

NEW YORK CITY TAXIS AND THE NEW YORK STATE
LEGISLATURE: WHAT IS LEFT OF THE STATE
CONSTITUTION'S HOME RULE CLAUSE AFTER THE COURT
OF APPEALS DECISION IN THE HAIL ACT CASE?

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I. INTRODUCTION

This past June, the Court of Appeals, in a unanimous opinion, upheld the constitutionality under the New York State Constitution of a plan, passed by the New York State Legislature in early 2011, which allows livery cabs to pick up passengers in the boroughs outside of Manhattan who hail the livery cabs from the street.¹ The statute also expands the number of traditional yellow cabs accessible to persons with disabilities.² The ruling was a victory for New York City Mayor Michael Bloomberg, who had turned to the state legislature to pass the Hail Accessible Inter-borough License Act, known as the HAIL Act,³ when the New York City Council did not act on his original proposal.⁴ Without the City Council's approval, however, the law could only survive under the New York State Constitution's Home Rule Clause if it served a "substantial" state interest.⁵ While the Court of Appeals found that it did, and while the court's decision will presumably make it easier for passengers outside of Manhattan to hail livery cabs, this convenience does not come without a real cost: the court's cursory dismissal of the plaintiffs' home rule challenge leaves open critical

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¹ *Greater N.Y. Taxi Ass'n v. State*, 21 N.Y.3d 289, 296, 297–98, 308–09, 993 N.E.2d 393, 396, 397, 405, 970 N.Y.S.2d 907, 910, 911, 919 (2013).

² *Id.* at 296, 993 N.E.2d at 396, 970 N.Y.S.2d at 910.

³ Hail Accessible Inter-borough License Act, ch. 602, 2011 N.Y. Sess. Laws 1558 (McKinney), *as amended by* Act of Feb. 17, 2012, ch. 9, 2012 N.Y. Sess. Laws 23 (McKinney) (codified as amended in scattered sections of the Tax Law, Vehicle and Traffic Law, and Administrative Code of the City of New York).

⁴ See Michael M. Grynbaum, *Legislature Approves Bloomberg Plan to Allow Street Hails of Livery Cabs*, N.Y. TIMES, June 25, 2011, at A17.

⁵ See N.Y. CONST. art. IX, § 2(b)(2).

questions about the scope of the State Constitution's protection of local governance.⁶ Although the Court of Appeals' ruling does not bode well for the future of home rule in New York State, as discussed below, there are a number of ways that the Court of Appeals can provide guidance to both state and local governments going forward.

II. THE HAIL PROGRAM

Prior to the enactment of the HAIL Act, only licensed yellow taxicabs with medallions⁷ were permitted to pick up passengers on the streets of New York City or at the city's airports.⁸ Another category of for-hire cabs, known as livery cabs, were only allowed to pick up passengers who had prearranged for their pick-up by telephone or otherwise.⁹ The HAIL Act dramatically changes this status quo by allowing livery drivers with new HAIL licenses to accept street hails in the outer boroughs and in northern Manhattan (above East 96th Street on the East Side and above West 110th Street on the West Side), but not at New York City airports.¹⁰ Yellow taxis will still maintain the exclusive right to pick up passengers on the streets of Manhattan outside of the "HAIL zone" and at the airports.¹¹ In order to qualify for a HAIL license, livery vehicles will have to install taxi meters to measure the fare, among other requirements.¹²

The HAIL Act further directs the New York City Taxi and Limousine Commission (TLC) to issue the new HAIL licenses in three installments over the course of three years.¹³ Twenty percent of the new HAIL livery licenses are to be set aside for wheelchair accessible vehicles.¹⁴ In order to further increase the number of handicap-accessible for-hire vehicles in New York City, the HAIL Act allows the City, "acting by the mayor alone," to direct the TLC

⁶ *Greater N.Y. Taxi Ass'n*, 21 N.Y.3d at 304, 993 N.E.2d at 403, 970 N.Y.S.2d at 916.

⁷ Medallions are numbered plates issued by the New York City Taxi and Limousine Commission (TLC) and are affixed to the outside of cabs to prove that the cab is licensed to operate. 35 RULES OF N.Y.C. § 51-03 (2012).

⁸ See N.Y.C., N.Y., ADMIN. CODE § 19-502 (2011) (stating in the notes that the TLC is given the authority to regulate non-medallion vehicles as well).

⁹ See 35 RULES OF N.Y.C. § 59A-03(e)(2), (j), (k).

