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I. Introduction

Nearly a century ago, in 1898, the City of New York was created in its present form.[1] The newly formed City included four counties: New York, Kings, Queens, and Richmond (Staten Island). The Greater New York Charter of 1901 reorganized the City government and altered the composition of the Board of Estimate. The Board of Estimate, the governing City body that controlled all expenditures, had eight members, with each Borough President having one vote regardless of population.[2] In 1981, residents of the most populous borough, Brooklyn, filed a lawsuit challenging the constitutionality of the Board's representation. The United States Supreme Court ruled that the Board's voting scheme was unconstitutional because it violated the principle of one person, one vote.[3]

The Board of Estimate was abolished as of September 1, 1990, with the majority of its power being transferred to the City Council. Unlike the Board of Estimate, representation on the City Council is apportioned according to the City's population. As a direct result of the transfer, Staten Island sustained a severe loss of political power within the City. Rather than accept this new situation, Staten Island state legislators succeeded in having Chapter 773 of the Laws of 1989 (as amended by Chapter 17 of the Laws of 1990) passed by the State Legislature. Chapter 773 provides a process for the borough of Staten Island to secede from New York City, without the residents of the rest of the City having a right to affect the process. Pursuant to Chapter 773, Staten Islanders conducted a vote in November of 1990, asking residents of Staten Island if they wanted to form a commission to create a city charter.[4] As a result of an affirmative vote, Staten Islanders formed a commission to create a charter that will eventually be

1. Staten Island and the other four boroughs were joined to form the greater City of New York by Chapter 488 of the Laws of New York of 1896, and Chapter 378 of the Laws of New York of 1897.

2. Record on Appeal at 49-50, 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).

3. Board of Estimate of City of New York v. Morris, 489 U.S. 688 (1989).

4. Staten Islanders voted overwhelmingly to continue the process for secession: 82 percent of the voters were in favor of taking the next step towards secession, while 18 percent were against it. Alessandra Stanley, *Staten Island Votes a Resounding Yes on Taking Step Towards Secession*, N.Y. TIMES, Nov. 7, 1990, at B7.

presented to the residents of Staten Island for a second vote. If the people of Staten Island ratify the secession plan, then the plan will go before the State Legislature for final approval.[5]

The possible secession of a borough from the City of New York, over the strenuous objections of the City, implicates two critical federal and state constitutional issues: the Equal Protection Clauses of both constitutions, and the Home Rule Doctrine of the state constitution. Three New York State courts recently ruled that Chapter 773 did not violate either of these provisions.[6] The two lower courts each ruled that Chapter 773 was a valid law, and further that the State Legislature had the power to dismember New York City at its discretion. In following the concurring opinion of the appellate division, the New York State Court of Appeals affirmed on different grounds.[7] The court ruled that Chapter 773 was advisory because the Legislature's permission was needed for a final approval of secession.[8] Therefore, the court of appeals declined to comment on whether the Legislature could validly allow Staten Islanders to secede over the objections of the City.

This Note argues that according to judicial interpretations of the state and federal constitutions, Staten Island should be allowed to secede from New York City regardless of the City's position. Part II of this Note analyzes the background history leading up to this case. The section examines the formation of the City, Staten Island's reasons for seceding, the positions of the City and State, and the state courts' decisions concerning Chapter 773.

Part III analyzes the issue of equal protection under the Fourteenth Amendment of the United States Constitution and Article I Section 11 of the New York State Constitution. Federal case law on the subject does not refer to any secession cases, but instead points to similar annexation and voting rights cases. All of these cases favor a very strong presumption of constitutionality regarding the state laws, and support the validity of Chapter 773 or any similar law.

Part IV discusses the more delicate Home Rule Doctrine of the New York State Constitution. While the concept of Home Rule has existed in the state constitution for almost 100 years, it has almost never invalidated a state law due to a lack of consent by the localities.

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5. 1989 N.Y. Laws 773 (amended 1990 N.Y. Laws 17).

6. City of New York v. State of New York, 146 Misc. 2d 488, 556 N.Y.S.2d 823; 158 A.D.2d 169, 557 N.Y.S.2d 914; 76 N.Y.2d 479, 562 N.E.2d 118, 561 N.Y.S.2d 154 (1990).

7. 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).

8. *Id.* at 484, 562 N.E.2d at 120, 561 N.Y.S.2d at 156.

