CAN NEW YORK CITY GOVERN ITSELF? THE INCONGRUITY OF THE COURT OF APPEALS' RECENT CASES REGARDING REGULATION OF NEW YORK CITY BY NEW YORK CITY

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I. INTRODUCTION

This past June, the New York Court of Appeals struck down as exceeding the scope of permissible regulation the proposed "soda ban" in New York City, a public health measure that prohibited most establishments in New York City, including restaurants and movie theaters, from serving certain sugary drinks in portions larger than sixteen fluid ounces.[1] This decision was a blow to the legacy of former New York City Mayor Michael Bloomberg, who had strenuously advocated for its passage and had made it a centerpiece of his public health agenda in order to combat obesity and related diseases, such as diabetes, among New York City residents.[2] Although the soda ban had widespread support from the public health community,[3] it was vehemently opposed by a number of lobbying groups associated with the food and beverage industry, who ultimately were responsible for filing the lawsuit that successfully overturned it.[4]

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[1] N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene, 23 N.Y.3d 681, 701, 16 N.E.3d 538, 549, 992 N.Y.S.2d 480, 491 (2014).

[2] *See, e.g.*, E.C. Gogolak, *Another State Court Rejects Limits on Sugary Drinks*, N.Y. TIMES, July 31, 2013, at A17.

[3] *See, e.g.*, Maggie Fox, *Nutrition Experts: Despite Ruling, Soda Ban Is Still a Great Idea,* NBC NEWS (Mar. 12, 2013), http://www.nbcnews.com/health/health-news/nutrition-experts-despite-ruling-soda-ban-still-great-idea-f1C8816720; *Ransdell* Pierson, *Diabetes Doctor: NYC Big-Soda Ban Is Just a Start*, REUTERS, June 21, 2012, *available at* http://www.reuters.com/article/2012/06/21/us-usa-health-diabetes-idUSBRE85K05Z20120621.

[4] Michael M. Grynbaum, *Court of Appeals, Ruling 4-2, Ends City's Fight to Limit Size of Sugary Drinks*, N.Y. TIMES, June 27, 2014, at A24.

The year before, however, in a big win for Mayor Bloomberg, the Court of Appeals had upheld as constitutional the HAIL Act,[5] which had been passed by the New York State Legislature after Mayor Bloomberg failed to convince the New York City Council to enact his original proposal.[6] The HAIL Act, for the first time, allowed livery cabs to accept passengers in the outer boroughs and outside Manhattan's central business district who hail the livery cabs from the street, and also expanded the number of traditional yellow cabs accessible to passengers with disabilities.[7] Although the home rule clause of the New York State Constitution limits the authority of the New York State Legislature when dealing with purely local matters, and it had always been assumed previously that laws regulating New York City taxicabs required a "home rule message,"[8] the Court of Appeals held that because the regulation of taxicabs in New York City constituted a matter of substantial state interest, the State was authorized to pass the legislation without input from the New York City Council.[9]

The obvious question posed by these two decisions, only a year apart, is what explains the seemingly contradictory results? Why were outer-borough livery cabs approved by the Court of Appeals and limits on soda portions struck down? How can it be that a regulation proposed by New York City's own health commissioner was invalid for the soda ban, but regulation by the state legislature of New York City taxi cabs was appropriate? Both cases involved New York City regulations, namely the complex scheme of taxicab regulation or the proposed new limitation on the available portion size of soda. Both cases focused on the same or similar question:

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[5] Greater N.Y. Taxi Ass'n v. State, 21 N.Y.3d 289, 308, 993 N.E.2d 393, 405, 970 N.Y.S.2d 907, 919 (2013).

[6] Roberta A. Kaplan, *New York City Taxis and the New York State Legislature: What Is Left of the State Constitution's Home Rule Clause After the Court of Appeals Decision in the HAIL Act Case?*, 77 ALB. L. REV. 113, 113 (2013/2014).

