, section 17. But the Court of Appeals found the act to be local within the meaning of the latter section and refused to consider whether it also violated section 1(b). From several old

19. *Id.* at 72, 158 N.E. at 26.

20. Other means of judicial restriction of city home rule were soon found, however. See Adler v. Deegan, *supra* note 13.

21. See *e.g.*, Mendelson, *Paths to Constitutional Home Rule for Municipalities*, 6 VAND. L. REV. 66, 73 (1952).

22. N.Y. CONST. art. XII, §2 (1924) 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 property, affairs or government of any city only by general laws which shall in terms and in effect apply alike to all cities except on message from the governor declaring that an emergency exists and the concurrent action of two-thirds of the members of each house of the Legislature.

23. 293 N.Y. 330, 57 N.E.2d 38 (1944).

24. Laws of 1944, chapter 206.

cases[25] based upon constitutional prohibitions which did not require a determination of the effect of local laws, the court drew the principle that "[c]lassification by the Legislature is not excluded *where the classification has reasonable relation to the subject . . .*"[26] But the application of the principle, at least, was obviously a good deal more strict than in the cases said to establish it. From the fact that the Court drew only upon pre-1924 authority (which was not concerned with the *effect* of the legislation) and explicitly refused to consider the validity of the act under section 1(b), it may be assumed that the test laid down was not intended necessarily to apply to section 1(b) questions.

A year later the Suppreme Court, against the same constitutional objections, upheld a jury law applicable to counties of a population between four and five hundred thousand as meeting the test laid down in *Stapleton.*[27] But no consideration was given to the possibility of a distinct test for section 1(b) purposes.

In *Farrington v. Pinckney,*[28] the only other Court of Appeals interpretation of section 1(b), however, the requirements of section 1(b) and article III, section 17 were considered to be identical.[29] In this case the Court upheld an amended uniform jury law[30] which accorded different treatment to counties, depending upon whether they had a population of less than one hundred thousand or not. The pre-1924 cases, *Adler v. Deegan, Elm St.,* and *Stapleton v. Pinckney* were all considered, but without note of the quite different constitutional clauses upon which they were based. The result was a reasonable classification test which included a determination of effect, somewhat diluted, however, by the Court's reluctance to enter the legislative domain—"We need only find some *reasonable* and *possible* basis for the classification created. Viewed in that light, we cannot say that the classification system . . . was arbitrary."[31] But a good deal of the opinion was taken up with showing that the classification in question was in fact reasonable.

The clause "or which shall relate specially to one county only" has not been deemed to have any independent significance or to impose a stricter standard which would prohibit reasonable classification where only one county is affected.[32] The theory apparently is that if the classification is reasonable, the law does not "relate specially" to such county.

25. See cases cited *supra* note 17 and Matter of Henneberger, 155 N.Y. 420, 50 N.E. 61 (1898).
26. 293 N.Y. at 333, 57 N.E. 2d at 39.
27. Clay v. Saunders, 184 Misc. 143, 52 N.Y.S.2d 837 (Sup.Ct. 1945).
28. 1 N.Y.2d 74, 150 N.Y.S.2d 585 (1956).
29. *Id.* at 95.
30. Laws of 1954, chapter 305, as amended by Laws of 1955, chapter 864 (N.Y. JUDICIARY LAW arts. 16, 18).
31. 1 N.Y.2d at 89, 150 N.Y.S.2d at 600.
32. See People v. Gerus, *supra* note 15; Robinson v. Broome County, *supra* note 16.

Although the reasonable classification test, as formulated in *Farrington v. Pickney,* has little basis in the constitutional language, in the light of the judicial history of language of this nature,[33] both in and out of New York, such a result was to be expected. In a Wisconsin case,[34] for example, the phrase "as shall with uniformity affect every city" was held not to prohibit reasonable classification. The court relied upon precedent, analogy to the Fourteenth Amendment, and the fact that it was impossible for any law to have the same effect upon different cities. But, as there was no emergency clause in the Wisconsin Constitution, the motivation to adopt such a test was considerably stronger than in the New York cases.