Regardless of the numerous changes in the constitution, supposedly increasing the strength of Home Rule, the state courts have consistently interpreted the doctrine very narrowly. These rulings lead to the conclusion that the doctrine would not stand in the way of Staten Island's secession. Yet, if the State Legislature can divide a city at its discretion, then it seems that the doctrine of Home Rule no longer exists.

Part V concludes that based upon federal and state case law, Staten Island can legally secede from New York City as long as the State Legislature supports the secession. It would take a clear deviation of case law on either the state or federal level to prevent the secession. The Supreme Court's decisions regarding the Equal Protection Clause strongly suggest that the clause would pose no barrier to secession. Rulings by the courts of New York State also support a similar result concerning the Home Rule issue. Such a decision, though, would lead to the unwanted result of a state court's de facto nullification of an article to the state constitution.[9]

II. Background

A. The Creation of New York City

" 'The sun will rise this morning upon the greatest experiment in municipal government that the world has ever known—the enlarged city.' "[10] On January 1, 1898, after a noisy and exuberant New Year's Eve celebration, the greater New York that we know today was formed.[11] The consolidation, though, had taken eight years of planning. The movement for a greater New York began in 1890, when the State Legislature passed, and Governor David B. Hill signed, an act which created a commission to investigate the feasibility of consolidating the municipalities located in or near the harbor of New York.[12] Based upon the commission's support of unification, the Legislature in 1894 passed a bill which allowed the citizens of all the affected areas to vote in an advisory referendum on the issue of consolidation.[13] All four counties, New York (which then included the Bronx),

9. The overall risk to New York City is even greater than the possible loss of Staten Island. Civic leaders in Queens, the City's second most populous borough, are also considering secession from New York City. Joe Queen, *Civic Leaders Mull Boro Secession Bid*, NEWSDAY, Oct. 13, 1991, at 2 (Queens ed.).

10. John A. Krout, *Framing the Charter*, in THE GREATER CITY NEW YORK, 1898-1948, 41 (Allan Nevins and John A. Krout eds., 1948) (quoting NEW YORK TRIBUNE, Jan. 1, 1898).

11. *Id.*

12. *Id.* at 47.

13. *Id.* at 48. The referendum included language informing the voters that "Your

Kings (Brooklyn), Queens and Richmond (Staten Island), voted for consolidation. Specifically, Staten Islanders voted overwhelmingly for unification by a vote of 5,531 to 1,505.[14] At the request of recently elected Governor Levi P. Morton, a new commission was formed by the State Legislature in 1896 to continue the work of the first commission. After a number of hearings, the new commission recommended the creation of a charter commission and set January 1, 1898 as the date for the establishment of a greater New York.[15] The new commission's recommendations were accepted by the Legislature in the form of the Lexow Bill, and the Legislature went on to create and pass a new charter for the new city in 1897.[16] Whatever imperfections the original charter had were partially corrected in 1901 by the Greater New York Charter. Among other things, the 1901 Charter altered the composition of the Board of Estimate by giving each Borough equal representation regardless of population.[17] The greater City of New York had been formed.

B. Staten Island and Secession

Today, however, Staten Island is in the process of trying to secede from New York City. In the last 90 years, Staten Islanders have accumulated a long list of grievances stemming from their borough's relationship with the City of New York.[18] This general discontent recently blossomed into a movement for secession after the United States Supreme Court decision in *Board of Estimate of City of New York v. Morris*.[19] In *Morris*, residents of Brooklyn, the City's most populous borough, challenged the legality of the Board of Estimate. Even though the boroughs had widely disparate populations, each had equal representation on the Board of Estimate.[20] The Court ruled that the Board provided Staten Island with voting power in excess of its population, in contravention of the "one person, one vote" princi-

vote is only a simple expression of opinion. Actual consolidation does not come until the Legislature acts." 1898 N.Y. Laws 64.

14. THE BROOKLYN DAILY EAGLE ALMANAC, 1898, at 135.

15. Krout, *supra* note 10, at 50-53.

16. *Id.* at 56-58. 1896 N.Y. Laws 488 created the commission; 1897 N.Y. Laws 378 created the charter. Both the Lexow Bill and the charter were submitted by the Legislature to the Mayors of New York and Brooklyn for approval based upon the Home Rule Article of 1894. *Id.* at 56-58. *See* JERROLD SEYMANN, COLONIAL CHARTERS PATENTS AND GRANTS TO THE COMMUNITIES COMPRISING THE CITY OF NEW YORK 613 (1939).

17. 1901 N.Y. Laws 446, § 226; Krout, *supra* note 10, at 60.

