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THE LIMITS OF STATE INTERVENTION IN A MUNICIPAL FISCAL CRISIS

I. Introduction

Municipal fiscal crises are becoming more frequent, causing the tradition of local control to be questioned. The problems plaguing New York City are but one example of this nation-wide trend.

In order to aid the City in overcoming its fiscal crisis, New York State has created two novel agencies, the Municipal Assistance Corporation (MAC)[1] and the Emergency Financial Control Board.[2] MAC's major purpose is to aid the City in meeting its financial requirements,[3] while the Control Board's main function is to monitor the City's spending.[4] One accomplishment of these two organizations has been the implementation of drastic austerity measures that have gone far towards remedying the City's fiscal situation.[5]

Thus far, both MAC and the Control Board have successfully withstood several court challenges.[6] However, the powers of these agencies raise certain questions concerning the limits of state control over a municipality in a fiscal crisis.[7] Furthermore, there is the additional question of whether the City has the power to implement certain of the measures ordered by MAC and the Control Board.[8] This Note will examine the legal bases for the creation of these agencies and evaluate the City's ability to comply with their directives.

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1. New York State Municipal Assistance Corporation Act, N.Y. Sess. Laws chs. 168-69 (McKinney 1975) (codified at N.Y. PUB. AUTH. LAW §§ 3001-40) (McKinney Supp. Pamphlet 1975).

2. Act of Sept. 9, 1975, N.Y. Sess. Laws chs. 868-70 (McKinney 1975). [hereinafter cited as Emergency Act].

3. N.Y. PUB. AUTH. LAW § 3031 (McKinney Supp. Pamphlet 1975).

4. Emergency Act ch. 868 § 7.

5. N.Y. Times, Feb. 2, 1976, at 1, col. 1.

6. Wein v. State of New York, No. 58 (Ct. App. March 23, 1976); *In re* Subway-Surface Supervisors Ass'n, 175 N.Y.L.J. 12 (Sup. Ct. March 3, 1976); Flushing Nat'l Bank v. Municipal Assistance Corp., 84 Misc. 2d 976, 379 N.Y.S.2d 978 (Sup. Ct. 1975); Flushing Nat'l Bank v. City of New York, 174 N.Y.L.J. 8 (Sup. Ct. Dec. 5, 1975).

7. *See* section II *infra*.

8. *See* section III *infra*.

II. State Intervention in a Municipal Crisis

A. The Scope of a Municipality's Autonomy

It is generally agreed that a municipal corporation such as New York City derives its power from two possible sources: the State Constitution and acts of the State Legislature.[9]

At one time, there was a third theory concerning the source of local authority. This doctrine was called "the inherent right of self-government"[10]—a belief that local government historically has its own rights, needing neither constitutional nor statutory authorization to exist. In 1923, the United States Supreme Court rejected this theory.[11]

The dominant view of municipal corporations at the present time is that they are "mere subdivisions" of the state and may thus do only that which the State allows.[12] In *Atkin v. Kansas*[13] the Supreme Court accepted this view of municipal government. *Atkin* concerned a Kansas statute which restricted the working hours of municipal employees in Kansas cities and towns. The Supreme Court upheld the statute, reasoning that since each municipality exists subject to the will of the state, the state could determine city policy as it saw fit.[14] It deemed the authority of state over city absolute, "being subject only to the fundamental condition that the collective and individual rights of the people of the municipality shall not thereby be destroyed."[15]

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9. *See* Vanlandingham, *Municipal Home Rule in the United States*, 10 WM. & MARY L. REV. 269 (1968) [hereinafter cited as Vanlandingham].

10. *See* People *ex rel.* Rodgers v. Coler, 166 N.Y. 1, 12-13, 59 N.E. 716, 719 (1901); Rathbone v. Wirth, 150 N.Y. 459, 467, 45 N.E. 15, 17 (1896).

11. Trenton v. New Jersey, 262 U.S. 182 (1923). The Court held that "[i]n the absence of state constitutional provisions safeguarding it to them, municipalities have no inherent right of self-government which is beyond the legislative control of the State." *Id.* at 187 (footnote omitted). Interestingly the issue in *Trenton* was freedom to contract. The Supreme Court held that freedom to contract did not operate in behalf of governmental agencies and political subdivisions, such as municipal corporations, so as to inhibit the legislature from limiting or prohibiting their right of contract. *Id.* at 192. *See also* Minot Special School Dist. No. 1 v. Olsness, 53 N.D. 683, 208 N.W. 968 (1926).

12. *See* Vanlandingham, *supra* note 9.

13. 191 U.S. 207 (1903).

14. *Id.* at 221-22.

15. *Id.* at 221; *accord*, Williams v. Eggleston, 170 U.S. 304, 310 (1898); Barnett v. Denison, 145 U.S. 135, 139 (1892); United States v. Railroad Co., 84 U.S. (17 Wall.) 322, 329 (1872); *cf.* Williams v. Baltimore, 289 U.S. 36, 40 (1933) where the Court held that a municipal

Although the language of *Atkin* broadly limits local autonomy, a municipality does have certain rights which the state legislature may not abolish, *i.e.* those granted directly by the state constitution.[16] These direct grants of power are known as "home rule" provisions. While an exact definition of "home rule" has never been universally accepted, one popular definition says it is "the autonomy of local government in the sovereign state, over all purely local matters."[17]

B. State Powers v. City Powers

The focal point of the state-city relationship is the extent of the state legislature's superior authority over the municipal corporation.

1. MAC and the Emergency Financial Control Board

After months of unsuccessful attempts to restore investor confidence in New York City, Governor Carey proposed a plan calling for a partial State takeover of the task of financing the City. The resulting June, 1975 legislation created MAC.[18]

In return for marketing bonds and for supplying the City with short-term financing, MAC called for certain fiscal restraints by the City. MAC retained the right to review the municipality's financial records in order to ascertain whether those restraints were in fact being implemented.[19] Although disagreement over budgetary policy did not materialize,[20] the MAC legislation provided remedies if the City did not agree to the fiscal changes MAC deemed necessary.[21]

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corporation has no privileges or immunities which it may invoke against state legislation affecting it.

