



TOURO UNIVERSITY
JACOB D. FUCHSBERG LAW CENTER
Where Knowledge and Values Meet

Touro Law Review

Volume 8 | Number 3

Article 4

1992

Home Rule and the Secession of Staten Island: City of New York V. State of New York

Florence L. Cavanna

Follow this and additional works at: <https://digitalcommons.tourolaw.edu/lawreview>



Part of the [Constitutional Law Commons](#), [Courts Commons](#), [State and Local Government Law Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

Cavanna, Florence L. (1992) "Home Rule and the Secession of Staten Island: City of New York V. State of New York," *Touro Law Review*: Vol. 8: No. 3, Article 4.

Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol8/iss3/4>

This Notes and Comments is brought to you for free and open access by Digital Commons @ Touro Law Center. It has been accepted for inclusion in Touro Law Review by an authorized editor of Digital Commons @ Touro Law Center. For more information, please contact lrass@tourolaw.edu.

HOME RULE AND THE SECESSION OF STATEN ISLAND: *CITY OF NEW YORK v. STATE OF NEW YORK*

In *City of New York v. State of New York*,¹ the New York Court of Appeals held that chapter 773 of the Laws of 1989,² a “special law that prescribes a procedure for determining Staten Islanders’ interest in secession from New York City, and the basis on which they would wish such separation to be accomplished,”³ was not an “act in relation to the property, affairs or government”⁴ of the city of New York and, thus, did not require a home rule message⁵ under the New York State Constitution.⁶ Naturally, the question that comes to mind is, if a procedure that seeks to implement the secession of one of a city’s boroughs does not relate to the property, affairs or government of a city, what in fact does?⁷

Part I of this Note presents an overview of the development of

1. 76 N.Y.2d 479, 562 N.E.2d 118, 561 N.Y.S.2d 154 (1990).

2. Act of Dec. 15, 1989, ch. 773, 1989 N.Y. Laws 1563 (McKinney), amended by Act of Mar. 1, 1990 ch. 17, 1990 N.Y. Laws 22 (McKinney). Chapter 773, in pertinent part, asked the voters of the borough of Staten Island: “Shall a charter commission to provide for the separation of the borough of Staten Island from the city of New York and for the establishment of the city of Staten Island be created” *Id.* “If a majority answers yes, a commission composed of Staten Island residents and legislators will be organized to draft a proposed charter and consider any subject it deems relevant to the organization of a new city of Staten Island.” *City of New York*, 76 N.Y.2d at 483, 562 N.E.2d at 119, 561 N.Y.S.2d at 155.

3. *City of New York*, 76 N.Y.2d at 483, 562 N.E.2d at 118, 561 N.Y.S.2d at 154.

4. *Id.* at 483, 562 N.E.2d at 119, 561 N.Y.S.2d at 155 (quoting N.Y. CONST. art. IX, § 2(b)(2)).

5. See N.Y. CONST. art. IX, § 2(b)(2). A home rule message is a message from the governor that an emergency exists, which allows the legislature to enact a general or special law that relates “to the property, affairs or government of a local government.” *Id.*

6. *Id.*; *City of New York*, 76 N.Y.2d at 483, 562 N.E.2d at 118-19, 561 N.Y.S.2d at 154-55.

7. *City of New York*, 76 N.Y.2d at 491, 562 N.E.2d at 124, 561 N.Y.S.2d at 160 (Hancock, J., dissenting); see *infra* note 91 and accompanying text.

the constitutional home rule in New York. Part II analyzes the decision in *City of New York v. State of New York*. Part III examines the potential consequences of secession. Finally, Part IV examines how selected other states have dealt with municipal home rule powers.

I. HISTORICAL OVERVIEW OF NEW YORK'S HOME RULE

A. General vs. Special Laws

The notion of home rule⁸ was first embodied in the New York State Constitution of 1894.⁹ While establishing a distinction between "general city laws . . . which relate to all the cities of one or more classes"¹⁰ and "special city laws . . . which relate

8. See Judith A. Stoll, Note, *Home Rule and the Sherman Act After Boulder: Cities Between A Rock And A Hard Place*, 49 BROOK. L. REV. 259, 259 n.1 (1983) [hereinafter *Home Rule*]. "The term 'home rule' encompasses the various means by which local governments are empowered by the State to act autonomously in local matters." *Id.*; see also J.D. Hyman, *Home Rule In New York 1941-1965, Retrospect and Prospect*, 15 BUFF. L. REV. 335, 337 (1965) [hereinafter *Home Rule In New York*]. "Today, 'home rule' is . . . commonly understood to refer to two . . . closely related but independent principles. One is the grant of affirmative power to municipalities. The other is the imposition of restriction on state legislative interference in matters over which the municipality does have affirmative power." *Id.* at 337-38.

9. N.Y. CONST. art. XII, § 2 (1894).

10. *Id.*; see W. Bernard Richland, *Constitutional City Home Rule In New York*, 54 COLUM. L. REV. 311, 320 (1954) [hereinafter *Constitutional City*].

The Committee on Cities of the 1894 Constitutional Convention proposed . . . a classification of cities, the first class of which was to consist of cities having a population of 50,000 or more, and provided that laws relating to all cities of the same class were to be deemed "general city laws." The committee's proposal further provided that except as noted below the Legislature could act in regard to cities only by "general" law in regard to specified matters traditionally viewed as of primarily local concerns.

Id. (citing 2 REV. RECORD, 1894 CONSTITUTIONAL CONVENTION 104-05 (1900)).

to a single city, or to less than all the cities in a class,"¹¹ the provision enunciated a restriction applicable to special laws:

After any bill for a special city law, relating to a city, has been passed by both branches of the Legislature, the house in which it originated shall immediately transmit a certified copy thereof to the mayor of such city, and within fifteen days thereafter the mayor shall return such bill to the house from which it was sent, or if the session of the Legislature at which such bill was passed has terminated, to the Governor, with the mayor's certificate thereon, stating whether the city has or has not accepted the same.¹²

This amendment originated from a will to curtail "the practice of extensive, detailed legislative intervention in the affairs of New York City primarily."¹³ As early as 1896, the New York Court of Appeals acknowledged that the amendment should be given a broad interpretation: A "liberal spirit . . . is especially required in the interpretation of a remedial provision of the fundamental law, so that, if possible, it shall be efficient to secure the purpose of its enactment."¹⁴

In 1923,¹⁵ the home rule amendment read:

The Legislature shall not pass any law relating to the property, affairs or government of cities, which shall be special or local either in its terms or in its effect, but shall act in relation to the

11. N.Y. CONST. art. XII, § 2 (1894).

12. *Id.*; see *Constitutional City*, *supra* note 10, at 321. "The provision provided the local governments with a 'suspensory veto,' and divided cities into three classes. The first class included cities of 250,000 or more inhabitants, the second class from 50,000 to 250,000, and the third class less than 50,000." *Id.* at 321 n.34.

13. *Home Rule in New York*, *supra* note 8, at 340. "As formulated, it gave the city only a suspensive veto: but since most legislation is passed in a rush at the close of the session, it was an effective check in practice." *Id.*

14. *People ex rel. Einsfeld v. Murray*, 149 N.Y. 367, 381, 44 N.E. 146, 150 (1896) (liquor tax law was not special law relating to the "property, affairs and government of cities" because it applied to the entire state).