18. Memorandum of Governor Mario M. Cuomo approving Senate Bill Number 2655-A, Approval Memo No. 68 (Dec. 15, 1989).

19. 489 U.S. 688 (1989); *see* Record on Appeal, *supra* note 2, at 6-7.

20. 489 U.S. at 690.

ple.[21] As a result, the Board of Estimate was abolished as of September 1, 1990, with the majority of its power being transferred to the City Council in which representation is apportioned by population.[22] Because Staten Island makes up only 5.2% of the City's population, its relative political power has been significantly lessened by the *Morris* decision.[23] Thus, perceiving that they had been denied a meaningful role in the governance of the City, many Staten Island residents and public officials have called for secession from New York City.

Motivated by Staten Islanders' call for secession, the State Legislature passed Chapter 773 of the Laws of 1989 by a wide margin.[24] Chapter 773 is a law which provides a mechanism for Staten Island to secede from the City. The process as described by Chapter 773 began on election day in November of 1990.[25] In a referendum, *only* Staten Islanders were asked if they wanted to form a charter commission which would plan secession and draw up a charter for the new City of Staten Island.[26] The commission which is now being formed can only be comprised of Staten Island residents.[27] The commission must create a charter and submit it to the Governor and State Legislature within 30 months of November, 1990.[28] In the six months following the submission, public hearings will be held in Staten Island to consider the charter, concluding in a vote by only Staten Island residents on whether to approve the charter.[29] Finally, if Staten Islanders vote in the affirmative, then the charter will go to the State Legislature for final approval.[30] Thus under Chapter 773, Staten Island cannot secede from New York City without final approval by the State.[31]

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21. *Id.*; *see* Record on Appeal, *supra* note 2, at 6-7.

22. City of New York v. State of New York, 146 Misc. 2d at 490, 556 N.Y.S.2d at 825; *see* Record on Appeal, *supra* note 2, at 50.

23. *See* Record on Appeal, *supra* note 2, at 123.

24. 1989 N.Y. Laws 773 (amended 1990 N.Y. Laws 17). Chapter 773 passed the Senate by a vote of 58 to 1, and the Assembly by a vote of 117 to 21. Senate bill S2655-A (and Assembly bill A3539-C). Chapter 17 passed the Senate by a vote of 51 to 6, and the Assembly by a vote of 94 to 38. Senate bill S6868 (and Assembly bill A9289). Memorandum by Governor Mario Cuomo approving Senate Bill Number 2655-A, Approval Memo No. 68 (Dec. 15, 1989).

25. Mireya Navarro, *Staten Island Turns to Cost of Parting*, N.Y. TIMES, Nov. 8, 1990, at B12.

26. 1989 N.Y. Laws 773 (amended 1990 N.Y. Laws 17); *See supra* note 4.

27. 1989 N.Y. Laws 773 (amended 1990 N.Y. Laws 17), § 4(a).

28. *Id.* at § 4(c).

29. *Id.*

30. 1989 N.Y. Laws 773 (amended 1990 N.Y. Laws 17), § 4.

31. 1989 N.Y. Laws 773 (amended 1990 N.Y. Laws 17).

C. The Positions of the City and State of New York

The City of New York opposes secession on the grounds of equal protection under the law and the need of a Home Rule message.[32] The City first argues that the non-Staten Island residents of New York City had their right to equal protection under the law violated by Chapter 773. Chapter 773, according to the City, allows one group of New Yorkers to exercise the franchise over key matters that affect other New Yorkers, without the other New Yorkers having the right to vote on the matter.[33] In cases where the State grants the franchise to some residents and denies it to other affected residents, the City argues that the State must show that the division serves a compelling state interest.[34] The City concludes that no compelling state interest has been presented by the State, and that none exists which would make the law legal.[35]

The City also argues that Chapter 773 is void because it was enacted without a Home Rule message from the Mayor of New York City and the City Council. The City states that Article IX of the New York State Constitution, the Home Rule Amendment to the constitution, only allows the State to affect the property, affairs or government of a locality through a general law, or, through a special law with the request of two-thirds of the local legislature or by request of the local chief executive officer and a majority of the local legislature.[36] The City contends that Chapter 773, and any future law that would allow Staten Island to secede, affects the property, affairs or government of the City, is a special law, is not a matter of state concern, and thus requires a Home Rule message from the City to make the law valid.[37]

The State of New York counters by arguing that Chapter 773 is a valid law. The State claims that the law does not offend the state and federal governments' Equal Protection Clauses. Chapter 773, according to the State, is only advisory because no secession can occur without the approval of the State Legislature.[38] Even if the law were not

32. Brief for the Corporation Counsel for the City of New York before the New York State Court of Appeals at 20, 41, 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).