¹⁰ Act of Feb. 17, 2012, ch. 9, § 4, 2012 N.Y. Sess. Laws 23, 25 (McKinney) (codified as amended in scattered sections of the Tax Law, Vehicle and Traffic Law, and Administrative Code of the City of New York)

¹¹ *Id.* § 11, at 28.

¹² *Id.* § 12, at 28–29.

¹³ See *id.* § 4, at 25.

¹⁴ *Id.*

to issue up to two-thousand new medallions for traditional yellow taxicabs, provided that they are wheelchair accessible.¹⁵ In addition, the Act requires the TLC to establish a program to provide grants totaling up to fifty-four million dollars to support the introduction of accessible vehicles into the HAIL fleet.¹⁶

The potential benefits of the statutory scheme are clear. Along with increasing the number and accessibility of for-hire vehicles in underserved areas, the HAIL Act legalizes, and hence regulates, what was previously an unlicensed and under-regulated industry.¹⁷ Passengers hailing HAIL-licensed cars can now be secure in knowing that livery vehicles have been inspected for safety and benefit from upgrades the program requires: taxi meters, which ensure that passengers pay a fair rate without having to haggle; Global Positioning System (GPS) locators, which help passengers recover lost property; and credit card readers, which make it easier for passengers to pay.¹⁸ Equally as significant, the HAIL program stands to generate up to \$1 billion in additional revenue for New York City.¹⁹

The procedural history of the HAIL Act is arguably as novel as its content. Mayor Bloomberg, who first proposed the plan in 2011, originally asked the New York City Council to approve the program.²⁰ According to David Yassky, the Commissioner of the TLC, the plan needed to be passed by the City Council to satisfy the Home Rule Clause of the State Constitution.²¹ The City Council, however, was reluctant to approve the program in the face of resistance from the yellow taxi industry, which feared that the proliferation of HAIL licenses would dilute their exclusive right to pick up street hails and thus decrease the economic value of their medallions.²²

In a move that challengers to the law characterized as an “[e]nd-

¹⁵ *Id.* § 8, at 27.

¹⁶ *Id.*

¹⁷ *See id.* § 1, at 24.

¹⁸ Memorandum from David Yassky, Comm’r of Taxi & Limousine Comm’n & Stephen Goldsmith to Mayor Bloomberg 2, available at <http://www.scribd.com/doc/47112385/TLC-Five-Borough-Taxi-Memo-1> [hereinafter Yassky Memo].

¹⁹ Michael M. Grynbaum, *Deal Struck to Broaden Taxi Service in the City*, N.Y. TIMES, Dec. 21, 2011, at A30.

²⁰ *See* Rebecca Fishbein, *Bloomberg’s Five Boro Taxi Plan Nixed By Judge*, GOTHAMIST (Aug. 18, 2012, 2:15 PM), http://www.gothamist.com/2012/08/18/bloombergs_five_boro_taxi_plan_is_n.php (detailing how Mayor Bloomberg failed to obtain the approval of City Council upon asking).

²¹ Yassky Memo, *supra* note 18, at 3.

²² Grynbaum, *supra* note 4.

[r]un’ [a]round [c]onstitutional [s]afeguards,”²³ Mayor Bloomberg instead urged the New York State Legislature to pass the bill.²⁴ The legislature first passed the bill in June of 2011, but Governor Cuomo would not sign it until the legislation had been amended to provide for increased access to taxi for persons with disabilities.²⁵ In early 2012, the HAIL Act finally was signed by the Governor and enacted into law.²⁶

III. THE LAWSUIT

Before the HAIL program had a chance to go into effect, representatives of the taxi industry brought multiple lawsuits in the spring of 2012 to enjoin its implementation.²⁷ Both state and municipal parties were named as defendants, and representatives of the livery cab industry intervened in all three cases.²⁸ The plaintiffs sought to enjoin the Act’s implementation on the ground, among others, that it violated Article IX, Section 2(b)(2) of the New York Constitution, known as the Home Rule Clause.²⁹

The New York Constitution limits the power of the state legislature to pass laws regulating matters that ordinarily fall within the purview of local government.³⁰ While the State may regulate the “property, affairs or government of any local government” by general law that applies to all cities,³¹ when it

²³ See Brief of Plaintiffs-Respondents at 69, *Greater N.Y. Taxi Ass’n v. State*, 21 N.Y.3d 289, 993 N.E.2d 393, 970 N.Y.S.2d 907 (2013) (Nos. 102553/12, 102472/12, 102783/12).

²⁴ Grynbaum, *supra* note 4 (“Micah C. Lasher, the city’s chief Albany strategist, began throwing ideas back and forth with James A. Yates, counsel for Sheldon Silver, the Assembly speaker. What if there was a way, they wondered, to avoid a Council vote entirely?”).