15. In 1907, in addition to changing the number of inhabitants of cities for classification purposes, an amendment substituted the phrase "property, affairs of government" to "property, affairs or government." NEW YORK STATE CONSTITUTIONAL CONVENTION COMMITTEE, AMENDMENTS PROPOSED TO

property, affairs or government of any city only by general laws which shall in terms and in effect apply alike to all cities except on message from the Governor declaring that an emergency exists and the concurrent action of two thirds of the members of each house of the Legislature.¹⁶

Accordingly, the legislature enacted the City Home Rule Law, with the intent to:

[P]rovide for carrying into effect the provisions of article twelve of the Constitution pursuant to the direction contained therein and hereby to enable cities to adopt and amend local laws for the purpose of fully and completely exercising the powers granted to cities by the terms and spirit of such article.¹⁷

As of the 1923 amendment, sufficient legislation had been enacted to serve the dual purpose of the home rule: to grant affirmative power to local governments, and to enjoin the state legislature from interfering in the field over which the municipalities were granted such powers.¹⁸ In this sense, home rule can be deemed to implement the broader concept of *imperium in imperio*, a model where “a limited sphere of power has been carved out in which local governments are to be autonomous and, conversely, an attempt has been made to preclude legislative intrusion into purely local concerns.”¹⁹

NEW YORK CONSTITUTION 1895-1937, 835 (1938).

16. N.Y. CONST. art. XII, § 2 (1923).

17. City Home Rule Law, ch. 363, § 30, 1924 N.Y. Laws 698, 706, *repealed by* Municipal Home Rule Law, ch. 843, § 58, 1963 N.Y. Laws 1381, 1415 (McKinney) (codified at N.Y. MUN. HOME RULE LAW § 50(1) (McKinney 1969)).

18. *See, e.g.*, General City Law, ch. 327, 1900 N.Y. Laws 690, *amended by* General City Law, ch. 26, 1909 N.Y. Laws 15 (codified at N.Y. Gen. City Law (McKinney 1989 & Supp. 1992)).

19. Note, *Home Rule and the New York Constitution*, 66 COLUM. L. REV. 1145, 1147 (1966) [hereinafter *New York Constitution*]. “This policy was first clearly expressed in the constitution of 1923, a document drafted under the apparent influence of the concept that cities are creatures created by the grace of the sovereign state and are, therefore, subject to its domination.” *Id.*

B. Property, Affairs or Government

In 1938, the *imperium in imperio* theory was more clearly integrated into the home rule article drafted at the New York State Constitutional Convention.²⁰ The text expressly granted cities the power to “adopt and amend local laws not inconsistent with the constitution and laws of the state relating to its property, affairs or government.”²¹ However, the crux of the local powers remained defined by the extent of the “property, affairs or government” of the municipalities.²² An attempt was made to delete the troublesome phrase, and thereby limit the vulnerability of cities from state interference.²³ However, the words were reinserted into the final draft of the article after some members of the committee voiced vigorous opposition to the modification.²⁴

20. 2 REV. RECORD, 1938, NEW YORK STATE CONSTITUTIONAL CONVENTION 1364.

21. N.Y. CONST. art. IX, § 11 (1938).

22. *Id.* The provision for an emergency message from the governor was replaced by a “Home Rule Message” procedure from the city concerned with the approval of two thirds of each house of the legislature. *Id.* This procedure is still in force today. See N.Y. CONST. art. IX, § 2(b)(2). According to one author:

Since the 1938 Amendment substitutes the request of the city for that of the governor, the two-thirds requirement is obviously unnecessary to protect the city. Indeed, that requirement only operates to make it more difficult for a city to get legislation it may need and which is beyond its power to enact locally.

W. Bernard Richland, *Constitutional City Home Rule In New York: II*, 55 COLUM. L. REV. 598, 604 (1955) [hereinafter *Constitutional City II*].

23. See NEW YORK STATE CONSTITUTIONAL CONVENTION, 1938, JOURNAL AND DOCUMENTS, Doc. No. 1. The Report of the Committee on Cities recommended: “The phrase, ‘relating to property, affairs or government of cities,’ which has caused much uncertainty, is eliminated.” *Id.* The bill offered by the Committee on Cities for the Home Rule Amendment provided:

The legislature shall not enact laws which in effect apply within or to any city, unless such laws in effect apply alike within or to all cities, or unless such laws vest in any city power in addition to the power vested in such city by this article, to enact or administer laws consistent with the constitution, which apply within or to such city.

1 PROPOSED AMENDMENTS, NEW YORK STATE CONSTITUTIONAL CONVENTION, 1938, No. 739, Int. 659.

24. See 2 REV. RECORD, 1938, NEW YORK STATE CONSTITUTIONAL

A home rule scholar noted that "it was the sense of the [1938] Convention that 'property, affairs or government' be interpreted in its judicially restricted sense and that the doctrine of state concern embodied in the decision be carried forward."²⁵ Indeed, the phrase left to the courts the freedom to determine, often arbitrarily, the extent of the immunity of the local entities from intrusive state legislation. By 1938, the New York courts had already greatly undermined the authority given to the municipalities by the home rule provisions.

In *Adler v. Deegan*,²⁶ for example, the court had to decide the constitutionality of the Multiple Dwelling Law²⁷ as it applied to the city of New York.²⁸ The court began by establishing that the words "property, affairs or government" were terms of art, used in the constitution "with a Court of Appeals definition, not that of Webster's dictionary."²⁹ It then went on to point out the limits

CONVENTION 1348. An upstate delegate commented: "Is there anything in the whole amendment which leaves any power in the Legislature to pass any emergency legislation for a special city under any circumstances other than to pass an act granting additional power to the city" *Id.*

25. *Constitutional City II*, *supra* note 22, at 605. "It is clear that the 1938 Convention did not intend to go further than the 1924 Amendments in exempting cities from legislative interference." *Id.*

26. 251 N.Y. 467, 167 N.E. 705 (1929).

27. Act of Apr. 18, 1929, ch. 713, §7, 1929 N.Y. Laws 1663 (McKinney) amended by Act of Apr. 22, 1946, ch. 950, 1946 N.Y. Laws 1761 (McKinney) (codified at N.Y. MULT. DWELL. LAW § 1 (McKinney 1974 & Supp. 1992)).

28. *Adler*, 251 N.Y. at 471, 167 N.E. at 706. The court stated that:

[The law] was passed in the manner in which other State legislation is adopted, that is, by a majority vote, and not as an emergency measure, by the concurrent vote of two-thirds of the members of each house of the Legislature The act has been challenged as unconstitutional, in that it violates the Home Rule provision of the State Constitution, article XII, section 2. The Special Term . . . decided that th[e] Multiple Dwelling Law relates to the "property, affairs or government" of New York City, and, therefore, should have been adopted by the action of two-thirds of both houses of the Legislature, upon an emergency message from the Governor. The law has, therefore, been declared unconstitutional.

Id.

29. *Id.* at 473, 167 N.E. at 707.

of this definition as it was set by previous decisions.³⁰ The court cited *Admiral Realty Co. v. City of New York*³¹ and *McAneny v. Board of Estimate*³² for the proposition that rapid transit was a matter of public interest which affected not only city residents, but the people of the state as a whole.³³ Therefore, any law affecting rapid transit did not interfere with the property, affairs or government of the cities because “[i]t had been generally regarded as a State affair.”³⁴

Similarly, the court relied on *Tenement House Department of City of New York v. Moeschen*³⁵ to find that:

[T]he police power of the State, in so far as it dealt with the health of the people of the State, including those in the large cities, has ever since, if not always, been considered a State affair, a matter in which the people of the State as a whole were interested, as contrasted with a local affair in which the people of the cities had the first and final say.³⁶

30. *Id.*

31. 206 N.Y. 110, 99 N.E. 241 (1912). The court in *Admiralty* stated that the Rapid Transit Act, dealing as it did directly with the railroads in New York, was not a law which related to municipal property and affairs. *Id.* at 140, 99 N.E. at 250. The law was adopted not only for the benefit of cities, but for the public at large. *Id.*

32. 232 N.Y. 377, 134 N.E. 187 (1922). In *McAneny*, the court examined the Public Service Commission Law which applied to the city of New York by controlling transit in the city. *Id.* at 381-85, 134 N.E. at 188-90. However, the court found that the “[r]apid transit for the city of New York has . . . been a matter of public interest, affecting not only the people of that city, but the whole state.” *Id.* at 393, 134 N.E. at 193.