33. *Id.* at 41.

34. *Id.* at 45-51.

35. *Id.* at 54-61.

36. *Id.* at 20; N.Y. CONST. art. IX, §§ 2, 3. A general law is a law which effects all areas of the State equally, while a special law is one which applies to one or more, but not all localities in the State. N.Y. CONST. art. IX, § 3.

37. *See* Appellant's Brief, *supra* note 32, at 20-23, 30.

38. Brief for the Attorney General of the State of New York before the New York State Court of Appeals at 31, 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).

advisory, and allowed Staten Island to secede without additional State approval, it would not violate the Equal Protection Clauses because a State can restrict participation in an election to residents most affected by the law. In such cases, the law must only be rationally related to the State's objectives.[39] Under either interpretation of Chapter 773, the State concludes that the law does not violate New Yorkers' right to equal protection under the law.

The State also argues that Chapter 773, or any future law allowing secession from the City, does not require a Home Rule message from the City of New York. Matters of state concern, according to the State, are never subject to Home Rule constraints regardless of the effect on localities.[40] The State claims that since the Home Rule Article to the constitution specifically grants the State the power to create local governments, the power is automatically one of state concern and thus exempt from a Home Rule message.[41] The State continues by stating that even if Article IX does not explicitly make this matter one of state concern, a state interest is created in resolving a conflict between a county and the rest of the City of New York.[42] The State thus reasons that Chapter 773, and any future law allowing Staten Island's separation from New York City, is and would be a valid exercise of the State's power.

D. The City of New York Sues the State of New York, Claiming that Chapter 773 Violates the State and Federal Constitutions

The City of New York challenged the validity of Chapter 773 by bringing suit against the State in New York State Supreme Court in New York County. In a decision written by Justice Herman Cahn, the court found that Chapter 773 was valid, and that the State Legislature had the power to separate Staten Island regardless of the position of the City of New York.[43] The court explained that Chapter 773 did not violate the Equal Protection Clauses because it required the final approval of the State Legislature and thus was merely advisory in nature.[44] Yet the court continued by declaring that even if Chapter 773 were not advisory, the State had the power to allow Staten Island

39. *Id.* at 34-36.

40. *Id.* at 11.

41. *Id.* at 18-19 (referring to Article IX, § 2(a) of the New York State Constitution).

42. *Id.* at 27.

43. City of New York v. State of New York, 146 Misc. 2d 488, 556 N.Y.S.2d 823 (1990).

44. *Id.* at 494, 556 N.Y.S.2d at 828.

to secede.[45] The trial court also found that Chapter 773 did not violate the Home Rule Article of the New York State Constitution. The court explained that the doctrine has been construed narrowly, so that the State has the power to create and destroy municipal corporations.[46] Furthermore, if the matter is one of state concern, then the State can ignore the Home Rule Amendment.[47] Since the boundaries of a city are of significant state concern, and Chapter 773 embodies the plenary power of the State, Justice Cahn concluded that Chapter 773 does not require a Home Rule message to be a valid state law, nor would any final state action creating the City of Staten Island.[48]

The Appellate Division, First Department, of the State Supreme Court affirmed the decision of the trial court by also finding Chapter 773 to be a valid state law, and that the State could allow Staten Island to secede without the City's approval.[49] The appellate division, agreeing with the trial court, stated that the law was definitely not advisory, and that Chapter 773 and any future decisions by the State were ripe for a judicial decision.[50] In the majority opinion, written by Justice Wallach, the appellate division ruled that Chapter 773 did not violate the state or federal constitutions' Equal Protection Clauses.[51] The court based the decision on a number of considerations: Staten Islanders were affected disproportionately compared to other residents of New York City, the distinction between the groups was very precise, and the geographical classification was acceptable.[52] The appellate division also concluded that Chapter 773 and any subsequent decision by the State to allow Staten Island to secede would not violate the Home Rule Article. Justice Wallach contended that laws affecting municipal boundaries simply do not fall under the Home Rule provisions of the state constitution.[53] The State's power to create local governments is plenary, "beyond Home Rule constraints," and a "matter of state concern by definition" despite any local interests.[54]

Justice Milonas, writing separately for himself and Justice Asch, concurred in the majority's decision. Justice Milonas agreed that

45. *Id.* at 495, 556 N.Y.S.2d at 828.