SPECIAL LEGISLATION RESTRAINED ONLY AS TO COUNTY ORGANIZATION AND GOVERNMENT

Although the act was held general by the standards of both article III, section 17 and article IX, section 1(b), and a determination of the scope of section 1(b) was thus rendered unnecessary, *Farrington v. Pickney* is also significant for the position, taken obiter dictum, that the restrain on special legislation in the second sentence of the section applied only to legislation enacted pursuant to the first sentence, which directs the legislature to provide for the organization and government of counties. "Under [section 1(b)], the Legislature may not enact a law, which is local in its terms or in its effect, where the subject of such law relates to the 'organization and government of counties.' Where an act does not relate to the organization and government of counties, the Legislature is not restricted."[35] Although rejected by Judge Bergan in his able Supreme Court opinion in *Stapleton v. Pickney,*[36] this position had been taken by the Attorney General[37] and in an Appellate Division decision[38] sustaining the validity of an act which granted to any town of a population of 50,000 or more, and which had already assumed the responsibilities of a city in a county public welfare district, the right to elect to become a town welfare district, the only such town being Union, in the County of Broome. Citing two leading city home rule cases[39] which had attributed a narrow meaning to the phrase "property, affairs or government," the court held that, "Since neither health nor welfare can be localized or limited to the boundaries of any one county, city, town or district, legislation

33. See MCQUILLIN, *op. cit.,* §§4.44, 4.47, 4.50, 5.54, 4.55.
34. Van Gilder v. City of Madison, 222 Wisc. 58, 267 N.W. 25, *aff'd on rehearing,* 222 Wisc. 58, 268 N.W. 108 (1936).
35. 1 N.Y.2d at 95, 150 N.Y.S.2d at 604.
36. 182 Misc. 590, 50 N.Y.2d 409 (Sup. Ct. 1944), *aff'd* (without reaching this question), *supra* note 23.
37. 1946 Attorney General Reports 338.
38. Robinson v. County of Broome, 276 App.Div. 69, 93, N.Y.S.2d 662 (3d Dep't 1949), *aff'd without opinion,* 301 N.Y. 524, 93 N.E.2d 77 (1950).
39. Adler v. Deegan, *supra* note 13; Robertson v. Zimmerman, 268 N.Y. 32, 196 N.E. 740 (1935).

relating thereto cannot be included within the category of special or local laws affecting the organization and government of any one county."

This position, that the constitutional protection of counties from special legislation is merely a limitation upon the legislature in the exercise of its duty to provide for the organization and government of counties, is, in the light of its purpose and legislative history, untenable. As has been noted, the 1938 clause was adopted as a replacement of the "property, affairs or government" clause of the original Fearon Amendment. In *Adler v. Deegan* and *Robertson v. Zimmerman*[40] a "Court of Appeals' definition"[41] of that phrase had been used to restrict severely the scope of city home rule. The 1938 language was submitted to the Constitutional convention with the following note:

> The first sentence of subdivision 1-b is the first twelve words of subdivision 2 of the Fearon amendment and has been transferred because it is apparent that this provision was intended to apply to all counties, not merely those counties adopting [alternative] forms of government. The second sentence is substantially the provision proposed by the Constitutional Convention of 1915. It prevents the enactment of special or local laws relating to any county, except upon the request of the governing body of each county to be affected. I propose to submit an amendment to this subdivision.[42]

The amendment to the subdivision mentioned in the above note, and adopted by the Convention, was the provision giving to the legislature the power to act, in case of emergency, by a two-thirds vote upon a certificate of necessity by the governor. The reason this amendment was thought necessary is significant:

> Section one-b of this bill as it now stands entirely prevents and excludes the Legislature from enacting any law upon any subject with relation to one county or several counties. This is not like the situation in connection with the city home rule bill where the Legislature was merely excluded from the field of "property, affairs and government of a city". In the committee bill, subdivision one-b, the State Legislature is prohibited from the entire field of legislative action with respect to a single county or several counties.
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> . . . No matter how pressing the emergency may be to the health of that county, or danger to life or property within that county, the Legislature and the Governor are prohibited from enacting any local or special law relating to one or more counties.[43]

The 1915 Convention attributed the same meaning to similar language.[44]

40. *Ibid.*
41. Adler v. Deegan, *supra* note 13 at 473, 167 N.E. at 707.
42. IV REVISED RECORD, 1938, NEW YORK STATE CONSTITUTIONAL CONVENTION 2959. For an excellent discussion of the significance of the legislative history of section 1(b) see *Stapleton v. Pinckney*, 182 Misc. 590, 50 N.Y.S.2d 409 (Sup. Ct. 1944), *aff'd. supra* note 23.
43. *Id.* at 2961.
44. See IV RECORD (UNREVISED), 1915, NEW YORK STATE CONSTITUTIONAL CONVENTION 3718, 3724, 3727, 3729, 3730.

But the only reference to county home rule in the Address of the Delegates to the People (in 1938) was the statement, "The powers of cities to act in relation to their property, affairs or government are enlarged. . . . Comparable home rule privileges are given to counties."[45] And in view of the inclusion of the direction to the legislature to provide for the organization and government of counties and the restriction on special legislation within the same paragraph, the courts cannot be blamed for reading the two provisions together.[46] Viewed apart from the legislative history of the language involved, this interpretation appears a rational attempt to find constitutional guidance for the drawing of the line between the areas of state and home rule. Indeed it is the only interpretation by which such guidance can be found. But such an interpretation, which assures freedom from legislative interference with respect to the forms of county government but denies to that government any independent jurisdiction, or power of independent action, certainly is not in keeping with the spirit in which the provisions were adopted. The forms are important, and may assure a large measure of day-to-day self-government, but genuine home rule must be based upon more than legislative inertia and good will.

THE DOCTRINE OF STATE CONCERN AND RELATED APPROACHES

Having been able to decide most of the cases in terms of the above two theories, the courts have not been impelled decisively to undertake the task, left to them by the constitution, of defining those governmental powers to be exercised by the counties without interference by special legislation. There is some relevant case material, however, to indicate the direction in which the courts may be expected to move.

The only case[47] decided under the original Fearon Amendment involved the validity of an act designed to cure an irregularity in the local election by which the incorporation of the City of Peekskill was approved. The act was contended to constitute prohibited special legislation in that the proposed city charter provided for two supervisors, who would become members of the board of supervisors of Westchester County and thereby increase the membership of that

45. IV REVISED RECORD, 1938, *supra* note 37 at 3513.

46. See *Kuhn v. Curran*, 294 N.Y. 207, 61 N.E.2d 513 (1945) ("It is the approval of the People of the State which gives force to a provision of the Constitution drafted by the Convention, and in construing the Constitution we seek the meaning which the words would convey to an intelligent, careful voter"). *But see, McGrath v. Grout*, 67 App.Div. 314, 74 N.Y.Supp. 782 (2d Dep't), *aff'd*, 171 N.Y. 7, 62 N.E. 547 (1902) ("The proceedings of the convention in which the Constitution was framed may properly be examined in considering the purpose of a given article or section . . ."); *Adler v. Deegan, supra* note 13, ("It is common knowledge that many words have a meaning at law different from that of common speech . . . When the people put the words in article XII of the Constitution, they put them there with a Court of Appeals' definition, not that of Webster's Dictionary").

47. Lane v. Johnson, *supra* note 14.

body. In sustaining the act, the court held county home rule to be limited by the duty of the legislature to provide for the organization of cities, the proper performance of which required provision for supervisors as city officers, who would become members of the county board only by force of general law. This conclusion was strengthened by the provision[48] in the county home rule section that nothing therein was to be construed to impair those sections of the constitution relating to the organization and government of cities. Although the effect of this provision is now limited to section 2 of article 9,[49] the reasoning of the case should remain valid.