33. *Adler*, 251 N.Y. at 472-74, 167 N.E. at 706-07.

34. *Id.* at 474, 167 N.E. at 707 (citing *McAneny v. Board of Estimate*, 232 N.Y. 377, 134 N.E. 187 (1922)).

35. 179 N.Y. 325, 72 N.E. 23 (1904). *Moeschen* involved the constitutionality of the Tenement House Act, which enabled the governor, in 1900, to appoint a committee to make a careful examination of the healthfulness of tenement houses in cities and to make “such recommendations as it deems wise to enable the best and highest possible condition for tenement-houses in said cities to be attained.” *Id.*; see Tenement House Act, ch. 334, 1901 N.Y. Laws 889 (McKinney), amended by Tenement House Act, ch. 352, 1902 N.Y. Laws 920 (McKinney), repealed by Act of Nov. 1, 1952, ch. 798, 1952 N.Y. Laws 977 (McKinney).

36. *Adler*, 251 N.Y. at 475, 167 N.E. at 708. “No point was made that

After reaching the conclusion that health measures were a matter of state concern, the court held that the Multiple Dwelling Law,³⁷ because it affected the health of the people of the state as a whole, was properly enacted by the state legislature without an emergency message and did not relate to municipal property, affairs or government.³⁸ Therefore, the court held that the Multiple Dwelling Law was constitutional.³⁹ This trend was to proceed uninhibited.

In 1963, another feeble attempt was made to counteract the narrow interpretation given by the courts to the controversial "property, affairs or government" phrase.⁴⁰ The new home rule amendment included a bill of rights for local governments, a provision for a statute of local governments, and a statement that the grant of local privileges and immunities should be given a liberal construction.⁴¹ This last addendum was apparently aimed at annihilating Dillon's Rule.⁴² However, since the local power and the authorized interference by the state were still determined by the judiciary's interpretation of what constitutes the "property,

The Tenement House Act was an affair of the city." *Id.*

37. Act of Apr. 18, 1929, ch. 713, § 7, 1929 N.Y. Laws 1663 (McKinney), amended by Act of Apr. 22, 1946, ch. 950, 1946 N.Y. Laws 1761 (McKinney) (codified at N.Y. MULT. DWELL. LAW § 1 (McKinney 1974 & Supp. 1992)).

38. *Adler*, 251 N.Y. at 477, 167 N.E. at 708.

39. *Id.* at 478, 167 N.E. at 709.

40. See N.Y. CONST. art. IX (1963).

41. *Id.* § 2; see *New York Constitution*, *supra* note, 19 at 1152. The amendment provided:

A bill of rights of local government; a grant of power with regard to ten specific subjects outside the realm of property, affairs or government; an authorization of a "statute of local governments" as a means of further extending the grant of local power; and a declaration that local privileges and immunities are to be liberally construed.

Id.

42. See Michael Libonati, *Home Rule: An Essay on Pluralism*, 64 WASH. L. REV. 51, 54 n.22 (1989) [hereinafter *Home Rule: Pluralism*] "Dillon's Rule holds that statutes delegating powers to local governments ought to be strictly construed and consist only of those powers expressly granted, necessarily implied, or indispensable." *Id.* (citing *Merriam v. Moody's Ex'rs*, 25 Iowa 163, 170 (1868); J. DILLON, MUNICIPAL CORPORATIONS § 237 at 448-51 (5th ed. 1911)).

affairs or government” of a city, the effort was in vain.

In *Wambat Realty Corp. v. State of New York*,⁴³ the court determined the constitutionality of the Adirondack Park Agency Act⁴⁴ under article IX of the New York State Constitution.⁴⁵ The court upheld the legislation as constitutional because it related to something “other than the property, affairs or government of a local government,”⁴⁶ and was therefore included among the powers granted to the state legislature by the home rule article of the constitution.⁴⁷ The court acknowledged that the “terminology [property, affairs or government had been] the subject of recurring controversy.”⁴⁸ It then went on to declare that the

43. 41 N.Y.2d 490, 362 N.E.2d 581, 393 N.Y.S.2d 949 (1977).

44. *Id.* at 491-92, 362 N.E.2d at 582, 393 N.Y.S.2d at 950; *see* Adirondack Park Agency Act, ch. 348, 1973 N.Y. Laws 540 (McKinney) (codified at N.Y. EXEC. LAW art. 27 (McKinney 1982 & Supp. 1992)). The Adirondack Park Agency Act consists of zoning and planning legislation enacted by the state to ensure the preservation and development of the resources of the Adirondack Park Region. *Wambat*, 41 N.Y.2d at 492, 362 N.E.2d at 582, 393 N.Y.S.2d at 950.

45. *Wambat*, 41 N.Y.S.2d at 492, 362 N.E.2d at 582, 393 N.Y.S.2d at 950. “Under the act plaintiff was required to seek approval for its project from the Adirondack Park Agency, created by the act to fashion a plan for future use of the public and private lands within the park region.” *Id.* at 492, 362 N.E.2d at 583, 393 N.Y.S.2d at 951. “The issue [was] whether comprehensive zoning and planning enacted by the State Legislature to ensure preservation and development of the resources of the Adirondack Park region, without re-enactment at a second session, is invalid because it encroaches upon the zoning and planning powers of local governments.” *Id.* at 492, 362 N.E.2d at 582, 393 N.Y.S.2d at 950.

46. *Id.* at 495, 362 N.E.2d at 585, 393 N.Y.S.2d at 953. The court noted that this “does not end the matter.” *Id.* “For plaintiff contends that with adoption of the 1963 home rule amendment, in particular its direction that a Statute of Local Governments be enacted, the powers reserved to the Legislature have been qualified even in areas of recognized State concern.” *Id.*

47. *Id.* at 498, 362 N.E.2d at 586, 393 N.Y.S.2d at 954. “The issue is . . . whether the State may override local or parochial interests when State concerns are involved. That issue is, and has been, resolved in favor of State primacy.” *Id.*

48. *Id.* at 493, 362 N.E.2d at 584, 393 N.Y.S.2d at 952 (citing, *inter alia*, *Adler v. Deegan*, 251 N.Y. 467, 471, 167 N.E. 705, 706 (1929); *Admiral Realty Co. v. City of New York*, 206 N.Y. 110, 139-40, 99 N.E. 241, 249-50 (1912)).

Adirondack Park Agency Act “addressed . . . an issue of substantial State concern.”⁴⁹ The state concern in this case was the preservation of the region from “despoliation, exploitation, and destruction by a contemporary generation in disregard of the generations to come.”⁵⁰ The court distinguished state and local concern in these terms: “[P]reserving the priceless Adirondack Park through a comprehensive land use and development plan is most decidedly a substantial state concern, as it is most decidedly not merely 119 separate local concerns.”⁵¹ Therefore, the court determined that although the statute interfered with the property, affairs or government of the local municipalities, an overriding state interest was present, namely the conservation of the environment.⁵²

The current home rule states:

[The legislature shall] 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 concurred in by a majority of such membership⁵³

The meaning of the terms “general” and “special” laws have not changed since the adoption of the first home rule provision in

49. *Id.* at 495, 362 N.E.2d at 585, 393 N.Y.S.2d at 953.

50. *Id.* at 495, 362 N.E.2d at 585, 393 N.Y.S.2d at 952-53.