46. *Id.* at 492-93, 556 N.Y.S.2d at 826-27.

47. *Id.* at 494, 556 N.Y.S.2d at 827.

48. *Id.*, 556 N.Y.S.2d at 827-28.

49. City of New York v. State of New York, 158 A.D.2d 169, 557 N.Y.S.2d 914 (1990).

50. *Id.* at 172, 557 N.Y.S.2d at 915-16.

51. *Id.* at 173-75, 557 N.Y.S.2d at 916-17.

52. *Id.* at 174, 557 N.Y.S.2d at 917.

53. *Id.* at 173, 557 N.Y.S.2d at 916.

54. *Id.*, 557 N.Y.S.2d at 916.

Chapter 773 did not violate either the state or federal constitutions.[55] Yet because the final decision would ultimately be made by the Legislature, Justice Milonas stated that Chapter 773 was non-binding and advisory, and as a result did not compel secession.[56] Justice Milonas therefore concluded that "it is premature for this court to decide whether the State Legislature may constitutionally bypass obtaining the consent of the City" if it later chooses to allow Staten Island to secede.[57]

The New York State Court of Appeals affirmed the decision of the appellate division by ruling that Chapter 773 was a valid law, but declined to rule on a possible future final decision by the Legislature to separate Staten Island from New York City without the City's approval.[58] In a per curiam opinion, the court of appeals agreed with the concurrers in the appellate division by stating that while Chapter 773 was ripe for review, it was merely advisory because it required an act by the Legislature to make the results of Chapter 773 binding.[59] The court held that Chapter 773 did not violate either Equal Protection Clause. According to the court, the State could recognize the distinctive interest of a political subdivision through a reasonable classification of distinct rights.[60] The court found that allowing Staten Islanders to express their views, without giving them the right to unilaterally come to a binding result, was clearly a reasonable classification, and unoffensive to the Equal Protection Clauses.[61]

The court of appeals also decided that Chapter 773 did not violate the Home Rule Article, but again did not rule on any possible future legislation. The court failed to find any State interference in the Home Rule Article because of its conclusion that Chapter 773 is advisory in nature.[62] Because of the "wholly speculative" nature of Chapter 773, and the fact that it does not initiate secession nor represent any loss of power by the Legislature with respect to secession, the court stated that the Home Rule provision of the constitution did not even apply.[63] The court concluded that Chapter 773 was a valid State

55. *Id.* at 175, 557 N.Y.S.2d at 917-18.

56. *Id.* at 176, 557 N.Y.S.2d at 918.

57. *Id.*, 557 N.Y.S.2d at 918.

58. 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).

59. *Id.* at 484-86, 562 N.E.2d at 120-21, 561 N.Y.S.2d at 156-57.

60. *Id.* at 486-87, 562 N.E.2d at 120-21, 561 N.Y.S.2d at 157.

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

62. *Id.* at 485-86, 562 N.E.2d at 120-21, 561 N.Y.S.2d at 156-57.

63. *Id.* at 486, 562 N.E.2d at 120-21, 561 N.Y.S.2d at 156-57.

law, but declined to make a ruling on whether a final law separating Staten Island from New York City would be legal.

The dissent, however, stated that Chapter 773 violated the Home Rule Article. Judge Hancock, writing for himself and Judge Alexander, argued that a Home Rule message is mandated because the matter is one of local concern.[64] Nothing could concern a city more than its boundaries and its governmental structure.[65] The dissent continued by contending that the charter commission is not advisory; instead it would be created to direct the process towards secession.[66] They stated that the actions of a commission investigating secession would lead to feelings of uncertainty and confusion felt by everyone, conscription of resources and personnel by Staten Island at State expense, and costs to New York City to "create and fund a parallel process" to prepare and react "to any Staten Island secession bill emanating from the Chapter 773 process."[67] Thus, the dissent stated that the distinct local concerns and the costs and confusion that would result from the law made Chapter 773 not advisory, and therefore subject to a Home Rule message. The dissent concluded since "[t]here was no such message, . . .the legislation, therefore, is invalid."[68]