A similar approach was adopted to sustain, under the 1938 Constitution, an act which applied only within the County of Onondaga but affected only the towns and school districts.[50] But this kind of reasoning, by which an act may apply only within one county, and yet not affect that county in a constitutional sense, was pushed too far when it was applied to an act[51] which in effect authorized the Town of Union, in Broome County, to elect to withdraw from the county public welfare unit and constitute itself a town welfare district. Notwithstanding the obvious and direct effect upon the traditional county welfare function, the court held the act to relate only to towns and districts, and thus not to fall within the scope of the county home rule provisions.[52] These cases seem to have been determined by consideration of what relates to, or affects, counties as such. And this seems a valid test, notwithstanding its misapplication in the last case.

A more serious threat to county home rule is posed by the doctrine of state concern, which has been dominant in judicial restriction of city home rule.[53] Its main development was with reference to the restraint on special legislation relating to the "property, affairs or government" of cities, the theory being that this phrase does not include matters of substantial state concern.[54] But a slightly varied form has been applied to the distinct question of what constitutes special legislation; the same state concern puts legislation into the general category no matter how limited its application, and thus achieves the same restrictive result

48. N.Y. CONST. art. III, §26(7) (1935).
49. N.Y. CONST. art. IX, §3.
50. Buchanan v. Town of Salina, 270 App.Div. 207, 58 N.Y.S.2d 797 (4th Dep't 1945).
51. Laws of 1946, Chapter 200 (N.Y. SOCIAL WELFARE LAW §75-a).
52. Robinson v. Broome County, *supra* note 38.
53. See Richland, *supra* note 8.
54. See Adler v. Deegan, *supra* note 13. For an extreme application see *Board of Supervisors of Ontario County v. Water Power & Control Comm.*, 227 App.Div. 345, 238 N.Y.Supp. 55 (3d Dep't 1929), *aff'd* 255 N.Y. 531, 175 N.E. 300 (1939) ("The statute affects the health and safety not only of the residents of Rochester, but of persons temporarily there. It does not deal solely with the 'property, affairs or government' of Rochester"). The stricter formulation in *New York Steam Corp. v. City of New York*, 268 N.Y. 137, 197 N.E. 172 (1935) ("It is only matters of paramount State concern, as discriminated from those of dominant local significance that are not subject to the requirements . . ."), has not been followed.

upon home rule. In some cases it is not clear just which form is being applied.[55] The rationale of the latter form of the doctrine was best expressed in a case[56] arising under the old requirement[57] that a local law embrace only one subject and that the subject be expressed in the title. The act in question, in order to prevent the dumping of waste in the North and East Rivers and in Raritan Bay and the Bay of New York, provided for the appointment by the governor of a shore inspector whose salary was to be raised by taxation on five counties. The court, holding this to be a general act, reasoned that:

> The fact that an act operates only upon a limited area or upon persons within a specified locality and not generally throughout the state is, in most cases, a reasonably accurate test by which to determine whether the act is general or local. But it is not decisive in all cases. The entire state may be interested in the enactment and execution of a law operating territorially upon a particular section of the state only.
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> The citizens of New York City may possibly have a greater stake in the matter than citizens in other localities, but the destruction or serious impairment of the harbor of New York would directly affect the prosperity of the state.
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> The act is limited territorially, but the subject is both public and general.

This reasoning would have been more convincing if the financial burden had been assumed by the state rather than imposed upon the counties.