51. *Id.* at 495, 362 N.E.2d at 584-85, 393 N.Y.S.2d at 952.

52. *Id.* at 498, 362 N.E.2d at 586, 393 N.Y.S.2d at 954. The court stated that:

The short of the matter is that neither Constitution nor statute was designed to disable the State from responding to problems of significant State concern. In this case the controversy is between the State and the would-be developer of land for profit . . . which understandably seeks to promote its own development, even, if necessary, at the expense of regional planning for the benefit of all the people and future generations. Such a controversy is not resolvable by the principles designed to encourage strong, decentralized, local government in matters exclusively of local concern and to restrain the State from paternalistic interference with local matters.

Id.

53. N.Y. CONST. art. IX, § 2(b)(2).

the 1923 constitution. In 1927, Chief Judge Cardozo defined a "general law" as one that in terms and effect applies alike to all cities.⁵⁴ In addition, this constitutional article now applies equally to towns, villages, cities and counties.⁵⁵

It has been generally accepted that the concept of home rule was incorporated into the constitutions of most states⁵⁶ to serve several purposes. Generally, article IX "evinces a recognition that essentially local problems should be dealt with locally and that effective local self-government is the desired objective."⁵⁷ By the same token, vesting more responsibilities in local governments would free the state from these concerns. The state would then be able to allocate more time and resources to state issues.⁵⁸ This distribution would result in a more efficient administration of both state and local matters. It should also be noted that "local problems, in which the state has no concern, can best be handled locally,"⁵⁹ because the local governments are

54. *In re Elm Street In City of New York*, 246 N.Y. 72, 76, 158 N.E. 24, 26 (1927). The court stated that:

The Home Rule Amendment established a new test. We are no longer confined to the inquiry whether an act is general or local "in its terms." Home Rule for cities, adopted by the people with much ado and after many years of agitation, will be another Statute of Uses, a form of words and little else, if the courts in applying the new tests shall ignore the new spirit that created their adoption. The municipality is to be protected in its autonomy against the inroads of evasion.

Id. at 75, 158 N.E. at 25-26.

55. James D. Cole, *Constitutional Home Rule in New York: "The Ghost of Home Rule,"* 59 ST. JOHN'S L. REV. 713, 721 (1985) [hereinafter *The Ghost of Home Rule*].

56. *Home Rule*, *supra* note 8, at 262 n.4. "By 1975, home rule had been authorized by constitution or statute in every state except Indiana, Mississippi, and Alabama. Forty states have constitutional home rule provisions, and approximately half of those states have adopted such provisions since 1953." *Id.*

57. *Kelley v. McGee*, 57 N.Y.2d 522, 535, 443 N.E.2d 908, 912, 457 N.Y.S.2d 434, 438 (1982).

58. *Home Rule*, *supra* note 8, at 259 n.1. "The term 'home rule' encompasses the various means by which local governments are empowered by the State to act autonomously in local matters." *Id.*

59. *Baldwin v. City of Buffalo*, 6 N.Y.2d 168, 172, 160 N.E.2d 443, 445, 189 N.Y.S.2d 129, 132 (1959).

more sensitive to the needs of the community and better equipped to satisfy them.⁶⁰

Additionally, the intent behind the home rule article "was to provide some measure of protection to a city from possible danger of ill-considered interference by the legislature in its local affairs."⁶¹ Notwithstanding these principles, the judiciary has consistently labored at reducing home rule in New York to the barest minimum.⁶² Until the decision in *City of New York v. State of New York*,⁶³ however, these limiting rulings were still based on the notion of the existence of a superior state concern, and did not simply dismiss the issue as unrelated to the municipal property, affairs or government.⁶⁴

60. See *Home Rule*, *supra* note 8, at 262. "Local officials . . . are more competent to manage local affairs than are state legislatures, since local officials are better informed about, and are more interested in local conditions." *Id.* (citing 2 EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 9.08 (3d ed. 1979)).

61. *City of New York v. Village of Lawrence*, 250 N.Y. 429, 435, 165 N.E. 836, 837 (1929). See generally *People ex rel. Einsfeld v. Murray*, 149 N.Y. 367, 44 N.E. 146 (1896) (purpose of article was to give some measure of protection to cities from the evils of special city legislation).

62. *The Ghost of Home Rule*, *supra* note 55, at 749. "This area -- 'property, affairs or government,' -- has been significantly narrowed and lacks identity." *Id.*

63. 76 N.Y.2d 479, 562 N.E.2d 118, 561 N.Y.S.2d 154 (1990).

64. See generally *Town of Islip v. Cuomo*, 64 N.Y.2d 50, 473 N.E.2d 756, 484 N.Y.S.2d 528 (1984) (legislation limiting use of landfills to protect water source for Nassau, Suffolk, and part of Queens counties from pollution was a matter of state concern); *Kelley v. McGee*, 57 N.Y.2d 522, 443 N.E.2d 908, 457 N.Y.S.2d 434 (1982) (legislation grouping counties into classes according to population and requiring that full-time district attorneys be paid salaries equivalent to the county court judges in those counties was a matter of state concern due to state's interest in retaining quality district attorneys); *Wambat Realty Corp. v. State of New York*, 41 N.Y.2d 490, 362 N.E.2d 581, 393 N.Y.S.2d 949 (1977) (zoning and planning act designed to protect Adirondack Park area addressed a matter of state concern); *New York Steam Corp. v. City of New York*, 268 N.Y. 137, 197 N.E. 172 (1935) (unemployment relief is a matter of state concern); *Adler v. Deegan*, 251 N.Y. 467, 167 N.E. 705 (1929) (housing law was a matter of state concern because it related to safety and health measures in which the state has an interest).

C. State Concern

The first instance in which it was established that the state could, in certain circumstances, enact special laws with respect to the property, affairs or government of a local entity was in the 1929 case of *Adler v. Deegan*.⁶⁵ In *Adler*, the court held that the Multiple Dwelling Act⁶⁶ did not require an emergency message,⁶⁷ because it related to health measures that were a concern not only of the city of New York, but also of the state as a whole.⁶⁸ In his concurring opinion, Chief Judge Cardozo stated that when an issue of local interest is at hand, "the State, acting by local laws and without an emergency message, must keep its hands off unless a State concern is involved or affected, and this in some substantial measure."⁶⁹ Judge Cardozo thus proposed that the state concern be substantial. This decision resulted in restricting the immunity of local governments from acts of the legislature to matters relating to the property, affairs or government of municipalities that did not also concern the state in a substantial manner.⁷⁰

However sound in this particular instance, this decision, unfortunately, did not help define the domain designated as the property, affairs or government of New York City. As a result, many special laws were upheld without requiring a home rule message⁷¹ simply by declaring that a substantial state interest was

65. 251 N.Y. 467, 477-78, 167 N.E. 705, 708-09 (1929).

66. Act of Apr. 18, 1929, ch. 713, § 7, 1929 N.Y. Laws 1663 (McKinney), *amended by* Act of Apr. 22, 1946, ch. 950, 1946 N.Y. Laws 1761 (McKinney) (codified at N.Y. MULT. DWELL. LAW § 1 (McKinney 1974 & Supp. 1992)).

67. *Adler*, 251 N.Y. at 478, 167 N.E. at 709. The emergency message was subsequently replaced by the home rule request. *See supra* note 22 and accompanying text.

68. *Id.* "Reason as well as authority justifies a conclusion that these health measures must be a matter of State concern." *Id.*

69. *Id.* at 485, 167 N.E. at 711 (Cardozo, C.J., concurring).

70. *Id.* (Cardozo, C.J., concurring).