III. Chapter 773 And Any Future Secession Legislation Do Not Violate The Equal Protection Clauses

A. The Equal Protection Clauses

Both the United States and New York State Constitutions include Equal Protection Clauses. The Fourteenth Amendment to the United States Constitution states that "[n]o State shall make or enforce any law which shall. . .deny to any person within its jurisdiction the equal protection of the laws."[69] Article I, Section 11 of the New York State Constitution states that "[n]o person shall be denied the equal protection of the laws of this state or any subdivision thereof."[70] In interpreting the two clauses, the New York State Court of Appeals has repeatedly held that "the State constitutional equal protection clause [sic]. . .is no broader in coverage than the Federal provision. . . ."[71]

64. *Id.* at 488-91, 562 N.E.2d at 122-24, 561 N.Y.S.2d at 158-60.
65. *Id.* at 488, 562 N.E.2d at 122, 561 N.Y.S.2d at 158.
66. *Id.* at 488-89, 562 N.E.2d at 122-23, 561 N.Y.S.2d at 158-59.
67. *Id.* at 489-91, 562 N.E.2d at 122-24, 561 N.Y.S.2d at 159-60.
68. *Id.*, 562 N.E.2d at 122-24, 561 N.Y.S.2d at 158-60.
69. U.S. CONST. amend. XIV, § 1.
70. N.Y. CONST. art. I, § 11.
71. *See also* Under 21 v. City of New York, 65 N.Y.2d 344, 360 n.6, 482 N.E.2d 1, 7 n.6, 492 N.Y.S.2d 522, 528 n.6 (1985); Golden v. Clark, 76 N.Y.2d 618, 624, 564 N.E.2d

Specifically, in "election matters we have. . .observed that the State guarantee of equal protection 'is as broad in its coverage as that of the Fourteenth Amendment.' "[72] When deciding whether a law violates the State Equal Protection Clause, the court of appeals analyzes federal decisions that interpret the Fourteenth Amendment.[73] Holdings by the United States Supreme Court strongly suggest that New York State has the power to pass a law allowing only Staten Islanders to vote for secession without violating either Equal Protection Clause.[74]

B. Federal Decisions Defining the Law

The United States Supreme Court has clearly stated that under specific circumstances, a state has the power to deny the franchise to some residents when it offers a referendum.[75] Specifically, the Court has described how to approach a special interest election, or a "single-shot" referendum, where the franchise is limited to a certain group of voters.[76] For the referendum to be constitutionally permissible, the issue must have a "disproportionate impact on an identifiable group of voters."[77] If this type of impact is found, the state can limit the franchise to the voters most affected if the special election concerns governmental bodies of limited jurisdiction.[78] The "classifications must be tailored so that the exclusion of. . .[one class of voters]. . .is necessary to achieve the articulated state goal."[79]

611, 614, 563 N.Y.S.2d 1, 4 (1990); Esler v. Walters, 56 N.Y.2d 306, 313-14, 437 N.E.2d 1090, 1094, 452 N.Y.S.2d 333, 337 (1982).

72. *Esler*, 56 N.Y.2d at 314, 437 N.E.2d at 1094, 452 N.Y.S.2d at 337 (quoting Seaman v. Fedourich, 16 N.Y.2d 94, 102, 209 N.E.2d 778, 782, 262 N.Y.S.2d 444, 450 (1965)).

73. *Golden*, 76 N.Y.2d at 624, 564 N.E.2d at 614, 563 N.Y.S.2d at 4; *Esler*, 56 N.Y.2d at 313-14, 437 N.E.2d at 1094, 452 N.Y.S.2d at 337. Therefore, for the purposes of this Note, the two Equal Protection Clauses will be treated as safeguarding the same rights.

74. *See infra* notes 75-84 and accompanying text.

75. The Fourteenth Amendment sets a relatively low standard of review for state laws that affect one group of citizens differently than others. "State Legislatures are presumed to have acted within their constitutional power," and the law "will not be set aside if any state of facts reasonably may be conceived to justify it." McGowan v. Maryland, 366 U.S. 420, 425-26 (1961).

76. Town of Lockport v. Citizens for Community Action, 430 U.S. 259 (1977); Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973).

77. *Town of Lockport*, 430 U.S. at 266. *Accord*, Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 69 (1978); *Salyer Land Co.*, 410 U.S. at 728.

78. *Town of Lockport*, 430 U.S. at 266. In *Salyer Land Co.*, for example, the Supreme Court held that the electorate of a water storage district could be apportioned to give greater influence to those groups most affected by the vote. 410 U.S. at 731-35.