[7] *Greater N.Y. Taxi Ass'n*, 21 N.Y.3d at 297–99, 993 N.E.2d at 397–99, 970 N.Y.S.2d at 911–13.

[8] *See* Kaplan, *supra* note 6, at 123 & n.79. A home rule message is issued by a municipality to the state legislature when requesting a specific law to be enacted to apply to that municipality. N.Y. CONST. art. IX, § 2(b)(2). No such message was issued in the HAIL Act case. Kaplan, *supra* note 6, at 117. The absence of a home rule message has, until recently, discouraged the state legislature from enacting laws specifically directed at a particular municipality. *See, e.g.*, Center for N.Y.C. Law, 2 CITYLAW 39, 40–41 (1996) ("The Speaker of the Assembly, Sheldon Silver, on the advice of the Assembly's Home Rule Counsel, ruled that the legislation required a home rule message, and refused to bring the bill to a vote.").

[9] *See Greater N.Y. Taxi Ass'n*, 21 N.Y.3d at 304–06, 993 N.E.2d at 402–04, 970 N.Y.S.2d at 916–18.

whether a regulation limited to New York City was appropriate under the New York State Constitution. And both cases were decided in opinions authored by Judge Pigott. Yet they came to starkly different answers—in one, a state regulation specifically limited in application to a New York City activity was held constitutional; in the other, a New York City health authority was held to lack the authority to promulgate an ordinance. Unfortunately, as discussed below, the answer to the question whether (and if) these two cases can somehow be comfortably reconciled with each other appears to be "no."

II. THE HAIL ACT CASE

Last year's decision by the Court of Appeals in the HAIL Act case reflects the continued weakness of the state constitutional guarantee of home rule by New York City as interpreted by the courts. In *Greater New York Taxi Association* v. *State*, a local interest group based in New York City challenged the HAIL Act, a statute promulgated by the New York State Legislature, which authorized, among other things, the ability of thousands of livery cabs—not holders of taxicab medallions—to accept street hails in "underserved" areas of New York City.[10] This statute represented a direct challenge to local control of taxi services, which had been directly regulated by New York City for more than half a century.[11] Judge Pigott, who would later reject the soda ban, wrote for a unanimous Court of Appeals, finding that the HAIL Act addressed a "substantial state concern," and so should be upheld,[12] despite the lack of approval—and indeed outright rejection—of the proposal by the New York City Council.[13]

The decision by the Court of Appeals in the HAIL Act case revolved around the interpretation of the home rule provision in the New York State Constitution. The home rule provision states in relevant part as follows:

> [T]he legislature . . . [s]hall have the power to act in relation to the property, affairs or government of any local government only by general law, or by special law only . . . on request of two-thirds of the total membership of its legislative body or on request of its chief executive officer

[10] *Id.* at 296–98, 300, 993 N.E.2d at 396–99, 970 N.Y.S.2d at 910–13.
[11] *Id.* at 297, 993 N.E.2d at 397, 970 N.Y.S.2d at 911.
[12] *Id.* at 302, 306, 993 N.E.2d at 404–05, 970 N.Y.S.2d at 918.
[13] Kaplan, *supra* note 6, at 113.

concurred in by a majority of such membership . . . .[14]

This clause limits the power of the New York State Legislature to enact laws regulating matters that fall within the purview of local government. Although the state legislature may pass laws of general application that apply to all cities, when it seeks to regulate the "property, affairs or government" of a specific city, the state legislature may only do so at the request of the local legislature, which issues what is known as a home rule message.[15]

However, the home rule clause of the New York State Constitution is subject to a significant limitation. In the 1929 case of *Adler* v. *Deegan*,[16] the New York Court of Appeals created a judicial exception to the home rule provision of the New York State Constitution: the "state concern" doctrine.[17] As articulated by Judge Cardozo, "if the subject be in a substantial degree a matter of State concern, the Legislature may act, though intermingled with it are concerns of the locality."[18] Subsequent decisions by the Court of Appeals have interpreted this "state concern" doctrine broadly,[19] as Judge Pigott did in upholding the constitutionality of the HAIL Act,[20] a law passed by the state legislature without an enabling "home rule message."[21]