71. *See New York Steam Corp. v. City of New York*, 268 N.Y. 137, 143, 191 N.E. 172, 173 (1935) (local bill can only be exempt from the home rule article procedures if the state concern is a paramount one); *but see Town of Islip v. Cuomo*, 64 N.Y.2d 50, 56, 473 N.E.2d 756, 759, 484 N.Y.S.2d 528,

present,⁷² while leaving the realm of the property, affairs and government of the local entity unlimited and vulnerable to multiplying restrictions.⁷³

II. *CITY OF NEW YORK v. STATE OF NEW YORK*: ONE STEP FURTHER

In *City of New York v. State of New York*,⁷⁴ the existence of a paramount state concern was not at issue. Significantly, neither the lower courts nor the New York Court of Appeals attempted to discern such an interest. The court's decision rested primarily on its interpretation of the terms "property, affairs or government."⁷⁵

As previously noted, under the current home rule article the state cannot enact a special law that relates to the property, affairs or government of a city without requiring a home rule message pursuant to the article.⁷⁶ If it were determined that chapter 773⁷⁷ affected the property, affairs or government of New York City, the state legislature would be permitted to interfere by special law *only* if it was established that a state interest of a paramount nature was present.⁷⁸ This two-step approach has been used in all

531 (1984). "If the subject matter of the statute is of sufficient importance . . . the state may freely legislate, notwithstanding the fact that the concern of the State may also touch upon local matters." *Id.*

72. *New York Steam Corp.*, 268 N.Y. at 143, 197 N.E. at 173. The court found a paramount concern existed since "[i]t is common knowledge that widespread unemployment has undermined standards of living to a degree which threatens the economic stability of State and Nation and affects the welfare of all the American people." *Id.*

73. *See Town of Islip v. Cuomo*, 64 N.Y.2d 50, 473 N.E.2d 756, 484 N.Y.S.2d 528 (1984) (special law limiting disposal of solid waste by landfill in Nassau County upheld because landfills pose threat to water supply of large portion of state's population).

74. 76 N.Y.2d 479, 562 N.E.2d 118, 561 N.Y.S.2d 154 (1990).

75. *Id.* at 485, 562 N.E.2d at 120, 561 N.Y.S.2d at 156.

76. *See* N.Y. CONST. art. IX, § 2(b)(2); *supra* note 5.

77. Act of Dec. 15, 1989, ch. 773, 1989 N.Y. Laws 1563 (McKinney), *amended by* Act of Mar. 1, 1990, ch. 17, 1990 N.Y. Laws 22 (McKinney) (relating to the secession of Staten Island from the city of New York).

78. *City of New York*, 76 N.Y.2d at 490, 562 N.E.2d at 123, 561

the decisions pertaining to home rule in New York.⁷⁹

In this case, however, the court of appeals' determination was based on a very succinct analysis of the first part of the test. The court held that chapter 773 was not an "act in relation to the property, affairs or government" of New York City and therefore did not require a home rule message under the state constitution.⁸⁰ Having reached this conclusion, the court did not have to assess whether a state concern was present. This would have been relevant only in the event of a finding of interference with the municipal property, affairs or government. In fact, the court merely stated that: "Here we discern no State interference in New York City property, affairs or government, and we therefore need not reach the next step of determining whether there is any substantial State interest in the matter."⁸¹ Significantly, this argument was not advanced by the state⁸² or considered by either of the lower courts.⁸³

As previously discussed, the phrase "property, affairs or government" has been the source of the problems experienced by home rule in New York since its first appearance.⁸⁴ Most cases

N.Y.S.2d at 159 (Hancock, J., dissenting). "Once the effect on city affairs, property or government is demonstrated, as it is here, a special act can be passed without a home rule message only where a concern exists 'of sufficient importance to the State, transcendent of local or parochial interests.'" *Id.* (Hancock, J., dissenting) (quoting *Wambat Realty Corp. v. State of New York*, 41 N.Y.2d 490, 494, 362 N.E.2d 581, 584, 393 N.Y.S.2d 949, 952 (1977)).

79. *Id.* (Hancock, J., dissenting).

80. *Id.* at 483, 562 N.E.2d at 119, 561 N.Y.S. 2d at 155.

81. *Id.* at 485-86, 562 N.E.2d at 120, 561 N.Y.S.2d at 156.

82. *Id.* at 488, 562 N.E.2d at 122, 561 N.Y.S.2d at 158 (Hancock, J., dissenting).

83. *City of New York v. State of New York*, 158 A.D.2d 169, 173, 557 N.Y.S.2d 914, 916 (1st Dep't 1990). The appellate division stated that municipal boundaries were a matter of state concern and the law, therefore, was not subject to home rule. *Id.*

84. *See Wambat Realty Corp. v. State of New York*, 41 N.Y.2d 490, 493, 362 N.E.2d 581, 584, 393 N.Y.S.2d 949, 951-52 (1977). "The terminology . . . has been the subject of recurring controversy." *Id.* (citing, *inter alia*, *Adler v. Deegan*, 251 N.Y. 467, 471-73, 167 N.E. 705, 706-07 (1929); *Admiral Realty Co. v. City of New York*, 206 N.Y. 110, 139-40, 99 N.E.

have avoided developing analyses based on a definition of the phrase. Instead, courts have decided the issue by finding that a state concern was present, rather than by asserting that the law did not in fact relate to the property, affairs or government of the city or local entity.⁸⁵ Only two cases have actually attempted to address the extent of the phrase “property, affairs or government.”⁸⁶

In *Baldwin v. City of Buffalo*,⁸⁷ the court held that the power to alter ward boundaries⁸⁸ through local legislation pertained to the “property, affairs or government” of the city of Buffalo, and was therefore within the powers granted to the cities by the home rule article.⁸⁹ The court stated:

The mere altering of ward boundaries would seem, on its face, clearly to come within the scope of the terms “property, affairs or government” of a city. Only the city is affected by the change. Residents of a county in which the city is located are not affected. Certainly the state has no paramount interest in such changes. Historically, these changes have been unopposed on constitutional grounds and, indeed, local legislation is the usual method by which changes in ward lines are effected.⁹⁰

This statement approximates the issue at hand more than any other case ever decided by the New York Court of Appeals because it specifically relates to boundaries. As pointed out by Judge Hancock, one of the dissenting judges in *City of New York*,

241, 249-50 (1912)).

85. See *The Ghost of Home Rule*, *supra* note 55, at 715. “The balance between state and local powers has tipped away from the preservation of local authority toward a presumption of state concern. The foundation, property, affair or government, has come to embody ‘the ghost of home rule.’” *Id.*

86. See *Wambat Realty Corp. v. State of New York*, 41 N.Y.2d 490, 493-94, 362 N.E.2d 581, 584, 393 N.Y.S.2d 949, 951-52 (1977); *Baldwin v. City of Buffalo*, 6 N.Y.2d 168, 172-73, 160 N.E.2d 443, 445, 189 N.Y.S.2d 129, 132-33 (1959).

87. 6 N.Y.2d 168, 160 N.E.2d 443, 189 N.Y.S.2d 129 (1959).

88. A ward boundary is “a division of a city or town for elections, police and other governmental purposes.” BLACK’S LAW DICTIONARY 1583 (6th ed. 1990).

89. *Baldwin*, 6 N.Y.2d at 173, 160 N.E.2d at 445, 189 N.Y.S.2d at 132.