79. Kramer v. Union Free School Dist. No. 15, 395 U.S. 621, 632 (1969); *see McGowan*, 366 U.S. at 425-26. This concept originated in the case of *Hunter v. Pittsburgh*,

The validity of a classification of voters into interested and noninterested groups also depends upon whether the classification is reasonably precise, and if the "group interests were sufficiently different to justify total or partial withholding of the electoral franchise from one of them."[80] Therefore, if the voters in the two groups have "substantially identical interests" regarding the substance of the referendum, then the classification would be unconstitutional.[81] The type of classification also affects the kind of standard used in analyzing the law. In an election, "any classification restricting the franchise on grounds other than residence, age, and citizenship cannot stand unless the. . .State can demonstrate that the classification serves a compelling State interest."[82] Thus, classifications that burden fundamental rights or that are used against minorities are subject to a test of strict scrutiny.[83] Franchise restrictions based on residence or geographical location are instead held to a mere rationality test.[84]

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207 U.S. 161 (1907). In *Hunter*, the Supreme Court stated that the powers a state gives to a municipal corporation is granted at the absolute discretion of the state:

> The State, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the State is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States.

Hunter, 207 U.S. at 178-79. While *Hunter* is still good law, *Kramer*, and subsequent Supreme Court decisions, have slightly limited the absolute statements in *Hunter*. *See Kramer*, 395 U.S. at 627-32; *Holt Civic Club*, 439 U.S. at 71 (discussing how *Kramer* has qualified *Hunter*). The Supreme Court has since stated that *Hunter* does not preclude judicial consideration of a claim that a change in municipal boundaries resulted in a violation of voting rights and the Constitution. Gomillion v. Lightfoot, 364 U.S. 339 (1960). Yet, all equal protection decisions made since *Hunter* have to be analyzed by recognizing the sweeping powers a state starts with in this area. *Holt Civic Club*, 439 U.S. at 71.

In a very similar case decided shortly after *Hunter*, the New York State Court of Appeals ruled that the State law which created the County of the Bronx from land that had been part of New York County was a valid law. People *ex rel.* Unger v. Kennedy, 207 N.Y. 533, 101 N.E. 442 (1913). The State law stated that only residents of the proposed county could vote on the issue of separation from New York County, and that the separation would automatically become effective upon the approval of the referendum by the Bronx voters. 1912 N.Y. Laws 548. The court ruled that no equal protection rights were violated by the law. *Unger*, 207 N.Y. at 543-44, 101 N.E. at 445-46. Yet just like *Hunter*, this case is subject to recent Supreme Court decisions.

80. *Town of Lockport*, 430 U.S. at 266-67.

81. *Id.* at 268.

82. Hill v. Stone, 421 U.S. 289, 297 (1975); *see Holt Civic Club*, 439 U.S. at 68-69.

83. Moorman v. Wood, 504 F. Supp. 467, 474-75 (E.D. Ky. 1980).

84. *Id.* at 474; St. Louis County, Mo. v. City of Town and Country, 590 F. Supp. 731,

C. Applying the Equal Protection Clauses to Chapter 773 and Any Future Secession Legislation

Based upon decisions by the United States Supreme Court, Chapter 773 and any future state law allowing the secession of Staten Island without the consent of New York City do not offend the Equal Protection Clauses.[85] In the special interest elections proposed by Chapter 773, there is no doubt that the secession of Staten Island would have a disproportionate impact on residents of Staten Island as compared to residents of the rest of the City. The State's goal, as articulated by Chapter 773, is to allow Staten Islanders, and not the rest of the City, to decide if they want to continue as a component of New York City.[86] By having only Staten Islanders participate in the process, up until final legislative approval, the State accomplishes that goal. The distinction between Staten Island residents and the residents of the other four boroughs is reasonable and precise, and the two groups clearly have different interests.[87] Since this type of classification is one of residence or geography, the law is held to a rationality test. Chapter 773 and any law allowing one group of people to choose secession through a series of referenda and a long deliberate process are both reasonable and rational. The State's desire to gauge the level of political discontent of approximately 400,000 of its residents is rationally related to any final vote by the State Legislature on the issue. Therefore, Chapter 773, as well as any other future state law which would allow the secession of Staten Island through a referendum limited only to Staten Island voters, does not and would not

736-37 (E.D. Miss. 1984); Adams v. City of Colorado Springs, 308 F. Supp. 1397, 1403 (D. Colo.), *aff'd*, 399 U.S. 901 (1970).

85. Of course if one concludes that Chapter 773 is merely advisory, then there is even less of a possibility that the law violates equal protection rights. For the purposes of this Note, the issue will be addressed as whether the State has the power to have such a special election in a nonadvisory capacity.