According to Judge Pigott, the State of New York had a substantial concern in the regulation of local taxicabs in New York City because "[e]fficient transportation service in the State's largest city and international center of commerce is important to the entire State."[22] Judge Pigott noted in particular the millions of visitors to the city and that the HAIL Act promoted the ability of the disabled to obtain accessible vehicles.[23]

Since the Court of Appeals issued its decision last year, a number of courts and commentators have noted the implications of that ruling for the continued application of home rule. Last year, this author noted that the Court of Appeals' reasoning concerning "the State's substantial interest has the potential to effectively

[14] N.Y. CONST. art. IX, § 2(b)(2).

[15] *See Greater N.Y. Taxi Ass'n*, 21 N.Y.3d at 301, 993 N.E.2d at 400, 970 N.Y.S.2d at 914 (quoting N.Y. CONST. art. IX, § 2(b)(2)).

[16] Adler v. Deegan, 251 N.Y. 467, 167 N.E. 705 (1929).

[17] *Id.* at 482–84, 167 N.E. at 710–11 (Pound, J., concurring).

[18] *Id.* at 491, 167 N.E. at 714 (Cardozo, J., concurring).

[19] *See, e.g.*, Uniformed Firefighters Ass'n v. City of N.Y., 50 N.Y.2d 85, 90, 405 N.E.2d 679, 680, 428 N.Y.S.2d 197, 198–99 (1980).

[20] *Greater N.Y. Taxi Ass'n*, 21 N.Y.3d at 306, 993 N.E.2d at 404, 970 N.Y.S.2d at 916.

[21] Kaplan, *supra* note 6, at 113.

[22] *Id.* at 303, 993 N.E.2d at 401, 970 N.Y.S.2d at 915.

[23] *Id.* at 302–03, 993 N.E.2d at 401, 970 N.Y.S.2d at 915.

eviscerate any separation of the local and state interest, at least for New York City."[24] Similarly, another commentator noted that "[j]udicial acceptance of the lack of need for such a home rule message might weaken the city's long-term interest in resisting interference from future state legislatures in the operations of New York City, to the dismay of future mayors and corporation counsels."[25] Courts have also cited to this decision when rejecting challenges to state legislation based upon the principle of home rule.[26]

Effectively, the legal reasoning adopted by the HAIL Act case could be used to nullify any demarcation between state and local authority, at least with respect to New York City. Since the economy of New York State is dependent upon that of New York City, any local ordinance relating to New York City would likely affect New York State—and so constitute a "state concern" under Judge Pigott's expansive conception of the law. The court's rationale in the HAIL Act case for enabling the regulation permitting livery cabs to pick up passengers through street hails outside Manhattan is particularly striking. Judge Pigott cited the "[m]illions of people from within and without the State [who] visit the City annually" as a justification for the state legislature's action in approving the HAIL Act.[27] Yet the overwhelming majority of these visitors to New York City will never venture outside Manhattan, and so will not be present in a location where they could hail a livery cab from the street.[28] In other words, the court appealed to the potential impact on visitors, even when the legislation at issue did not really concern them. Such a concern about "visitors" could permit the state legislature to legislate with respect to virtually any local matter concerning New York City. For example, the state legislature could make a finding that visitors to New York City would find it convenient for certain municipal offices

[24] Kaplan, *supra* note 6, at 122.

[25] Michael A. Cardozo, *The Conflicting Ethical, Legal, and Public Policy Obligations of the Government's Chief Legal Officer*, 22 J. PROF. LAW 4, 9 (2014).

[26] *See, e.g.*, Mangano v. Silver, 107 A.D.3d 956, 958–59, 968 N.Y.S.2d 147, 149–50 (App. Div. 2d Dep't 2013) (citing *Greater N.Y. Taxi Ass'n*, 21 N.Y.3d at 304–06, 993 N.E.2d at 402–04, 970 N.Y.S.2d at 916–18).