16. It has been observed that "[i]f a power is conferred on a municipal corporation by a provision of the state constitution, the legislature has no power to impose restrictions or limitations on that power." 2 E. McQUILLIN, MUNICIPAL CORPORATIONS § 4.06, at 21 (3d ed. 1966) [hereinafter cited as McQUILLIN]. *See* Baldwin v. Buffalo, 6 N.Y.2d 168, 173, 160 N.E.2d 443, 445, 189 N.Y.S.2d 129, 132 (1959).

17. MASS. SEN. DOC. No. 950, at 35 (1965) (Report Relative to Home Rule).

18. New York State Municipal Assistance Corporation Act, N.Y. Sess. Laws chs. 168-69 (McKinney 1975) (codified at N.Y. PUB. AUTH. LAW §§ 3001-40 (McKinney Supp. Pamphlet 1975)).

19. N.Y. PUB. AUTH. LAW § 3039 (McKinney Supp. Pamphlet 1975). The section provides that MAC may conduct periodic review of the city's records, accounts, budgets, forecasts, etc., using its own or state employees as reviewers. The city officers and employees are to cooperate fully with the MAC reviewers and are to always be available to MAC. *Id.*

20. N.Y. Times, July 30, 1975, at 1, col. 8.

21. N.Y. PUB. AUTH. LAW § 3040 (McKinney Supp. Pamphlet 1975) provides: (1) for

Those remedies, though ambiguous in part, made clear MAC's paramount authority over the municipality's expenditures.[22]

Within two months after its creation, MAC experienced difficulty in selling its bonds. The financial community was apparently unmoved by the austerity measures worked out by the City and MAC.[23] To meet the newest financial difficulties, the Governor proposed legislation which would help finance the City, but which required a virtual takeover of the City's budgetary powers. In September, 1975, this legislation was signed into law.[24]

The resulting law provided short-term funding for the City and created the Emergency Financial Control Board,[25] a state-dominated group consisting of the Governor, the State and City Comptrollers, the Mayor, and three appointees of the Governor. The purpose of the Board was to develop a financial plan in conjunction with the City. It had ultimate "rights of approval, disapproval and modification."[26] Whereas MAC has no *express right* to modify financial plans,[27] the Emergency Control Board was given specific powers to implement its own ideas of fiscal constraint.[28] All city contracts were to comply with the Control Board's financial plan;[29] and if they failed to meet with board approval, they were voided.[30] Municipal

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prompt submission of an expense report by the City to MAC; (2) that if such report reflects a policy not agreed to by the MAC Board of Directors, the Board shall promptly notify the Mayor for the purpose of reviewing an alternate policy; (3) if corrective action is not taken, the MAC Board shall send a "determination of noncompliance" to the Governor, the Legislature, the State Comptroller, the Mayor, Board of Estimate, City Comptroller, and the City Council and shall disclose such determination to the public; and (4) MAC may exercise all rights and remedies provided by law.

22. The remedies available to MAC in the event of the Mayor's refusal to accede to MAC's conditions are no doubt intentionally unclear. Particularly unclear is the idea that MAC has all rights and remedies provided by law. Since the MAC legislation was without actual precedent, the drafters no doubt were leaving an avenue available for imposing MAC's budgetary will on the City of New York, without specifically detailing what that avenue was or could be. *See id.* § 3040(4).

23. The austerity plan included a wage freeze for municipal employees, elimination of many positions, a transit fare increase, and a reduction in the City University budget. N.Y. Times, July 30, 1975, at 1, col. 8.

24. Emergency Act.

25. *Id.*

26. *Id.*, ch. 868 § 2(§7(1)(a)(iv)).

27. *See* text accompanying notes 19-22 *supra*.

28. Emergency Act, ch. 868 § 2 (§8(3)(e)).

29. *Id.* § 2 (§ 7(1)(e)).

30. *Id.* § 2 (§ 7(1)(e)(iii)).

employees' salary increases were suspended;[31] all expenses required approval of the Control Board.[32] Furthermore, the Control Board was authorized to receive all City funds; and, having a practical stranglehold on the City, could virtually supersede the municipal government as sole comptroller of City finances.[33]

Such provisions are of questionable constitutionality. The legality of "fiscal emergency" legislation depends, to a large degree, on whether the state constitution has a "home rule" provision, and, if it does, the scope given it by state courts.[34]

2. Home Rule and the Right to Self-Government

Home Rule powers differ from other municipal powers because they are derived from a state constitution and therefore cannot be subverted at will by the state legislature.

The New York Home Rule provision, Article IX of the State Constitution, provides that "[a]ll officers of every local government whose election or appointment is not provided for by this constitution shall be elected by the people of the local government, or of some division thereof, or appointed by such officers of the local government as may be provided by law."[35] The powers, duties, qualifications, number, mode of selection and removal, terms of office, and compensation of municipal officers and employees are within the municipal corporation's authority.[36] The most debated part of New York's Home Rule law states that matters concerning the "property, affairs or government" of the municipality are exclusively local and subject to the municipality's control.[37]

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31. *Id.* § 2 (§ 10(1)).

32. *Id.* § 2 (§ 11(1)). Section 11(3) provided a penalty of suspension for non-compliance. Section 41-a appoints a special deputy comptroller for the City of New York to assist the Control Board. There are many other provisions of the Act which are not germane to this discussion.

33. *See id.* § 2 (§ 7(1) (2)).

34. *See generally* H. McBAIN, THE LAW AND PRACTICE OF MUNICIPAL HOME RULE (1st ed. 1916); Vanlandingham, *supra* note 9.