Obviously that form of the state concern doctrine which is directed to the meaning of "property, affairs or government" of cities should, as such, have no application to county home rule, from whose provisions that phrase was discarded in 1938. The cases discussed above (notes 50 and 52 *supra*) represent an equivalent approach to a constitutional provision which lacks an equivalent indication of the area to be occupied by home rule. And if the two overly restrictive doctrines already discussed are to be rejected, some such approach is necessary. But there have been attempts to apply to the counties the same state concern doctrine by which city home rule has been so severely restricted. For instance, the sole dissenter in *Stapleton v. Pinckney*,[58] citing, without distinction, cases concerned with the meaning of "property, affairs or government" of cities and with pre-

55. See *e.g.* Robertson v. Zimmerman, *supra* note 39.
56. Ferguson v. Ross, 126 N.Y. 459 (1891).
57. N.Y. CONST. art. III, §16 (1846).
58. *Supra* note 23.

Elm St. special-general determinations, took the position that an act relating to a matter of state concern is necessarily general. And in an Appellate Division decision[59] the court stated in dicta that a jury law applying to counties within cities of a population one million or more would be upheld since the selection of jurors was deemed "a function peculiar to the judicial system of the entire state and in no way limited to one county only."[60] The Attorney General relied upon this dictum to support opinions that section 1(b) in no way impaired the power of the legislature to deal with matters of state concern, which were taken to include selection of jurors[61] as well as public education.[62] In one such opinion[63] the *Stapleton* dissent was also cited in support. In another,[64] the Attorney General apparently recognized the difference in the constitutional language relating to city and county home rule. For he cited the one-sentence reference to county home rule in the Address of the (1938 Convention) Delegates to the People,[65] which stated that home rule privileges comparable to those of the cities had been given to the counties, and reasoned that since the state concern doctrine had, by then, been well established with respect to city home rule, it was intended to apply also to county home rule.

When the constitution furnishes so little guidance, and to a lesser extent when it furnishes guidance as reasonable as "property, affairs, or government," the impetus behind doctrines like that of state concern is not difficult to understand.

> The fundamental difficulty is that governmental powers cannot be neatly compartmentalized into national, state and local categories. To expect courts to do so is to expect the impossible. Judges must be painfully aware that in making a constitutional decision they are deciding far more than the case immediately before them. When called upon to allocate governmental powers on an either-or basis they must inevitably favor the larger, more comprehensive level of government. For those upon whom such responsibility falls must be constantly aware that there is far greater danger in depriving a larger, rather than a smaller, unit of government of any given power.[66]

But if we are to enjoy genuine home rule we must accept the correlative risk of misrule; the doctrine of substantial state concern, in eliminating the risk, to the same extent eliminates home rule. A cogent rebuttal to the state concern argument

59. People ex rel. Young v. Martin, 270 App.Div. 1069 (4th Dep't 1946), *aff'd*, 297 N.Y. 892, 79 N.E.2d 737 (1948).
60. *Contra*, Stapleton v. Pinckney, 182 Misc. 590, 50 N.Y.S.2d 409 (Sup.Ct. 1949), *aff'd* (without reaching this question), *supra* note 23.
61. 1949 Attorney General Reports 191.
62. 1946 Attorney General Reports 338.
63. *Supra* note 61.
64. *Supra* note 62.
65. *Supra* note 45.
66. Mendelson, *supra* note 21, at 70.

(as applied to the prohibition of local jury bills[67]) was stated in the lower court opinion in *Stapleton v. Pinckney*:[68] "The proper operation of the jury system is of State concern, but the people have exhibited that concern by a constitutional expression which treats the local jury bill as an evil."

Even under the doctrine of state concern the courts have often purported to adhere to an historical approach in determining which matters are to be included within the home rule powers and which are to remain subject to the unimpaired control of the legislature. And the same approach was adopted in the only opinion explicitly to reject state concern as the determinative factor.[69] But the courts have abused this approach by defining the function of the act in question in the most general terms and then declaring it to be a traditional subject of state concern. For example, an act which created a local sewer authority and turned over to it the control of a city's sewer system was deemed a health measure and upheld as a proper exercise of the state's traditional power to maintain health.[70] Of course any governmental function, if sufficiently generalized in this way, can be made to appear to be one traditionally performed by the state. A more basic objection to application of the historical approach to county home rule, however, lies in the historically limited function which has been assigned to county government. In a time of great suburban development, increasing interdependence among urban, suburban and rural areas, and increasing demands upon government generally, the tendency of an historical appproach will be to obstruct the very forces which gave rise to county home rule, and to defeat its objectives.