90. *Id.*

“[r]ealistically, no subject more directly concerns the affairs and government of a city than whether the integrity of its boundaries and of its existing governmental structure should be altered.”⁹¹

In *City of New York v. Village of Lawrence*,⁹² the court held that a law regarding a boundary dispute between the City of New York and Nassau County did not require an emergency message because it did not affect the property, affairs or government of New York City.⁹³ The object of the dispute, however, was “[a] strip of land . . . substantially unoccupied ‘[with] no public buildings or structures of any character or any property of any nature whatsoever of the city of New York’[;] no sewers[;] no city water pipes or city light poles or wires.”⁹⁴ This description hardly bears any kind of resemblance to the borough of Staten Island. The court recognized that, in different circumstances, a boundary modification might result in a “substantial change in the city’s internal affairs, its property or its government”⁹⁵ *City of New York* seems to embody the eventuality thus envisioned by the *Lawrence* court. Indeed, the kind of change in boundary lines that would result from the secession of Staten Island would have a very substantial impact

91. *City of New York*, 76 N.Y.2d at 488, 562 N.E.2d at 122, 561 N.Y.S.2d at 158 (Hancock, J., dissenting).

92. 250 N.Y. 429, 165 N.E. 836 (1929).

93. *Id.* at 434-35, 447, 165 N.E. at 837, 841. The court stated:

By chapter 802 of the Laws of 1928, entitled “An Act to define the boundary line between the city of New York and town of Hempstead along the eastern and southerly boundary lines of the former village of Far Rockaway,” the Legislature of the State has attempted to change the description of a boundary line of the city. The act is, undoubtedly, special or local in its terms and its effect, and it was not passed by the Legislature on a message from the Governor declaring that an emergency exists. The city of New York [claimed] that the act relates to the property, affairs or government of the city, and in the absence of such a message violates the provisions of section 2 of article XII of the Constitution of the State of New York. [However] here the incidental effect of the statute upon the property, affairs or government of the city is so slight as to be almost illusory.

Id.

94. *Id.* at 445-46, 165 N.E. at 841.

95. *Id.* at 446, 165 N.E. at 841.

on New York City.

In *City of New York*, the court refused to address the issue of whether secession legislation in this instance would have required a home rule message pursuant to article IX, section 2(b)(2) of the New York State Constitution.⁹⁶ Instead, it reasoned that chapter 773 would not be followed by an actual act of secession.⁹⁷ According to the court, the legislation merely “allows Staten Island to explore its [already] publicized interest in secession, stripped of any force without further act of the Legislature.”⁹⁸ The court offered, as its basis for upholding the legislation the contention that it does not interfere with the property, affairs or government of the city of New York.⁹⁹ It stated that the law does not actually authorize, initiate or support secession.¹⁰⁰ Therefore, its impact on New York City is merely speculative. Similarly, the court added, rather boldly, that New York City should have begun taking anticipatory measures after the decision in *Morris v. Board of Estimate*,¹⁰¹ which presumably publicized Staten Island’s interest in secession.¹⁰²

96. *City of New York*, 76 N.Y.2d at 484, 486, 562 N.E.2d at 120, 561 N.Y.S.2d at 156; N.Y. CONST. art. IX, § 2(b)(2).

97. *City of New York*, 76 N.Y.2d at 484, 486, 562 N.E.2d at 120, 561 N.Y.S.2d at 156.

98. *Id.* at 487, 562 N.E.2d at 121, 561 N.Y.S.2d at 157.

99. *Id.* at 485-86, 562 N.E.2d at 120, 561 N.Y.S.2d at 156.

100. *Id.* The court stated that:

Chapter 773 does not authorize secession; it does not authorize the voters of Staten Island to decide the secession issue; it does not initiate secession, or commit the State to support it; it does not represent any relinquishment by the Legislature of any power it may have with respect to secession; and it in no way circumscribes whatever protections exist in the State Constitution home rule provision with respect to an act formally triggering secession.

Id. at 486, 562 N.E.2d at 120, 561 N.Y.S.2d at 156.

101. 707 F.2d 686 (2d Cir. 1983), *aff’d*, 489 U.S. 688 (1989).

102. *Id.* at 688-90. In *Morris*, the court held that the Board of Estimate (created in 1901, three years after the creation of a consolidated city of New York, and which gave one seat, with equivalent voting power, to each borough president) afforded Staten Island voting power in excess of its population (only 5.2% of the population of New York), in contravention of the “one person, one vote” principle. *Id.* After *Morris*, a new charter was established that transferred the powers of the abolished Board of Estimate to the City Council,

There can be little or no doubt as to the fact that chapter 773 interferes to a large extent with the property, affairs and government of New York City.¹⁰³ The law can be described as implementing a process geared toward the secession of the borough of Staten Island from the city of New York, and the creation of a city of Staten Island.¹⁰⁴ This procedure would be initiated by a referendum presenting the following question to the people of Staten Island: "Shall the borough of Staten Island separate from the city of New York to become the city of Staten Island?"¹⁰⁵ If the outcome of this referendum is an affirmative vote, a charter commission will be created.¹⁰⁶ The purpose of this commission would be to draft a charter for Staten Island City, in turn to be submitted to residents of Staten Island for approval. If the charter is not acquiesced to, the voters will then be asked whether an alternative charter should be drafted,¹⁰⁷ and

apportioned by population. It is recognized that this change in the governmental structure was the impetus behind the enactment of chapter 773. *Id.*; see *City of New York*, 76 N.Y.2d at 486, 562 N.E.2d at 121, 561 N.Y.S.2d at 157.

103. *City of New York*, 76 N.Y.2d at 487, 562 N.E.2d at 121, 561 N.Y.S.2d at 157 (Hancock, J., dissenting). Judge Hancock stated that "[t]he court today holds that a measure which establishes a detailed process aimed at splitting New York City into two separate cities -- while depriving four of its five boroughs from any voice in the process -- does not affect its property, affairs or government. I cannot agree." *Id.* (Hancock, J., dissenting).

104. *Id.* (Hancock, J., dissenting).

105. Act of Dec. 15, 1989, ch. 773, § 1 1989 N.Y. Laws 1563 (McKinney), amended by Act of Mar. 1, 1990, ch. 17, 1990 N.Y. Laws 22 (McKinney). The court in *City of New York v. State* combined both versions of the law and simply referred to it as "chapter 773." *City of New York*, 76 N.Y.2d at 483, 562 N.E.2d at 118, 561 N.Y.S.2d at 154.

106. Act of Dec. 15, 1989, ch. 773, § 4 1989 N.Y. Laws 1563 (McKinney), amended by Act of Mar. 1, 1990, ch. 17, § 3(e) 1990 N.Y. Laws 17 (McKinney). The section provides that:

In the event the greatest number of votes cast in said election are in the affirmative, a charter commission for the city of Staten Island shall be created for the purpose of drafting a charter for such city which charter shall be submitted to such voters of such borough for approval.

Id.

107. *Id.* § (4)(d). This section provides, in pertinent part, that: "Provided that the greatest number of votes cast in said election by voters of the borough

the commission would be given six additional months to draft a new charter.¹⁰⁸ If the charter is approved, it would then take effect upon the enactment of state legislation.¹⁰⁹

It is important to note that at no time the voters of the other boroughs would be involved in this process. Moreover, it is apparent that the charter commission would not be created merely to study the position of Staten Islanders with respect to an act of secession. Rather, the commission is legally required to support secession, as is shown by the provision for the draft of an alternative charter if the original one does not satisfy the voters.¹¹⁰ Since it does not involve other boroughs in the process,¹¹¹ chapter 773 is plainly designed to use all possible means to draft a charter based on the interests of the borough of Staten Island, at the expense of New York City.¹¹²

This procedure alone would have a significant impact on the property, affairs and government of New York City. The referendum is to be submitted at a general election, which implies that the city's resources and personnel will be used to that end,

of Staten Island are cast in the negative, shall such charter commission continue in existence for the purpose of drafting an alternative proposed charter for the city of Staten Island?" *Id.*

108. *Id.* § (4)(e). This section provides, in pertinent part, that: "[T]he charter commission shall remain in existence for six months duration for the purpose of drafting an alternative proposed charter for the city of Staten Island in the manner prescribed herein." *Id.*

109. *Id.* This section provides, in pertinent part, that :

If the charter for the city of Staten Island submitted by such charter commission receives the affirmative vote of a majority of the votes cast in such election, such charter shall take effect as specified therein and until such time, the borough of Staten Island shall remain part of the city of New York.