35. N.Y. CONST. art. IX, § 1(b) (officer provision).

36. *Id.* § 2(c)(1). This section while giving the municipality control over its officers and employees does not specifically exclude state control.

37. *Id.* § 2(b) ("property, affairs or government" provision). Section 2(b)(2) provides that in order for the State legislature to pass bills concerning the "property, affairs or government" of a municipality, the Mayor must specifically request such special legislation.

An interesting question concerns such a request by the Mayor. What standards are to be used regarding the request? Caparco v. Kaplan, 38 Misc. 2d 1058, 237 N.Y.S.2d 448 (Sup.

People ex rel. Town of Pelham v. Village of Pelham[38] is an early case which illustrates the general scope of the "officers" provision. In *Pelham* the New York Court of Appeals held that a state-created tax act, passed specifically for Westchester County,[39] violated home rule by removing from Westchester's local officers a right associated with local self-government,[40] *i.e.* the right to the local assessment of property values. The court interpreted the "officers" provision of the constitution as including not only the right to elect local officers, but the right to preserve their traditional powers and functions, so long as such powers remained local in nature.

In defining the practical usage of the home rule provision, New York courts have limited the application of the "officers" provision to cases where traditionally local powers have been seized from local officials, only to be given to existing state officials who subsequently exercised them.[41] This limited application was demonstrated by judicial refusal in *People v. Bradley*[42] to apply the "officers" provision to the case of a state officer whose position encompassed "new" local duties.[43]

Bradley involved a legislative act creating a railroad terminal commision for the City of Buffalo. The City contended that the state-appointed commission usurped powers normally associated with local officials, thereby violating the "officers" provision. The court of appeals rejected this argument, reasoning that commission members were "new officers" with "essentially new duties" and therefore they did not substantially interfere with the autonomy of

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Ct. 1963), *rev'd on other grounds*, 20 App. Div. 2d 212, 245 N.Y.S.2d 837 (4th Dep't 1964) held that an attack made on legislation on the grounds of an inadequate request by the Mayor was prohibited. A request such as a city message is not subject to review on the ground that the alleged necessity provoking the request did not exist or was not properly established by facts recited. *Id.* at 1066-67, 237 N.Y.S.2d at 456-57.

38. 215 N.Y. 374, 109 N.E. 513 (1915). The act took the task of collecting taxes from individual towns and gave this assignment to a receiver who would be responsible for the collection of all state and local taxes. *Id.* at 378, 109 N.E. at 514.

39. *Id.* at 377, 109 N.E. at 513.

40. *See* text accompanying note 36 *supra*.

41. *See, e.g.*, County of Cayuga v. McHugh, 4 N.Y.2d 609, 152 N.E.2d 73, 176 N.Y.S.2d 643 (1958); Sun Printing & Publishing Ass'n v. City of New York, 152 N.Y. 257, 46 N.E. 499 (1897).

42. People *ex rel.* Simon v. Bradley, 207 N.Y. 592, 101 N.E. 766 (1913).

43. *Id.* at 620, 101 N.E. at 775.

local officials.[44] The court distinguished between the performance of "essentially new duties," meaning that the essence of the officer's job is new, and the performance of most of a local officer's former duties.[45]

MAC and the Control Board do not appear to be entirely consistent with prior law concerning the "officers" provision of the state constitution. By taking final budgetary power from the municipality, the legislature may well be violating what one court has called "the obvious purpose" of the home rule law, the right to have local offices administered by locally elected officers.[46] Furthermore, the characterization of MAC and the Control Board as "new officers" performing[47] "new duties" to circumvent the "officers" provision of Article IX is strained. Even with the temporary nature of MAC and the Board, it can be argued that they perform only functions previously performed by city officials and they reduce the powers of those local officials substantially.[48]

The legislation creating MAC and the Control Board should also be examined in respect to the "property, affairs or government" provision of the constitution.[49] Under this provision, a court must decide what is a substantially local concern, and what is of statewide significance.

In *Baldwin v. City of Buffalo*[50] the court of appeals held a local

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44. *Id.*

45. *Id.* For a later affirmation of this distinction, see Prescott v. Ferris, 251 App. Div. 113, 295 N.Y.S. 818 (4th Dep't 1937), which involved the creation of a Tax Review Board for the City of Syracuse, by the State Legislature. The court held that since the board members would be assuming duties previously performed by city assessors the board members in effect would be city officers and under the "officers" provision, city officers cannot be appointed by the state. *Id.* at 116-17, 295 N.Y.S. at 823. *See* also People *ex rel.* Met St. Ry. v. Tax Comm'rs, 174 N.Y. 417, 435, 67 N.E. 69, 72 (1903), *aff'd*, 199 U.S. 1 (1905); People v. Raymond, 37 N.Y. 428 (1868).

46. People *ex rel.* Williamson v. McKinney, 52 N.Y. 374, 378 (1873). However, courts have said that subject to constitutional restrictions, the legislature may do what it thinks best with a public office or officer. Koch v. City of New York, 152 N.Y. 72, 46 N.E. 170 (1897); Nichols v. MacLean, 101 N.Y. 526, 5 N.E. 347 (1886); Long v. City of New York, 81 N.Y. 425 (1880).

47. People *ex rel.* Bolton v. Albertson, 55 N.Y. 50 (1873).

48. *Id.* at 56-57. *See also* Lanza v. Wagner, 11 N.Y.2d 317, 183 N.E.2d 670, 229 N.Y.S.2d 380, *appeal dismissed,* 371 U.S. 74 (1962) which stated that the purpose of the home rule provision is to preserve for the cities, towns, and villages the right to select their local officers with the general functions associated with such offices. *Id.* at 325, 183 N.E.2d at 674, 229 N.Y.S.2d at 386.