[27] *See Greater N.Y. Taxi Ass'n*, 21 N.Y.3d at 302, 993 N.E.2d at 401, 970 N.Y.S.2d at 915.

[28] Memorandum from David Yassky, Comm'r, N.Y.C. Taxi & Limousine Comm'n & Stephen Goldsmith, Deputy Mayor, N.Y.C., to Michael Bloomberg, Mayor, N.Y.C., Five-Borough Tax Plan, http://www.scribd.com/doc/56957906/Five-Borough-Taxi-Memo-TLC ("[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.").

to be open on weekends and so dictate the operating hours of local administrative agencies. A similar logic would enable the interference of the state legislature with respect to the New York City police department. The justifications offered by the State in the HAIL Act case, and endorsed by the Court of Appeals, would allow home rule in New York City to be overridden by the state legislature whenever it was deemed politically expedient or convenient to do so.

III. THE SODA BAN DECISION

In contrast, in *New York Statewide Coalition of Hispanic Chambers of Commerce* v. *New York City Department of Health and Mental Hygiene*, a divided Court of Appeals overturned a health regulation promulgated by the New York City Board of Health that banned restaurants, movie theaters, and similar food service establishments from serving soda and other sugary drinks in serving sizes larger than sixteen ounces.[29] (This regulation had specifically excluded from its purview certain other establishments, such as groceries, because those establishments were regulated by New York State rather than by New York City.)[30]

The regulation was challenged in a lawsuit brought by a number of business associations and a union with interests affected by the proposed soda ban in New York City (e.g., restaurants, movie theater owners).[31] In the lawsuit, the plaintiffs argued that New York City violated the state constitution's separation of powers principles,[32] as elucidated by the Court of Appeals in *Boreali* v. *Axelrod*.[33] In *Boreali*, the New York Court of Appeals had examined whether an antismoking code promulgated by the Public Health Council had exceeded the mandate and authority of the agency.[34] In doing so, the Court of Appeals discussed the state of the law and

[29] *See* N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene, 23 N.Y.3d 681, 690–91, 16 N.E.3d 538, 541–42, 992 N.Y.S.2d 480, 483–84 (2014).

[30] *See* N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene, 110 A.D.3d 1, 6, 970 N.Y.S.2d 200, 205 (App. Div. 1st Dep't 2013), *aff'd*, 23 N.Y.3d 681, 16 N.E.3d 538, 992 N.Y.S.2d 480 (2014).

[31] *Id.* at 6 n.2, 970 N.Y.S.2d at 206 n.2.

[32] *Id.* at 6–7, 970 N.Y.S.2d at 206.

[33] Boreali v. Axelrod, 71 N.Y.2d 1, 517 N.E.2d 1350, 523 N.Y.S.2d 464 (1987).

[34] *See* N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene, No. 653584/12, 2013 WL 1343607, at *6 (Sup. Ct. N.Y. Cnty. Mar. 11, 2013) (citing *Boreali*, 71 N.Y.2d at 6, 517 N.E.2d at 1351, 523 N.Y.S.2d at 466), *aff'd*, 110 A.D.3d 1, 970 N.Y.S.2d 200 (App. Div. 1st Dep't 2013), *aff'd*, 23 N.Y.3d 681, 16 N.E.3d 538, 992 N.Y.S.2d 480 (2014).

identified a series of considerations that have subsequently been interpreted as a multifactor test to determine whether a New York administrative agency impermissibly exceeded its powers:

> The four factors to be considered are (1) whether the challenged regulation is based upon concerns not related to the stated purpose of the regulation, i.e., is the regulation based on other factors such as economic, political or social concerns? (2) was the regulation created on a clean slate thereby creating its own comprehensive set of rules without the benefit of legislative guidance? (3) did the regulation intrude upon ongoing legislative debate? In other words, did the regulation address a matter the legislature has discussed, debated or tried to address prior to this regulation? And (4) did the regulation require the exercise of expertise or technical competence on behalf of the body passing the legislation?[35]

The *Boreali* test is grounded in article 3, section 1 of the New York State Constitution, which provides that "[t]he legislative power of this state shall be vested in the senate and assembly."[36] This provision of the New York State Constitution has been interpreted by the courts to mean that "the Legislature cannot pass on its law-making functions to other bodies, but there is no constitutional prohibition against the delegation of power, with reasonable safeguards and standards, to an agency or commission to administer the law as enacted by the Legislature."[37] Thus, the authority of any administrative agency in New York State is bounded by the extent of the delegation of authority to that agency by the relevant legislative body.