In the determination of whether a special act encroaches upon county home rule, it is suggested that one factor, the economic, should be given almost conclusive effect. The counties should remain free with respect to those activities for which they are financially responsible. A "state concern" bill which leaves, or imposes, the economic burden upon the counties affected represents an attempt by the state to have its cake and eat it too. The county request and emergency provisions provide sufficient insurance against any inadequacies of county rule.

THE 1958 AMENDMENT

In the elections last November the people adopted a county home rule amendment which has been described as "the most significant advance in home rule powers in many years."[71] Its primary purpose was to allow the counties to tailor-make their own charters, subject to such limitations as the legislature should impose by general law. But Suffolk County had already obtained legislative

67. N.Y. CONST. art. III, §17.
68. *Supra* note 42.
69. Stapleton v. Pinckney, *supra* note 42.
70. Robertson v. Zimmerman, *supra* note 39.
71. CITIZENS UNION VOTERS DIRECTORY 5 (1958).

enactment of a special charter,[72] and this charter was apparently valid since there was no constitutional requirement that provision of alternative forms be by general law.[73] The split referendum was restored for adoption of alternative forms, a majority vote being required in the cities, in the area outside the cities, and if a transfer of functions from the villages is involved, in the villages so affected (considered as one unit.) In addition, the amendment had the object of "removing ambiguities and clarifying the provisions relating to county government."[74] One such clarifying function is performed by the restriction of the scope of section 13-B, which had provided that "nothing in this article" should impair the power of the legislature with respect to counties, and, if taken literally, would have nullified the county home rule provisions. Section 13-B was derived from the article relating to city home rule, and cities and counties were brought within the same article in 1938 without the necessary restriction of this section. The effect of section 13-B is now expressly limited to the city and village sections of article 9; but the same result had been reached in the only case in which the problem was considered.[75]

With respect to special legislation, section 1 provides:

> (b) The legislature shall provide by law for the organization and government of counties. No law which shall be special or local in its terms or in its effect, or which shall relate specially to one county only, shall be enacted by the legislature unless in its application, if any, to counties outside the city of New York it complies with the requirements of subdivision (c) of this section and in its application, if any, to counties within the city of New York it complies with the requirements of subdivision (d) of this section.
>
> (c) The legislature shall not pass any such law affecting a county or counties outside the city of New York unless
>
> (1) such law applies alike to all such counties; or
>
> (2) such law applies alike to all such counties which have not adopted alternative forms of government pursuant to the provisions of section two of this article and, if it applies also to one or more of the counties which have adopted such alternative forms, meets the requirements of paragraph (3) of this subdivision with regard to each of such counties; or
>
> (3) such law is requested by the board of supervisors or other elective governing body of each county to be affected outside

72. Laws of 1958, chapter 278.
73. The Alternative County Government Law, §3, however, seems to limit the counties to the four forms therein provided, or any combination thereof. But the Suffolk County Charter, which was none of these, was passed on a county message and constituted an amendment of the Alternative County Government Law. See §2303 of the charter.
74. Form of Submission of Proposed Amendment Number One.
75. Stapleton v. Pinckney, *supra* note 42.

> the city of New York, and in any county affected which has an elective county executive officer under an alternative form of government, the request is either concurred in by such executive officer or, in the absence of such concurrence within ten days of its approval by the governing body, is reconsidered and passed by at least a two-thirds vote of all the members of such body; or
>
> (4) the legislature receives a certificate of necessity from the governor reciting the facts which in his judgment require the passage of such law and subsequently approves it with the concurrence of two-thirds of the members elected to each house.