49. N.Y. CONST. art. IX, § 2(b)(2).

50. 6 N.Y.2d 168, 160 N.E.2d 443, 189 N.Y.S.2d 129 (1959).

law involving alteration of city council ward boundaries to be within the home rule constitutional provision guaranteeing local control over the "property, affairs or government" of a municipality. In determining whether an act is local, the court reasoned that weight should be given to historical considerations, and it concluded that councilmanic boundaries were traditionally within the exclusive province of local authorities.[51]

In *Adler v. Deegan*[52] a multiple-dwelling law was held to be a statewide concern and therefore not violative of home rule. While admitting the difficulty in allocating interests between the state and municipality, Chief Judge Cardozo stated that the maintenance of life and health is always a state concern, even though its effect is essentially on the municipality.[53] That court did, however, clearly limit its holding to the social element; the need for adequate housing.

Another case frequently cited to show the breadth of state concern is *Robertson v. Zimmermann*[54] which involved the state's creation of a sewer authority for the City of Buffalo. That case, however, is clearly distinguishable from New York City's predicament. Not only was public health, rather than fiscal integrity involved, but there was no violation of the "officers" aspect of home rule since all members of the Sewer Authority were to be appointed by the Mayor of Buffalo.

Courts outside New York have been inconsistent in determining what is a local and what is a statewide concern. For example, in some courts the environment has been called a statewide concern,[55] while "zoning" has been characterized as local.[56] As a further example of confusion, the regulation of a police force has been categorized as both.[57]

Similar problems have plagued courts in trying to determine

51. *Id.* at 173-74, 160 N.E.2d at 445-46, 189 N.Y.S.2d at 133.

52. 251 N.Y. 467, 485, 167 N.E. 705, 711 (1929).

53. *Id.* at 485, 167 N.E. at 711 (concurring opinion).

54. 268 N.Y. 52, 196 N.E. 740 (1935).

55. Chicago v. Pollution Control Bd., 59 Ill. 2d 484, 322 N.E.2d 11 (1974).

56. *See* Rochester Poster Advertising Co. v. Brighton, 49 App. Div. 2d 273, 374 N.Y.S.2d 510 (4th Dep't (1975)).

57. *Compare* Popper v. Broderick, 123 Cal. 456, 56 P. 53 (1899) *with* Lossman v. Stockton, 6 Cal. App. 2d 324, 44 P.2d 397 (3d Dept. 1935). *See* Kansas City v. J.I. Case Threshing Mach. Co., 337 Mo. 913, 87 S.W.2d 195 (1935).

what acts affecting municipal employees are of local concern. Generally, the decision in each case depends upon which aspect of municipal employment is involved. Most home rule decisions have concluded that hours, wages,[58] qualifications, and appointment are local concerns.[59] But, the characterization of municipal employment as a whole has been far from uniform.[60]

The unusual quality of the City's current plight must always be noted. Cases allowing the state to enact legislation in traditional areas such as police, fire protection, and health, usually involved state attempts to regulate or bolster the services.[61] Fiscal emergencies have never before been so extreme; and, the issue has never before been considered in the context of state regulation to enhance the general welfare.[62]

Undoubtedly, there is an enormous difference between allowing a state to set minimum qualifications for a police officer, and allowing the state to fire him. If one assumes that the fiscal integrity of a subdivision is a legitimate state concern, does that necessarily negate the municipality's uniquely local concern for the protection of its own citizenry? *Adler v. Deegan* stated that "health and safety" is always a state concern regardless of home rule.[63] But that case and all others like it dealt with protecting "health and welfare," not with decreasing such protection through making and breaking municipal employee contracts.[64] A new problem arises then in defining "health and welfare." For the present, it appears that fiscal stability is being given priority over municipal services.

Suits challenging the emergency legislation have been directed at specific provisions rather than the entire statutory scheme.[65] More-

58. Holland v. Bankson, 290 N.Y. 267, 49 N.E.2d 16 (1943); Allmendinger v. City of New York, 182 Misc. 142, 46 N.Y.S.2d 641 (Sup. Ct. 1944), *aff'd*, 269 App. Div. 691, 54 N.Y.S.2d 392 (1st Dep't), *aff'd*, 295 N.Y. 644, 64 N.E.2d 712 (1945).

59. 1943 N.Y. ATT'Y GEN. OP. 419.

60. *Compare* Caparco v. Kaplan, 20 App. Div. 2d 212, 245 N.Y.S.2d 837 (4th Dep't 1964) (municipal civil service is a matter relating to the "property, affairs, or government of a city") *with* Buffalo v. New York State Pub. Employment Relations Bd., 80 Misc. 2d 741, 363 N.Y.S.2d 896 (Sup. Ct.), *aff'd*, 37 N.Y.2d 19, 332 N.E.2d 290, 371 N.Y.S.2d 404 (1975) (paramount authority in relation to municipal employees is in the State Legislature).

61. *See* text accompanying notes 52-54 *supra*.

62. *See* Section III *infra*.

63. 251 N.Y. 467, 475, 167 N.E. 705, 708 (1936).

64. *See* Admiral Realty Co. v. City of New York, 206 N.Y. 110, 99 N.E. 241 (1912).

65. *See* text accompanying notes 68-71 *infra*.

over, they have been based on state and federal constitutional provisions other than "home rule."[66]

Thus far, this litigation has been unsuccessful. The suspension of the City's right to collect sales and use taxes was upheld as consistent with the City's responsibility to appropriate sufficient money to meet its credit obligations.[67] In a New York Court of Appeals decision, the state's constitutional prohibition against state loans or gifts was found not applicable to the lending of state funds to the City.[68] Finally, suits brought under impairment of contract theories, have unsuccessfully challenged the moratorium on the enforcement of city notes[69] and the suspension of wage increases for public employees.[70] In upholding these two procedures, courts have taken judicial notice of the City's fiscal emergency and the implicit power of the State to safeguard the public welfare.[71]

At least one court has recognized the connection between the State's financial well-being and that of the City's fiscal crisis.[72] When confronted with this notion, home rule arguments become somewhat untenable. Once the actions of a municipality have statewide effect, they can no longer be defended as local in nature. This may account for the absence of home rule arguments in the suits brought against MAC and the Control Board. However, it cannot be gainsaid that traditional notions of "home rule" have been undermined by the creation of both agencies.