Id.

110. *Id.*

111. *See id.* § 4(a). The commission would be composed exclusively of Staten Island residents and of members of the New York State Legislature representing Staten Island. *Id.* Each of these legislators would appoint an additional member, who must be a resident of Staten Island. *Id.* Moreover, voters of the other boroughs or city officials are not to take part in the process, at any time. *Id.*

112. *City of New York*, 76 N.Y.2d at 488-89, 562 N.E.2d at 122-23, 561 N.Y.S.2d at 158-59 (1990) (Hancock, J., dissenting).

including preparation of ballots and certification of the results.¹¹³ The commission may literally “request and receive from any state or city of New York department, board, bureau, commission, office, agency or other instrumentality such facilities, assistance, data and personnel as may be necessary or desirable for the proper execution of its powers and duties.”¹¹⁴ Although most of these expenditures are to be reimbursed later by the state, there can be no doubt as to their imposing an unfair burden on the city of New York, in light of the fact that it would not be consulted in any manner. Moreover, the mere prospect of the secession of Staten Island is likely to create “uncertainty and confusion” and to interfere with city planning.¹¹⁵

III. POTENTIAL CONSEQUENCES OF SECESSION

Chapter 773 does not in itself authorize secession. Rather, it establishes procedures that are designed to first obtain the approval of Staten Islanders and then to implement secession.¹¹⁶ Were these procedures to actually result in the secession of Staten Island, the property, affairs and the government of New York City would be deeply affected.¹¹⁷ Secession would have an impact on the population and geographic size of New York

113. Act of Dec. 15, 1989, ch. 773, § 4(f), 1989 N.Y. Laws 1563 (McKinney), *amended by* Act of Mar. 1, 1990, ch. 17, 1990 N.Y. Laws 22 (McKinney) (“The provision of the election law . . . shall apply to the question submitted . . .”).

114. *Id.* § 6(e).

115. *City of New York*, 76 N.Y.2d at 489-90, 562 N.E.2d at 123, 561 N.Y.S.2d at 159 (Hancock, J., dissenting). Judge Hancock stated that “[t]his widespread uncertainty necessarily impairs effective present-day city planning for the future in several governmental areas.” *Id.* (Hancock, J., dissenting).

116. *See* Act of Dec. 15, 1989, ch. 773, § 4(e), 1989 N.Y. Laws 1563 (McKinney), *amended by* Act of March 1, 1990, ch. 17, 1990 N.Y. Laws 22 (McKinney).

117. *City of New York*, 76 N.Y.2d at 488, 562 N.E.2d at 122, 561 N.Y.S.2d at 158 (Hancock, J., dissenting). Judge Hancock stated “chapter 773 reveals that the process intrudes deeply into city affairs and has a direct and immediate impact on the personnel, finances and administration of the city.” *Id.* (Hancock, J., dissenting).

City.¹¹⁸ Secession would remove four hundred thousand New Yorkers who reside in Staten Island, “more people than the entire population of Buffalo, and more people than the populations of Rochester and Albany combined or Syracuse and Albany combined.”¹¹⁹ Staten Island also extends over 19.5% of the city’s total land area.¹²⁰

The city has also invested in a large infrastructure located on Staten Island: “[M]ore than 50 schools, more than 25 parks, 18 firehouses, approximately a dozen libraries, cultural facilities[,] . . . police precincts, a hospital, a ferry terminal, over 1,000 miles of paved streets, almost 900 miles of water pipes, over 650 miles of sewers, 33,475 street lights, and a variety of other buildings and properties.”¹²¹ These include the Fresh Kills landfill, used to dispose of nearly all of New York City’s 20,000 tons of waste collected daily.¹²²

Also, it can be shown that secession of Staten Island would impact on New York City’s fiscal affairs by reducing its property, sales and income tax.¹²³ The city would have to forego the benefit of the borough’s share in an outstanding long-term bonded debt as well, which amounts to more than 10 billion dollars.¹²⁴ Additionally, separation of Staten Island from the city is likely to cause the default of bond covenants made by the Municipal Assistance Corporation for the City of New York.¹²⁵

In the event of the loss of one of its boroughs, New York City

118. See Brief for Appellant at 10, *City of New York v. State of New York*, 76 N.Y.2d 479, 562 N.E.2d 118, 561 N.Y.S.2d 154 (1990).

119. *Id.* at 10-11.

120. *Id.* at 11. “Secession will [therefore] bring about a significant reduction in the City’s geographic size.” *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 12. “The secession of Staten Island would impact upon the city’s fiscal affairs. Secession would obviously deprive the City of property, sales, income and other taxes.” *Id.*

124. *Id.* at 12.

125. *Id.* at 26. Municipal Assistance Corporation of the City of New York [MAC] Chairman, Felix Rohatyn, noted that MAC revenue streams, derived from the Special Sales Tax and the city’s share of Per Capita Aid, are likely to decrease in the event of secession. *Id.*

would be forced to restructure its government, notably the city council, and possibly to revise its charter.¹²⁶ These costly and lengthy modifications could be extremely damaging to an already troubled and heavily burdened municipality.

The court refused to consider whether secession itself would impact upon the property, affairs or government of the city.¹²⁷ However, chapter 773 is essentially designed to set in motion all that is necessary to implement secession.¹²⁸ It seems unrealistic that the state legislature, after enacting chapter 773, would stop short of enabling Staten Island to secede in the event of an affirmative vote to the referendum and proposed charter. As previously discussed, no paramount state interest has been advanced by the court that would justify the enactment of this

126. *Id.* at 15. The Appellant argued that:

In addition, secession would require either that City Council districts be redrawn or that the size of the City Council be changed. Under the recently adopted Charter, the Council will be expanded from 35 to 51 members, with the expanded Council to be first elected in November 1991 The secession of Staten Island, which under the timetable set forth in Chapter 773 could take effect no earlier than May 1993, would require either another drawing of the 51 Council seats among four remaining boroughs or a charter amendment to the size of the City Council once again.

Id.

127. *City of New York*, 76 N.Y.2d at 484, 562 N.E.2d at 120, 561 N.Y.S.2d at 156. The court stated its uncertainty as to "whether genuine secession legislation, if ever it were to come before the legislature, would require a home rule message." *Id.*

128. *Id.* at 484, 562 N.E.2d at 119, 561 N.Y.S.2d at 155. The court noted that:

Significantly, as made explicit by later amendment to chapter 773, no act or proposal of the various Staten Island committees or commissions can have the force of law. The charter, or alternative charter, for the city of Staten Island can become law only if the Legislature enacts legislation enabling Staten Island to disengage and separate from the city of New York. The law specifically directs that until such time, "the borough of Staten Island shall remain a part of the city of New York."

Id. (quoting Act of Dec. 15, 1989 ch. 773, 1989 N.Y. Laws 1563 (McKinney), amended by Act of Mar. 1, 1990 ch. 17 1990 N.Y. Laws 22 (McKinney)).

special law without a home rule message.¹²⁹ Therefore, although the judiciary has consistently retired home rule further and further into oblivion, this court has ruled *against and beyond* all previous binding authority on the matter.