The proposed soda regulation was rejected by each court to consider the issue. The supreme court rejected the soda ban on the merits, finding that the regulation by the New York City Board of Health was

> arbitrary and capricious because it applies to some but not all food establishments in the City, it excludes other beverages that have significantly higher concentrations of sugar sweeteners and/or calories on suspect grounds, and the loopholes inherent in the Rule . . . defeat and/or serve to gut

[35] *N.Y. Statewide Coal. of Hispanic Chambers of Commerce*, 2013 WL 1343607, at *8 (citing *Boreali*, 71 N.Y.2d at 11–14, 517 N.E.2d at 1355–56, 523 N.Y.S.2d at 470–71).

[36] N.Y. CONST. art. III, § 1.

[37] Levine v. Whalen, 39 N.Y.2d 510, 515, 349 N.E.2d 820, 822, 384 N.Y.S.2d 721, 723 (1976) (citations omitted).

the purpose of the Rule.[38]

Judge Tingling further held, after examining the *Boreali* factors, that the soda ban "would not only violate the separation of powers doctrine, it would eviscerate it."[39] The *Boreali* factors are examined in New York State in determining "whether an administrative rule may have run afoul of the separation of powers doctrine."[40] After considering these four factors, including an in-depth historical analysis of New York City's various charters for the second *Boreali* factor, and finding that only the fourth factor weighed in favor of the agency, Judge Tingling determined that the New York City Board of Health had exceeded its authority.[41]

The Appellate Division, First Department, when unanimously striking down the soda ban regulation, held that "the Board of Health failed to act within the bounds of its lawfully delegated authority . . . [and so] the regulation [is] invalid, as violative of the principle of separation of powers."[42] Unlike the trial court, the First Department did not discuss the merits but instead focused exclusively on the four *Boreali* factors, finding that "under the principles set forth in *Boreali*, the Board of Health overstepped the boundaries of its lawfully delegated authority when it promulgated the [soda ban]."[43] Notably, while the lower court had held that three of the four *Boreali* factors had weighed against the administrative agency, the First Department determined that the proposed regulation violated all four *Boreali* factors.[44] Specifically, the First Department rejected the notion that "expertise or technical competence" had been involved in the devising of the soda ban, since "despite the City's argument to the contrary, the Board did not bring any scientific or health expertise to bear in creating the [soda ban]. Indeed, the rule was drafted, written and proposed by the Office of the Mayor and submitted to the Board, which enacted it without substantive changes."[45] So, the First Department, in affirming the lower court's decision to strike down the soda ban, adopted the same analytical framework—the *Boreali*

[38] *N.Y. Statewide Coal. of Hispanic Chambers of Commerce*, 2013 WL 1343607, at *20.

[39] *Id.*

[40] *Id.* at *8.

[41] *Id.* at *8–18, *20.

[42] N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene, 110 A.D.3d 1, 3, 970 N.Y.S.2d 200, 204 (App. Div. 1st Dep't 2013), *aff'd*, 23 N.Y.3d 681, 16 N.E.3d 538, 992 N.Y.S.2d 480 (2014).

[43] *Id.* at 16, 970 N.Y.S.2d at 213.

[44] *Id.* at 9, 970 N.Y.S.2d at 208.

[45] *Id.* at 15–16, 970 N.Y.S.2d at 212–13.

factors—but found that an analysis under these factors was even less favorable to the administrative agency.