²⁵ Grynbaum, *supra* note 19.

²⁶ See Act of Feb. 17, 2012, ch. 9, § 31, 2012 N.Y. Sess. Laws 23, 35 (McKinney) (codified as amended in scattered sections of the Tax Law, Vehicle and Traffic Law, and Administrative Code of the City of New York).

²⁷ See *Metro. Taxicab Bd. of Trade v. Bloomberg*, 20 N.Y.3d 1075, 1075, 986 N.E.2d 438, 438, 963 N.Y.S.2d 620, 620 (2013); *Greater N.Y. Taxi Ass’n v. N.Y.C. Taxi & Limousine Comm’n*, 2013 N.Y. Misc. LEXIS 3091, at *1 (Sup. Ct. New York County 2013); *Taxicab Serv. Ass’n v. State*, 2012 N.Y. Misc. LEXIS 4098, at *1–2 (Sup. Ct. New York County 2012). These plaintiffs include: a trade association of taxicab medallion owners, individual medallion owners, a City Council Member (Lewis A. Fidler), an association of credit union lenders who provide loans for the purchase of medallions, and an association representing owners of up to 1500 medallions. *Metro. Taxicab Bd. of Trade*, 20 N.Y.3d at 1075, 986 N.E.2d at 438, 963 N.Y.S. at 620; *Greater N.Y. Taxi Ass’n*, 2013 N.Y. Misc. LEXIS 3091, at *1; *Taxicab Serv. Ass’n*, 2012 N.Y. Misc. LEXIS 4098, at *1–2.

²⁸ *Metro. Taxicab Bd. of Trade*, 20 N.Y.3d at 1075, 986 N.E.2d at 438, 963 N.Y.S. at 620; *Greater N.Y. Taxi Ass’n*, 2013 N.Y. Misc. LEXIS 3091, at *1; *Taxicab Serv. Ass’n*, 2012 N.Y. Misc. LEXIS 4098, at *1–2.

²⁹ See *Greater N.Y. Taxi Ass’n v. State*, 21 N.Y.3d 289, 300 (2013).

³⁰ N.Y. CONST. art. IX, § 2(a)–(b).

³¹ N.Y. CONST. art. IX, § 2(b)(2).

wishes to regulate the “property, affairs or government” of a *specific* city, the state legislature may do so only at the request of the local legislature, issuing what is known as a “home rule message.”³² In the 1920s, the Court of Appeals (then-Chief Judge Cardozo, specifically) created an additional exception: the State may regulate in areas of local concern when there is a substantial state interest at stake.³³ Because New York City’s local legislature, the New York City Council, did not issue a home rule message seeking the passage of the HAIL Act, the law therefore is only valid if it serves a substantial state interest.³⁴

Given that most home rule challenges fail,³⁵ it came as a surprise when Justice Arthur F. Engoron agreed with the plaintiffs at the trial court level that the HAIL Act violates the “home rule clause,” as well as the “double enactment” and “exclusive privileges” clauses of the State Constitution.³⁶ In his opinion,³⁷ Justice Engoron took Mayor Bloomberg and the State to task for going against decades of local control of the New York City taxi market and “run[ning] roughshod over what had heretofore been the [City] Council’s prerogative.”³⁸ Justice Engoron reviewed both the nature of the purported state interest and the fit between that interest and the HAIL Act in determining whether the HAIL Act “bear[s] a reasonable relationship to [a] legitimate, accompanying substantial

³² N.Y. CONST. art. IX, § 2(b)(2)(a). A “home rule message” is either a “request of two-thirds of the total membership of [the affected locality]’s legislative body or [a] request of its chief executive officer concurred in by a majority of such membership.” N.Y. CONST. art. IX, § 2(b)(2).

³³ *Adler v. Deegan*, 251 N.Y. 467, 491, 167 N.E. 705, 714 (1929); *see also* *City of New York v. Patrolmen’s Benevolent Ass’n*, 89 N.Y.2d 380, 390, 676 N.E.2d 847, 851, 654 N.Y.S.2d 85, 89 (1996).

³⁴ *See Greater N.Y. Taxi Ass’n*, 21 N.Y.3d at 306.