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66. *See, e.g.*, Wein v. State of New York, No. 58 (N.Y. Ct. App. March 23, 1976). (N.Y. CONST. art. VII, § 8 which provides that credit of the State shall not "be given or loaned to or in aid of any individual, or public or private corporation . . . ."); *In re* Subway-Surface Supervisors Ass'n 174 N.Y.L.J. 12 (Sup. Ct. March 3, 1976) (U.S. CONST. art. I, § 10 which prohibits a state from enacting a law impairing contract obligations; N.Y. CONST. art. V, § 7 which prohibits impairment of pension benefits for public employees).

67. Flushing Nat'l Bank v. City of New York, 174 N.Y.L.J. 8 (Sup. Ct. Dec. 5, 1975).

68. Wein v. State of New York, No. 58 (N.Y. Ct. App. March 23, 1976).

69. Flushing Nat'l Bank v. Municipal Assistance Corp., 84 Misc. 2d 976, 379 N.Y.S.2d 978 (Sup. Ct. 1975).

70. *In re* Subway-Surface Supervisors Ass'n, 175 N.Y.L.J. 12 (Sup. Ct. March 3, 1976).

71. *E.g., id.*, Flushing Nat'l Bank v. Municipal Assistance Corp., 84 Misc. 2d 976, 379 N.Y.S.2d 978 (Sup. Ct. 1975).

72. Wein v. State of New York, 84 Misc. 2d 453 (Sup. Ct. 1975), *aff'd*, No. 58 (Ct. App. March 23, 1976). The court observed:

> The amelioration of a State financial crisis arising from the City's financial difficulties is *a proper State purpose* which justifies the State in borrowing money to meet what the Legislature regards as a State emergency.

Id. at 459.

III. Fiscal Crisis, City Powers, and the Municipal Worker

A large part of New York City's budget consists of labor costs. Therefore, in seeking ways to reduce expenditures, the City has eliminated various municipal employee positions.

With limited exceptions, an employer can fire an employee at will absent contractual or statutory protection.[73] The municipal employee is no exception to this rule. However, most municipal employees in New York State are protected by the Civil Service Law[74] and therefore cannot be individually discharged unless the employer complies with certain procedures.[75] It has long been held proper to abolish positions due to economic reasons.[76]

A. Collective Bargaining Law

A less settled question, however, is whether a municipality may abolish jobs protected by collective bargaining agreements.[77] One possible source of authority is the Collective Bargaining Law[78] of the New York City Administrative Code which covers employee negotiations with the City. Generally the law refers to ordinary labor negotiations and therefore would not appear relevant to austerity cutbacks.[79] However, section 1173-4.3(b) does allow the city to "relieve its employees from duty because of lack of work or other legitimate reasons . . . ."[80] In *DeLury v. City of New York*,[81] an action brought on behalf of the Uniformed Sanitation Association to enjoin the City from laying off sanitation men, the City argued that "lack of work" includes an implication of "lack of funds" as a legitimate reason for firing servants.[82] The supreme court agreed, stating that[83]

73. *See* Martin v. New York Life Ins. Co., 148 N.Y. 117, 121, 42 N.E. 416, 417 (1895). The employer, however, may forfeit this right if the dismissal was done in bad faith, with malice, or as a retaliatory measure. Mange v. Beebe Rubber Co., ___ N.H. ___, 316 A.2d 549 (1974).

74. N.Y. CIVIL SERVICE LAW art. 5 (McKinney 1973), *as amended*, (McKinney Supp. 1975).

75. *Id.*

76. *See, e.g.*, Allen v. Lindsay, 66 Misc. 2d 705, 321 N.Y.S.2d 740 (Sup. Ct. 1971); Wiptler v. Klebes, 164 Misc. 220, 298 N.Y.S. 353 (Sup. Ct. 1937), *rev'd*, 260 App. Div. 228, 22 N.Y.S.2d 1 (3d Dep't), *rev'd*, 284 N.Y. 248, 30 N.E.2d 581 (1940).

77. *See* text accompanying notes 78-124 *infra*.

78. NEW YORK, N.Y. ADMIN. CODE ch. 54 § 1173-1.0-13.0 (1975).

79. *See, e.g., id.* §§ 1173-4.2 (good faith bargaining), 1173-5.0 (union certification), 1173-7.0 (mediation and impasse panels).

80. *Id.* § 1173-4.3(b).

81. 83 Misc. 2d 202, 371 N.Y.S.2d 964 (Sup. Ct. 1975), *aff'd*, 51 App. Div. 2d 288, 381 N.Y.S.2d 236 (1st Dep't 1976).

82. 48 App. Div. 2d at 605, 378 N.Y.S.2d at 58.

83. 83 Misc. 2d at 208, 371 N.Y.S.2d at 970.

> [t]here can, of course, be no question that the unprecedented financial crisis facing the City is a "legitimate reason" under Section 1173 of the Administrative Code upon which to base the layoffs being made by the city.