The decision by the Court of Appeals likewise did not center on the merits of the proposed soda ban, but rather focused on the administrative process by which the soda ban was implemented. Specifically, the Court of Appeals held that the New York City Board of Health, which was the entity that promulgated the regulation, lacked the authority to do so.[46] Judge Pigott grounded his reasoning in an analysis of the *Boreali* factors,[47] which, as described above, are evaluated to determine whether an administrative agency has impermissibly strayed into a policy-making role. Judge Pigott held, in reference to the soda ban, that "[b]y choosing between public policy ends in these ways, the Board of Health engaged in law-making beyond its regulatory authority."[48] In analyzing the four *Boreali* factors, Judge Pigott held that the first three *Boreali* factors weigh against the administrative agency and offered no opinion as to the fourth *Boreali* factor,[49] on which the lower courts disagreed.

The dissent, by Judge Read, likewise analyzed the soda ban within the analytic framework provided by the *Boreali* factors, but reached the opposite conclusion. Adopting a more flexible approach to the *Boreali* factors, the dissent held that:

> [T]he Board identified a complicated threat to the health of City residents with many interrelated causes; i.e., obesity . . . [and] considered several options for addressing the problem, and chose one after open public debate, calibrated to the severity of the threat and its most serious manifestations, and cognizant of the limits of its enforcement power and the feasibility of compliance. There can be little doubt that this was within the Board's statutory delegation.[50]

Effectively, the dissent embraced a "flexible and case specific" approach to the "separation-of-powers analysis," which produced a different result than a mechanical application of the *Boreali* factors.[51] The dissent also found that the New York City Board of Health had substantial independent authority based upon an

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[46] N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene, 23 N.Y.3d 681, 694, 16 N.E.3d 538, 544, 992 N.Y.S.2d 480, 486 (2014).

[47] *Id.* at 696–701, 16 N.E.3d at 546–49, 992 N.Y.S.2d at 487–91.

[48] *Id.* at 699, 16 N.E.3d at 547, 992 N.Y.S.2d at 489.

[49] *Id.* at 696–701, 16 N.E.3d at 546–49, 992 N.Y.S.2d at 487–91.

[50] *Id.* at 713, 16 N.E.3d at 557–58, 992 N.Y.S.2d at 499–500 (Read, J., dissenting).

[51] *Id.* at 712, 16 N.E.3d at 557, 992 N.Y.S.2d at 497.

examination of the relevant history and so would also have found that the *Boreali* test did not apply here.[52] Still, a majority of the Court of Appeals rejected the soda ban, and as a result, a proposed public health measure, approved by the local body most concerned—the New York City Board of Health—was negated by the Court of Appeals.

In Judge Pigott's legal analysis under the *Boreali* framework, Judge Pigott made certain observations that are relevant to home rule. Most particularly, in Judge Pigott's discussion of the second and third *Boreali* factors, which relate respectively as to whether the agency received "legislative guidance" or whether the legislature had attempted and failed a similar regulation, Judge Pigott mentioned both the New York City Council and the New York State Legislature as potential sources of authority.[53] In other words, Judge Pigott viewed the state legislature as an appropriate source of authority for a local administrative agency implementing a local ordinance. This reasoning strikes directly at the principle of home rule, as the New York City Council should be considered the only appropriate source for legislative authority when a purely local rule is at stake.

Although the administrative law ruling in the soda ban case appears to offer a degree of support to the notion of home rule, given that the inaction of the New York City Council contributed to the decision that the New York City Board of Health had exceeded its authority, a more nuanced reading of the opinion likewise erodes the basis of home rule. Judge Pigott's opinion suggests that inaction by either the New York City Council *or the New York State Legislature* would be sufficient to overturn the proposed regulation by the New York City Board of Health.[54] By assigning functional equivalence to the state legislature and the city council in this manner, Judge Pigott is implicitly undermining the principle of home rule, since this opinion suggests that either the state government *or* the city council is an appropriate source of authority for a purely local ordinance. Additionally, it is important to recall

[52] *See id.* at 710–11, 16 N.E.3d at 555–56, 992 N.Y.S.2d at 497–498.