³⁵ *See, e.g.,* *City of New York v. State*, 94 N.Y.2d 577, 591–92, 730 N.E.2d 920, 926–27, 709 N.Y.S.2d 122, 128–29 (2000) (upholding a state law that repealed the City’s commuter tax because the State had a substantial interest in easing the burden on non-City residents who work in New York City); *Uniformed Firefighters Ass’n v. City of New York*, 50 N.Y.2d 85, 90, 405 N.E.2d 679, 680, 428 N.Y.S.2d 197, 198–99 (1980) (upholding a state law that eliminates the requirement that New York City firefighters live in New York City because the State has an interest in protecting the residential mobility of members of the civil service); *Wambat Realty Corp. v. State*, 41 N.Y.2d 490, 490–91, 362 N.E.2d 581, 582, 393 N.Y.S.2d 949, 950 (1977) (upholding a state zoning plan for the Adirondack Park region); *Patrolmen’s Benevolent Ass’n*, 89 N.Y.2d at 392, 676 N.E.2d at 852, 654 N.Y.S.2d at 90 (striking down a statute for lack of a substantial state interest); *Osborn v. Cohen*, 272 N.Y. 55, 60, 4 N.E.2d 289, 290 (1936) (striking down a statute that “deals with nothing but the duties of firemen”).

³⁶ *Taxicab Serv. Ass’n v. State*, 2012 N.Y. Misc. LEXIS 4098, at *2, *59, *62–63 (Sup. Ct. New York County 2012).

³⁷ *See, e.g., id.* at *55 (“[T]he means adopted are like cracking an egg with a sledgehammer” in reference to the reasonable relationship).

³⁸ *Id.* at *57.

State concern.”³⁹ In holding that the Act did not serve a state interest, the trial court emphasized the long history of local regulation of the New York City taxi industry and the political maneuverings referenced above that accompanied the Act’s passage.⁴⁰

IV. THE COURT OF APPEALS DECISION

After hearing oral argument in late April, the Court of Appeals issued its decision in early June upholding the constitutionality of the HAIL Act.⁴¹ The conclusory manner in which the court rejected the plaintiffs’ arguments shows this review to be highly deferential as a practical matter, thereby casting a long dark shadow on the future of local governmental autonomy in New York State. In particular, the court’s willingness to accept the State’s purported interest at face value, combined with its dismissal of state interference with the local separation of powers as “merely an implementation device,”⁴² raises red flags about how much (if any) of the constitution’s home rule clause remains in force going forward, making it difficult (if not impossible) for local governments in New York to delineate the appropriate boundaries of autonomous local self-rule.

The central and unanswered question in the case is this: What degree of deference should courts give to the State’s purported interest when a party brings a home rule challenge to the constitutionality of a statute? The court’s silence on the scope and stringency of its review is curious for a number of reasons. First, the parties raised the issue of the proper standard of review in their briefs and proffered very different formulations of the level of scrutiny that was warranted.⁴³ The State, for instance, argued that “acts of the Legislature enjoy a strong presumption of constitutionality that ‘can be upset only by proof persuasive beyond

³⁹ *Id.* at *26 (quoting *Patrolmen’s Benevolent Ass’n*, 89 N.Y.2d at 391, 676 N.E.2d at 851, 654 N.Y.S.2d at 89).

⁴⁰ *Taxicab Serv. Ass’n*, 2012 N.Y. Misc. LEXIS at *36–37, *39–43.

⁴¹ *Greater N.Y. Taxi Ass’n v. State*, 21 N.Y.3d 289, 308 (2013). The appellants were entitled to a direct appeal to the Court of Appeals pursuant to CPLR section 5601(b) thereby bypassing the Appellate Division. N.Y. C.P.L.R. 5601(b) (McKinney 2013); see also *Greater N.Y. Taxi Ass’n*, 21 N.Y.3d at 300 (explaining that the case was directly appealed to the Court of Appeals on constitutional grounds under CPLR section 5601(b)).

⁴² *Greater N.Y. Taxi Ass’n*, 21 N.Y.3d at 305.

⁴³ See Corrected Brief for State Appellants at 37–38, *Greater N.Y. Taxi Ass’n*, 21 N.Y.3d 289 (2013) (No. 102783/12); Brief of Plaintiffs-Respondents at 37, *Greater N.Y. Taxi Ass’n*, 21 N.Y.3d 289 (No. 102783/12).

a reasonable doubt.”⁴⁴ Significantly and somewhat ironically, given its obvious institutional interest in favor of a vibrant home rule clause, New York City actually supported the State’s position.⁴⁵ Plaintiffs, on the other hand, argued that the court should engage in a searching inquiry that goes beyond deferential rational basis review.⁴⁶ The supreme court agreed; as it explained, “plaintiffs have a trump card, too: the State Constitution is surprisingly solicitous of local . . . self-rule.”⁴⁷