Section 1173-4.3(b) may not be as supportive of the City's position as the court suggests. It addresses the scope of management rights in collective bargaining and itemizes those areas which are within the City's perogative.[84] It is clear therefore, that the City could refuse to bargain on job security, but once a job guarantee is provided in a contract it is not so obvious that the City may use section 1173-4.3(b) to remove it.[85]

A similar issue has been litigated in several cases outside New York City where the administrative code is not controlling.[86] These cases have raised the question whether an austerity cutback of positions is subject to arbitration under a collective bargaining agreement, and have turned on whether austerity cutbacks or staff size are permissible terms or conditions of employment.[87]

A lower court hearing a case involving the abolition of school district positions held that "[t]he creation and abolition of positions within a school district, in good faith, are functions of boards of education."[88] The court reasoned that under the State Civil Service Law the reduction of a work force for economic reasons does not constitute a term or condition of employment and is not a proper subject of a collective bargaining agreement since "[t]he Board of Education may not delegate its authority [to an arbitration panel]

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84. NEW YORK, N.Y. ADMIN. CODE ch. 54 § 1173-4.3(b) (1975).

85. *See* DeLury v. City of New York, 48 App. Div. 2d 595, 378 N.Y.S.2d 49 (1st Dep't 1975). Judge Murphy in his dissent stated:

> But even assuming, *arguendo*, as the city contends, that lack of funds is the statutory equivalent of "lack of work" . . . we do not read [section 1173-4.3(b)] as prohibiting, either explicitly or by plain and clear language, an agreement providing for secure employment for a specified term. At most, subdivision b of section 1173-4.3 of the Administrative Code permits the city to refuse to bargain on a term agreement without fear of incurring sanctions for the commission of an improper practice.

Id. at 605, 378 N.Y.S.2d at 58 (citations omitted).

86. *See, e.g.*, Susquehanna Valley Cent. School Dist. v. Susquehanna Valley Teachers Ass'n., 37 N.Y.2d 614, 339 N.E.2d 132, 376 N.Y.S.2d 427 (1975); West Irondequoit Teachers Ass'n. v. Helsby, 35 N.Y.2d 46, 315 N.E.2d 775, 358 N.Y.S.2d 720 (1974); Board of Educ. v. Associated Teachers of Huntington, Inc., 30 N.Y.2d 122, 282 N.E.2d 109, 331 N.Y.S.2d 17 (1972).

87. 37 N.Y.2d at 617, 339 N.E.2d at 133, 376 N.Y.S.2d at 429.

88. Carmel Central School Dist. v. Carmel Teachers Ass'n, 76 Misc. 2d 63, 66, 348 N.Y.S.2d 665, 669 (Sup. Ct. 1973).

to create or abolish positions."[89]

This position was seemingly overruled by the New York Court of Appeals in *Susquehanna Valley Central School District v. Susquehanna Valley Teachers Association.*[90] There a grievance contesting the school district's elimination of positions was held arbitrable by the court.[91] Chief Judge Breitel distinguished between issues which must be addressed in collective bargaining and those which may be a subject of bargaining at the discretion of the parties.[92] Calling "staff size" a legitimate issue which may be negotiated at the bargaining table, the court held the elevation of positions to be arbitrable.[93]

In a recent case before the appellate division, however, the rule of *Susquehanna* was ignored. *Schwab v. Bowen*[94] involved a contract which specifically excluded economy or abolition of position as grounds for dismissal.[95] The lower court decision holding good faith austerity cutbacks not to be arbitrable[96] was upheld. Relied on for authority in that case were two decisions by the New York State Public Employment Relations Board (PERB) which, according to the court, held that the reduction of a work force for economic reasons does not constitute a term or condition of employment and is not a proper subject for a collective bargaining agreement.[97] However, the *Schwab* court clearly misunderstood the PERB decisions which said that the job reduction issue is not a mandatory subject of bargaining. The Board did not say that it was not a proper subject for an agreement, but rather held that the parties could voluntariy agree to include such a provision.[98] This is of course consistent with the *Susquehanna* rationale. Nevertheless the *Schwab* court, in

89. *Id.*

90. 37 N.Y.2d 614, 339 N.E.2d 132, 376 N.Y.S.2d 427 (1975).

91. *Id.* at 617, 339 N.E.2d at 133, 376 N.Y.S.2d at 430.

92. *Id.*

93. *Id. See also* Board of Educ. v. Associated Teachers of Huntington, 30 N.Y.2d 122, 282 N.E.2d 109, 331 N.Y.S.2d 17 (1972).

94. ___ App. Div. 2d ___, 379 N.Y.S.2d 111 (2d Dep't 1976), *aff'g* 80 Misc. 2d 763, 363 N.Y.S.2d 434 (Sup. Ct. 1975).

95. 80 Misc. 2d at 764, 363 N.Y.S.2d at 435.

96. *Id.* at 766, 363 N.Y.S.2d at 437.

97. *In re* Yorktown Faculty Ass'n, 7 N.Y. PERB 4503 (1974); *In re* City of White Plains, 5 N.Y. PERB 3008 (1972).

98. *In re* Yorktown Faculty Ass'n, 7 N.Y. PERB 4503, 4513-14 (1974); *In re* City of White Plains, 5 N.Y. PERB 3008, 3014 (1972).

reaching its decision, ignored the distinction between subjects which cannot be negotiated and those which are proper but not mandatory subjects of bargaining. Since *Susquehanna* and *Schwab* seem to be in direct conflict,[99] a clarification by the court of appeals is no doubt imminent.

B. Emergency Powers

An alternative source of authority for abolishing municipal employee positions is a municipality's "emergency powers."[100] This theory allows a mayor, in a time of crisis, to impose sanctions otherwise not within his authority.[101] The theory is an adjunct of a city's "police power" and its duty to maintain the health, welfare, and safety of its citizens.[102] The limits of this doctrine have yet to be determined.

The New York City Administrative Code contains an "emergency" provision, but this section concerns measures to guard against "an act of violence or a flagrant and substantial defiance . . . of public authority . . . ."[103] Taking the words of the Code at face value, it would seem that "emergency" includes only physical threats to the well-being of the City.[104]

Apart from the possible assertion of the "emergency powers" theory,[105] the Mayor may make massive cutbacks under a theory of "police power."[105] These powers permit severe measures in

99. One important difference between *Schwab* and *Susquehanna* is that the former involved a municipality in fiscal crisis, while the latter did not. There may indeed be a different attitude on the part of the court of appeals when the contracting city is having severe fiscal problems.