[53] *See id.* at 699–701, 16 N.E.3d at 548–49, 992 N.Y.S.2d at 490–91 (majority opinion) ("With respect to the second *Boreali* factor, respondents are unable to point to any legislation concerning the consumption of sugary beverages by the state legislature or City Council that the [soda ban] was designed to supplement. . . . With regard to the third *Boreali* factor . . . inaction on the part of the State Legislature and City Council . . . simply constitutes additional evidence that the Board's adoption of the [soda ban] amounted to making new policy, rather than carrying out preexisting legislative policy.").

[54] *See id.*

that the immediate effect of Judge Pigott's decision in the soda ban case was to bar the implementation of a purely local public health ordinance.

A further irony is that the various judicial opinions striking down the soda ban, which were hailed as resounding victories by libertarians who were opposed to a perceived "nanny state" intrusion, merely established the groundwork for a later soda ban, if one was procedurally proper—that is, enacted by either the New York City Council or the state legislature.[55] Indeed, the final chapter in this saga has yet to be written since recent news reports state that Mayor de Blasio is exploring ways of imposing a similar soda ban, including through legislation by the New York City Council.[56]

IV. INCONGRUITY BETWEEN THE HAIL ACT AND SODA BAN CASES

In the HAIL Act litigation, the state legislature enacted a law, over the objections of the New York City Council, which was then upheld by the Court of Appeals.[57] In that case, the Court of Appeals held that the position of the New York City Council with respect to the regulation of taxicabs in New York City was immaterial. But in the soda ban case, the Court of Appeals overturned a local health ordinance promulgated by the New York City Board of Health, in part because the New York City Council did not act and failed to pass a resolution justifying such an ordinance.[58] In that case, the Court of Appeals invited the New York City Council to exercise its rule-making authority and held that, in the absence of such authority, a particular regulation was improper. In one opinion, the actions of the New York City Council were deemed to be irrelevant, while in the other the non-action of the New York City Council was determinative of the ultimate result.

This inconsistency in the legal reasoning of the two opinions has been masked through the HAIL Act litigation being conducted under the auspices of a direct application of the constitutional

[55] *See* Andrew Geltman, *New York: Public Health Implications of the "Soda Ban" Ruling*, DOMPREP J., Aug. 2014, at 28–29 ("The court does not say that New York City cannot create these types of 'nanny state' regulations but, if it wants to do so, it must be done through the legislative process.").

[56] Michael Howard Saul, *Forward Push on Soda Ban: De Blasio Administration Considers New Ways to Cap Size of Sugary Drinks*, WALL ST. J., Oct. 16, 2014, at A21.

[57] Greater N.Y. Taxi Ass'n v. State, 21 N.Y.3d 289, 297–98, 308, 993 N.E.2d 393, 397–98, 405, 970 N.Y.S.2d 907, 911–12, 919 (2013); *see* Kaplan, *supra* note 6, at 113.

[58] *N.Y. Statewide Coal. of Hispanic Chambers of Commerce*, 23 N.Y.3d at 700–01, 16 N.E.3d at 548–49, 992 N.Y.S.2d at 490–91.

principle of home rule, while the soda ban case has been argued on the basis of principles of New York administrative law under *Boreali*.[59] Yet these two spheres of law are linked. Both the legal principles of home rule and administrative law, as reflected in the *Boreali* factors, ultimately stem from fundamental constitutional principles of separation of powers. While administrative law and *Boreali* deal with the division of responsibility between the executive and the legislature,[60] the principle of home rule addresses the proper balance between the local and state divisions of the legislative authority.[61] Additionally, while the precise elements of administrative law and the balance between the legislature and executive have been judicially determined in New York State—as in the *Boreali* case[62]—the principle of home rule, and the divided authority of the legislative branch, derives from a more direct and fundamental source: an explicit provision in the New York State Constitution itself.[63] As such, the legal principle of home rule should arguably provide greater protection to regulations promulgated by New York City, as opposed to mere administrative law, since it draws from a deeper and more potent source.