Second, at oral argument, Chief Judge Lippman twice raised the question of how closely the court should scrutinize the purported state interest.⁴⁸ He asked attorneys for the HAIL Act’s defenders: “[A]re we . . . duty bound to accept the state legislature’s description of the state interest? How do we view what they say? Is . . . it[] [a] state interest because they say it is?”⁴⁹ When Judge Smith followed up, asking if the court must accept the State’s interest as true even if the court is “convinced” it is not, the lawyer for the State insisted that the court accept on its face the legislature’s expressly stated purpose.⁵⁰

Third, the court’s silence on the question of how closely it was reviewing the purported state interest is surprising given that its home rule jurisprudence explicitly provides that the state interest must be substantial, not merely rational or plausible.⁵¹ The court, however, gave no indication of what this “substantial” test actually means.⁵² The HAIL Act’s defenders argued that the State need only

⁴⁴ Corrected Brief for State Appellants, *supra* note 43, at 37–38 (quoting *Hotel Dorset Co. v. Trust for Cultural Res.*, 46 N.Y.2d 358, 370, 385 N.E.2d 1284, 1289, 413 N.Y.S.2d 357, 362 (1978)).

⁴⁵ For example, a brief filed by Corporation Counsel of the City of New York argued in favor of an extremely deferential version of the “reasonable relationship” Home Rule test. *See, e.g.*, Brief of Mun. Appellants at 27–29, *Greater N.Y. Taxi Ass’n*, 21 N.Y.3d 289 (No. 102783/12). Indeed, given that the City appeared to be arguing against its longstanding and fundamental interest in support of local legislative prerogatives, one might wonder whether the court should have appointed amicus counsel to argue on behalf of the City’s interests with respect to the Home Rule Clause more generally.

⁴⁶ Brief for Plaintiffs-Respondents, *supra* note 43, at 60–61.

⁴⁷ *Taxicab Serv. Ass’n v. State*, 2012 N.Y. Misc. LEXIS 4098, at *22 (Sup. Ct. New York County 2012).

⁴⁸ Transcript of Oral Argument at 8, 36, *Greater N.Y. Taxi Ass’n*, 21 N.Y.3d 289 (No. 102783/12).

⁴⁹ *Id.* at 8; *see also id.* at 36 (“How do we view what they say?”).

⁵⁰ *Id.* at 8.

⁵¹ *See Adler v. Deegan*, 251 N.Y. 467, 485, 491, 167 N.E. 705, 711, 714 (1929) (Cardozo, J., concurring); *see also City of New York v. Patrolmen’s Benevolent Ass’n*, 89 N.Y.2d 380, 390–91, 676 N.E.2d 847, 851, 654 N.Y.S.2d 85, 89 (1996) (discussing *Adler* in this capacity).

⁵² *Greater N.Y. Taxi Ass’n*, 21 N.Y.3d at 302, 304 (2013) (demonstrating the vagueness of the court’s substantial test analysis).

have an interest in the subject matter of the statute, not the statute as it actually will operate.⁵³ It is enough, New York City's Corporation Counsel wrote, that "the 'subject matter of the statute' . . . 'is of sufficient importance to the State generally to render it a proper subject of State legislation.'"⁵⁴ Since many subject matters (e.g., health, public safety) will touch on a state interest, this reading gives the State potentially enormous leeway to tread on local affairs.

All that the court did in response to these arguments was simply to repeat and endorse the language from the HAIL Act stating that transportation in New York City is important to all of New York State and the Act therefore benefits all New Yorkers, particularly those disabled citizens who currently lack access to taxi services.⁵⁵ This suggests that all it takes for a statute to survive a home rule challenge is for the legislature simply to articulate that there is some state interest in the text of the statute itself.

Apart from the court's failure to articulate a standard of review, there are at least two additional infirmities in the court's reasoning. The first is the court's treatment of historical custom and tradition, and the second is the court's focus on visitors to New York City as sufficient to establish a "substantial" state interest.

In the past, the Court of Appeals has recognized the important role past practice plays in drawing lines between state and local interest.⁵⁶ Here, however, the court dismissed the exclusively local nature of the regulation of the taxicab industry up until the passage of the HAIL Act.⁵⁷ As the court noted: "Our review concerning what constitutes a substantial state interest is not dependent on what historically has been the domain of a given locality. Rather, our determination is dependent on the 'stated purpose and legislative history of the act in question.'"⁵⁸ In the court's view, prior practice

⁵³ Transcript of Oral Argument at 74–75, *Greater N.Y. Taxi Ass'n*, 21 N.Y.3d 289 (No. 102783/12) ("What you do do is examine whether the act rationally relates to a subject matter of substantial state concern . . .").

