



Supporters of Airbnb. | AP Photo/Bebeto Matthews

Experts see weaknesses in home rule provisions

By **BILL MAHONEY** | 10/24/16 05:32 AM EDT

ALBANY — In its legal challenge to a new statute designed to crack down on illegal property rentals in New York City, Airbnb is arguing that the law “violates the home rule clause of the New York State Constitution.”

The commonly used brief definition of this clause is that state government is prohibited from enacting statutes impacting a specific municipality unless it gains that municipality’s consent. If home rule’s requirements were viewed only through that simple lens, the Airbnb statute would indeed raise eyebrows.

“The laws that they seek to increase the penalties for [violating] only affect buildings in New York City,” said attorney Roberta Kaplan, whose clients have included Airbnb. “It does

not affect any buildings outside of New York City.”

But the clause’s real-world impacts are significantly more complicated than the terse definition given above. Kaplan’s remarks came at a forum hosted by the Rockefeller Institute and Columbia Law School last Thursday to discuss the question of home rule in advance of next year’s vote on a constitutional convention, and most of the participants agreed that the current system has become both dated and burdened with conflicting judicial precedents.

“The current jurisprudence of the New York Court of Appeals on home rule is a mess,” Kaplan said.

Section 2 of Article IX of the state constitution gives local governments the power to pass laws relating to topics such as “the acquisition, care, management and use of its highways, roads, streets, avenues and property” and the “safety, health and well-being of persons or property” who live within the government as long as these laws aren’t inconsistent with the constitution or state statutes that apply to multiple municipalities.

The state can involve itself in these matters only if obtains prior approval from an affected locality or enacts a law that applies to an entire category of localities (for example, every county in the state).

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This relationship is reversed for matters of taxation, when counties need approval from the state before enacting new statutes.

There are also other provisions in the constitution that have an impact on what local governments can and can't do. Article VIII, for example, imposes a formula to determine how much debt a municipality can accrue. And a separate part of Article IX lays out provisions for how a locality can annex portions of another and details their powers of eminent domain.

This entire structure rests on a system of local governance that has gradually developed throughout the state's history. And given that the current language was written decades or even centuries ago, it might not be the best method of organizing a state where citizens' dealings with governments and the types of municipalities they live in have repeatedly changed over the years.

"It's not a system, because a system implies intelligent design," said SUNY New Paltz's Gerald Benjamin. "And it was not designed, it evolved."

This method of governance, which was created without any realization of future demographic trends, has resulted in a patchwork system in which most citizens have no idea what level of government they should approach when they have a problem with, for example, their water bill or local park.

"Fundamentally, what bothers me and upsets me the most is that they're antidemocratic," said Benjamin. "And they're antidemocratic because they create complexity in the elected officialdom in New York that prevents citizens from understanding who to approach ...

"When I was an elected official for 12 years and ultimately came out of the county government, I was stopped in the supermarket by people who most often didn't understand what I did and wanted to hold me accountable for the actions of governments that I had no sway in, because this complexity is confusing, it misdirects expectations and ill-informs

and misinforms their political and governmental behavior,” Benjamin added.

The current rules have also frequently been construed by the courts in a way that’s extremely constrictive of how much power localities have relative to the state.

Michael Cardozo, who served as former New York City mayor Michael Bloomberg’s corporation counsel, pointed to a number of occasions in which the city attempted to address problems that existed solely within its borders, but were forced to kowtow to Albany officials to get anything accomplished. This occurred in a number of areas, such as mayoral control of public schools, the failed bid to build a stadium on the West Side, congestion pricing and even gay rights.

“The City Council passed a law saying, ‘well, we can’t control marriage, but let’s have a rule that no city agency can enter into a contract with a company that doesn’t provide domestic partner benefits to its employees,’” Cardozo said. “Well, there’s a state law that says you have to enter into a contract with the lowest bidder. Well, how do you square those two? And the court said, ‘preemption, Mr. City Council,’” and blocked the city’s statute.