100. *See* Eagen v. Beame, 174 N.Y.L.J. 5 (Sup. Ct. Aug. 12, 1975); *In re* Vizzini, 174 N.Y.L.J. 13 (Sup. Ct. July 8, 1975).

101. *See* Eagen v. Beame, 174 N.Y.L.J. 5 (Sup. Ct. Aug. 12, 1975).

102. "While emergency does not create power, emergency may furnish the occasion for the exercise of power." Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398, 426 (1934).

103. NEW YORK, N.Y. ADMIN CODE § 8a-5.0 (1971).

104. That such emergency powers refer only to threats of physical violence and not fiscal crisis is implied by section 8a-8.0 of the Administrative Code which allows emergency measures to last only fifteen days (although renewable), clearly not the amount of time needed to deal with a fiscal emergency. Furthermore, the kinds of remedial measures called for in section 8a-6.0 such as the imposition of curfews, controls on liquor and on guns, do not encompass reactions to a fiscal crisis.

105. *See* text accompanying note 103 *supra*.

106. *See* text accompanying notes 108-14 *infra*.

order to protect the health, safety, and welfare of the citizens of the municipality.[107]

The exact breadth of a city's "police power" in a period of fiscal crisis remains unclear.[108] No doubt the resolution will turn on whether a budgetary problem, as opposed to a physical threat, is one that affects the "welfare" of the citizenry. Modern authority adopts a broad reading of "police power."[109] Whether such a broad interpretation is applicable to a fiscal crisis is a question which has not yet been answered.[110]

The New York General City Law provides that municipal corporations have only those powers expressly granted to them or implied from those expressly granted.[111] Courts have disagreed on the interpretation and applicability of these provisions in relation to the "police power" theory. One court has held that city contracts must be read in the spirit of the law, especially in relation to carrying out declared objectives and purposes of the municipal corporation.[112] However, it has also been held that the City is bound by the terms of a contract and thus no different in law than a business corporation or individual.[113]

New York City's Corporation Counsel has stated that a "broad" interpretation of "emergency" would contradict the provisions of the State Civil Service Law,[114] popularly known as the Taylor Law,[115] which governs the collective bargaining rights of all public

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107. *See* Flushing Nat'l Bank v. Municipal Assistance Corp., 84 Misc. 2d 976, 379 N.Y.S.2d 978 (Sup. Ct. 1975).

108. One court has held that "[t]he only restriction upon such power [the police power of a city] is that it must be necessary to the protection or promotion of some public interest or welfare . . . ." New Albany v. New Albany St. R.R., 172 Ind. 487, 490, 87 N.E. 1084, 1085 (1909).

109. N.Y. GEN. CITY LAW § 20(13) (McKinney 1968).

110. An examination of the cases that have challenged MAC and the Control Board indicates that the answer is "yes." *See* text accompanying notes 67-72. *supra.*

111. Syracuse Water Co. v. Syracuse, 116 N.Y. 167, 22 N.E. 381 (1889). This case dealt with a city's right to negotiate an exclusive contract with a water contractor. The court held that exclusive contracts were against public policy and hence were illegal absent a specific grant to negotiate such contracts.

112. Greenberg v. City of New York, 152 Misc. 488, 274 N.Y.S. 4 (Sup. Ct. 1934).

113. Whitestone Bridge Drive-In Theatre, Inc. v. O'Connell, 14 App. Div. 2d 51, 217 N.Y.S.2d 371 (1st Dep't 1961). Under this decision the City may be limited in expanding section 8a-5.0 of the Administrative Code beyond its clear reference to physical disruptions.

114. N.Y. Times, July 13, 1975, at 30, col. 1 (remarks of Bernard Richland, New York City Corp. Counsel).

115. Public Employees' Fair Employment Act, N.Y. CIVIL SERV. LAW, §§ 200-14

employees in the State of New York. Others have contended that since the Taylor Law does not mention removals for austerity purposes, but only those for cause, it is inapplicable to a municipal fiscal crisis and has no effect on the scope of a city's "emergency" powers.[116]

Much of the case law regarding "powers" during times of crisis has been formulated without reference to statutory authority.[117] An early case, *Lethbridge v. Mayor of New York,*[118] involved the firing of a non-civil servant from his civil service position, due to lack of funds. Ignoring any civil service—non-civil service distinction, the court held that Charter provisions for removal of public employees were inapplicable in times of budgetary distress.[119] Another early case, *Rosenthal v. Travis,*[120] held that even the requirement of giving notice to discharged employees was suspended if such discharges were for austerity reasons. The standard used in evaluating such decisions has been the City's "good faith" in reducing the work force for lack of funds.[121]

In the final analysis, the determinative issue may well be whether a budgetary emergency should have been anticipated at the time of the signing of the collective bargaining agreement.[122] Even under the *Lethbridge* and *Rosenthal* cases, if it can be shown that a fiscal crisis was not totally unanticipated, the City would not be allowed to impair existing contracts. The City through its collective bargaining agreements may have assumed the risk of change in financial circumstances by not providing for such an emergency in the contracts. This position was reinforced recently by a decision of

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(McKinney 1973), *as amended,* (McKinney Supp. 1975).

116. N.Y. Times, July 13, 1975, at 30, col. 1 (remarks of Councilman Edward Sadowsky).

117. N.Y. CONST. art. 5, § 6, *interpreted in* Wipfler v. Klebes, 284 N.Y. 248, 30 N.E.2d 581 (1940).

118. 133 N.Y. 232, 30 N.E. 975 (1892).

119. *Id.*

120. 169 App. Div. 203, 154 N.Y.S. 403 (1st Dep't 1915).