IV. HOME RULE IN OTHER STATES

Earlier in the century, home rule appeared to hold a higher standing in California.¹³⁰ One scholar noted that the home rule provision of the California State Constitution made “the California city the best protected in the United States against the corrupt or misguided efforts of outsiders to save her from herself.”¹³¹ The provision grants cities immunity from state intervention by special as well as general laws, if these relate to

129. *Id.* at 490, 562 N.E.2d at 123, 561 N.Y.S.2d at 160 (Hancock, J., dissenting). Judge Hancock stated that:

Once the effect on city affairs, property or government is demonstrated, as it is here, a special act can be passed without a home rule message only where a concern exists “of sufficient importance to the State, transcendent of local or parochial interests.” The court’s holding that chapter 773 was properly passed without a home rule message in the absence of a showing of such State concern contradicts prevailing authority and ignores the significant enlargement of municipal home rule protections given to municipalities in the new reformatting local governments provision of article IX, adopted on January 1, 1964.

Id. at 490-91, 562 N.E.2d at 123-24, 561 N.Y.S.2d at 159-60 (Hancock, J., dissenting) (quoting *Wambat Realty Corp. v. State of New York*, 41 N.Y.2d 490, 494, 362 N.E.2d 581, 584, 393 N.Y.S.2d 949, 952 (1977)).

130. *Constitutional City II*, *supra* note 22, at 626. “Other states, notably California, have achieved a great measure of home rule through constitutional provisions interpreted by sympathetic courts.” *Id.*

131. *Id.* at 626 n.215 (quoting Thomas H. Reed, *Municipal Home Rule in California*, 1 NAT’L MUN. REV. 569, 574 (1912)). The author noted:

[T]o sum up the privileges of California cities: (1) They may make their own charters subject to a formal submission to the legislature which always approves them; (2) These charters prevail over general laws, even in all matters affecting the internal affairs of the municipality; (3) Special or local laws are forbidden; (4) They may adopt any kind of ordinance or regulation even outside the field of strictly “municipal affairs” not inconsistent with the general laws of the State.

Id. at 576.

“municipal affairs.”¹³² However, the interpretation of the term “municipal affairs” is still left to the courts. The extent, and even the existence, of home rule happened to have fallen into the hands of “sympathetic courts.”¹³³ This terminology proved nearly as problematic as New York’s “property, affairs or government.” The phrase “municipal affairs” was referred to as “loose, indefinable, wild words.”¹³⁴

The Illinois State Constitution home rule provision was described as “a particularly interesting example of how to create and implement a robust notion of home rule.”¹³⁵ However, it does not differ significantly from the New York version. As in New York, Dillon’s Rule is abolished.¹³⁶ The scope of home

132. See CAL. CONST. art. 11, § 5(a). This section provides:

It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws. City charters adopted pursuant to this Constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith.

Id.

133. *Constitutional City II*, *supra* note 22, at 626.

134. *Ex parte Braun*, 74 P. 780, 784 (Ca. 1903) (Beatty, C.J., dissenting) (“The decision of the court is rested and necessarily depends upon the construction given to the phrase ‘municipal affairs’”); see Sho Sato, “*Municipal Affairs*” in *California*, 60 CAL. L. REV. 1055, 1075 (1972). Sato proposed three standards designed to clarify the term “municipal affairs.” *Id.* at 1075-78. The first standard was: “State laws should prevail where such laws deal with substantial externalities of municipal improvements, services, or other activities, regardless of whether the general laws are directed only to the public sector.” *Id.* at 1076. The second standard was: “State laws should govern if their policies are made applicable to the public and private sectors.” *Id.* The third standard was: “Matters of intracorporate structure and process designed to make an institution function effectively, responsively, and responsibly should generally be deemed a municipal affair.” *Id.* at 1077.

135. *Home Rule: Pluralism*, *supra* note 42, at 67; see ILL. CONST. art. VII § 6(m), which states that “[p]owers and functions of home rule units shall be construed liberally.” *Id.*

136. See *Home Rule: Pluralism*, *supra* note 42, at 67. The constitution provides that the “[p]owers and functions of home rule units shall be construed liberally,” thus extinguishing Dillon’s Rule of narrow construction

rule powers extends as far as the city's "government and affairs."¹³⁷ The state's legislative reach is defined in these terms: "Home rule units may exercise and perform concurrently with the state any power or function of a home rule unit to the extent that the General Assembly by law does not specifically limit the concurrent exercise or specifically declare the state's exercise to be exclusive."¹³⁸ This article is not likely to provide the kind of guidelines which would be helpful in order to ensure the survival of home rule for cities.

In fact, a constitutional text by its nature draws broad outlines and it would be almost impossible to embody the precision required to remain faithful to the intent of its framers.¹³⁹ The problem which faces home rule today results from a consistent bias of the courts in favor of the state and to the detriment of the cities.¹⁴⁰ It was pointed out that "[t]his stance ignores the state's

of grants of power to localities." *Id.* (quoting ILL. CONST. art. VII, § 6(m)). For a discussion of Dillon's Rule see *supra* note 42 and accompanying text.

137. ILL. CONST. art. VII § 6(a). This section provides, in pertinent part, that:

Except as limited by this Section, a home rule unit may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare; to license; to tax; and to incur debt.

Id.

138. *Id.* § 6(i).

139. See *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819). The United States Supreme Court stated that:

A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American Constitution, is not only to be inferred from the nature of the instrument, but from the language.

Id.

140. *Home Rule: Pluralism*, *supra* note 42, at 68. The author stated that:

interest in supporting effective local government, and in encouraging localities to develop their own decision making mechanisms governing their own institutions.”¹⁴¹ The mere existence of home rule stands to acknowledge the need, not only of the cities, but of the state entities, for a decentralization of legislative powers.¹⁴² The judiciary branch, by denying home rule the deference it is due, has deprived the whole net of interaction between city and state of a sound and needed structure.

CONCLUSION

Courts have annihilated the ability of cities to exercise their home rule powers as to issues with respect to which the state has a paramount interest.¹⁴³ One could argue that the state would be justly concerned with laws pertaining to the environment or the health and safety of its inhabitants.¹⁴⁴ However, it is difficult to conceive that the secession of Staten Island from the city of New York could be determined to lie outside the realm encompassing the property, affairs and government of New York City.¹⁴⁵ In fact, it would be almost impossible to think of a more essential need than for a city to be in control of its physical integrity. The court of appeals, in *City of New York v. State of New York*,¹⁴⁶ by allowing Staten Island to set in motion its separation from the other boroughs, has done little more than give its blessing to a secession.

Courts, aided and abetted by the academic bar, have not uncommonly regarded themselves as stewards of the center, quick to overrule local initiatives which directly or indirectly impede the “implementation of statutes which sought to further a specific statewide policy,” in order to assure the uniformity and supremacy of state law vis-a-vis local enactments.

Id. (quoting *Jefferson v. State*, 527 P.2d 37, 44 (Alaska 1974)).

141. *Id.*

142. *See id.* at 69-71.

143. *See supra* notes 65-73 and accompanying text.

144. *See supra* notes 26-52 and accompanying text.

145. *See supra* note 91 and accompanying text.

146. 76 N.Y.2d 479, 562 N.E.2d 118, 561 N.Y.S.2d 154 (1990).

The motivation for such a decision is difficult to assess, principally due to the levity of its reasoning.¹⁴⁷ Nevertheless, the principles which led the people to embody the notion of home rule into the state's constitution and legislation have doubtlessly been defeated. Indeed, whether home rule was meant to protect municipalities from unwarranted state interference, or to grant local entities both responsibilities and immunities by delegating certain powers in order to allow state and city to administrate their affairs more efficiently, this intent has been betrayed, wholly without justification.

Florence L. Cavanna

147. *See supra* notes 74-83 and accompanying text.