⁵⁴ Brief for Mun. Appellants, *supra* note 45, at 43 (quoting *Kelley v. McGee*, 57 N.Y.2d 522, 538, 443 N.E.2d 908, 914 (1982)); *see also* Brief for Mun. Appellants, *supra* note 45, at 38 (explaining the importance of a substantial state interest).

⁵⁵ *Greater N.Y. Taxi Ass'n*, 21 N.Y.3d at 302–03.

⁵⁶ *See, e.g.*, *Osborn v. Cohen*, 272 N.Y. 55, 59, 4 N.E.2d 289, 290 (1936) ("[R]ecogniz[ing] in our decision the useful division which custom and practice have made between those things which are considered State affairs, and those which are purely the affairs of cities.") (quoting *Adler*, 251 N.Y. at 478, 167 N.E. at 709).

⁵⁷ *Greater N.Y. Taxi Ass'n*, 21 N.Y.3d at 302.

⁵⁸ *Id.* at 302.

is not part of the legislative history.⁵⁹ Neither is the process by which the bill found its way to the legislature nor the motives of the legislators who passed it. Since no hearings were held to consider the HAIL Act, this approach leaves precious little for the court to consider. Indeed, as a result, the court only had before it the legislative findings in the text of the bill itself.

When it comes to the regulation of the New York City taxi industry, however, there is a rich historical background that at least ought to have informed the court's analysis. First and foremost, it is true, as Justice Engoron wrote in his opinion, that the HAIL Act "is the first to claim a State interest in regulating taxicabs and livery vehicles in New York City and the first to seek to authorize more taxicab medallions without a City Council 'home rule' message."⁶⁰ The Act's passage interrupted decades of local control over the issuance of taxi licenses.⁶¹ In 1937, for example, New York City passed an ordinance known as the Haas Act that limited the number of taxi licenses to those currently in existence.⁶² The state legislature codified this law as part of the New York City Administrative Code,⁶³ and two decades later authorized all municipalities in the state to cap the number of taxi licenses and to make rules governing passenger pick-up and drop-off.⁶⁴ Each of the three times the City Council issued new taxicab medallions (in 1996, 2004, and 2006), it did so with an accompanying home rule message.⁶⁵ While, as the law's defenders argued, the State has long regulated New York City's "rapid transit" without a home rule message from the City Council,⁶⁶ regional rail transit (i.e. Metro North) is far more likely to affect non-City residents than taxi service within the City.⁶⁷ In other words, it would have been one thing for the court to examine the history and conclude that, on the whole, it evinces both a local and statewide custom of regulation.

⁵⁹ *See id.* at 302.

⁶⁰ *Taxicab Serv. Ass'n v. State*, 2012 N.Y. Misc. LEXIS 4098, at *37 (Sup. Ct. New York County 2012).

⁶¹ *See id.*

⁶² *Id.* at *38–39.

⁶³ *See generally* Council of the City of New York v. Giuliani, 183 Misc. 2d 799, 818–19, 705 N.Y.S.2d 801, 815 (Sup. Ct. Queens County 1999) (explaining the legislative history behind the state legislature's codification of certain provisions of the New York City Administrative Code).

⁶⁴ N.Y. GEN. MUN. LAW §§ 181(1)–(2) (McKinney 2013).

⁶⁵ *Taxicab Serv. Ass'n*, 2012 N.Y. Misc. LEXIS 4098, at *4.

⁶⁶ Brief for Mun. Appellants, *supra* note 45, at 32, *Greater N.Y. Taxi Ass'n v. State*, 21 N.Y.3d 289 (2013) (No. 102783/12).

⁶⁷ *Taxicab Serv. Ass'n*, 2012 N.Y. Misc. LEXIS 4098, at *35–36.

That was at least a plausible conclusion for the court to draw in this case. But it is another thing altogether for the court to simply cast off that history as entirely irrelevant and beside the point.