121. Colligan v. Williams, 91 Misc. 128, 154 N.Y.S. 329 (Sup. Ct. 1915). *See also* People *ex rel.* Corrigan v. Mayor of Brooklyn, 149 N.Y. 215, 225, 43 N.E. 554, 562 (1896).

122. Basically the rationale behind cases allowing austerity measures by a municipality has been one of "impossibility," defined by one court to be "impracticable," something which can only be done at an excessive and unreasonable cost. Transatlantic Financing Corp. v. United States, 363 F.2d 312 (D.C. Cir. 1966). *Transatlantic* held that an impracticable contractual obligation can be dismissed if (1) an unexpected contingency occurs, and (2) the risk of that contingency was not allocated by agreement or custom. *Id.* at 315. *See generally* J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS §§ 186-200 (1970).

New York City's Office of Collective Bargaining forbidding the Mayor from expanding summer hours for City employees.[123] That decision stated that "the situation in which the City finds itself is not a sudden unexpected happening of the kind normally associated with the word 'emergency.' "[124]

On the other hand, *Flushing National Bank v. Municipal Assistance Corporation* indicates that allegations of impairment of contract will be unpersuasive.[125] In upholding a moratorium placed on the enforcement of City notes,[126] the court relied on *Home Building & Loan Association v. Blaisdell*[127] and subsequent Supreme Court cases[128] that have upheld moratoriums on mortgage foreclosures under a "police power" theory.[129] The court, while recognizing certain distinctions in these cases,[130] stated that "there is no doubt that the same principles apply to the power of the Legislature over contracts made by the subdivisions of the State."[131] Thus the court held that the fiscal crisis which threatened the general welfare justified the resulting impairment of contracts.[132]

The case is significant for two reasons. First, its assumption that the State may affect contracts entered into by a municipality would appear to uphold MAC and the Control Board as not violative of the "home rule" provision of the New York Constitution.[133] However, *Flushing National Bank* is certainly not conclusive on this issue. It is one thing to allow the State to affect municipal contracts

123. N.Y. Times, July 13, 1975, at 30, col. 3.

124. *Id.*

125. 84 Misc. 2d 976, 379 N.Y.S.2d 978 (Sup. Ct. 1975).

126. *Id.* at 985, 379 N.Y.S.2d at 987.

127. 290 U.S. 398 (1934).

128. East New York Sav. Bank v. Hahn, 326 U.S. 230 (1945); Faitoute Iron & Steel Co. v. City of Asbury Park, 316 U.S. 502 (1942). *See also* City of El Paso v. Simmons, 379 U.S. 497 (1965); Klinke v. Samuels, 264 N.Y. 144, 190 N.E. 324 (1934).

129. "Numerous decisions . . . repudiated the notion which plaintiff here espouses that the contract clause (U.S. Const. Art. 1 sec. 10) presents a rigid bar to the protection of vital public interests, recognizing instead the power, and indeed, the duty of States to prevent the literal enforcement of contractual terms in order to protect the health, safety or welfare of their citizens." 84 Misc. 2d at 979, 379 N.Y.S.2d at 982.

130. The line of Supreme Court cases, *see* cases cited in note 128 *supra*, involved individuals and not subdivisions of the state as did *Flushing Nat'l Bank*.

131. 84 Misc. 2d at 981, 379 N.Y.S.2d at 984.

132. *Id.*

133. *See* text accompanying notes 61-64 *supra*.

because of "public welfare" considerations; it is quite another to substitute state agencies for the existing structure of a municipal government.[134]

Flushing National Bank is also significant because of the court's reverential treatment of the "emergency" theory. The case will not only be persuasive in challenges to future debt moratoriums but will most likely influence cases similar to those discussed earlier concerning layoffs under collective bargaining agreements.[135] One commentator has criticized the court's line of argument by noting that *Blaisdell* and its progeny involved insolvent parties while New York has a taxing power at its disposal that renders it incapable of being truly insolvent.[136] Whether this distinction is accepted by future courts will probably depend on the severity of the fiscal dilemma in question.

IV. Conclusion

As more fiscal crises plague American cities, the scope of available local remedial measures must be defined. The very lack of such measures is an invitation to state intervention which in turn raises many constitutional and practical problems. With respect to New York's experience, it appears that both MAC and the Control Board go far in eroding traditional notions of home rule and therefore are vulnerable to constitutional attack. *People ex. rel. Town of Pelham v. Village of Pelham* stated that home rule guarantees municipal officers the right to hold office with customary powers. Certainly it can be argued that budgetary decision-making comes within the scope of these powers. At the very least *Pelham* might require that city residents elect the three Control Board members currently ap-

134. The court in *Flushing Nat'l Bank* does seem to emphasize the importance of maintaining essential services in noting:

> Bankruptcy for the City of New York is not only financial disaster for the city but the note holders . . . would lose interest on their investment and a substantial portion of the principal as well. The many services that a municipality must provide would be so depleted as to cause danger to health, safety and the welfare of the public.

84 Misc. 2d at 984, 379 N.Y.S.2d at 987.

135. Under the facts of *Flushing Nat'l Bank*, impairing a contract appeared to hurt the public's "health, safety, and welfare." However, if through the elimination of civil service positions (and impairment of collective bargaining agreements) essential services were disrupted would the court choose the maintenance of services or financial stability? This is the question that *Flushing Nat'l Bank* doesn't answer.

136. Brecker, *Moratorium Act for the City: Is it Valid?*, 174 N.Y.L.J. 1 (Dec. 12, 1975).

pointed by the Governor or that City officials have a greater voice in their selection.

The most significant effect of the crisis may well be the extension of the "emergency" and "police" powers theories that have been pronounced by New York courts. The precedent set may cause future courts to take a carte blanche approach to austerity cutbacks less justified than those presently made. Such a development would not encourage sound long-term fiscal management by the City.

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