Equivalent provision is made for the counties of the City of New York, except that the home rule request is to be made by the legislative body of the city.

The most striking feature of this language is the apparent redundancy of subsections b and c. If a law "applies alike to all such counties" under subsection c(1), it certainly cannot be "special or local," nor can it "relate specially to one county only" in the meaning of subsection b. If reasonable classification is to remain permissible we have very nearly the same situation with respect to subsection c(2); for it is doubtful whether in any practical situation a law which met the requirements of subsection c(2) could fail the test of reasonable classification. But any argument against reasonable classification based upon this practically redundant effect of subsection c(2) is rebutted by the same effect of subsection c(1). In view of this redundancy the question arises whether subsections b and c are not to be read together, as imposing a single restriction, so that subsections c(1) and c(2), rather than imposing independent requirements for legislation which has already been determined to be special, define what is meant by "special or local in its terms or in its effect, or which shall relate specially to one county only." If this construction were adopted what would be the effect upon the doctrine of reasonable classification? The phrase "applies alike to all" might seem to preclude any classification at all. But the judicial history of such language is a strong indication to the contrary. As has been noted,[76] *Elm St.* adopted a reasonable classification test nothwithstanding the explicit requirement that a general law "apply alike to all cities," and this is the usual result in the United States.[77]

Another question raised by the amendment is whether the new language confirms or disavows the theory that only legislation relating to the organization and government of counties is affected by the restraint on special legislation. The answer to this question depends upon the meaning to be attributed to the word "such" which modifies "law" in the first sentence of subsection c. "[S]uch law" has three possible referents:

76. See text accompanying note 22 *supra.*
77. See notes 33 and 34 *supra.*

(1) "law" in the second sentence of subsection b, that is, a law "special or local" etc.;

(2) "law" in the second sentence of subsection b, which "law" in turn refers to the first sentence of subsection b, that is, a law which provides for the organization and government of counties;

(3) "law" in the first sentence of subsection b, that is, a law providing "for the organization and government of counties."

The abstract which accompanied the proposed amendment seems to have adopted the second of these possibilities, for it states that, "the Legislature shall not pass any special or local law relating to the organization and government of counties . . . without a home rule request . . . or a message of necessity from the Governor." But, as already noted, the two sentences of section 1(b) were not placed together with the intent that the second merely qualify the first. And there is nothing in the second sentence to indicate such a limited function. Gramatically the first of these possibilities is preferable to both of the others. "Such" means of a type already indicated, and the only previous indication of a type of law is found in the "which" clauses of the second sentence. In the first sentence, "by law" merely qualifies "shall provide," and "law" is not itself modified in any way. Furthermore, "such" would be expected, for the sake of clarity, to modify the last previous "law," which is that in the second sentence. Another objection to any construction by which subsection c would be limited to laws providing for "the organization and government of counties," lies in the redundant effect it would give to the phrase "affecting a county or counties." Thus, there is no longer any constitutional basis for the position that special legislation is restricted only insofar as it relates to "the organization and government of counties."

There is nothing in the new language which can be expected to effect the doctrine of state concern one way or the other. The word "affecting" in section 1(c) seems a likely focal point for state concern interpretation.

The experience of the cities offers little encouragement that an area of local government free from legislative interference can be secured by such broad and general terms as "property, affairs, or government." Perhaps more exact definition is required. At any rate, the attempt in the 1938 Constitution to insure that the area be significant, by refusing in any way to delimit it, has not proved successful. The 1958 Amendment, while undoubtedly effective in its grant to the counties of the right to choose their own *forms* of government, has done little to clear away the judicially-imposed restrictions on their independence in the exercise of their *powers* of government. Nonetheless, the increasing need and demand for effective county home rule, manifested by the Amendment, should certainly exert a long range influence on the judicial attitude toward home rule.

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