Second, given the role of New York City as a leading tourist destination, the court's emphasis on visitors to New York City as one of the key sources of the State's substantial interest has the potential to effectively eviscerate any separation of the local and state interest, at least for New York City. Here, the court merely repeated the defendants' position: "This is not a purely local issue. Millions of people from within and without the State visit the City annually. Some of these visitors are disabled, and will undoubtedly benefit from the increase in accessible vehicles in the Manhattan central business district and in the outer boroughs."⁶⁸

But the centerpiece of the HAIL Act is the issuance of eighteen thousand new licenses that allow livery cabs to pick up street hails in the outer boroughs other than Manhattan that is *outside of the area* most people visit. Tourists, as TLC Commissioner Yassky himself conceded, are very unlikely to ever use livery cars because they spend most of their time in Manhattan.⁷⁰ If concern for people who are only temporarily in New York City and primarily in Manhattan can justify the State's revamping of the entire New York City taxi industry focused on taxis for the outer boroughs, then one wonders where the limits to the State's power lie. Indeed, there are obviously many public services that benefit residents from other parts of the State who visit New York City. Policing is one example. If the State can intervene in New York City's management of its police force on the basis of a concern for visitors or tourists, the separation between predominantly local and state spheres could, as a practical matter, cease to exist.

It seems likely that the court's deference towards the State in this case was influenced by the fact that Mayor Bloomberg was the chief lobbyist for the HAIL Act.⁷¹ Focusing solely on the Mayor's role, the law does not appear to fall afoul of the basic principle underlying the home rule message requirement that states should not tread on local affairs without the permission of the locality. But this ignores the fact that the home rule provision literally requires the local *legislature* to consent to state regulation of local matters, not the

⁶⁸ Greater N.Y. Taxi Ass'n v. State, 21 N.Y.3d 289, 302 (2013) (emphasis omitted).

⁷⁰ Yassky Memo, *supra* note 18 ("[W]e expect that the bulk of trips outside Manhattan will continue to be provided through prearrangement—in most residential neighborhoods, the street hail model just doesn't make sense.").

⁷¹ Grynbaum, *supra* note 4.

local executive.⁷²

And significantly, the HAIL Act does not merely change the rules governing for-hire car pick-ups; it also changes the rules governing who (the Mayor or the City Council) gets to decide how new taxicab licenses will be issued.⁷³ Section eight of the HAIL Act vests authority in “the mayor alone” to authorize the TLC to issue up to two thousand taxicab medallions to wheelchair accessible vehicles.⁷⁴ This means that the issuance of these additional licenses is contingent upon the approval of the Mayor, rather than the City Council, a transfer of authority that flies in the face of decades of control by the local legislature.⁷⁵ For example, in 1956 the State delegated to local legislatures the power to adopted ordinances regulating “[t]he registration and licensing of taxicabs and [to] limit the number of taxicabs to be licensed.”⁷⁶ The New York State Attorney General viewed this law as “a home rule measure to give municipalities power they properly should have.”⁷⁷ In 1971, the City Council amended the City’s charter to provide that “[a]dditional taxicab licenses may be issued from time to time only upon the enactment of a local law providing therefor.”⁷⁸ Since then, and as a result, new medallions have *only* been issued at the request of the City Council.⁷⁹

The court missed the significance of this aspect of the law and past precedent. Consequently, the most serious weakness in the court’s decision is that it allows the State to take away the power to issue licenses from the New York City Council and transfers that power to the Mayor, without any legitimate state interest in doing so. In other words, while it is one thing for a court to bless a certain distribution of power between the State and a city, it is quite another for a court to sanction the State’s attempt to redistribute long-established authority within a city itself. Discussing this issue, one commentator appropriately asked, “where is the

⁷² *Greater N.Y. Taxi Ass’n*, at 21 N.Y.3d at 301 (quoting N.Y. CONST. art. IX, § 2(b)(2)).

⁷³ Act of Feb. 17, 2012, ch. 9, § 8, 2012 N.Y. Sess. Laws 23, 27 (McKinney) (codified as amended in scattered sections of the Tax Law, Vehicle and Traffic Law, and Administrative Code of the City of New York).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ N.Y. GEN. MUN. LAW § 181(1) (McKinney 2013).

⁷⁷ 1983 Op. Att’y Gen. (Inf.) 66, 67 (Jan. 28, 1983).

⁷⁸ N.Y. City Charter, ch. 65, § 2303(b)(4) (2013).