The connection between administrative law and the principle of home rule can be seen in an examination of the *Boreali* case itself. The *Boreali* factors, through which the authority of the New York City Board of Health was evaluated, make explicit reference to the power and authority of local government.[64] Specifically, both the second and the third *Boreali* factors inquire as to whether any relevant legislation was passed or considered by the appropriate legislative body.[65] In other words, the authority of a local administrative or executive agency can be determined in part by examining whether the local legislative authority acted in accordance with the provisions of home rule and enacted relevant laws. So, according to the logic of the soda ban case, the failure of the New York City Council to enact the sought reform in the taxi

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[59] *Compare Greater N.Y. Taxi Ass'n*, 21 N.Y.3d at 300–01, 993 N.E.2d at 399–400, 970 N.Y.S.2d at 913–14, *with N.Y. Statewide Coal. of Hispanic Chambers of Commerce*, 23 N.Y.3d at 696, 16 N.E.3d at 545, 992 N.Y.S.2d at 487.

[60] *N.Y. Statewide Coal. of Hispanic Chambers of Commerce*, 23 N.Y.3d at 696–97, 16 N.E.3d at 545–46, 992 N.Y.S.2d at 487–88.

[61] *See Greater N.Y. Taxi Ass'n*, 21 N.Y.3d at 300–01, 993 N.E.2d at 399–400, 970 N.Y.S.2d at 913–14.

[62] *See generally* Boreali v. Axelrod, 71 N.Y.2d 1, 517 N.E.2d 1350, 523 N.Y.S.2d 464 (1987).

[63] N.Y. CONST. art. IX, § 2(b)(2).

[64] *See Boreali*, 71 N.Y.2d at 11–14, 517 N.E.2d at 1355–57, 523 N.Y.S.2d at 469–71.

[65] *Id.* at 13, 517 N.E.2d at 1356, 523 N.Y.S.2d at 470–71.

licensing laws of New York City—the third *Boreali* factor—would counsel against a finding that the revised taxi licensing scheme should be permitted, since the relevant local authority had already considered the issue and decided not to act.

One could argue, on the other hand, that the HAIL Act and soda ban cases are potentially reconcilable in the sense that the state legislature could act to overturn a local ordinance when it substantially affected a "state concern," as in the HAIL Act case, and its inaction would doom any rulemaking by administrative agencies outside their purview, as illustrated by the soda ban case. Yet such an analysis fails to account for the constitutional imperative to take into account the local communities affected by the actions of the state legislature.

The voters of New York State have persistently, and increasingly, supported home rule for New York State's local communities as illustrated by the changes in the New York State Constitution over the past century; changes that reject dominance by the state legislature in Albany.[66] However, during that same time period, the New York Court of Appeals has consistently acted to preserve the authority of the state legislature against the application of home rule through the use of various legal doctrines; doctrines that have carved out exceptions to the policy dictated by the state constitution.[67] The recent HAIL Act and soda ban decisions are no exception to this trend. Both decisions overturned local ordinances enacted by the City of New York or associated agencies, emphasizing the limited authority of New York City to govern itself.

While the overall impact of these decisions was to reverse local regulations, what is perhaps most noteworthy is the practical incongruity presented by the soda ban and HAIL Act decisions. In the HAIL Act case, a straightforward interpretation of the home rule provisions of the New York State Constitution resulted in a loss of authority for New York City vis-à-vis the state legislature, as local transportation in New York City was determined to be a "state concern" no matter what. Yet the soda ban case, a decision founded upon administrative law, expressed deference to the New York City Council and held that the inaction of the New York City Council deprived the New York City Board of Health of the ability to enact a local public health ordinance.

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[66] *See* James D. Cole, *Constitutional Home Rule in New York: "The Ghost of Home Rule,"* 59 ST. JOHN'S L. REV. 713, 713 n.4 (1985).

[67] *Id.* at 713–15, 718.