In this case, the city’s law conflicted with state statute, prohibiting it from acting. But in other instances, the Bloomberg administration was able to rest on this preemption case law to accomplish what the City Council didn’t want to do. Most notably, this occurred when the mayor wanted to set up a system of “green taxis” that could pick up riders in the outer boroughs, and the Council declined to act.

“The city went around the City Council and went to Albany,” Cardozo said, “and got the state Legislature to say yes, we’re going to have green cabs in the rest of New York City, and if they get a license then someone in Queens can hail a taxi. And that produced a very interesting lawsuit, and the state Court of Appeals said taxis of course are a concern of New York City, but they’re also the concern of the state because so many people come to New York City and therefore legislation is constitutional.”

Airbnb’s lawsuit seems to be written with this decision in mind, as it explicitly addresses the impact on tourists visiting the city.

The law “does not have any reasonable relationship to any area of substantial state concern,” the suit says. “First, it was enacted in response to local problems, and conflicts with the interest of out-of-City state residents. Indeed, the Act’s restrictions will serve to make it more difficult for out-of-City residents to find affordable housing while visiting the City.”

With cases like the one dealing with taxis, the constitution's limits are, at best, confusing and somewhat vague. It's also possible to argue they've been rendered meaningless.

"As that language has been construed, particularly in the green taxi case, it's basically been eradicated," Kaplan said.

If voters decide next November to launch a constitutional convention, what might a convention do to clarify and modernize home rule law? Columbia Law professor Richard Briffault laid out several suggestions.

Some of these involve clarifying the provisions of preemption discussed above. The constitution could explicitly spell out "the rules that govern limits on state intervention in respect to local matters."

It's also possible to give municipalities more fiscal autonomy.

"Local governments don't have the power to tax, that's authorized by the state," Briffault said. "It would be worth considering whether local governments should be given more freedom to set their own tax policies ... This is an area where you think that control by local voters, that local political control, would be reasonably effective at keeping local taxes under control."

And at the same time, constitutional amendments could limit how much localities need to pay for.

"If you think about the fiscal plight of most ... governments, you can look at one side of the coin is the limits on their collecting revenue; the other side of the coin is the costs and costs that are not under their control," Briffault said. "There are no limits for states to impose mandates on state localities, unfunded mandates. They require local governments to spend money, then don't give them the money to cover the costs. Some constitutions in some other states do address and bar unfunded mandates."

Despite these critiques, the idea that home rule is in need of a massive overhaul isn't universal.

"In the end, those problems are solvable outside a constitutional provision, and it would make much more sense to me to sort of fight it out on a more principled basis within the context of individual litigation than it would be to reinvent a very complex deal," said former assemblyman Richard Brodsky, a regular defender of legislative prerogative.

"I don't think the article is a hot mess," Brodsky said.

And many of the limitations on local power critiqued by other panelists are actually better off remaining with the state, Brodsky argued. He pointed to the topic of congestion pricing raised by Cardozo.

“Imposing a toll on people not from New York City, I think is significant,” Brodsky said. “The same is true of the commuter tax. The power of New York City to tax people who don’t live in New York City can be argued to be a good thing. I’m not suggesting otherwise, but it is a matter that requires a broader exercise of the plenary powers of the state to decide.”

And unfunded mandates are not necessarily evil or even a question of home rule, he argued.

“It may be a terrible system. But the sovereign eventually has the right to say to a local government, ‘you need to have a school district’ — that’s an unfunded mandate,” Brodsky said.

And notably, any discussion of home rule will likely open up related questions that are even more difficult to address.

“It’s hard to find a person who’s against the Forever Wild provision in the state constitution that ensures the Adirondacks and Catskills are preserved and kept forever wild, even though it has some mischievous consequences, like requiring people ... in Manhattan to vote if certain villages in the Adirondacks can improve their water systems,” said New Paltz’s Benjamin.

“I say that as an advocate of constitutional change, an advocate of a convention, because we have to realize that that’s likely to happen, and we have to prepare for it and understand it and try to accommodate what I think are the justifiable values and positions that will arise.”