⁷⁹ *See Greater N.Y. Taxi Ass’n v. State*, 21 N.Y.3d 289, 303 (2013) (“[I]n the years between 1996 and 2008 when the New York State Legislature approved the issuance of 1,450 new medallions, it did so only after the City Council issued a home rule message requesting such an increase.”).

legitimate state interest in selecting the mayor over the city council to control those medallions?”⁸⁰

The court’s cursory analysis of this element of the law and the loose language it used to validate the delegation to the Mayor opens the door for the State to transfer power from one branch of local government to the other. The court characterized section eight as “merely an implementation device” which the State was free to choose.⁸¹ “As the governing body that passed this Act,” the court wrote, “it was within the State legislature’s purview to delegate a portion of the Act’s implementation to the Mayor.”⁸² This formulation is especially troubling in light of the court’s highly deferential review of the State’s interest. If courts will broadly construe the state interest, requiring only that the State have an interest in the subject matter of the statute, and will uncritically accept the State’s reorganization of local governing powers as merely incidental and valid without its own compensating state interest, then the state legislature can accomplish a great deal of mischief without ever having to meaningfully justify its actions before a court. With these implications laid bare, the court’s decision in the HAIL Act case shows a profound lack of judicial scrutiny over state intrusion into local affairs. There is no doubt that the line-drawing that courts must undertake in home rule cases is difficult. The legislative history of the statute at issue is all too often muddled and the substantial state interest standard is vague.⁸³ But unfortunately, the court’s decision in the HAIL Act case does little to clarify the standard and opens the door to highly intrusive meddling from Albany in the internal affairs of local government. In order to ensure that the home rule clause continues to have any force or effect, the court should specify and strengthen its standards of review in home rule cases. Enhancing the clarity of the home rule doctrine will lead not only to judicial efficiency, but greater predictability for state and local actors.

First, in future cases, the court should reject the position taken by the HAIL Act’s defenders that the State’s interest in the subject matter of legislation that intrudes on local affairs suffices to justify

⁸⁰ Rick Hills, *A Judicial Victory for City Home Rule—but Maybe Not Taxi Customers? Some Reflections on Local Autonomy and Protectionism*, PRAWFSBLAWG (June 10, 2012, 10:12 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2012/06/a-victory-for-city-home-rule-but-maybe-not-taxi-customers.html>.

⁸¹ *Greater N.Y. Taxi Ass’n*, 21 N.Y.3d at 305.

⁸² *Id.*

⁸³ See *supra* text and accompanying notes 50–54.

the act. The State should not be able to invoke broad values like public safety and transportation when many of those domains actually represent overlapping state and local concern. Failing to do so would not preserve the balance of power between state and local interests; rather, it would give the State the ability to dominate whenever it wanted and without sufficient justification.

Second, the substantial state interest should actually mean something substantial. Simply expressing some *plausible* state interest should not suffice. The court should clarify what factors courts must consider when identifying and weighing that interest. There are a variety of factors a court might and should consider when adjudicating home rule disputes. These include the need for statewide uniformity in the regulation of the problem at hand, the impact on people outside of the City, and how the State and the locality have historically handled the issue in the past.⁸⁴ In the HAIL Act case, the first factor—uniformity—played no part, since the statute singled out New York City’s taxi service and did not regulate for-hire car services in other municipalities around the State.⁸⁵ Regarding the second factor, the court considered extraterritorial externalities (*e.g.*, it is harder for visitors in New York City to get cabs outside of central Manhattan and the airports).⁸⁶ But *any* degree of impact should not be enough. Rather, the impact of the problem outside of the City must itself be significant. As for the third factor, the court should always consider history as a factor in its analysis. While a pattern of past practice need not determine the result in any particular case, it certainly should, at a minimum, inform the analysis.

In other words, the larger the role that history plays—that is, if past is at least to some extent prologue—the easier it will be for state and municipal actors to know what to expect going forward.⁸⁷

V. CONCLUSION

Unfortunately, the Court of Appeals’ decision upholding the HAIL Act left unaddressed important questions about the nature of the

⁸⁴ Lynn A. Baker & Daniel B. Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, 86 DENV. U. L. REV. 1337, 1351 (2009).

⁸⁵ See *Greater N.Y. Taxi Ass’n*, 21 N.Y.3d at 297–98.

⁸⁶ *Id.* at 303–04.

⁸⁷ Brief of Plaintiffs-Respondents, *supra* note 23, at 21 (“Because the Legislature had never before dealt with City medallion issues, it could hardly understand the destabilizing effect the Act would have on a local industry that has been effectively regulated by City Council since its inception.”).

court's review of special state laws infringing on essential matters of local concern and the continued vitality of the Home Rule Clause in the New York State Constitution. The court's cursory analysis of the HAIL Act and its conclusion in the case do not bode well for the future of home rule. The next time a home rule challenge comes its way, the court should clarify its standards and what it takes to satisfy them. In particular, the court should identify and bolster the limits on state interference with the division of authority between branches of local government. The existing gap in the jurisprudence leaves state and municipal actors in the dark and threatens to render obsolete the constitutional protection that insulates the local separation of powers from state intrusion.