86. 1989 N.Y. Laws 773 (amended 1990 N.Y. Laws 17).

87. The City of New York opposes secession, because it fears losing a tax paying population of almost 400,000 people, approximately 20% of the City's total land area, and billions of dollars worth of property that the City has built, improved and maintained at the City's expense. *See* Brief for the City of New York, *supra* note 32, at 10-11. Staten Island supports secession on the grounds that it has lost a great deal of political power in the City and now wants to control itself after years of grievances with City dominion. *See supra* notes 18, 23.

In *Lockport*, the Supreme Court addressed a New York law which required two separate groups to vote for the creation of a county before the county could be created. In upholding the law, the Court stated that "the question of the constitutionality of Art. IX of the New York Constitution. . .turns, not on the perceptions of voters in a particular county, but on whether the State might legitimately view their interests as sufficiently different to justify a distinction between city and town voters." *Town of Lockport*, 430 U.S. at 270 n.17.

violate the Equal Protection Clauses of the United States and New York State Constitutions.[88]

IV. According To Judicial Interpretations Of The Home Rule Doctrine, The State Government Can Separate Staten Island From New York City Without City Approval

"Under the current scheme of things, the term 'constitutional home rule' is a misnomer. In most states, a more accurate designation would be 'judicial home rule.' "[89] State courts have had to reconcile the "difficult problem of furthering strong local governments but leaving the State just as strong to meet the problems that transcend local boundaries, interests and motivations."[90] New York State courts have interpreted the Home Rule Amendment to the state constitution as being completely subservient to the State's interests.[91] One commentator has even described Home Rule as being nothing more than a "ghost."[92] Yet at no point has Home Rule been so fundamentally tested as with the actual tearing apart of a city by the State. One would assume that the Home Rule Article to the state constitution would be able to protect the very integrity of a city. However, if the judicial history of Home Rule is any guide, the New York State Court of Appeals will allow Staten Island to secede from New York City, and simultaneously finally destroy Home Rule.

A. A History of the Home Rule Doctrine

In 1894, a Home Rule provision was first added to the New York State Constitution.[93] However, New York courts have historically been loathe to enforce the Home Rule message mandate. From 1894

88. In regard to their inability to vote in a referendum, the citizens of the rest of New York City are qualified voters in the State, "and so remain equal participants in the election of the state legislators who created and have the power to change" the law. Ball v. James, 451 U.S. 355, 371 n.20 (1981).

89. W. Bernard Richland, *Constitutional City Home Rule in New York*, 54 COLUM. L. REV. 311, 314 n.10 (1954) (quoting R. MOTT, HOME RULE FOR AMERICAN CITIES 51 (1949)).

90. Wambat Realty Corp. v. State of New York, 41 N.Y.2d 490, 498, 362 N.E.2d 581, 587, 393 N.Y.S.2d 949, 955 (1977).

91. *See, e.g., id.* at 490, 362 N.E.2d at 581, 393 N.Y.S.2d at 949; Adler v. Deegan, 251 N.Y. 467, 167 N.E. 705 (1929).

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

93. The Home Rule provision stated that any special law — a law which affects only a small number of localities — that also "relat[es] to the property, affairs or government of cities," requires the Legislature to request a Home Rule message from the mayor of the locality affected. If the mayor refused to accept the bill, then the Legislature would then

to 1923, the New York State Court of Appeals consistently upheld laws which never obtained Home Rule messages from localities.[94] In *Admiral Realty Co. v. City of New York*, a case that presents the tone found in the rest of the decisions of this period, the State's Rapid Transit Act only applied to cities with populations over one million people.[95] In rejecting a Home Rule challenge, the court stated that the law is a general one, and therefore not subject to Home Rule because it could affect all cities in the State.[96] While Home Rule appeared in the constitution of 1894, it was "viewed by the courts. . .[as] merely a pleasant myth."[97]

Although in 1923 the Home Rule Article was amended to strengthen the principle of Home Rule,[98] the New York State Court of Appeals chose to ignore the significance of this amendment. The amendment no longer allowed a mayor to temporarily suspend a law. Instead, all special laws that affected the "property, affairs or government" of a locality became illegal unless the Governor declared that an emergency existed and the Assembly and Senate passed the law by a two-thirds majority.[99] After 1923, one of the first cases to challenge a state law on Home Rule grounds actually resulted in the striking down of the statute. In the *Matter of the Mayor of New York [Elm Street]*, the court unanimously struck down a law that was written with so much detail, that there was no way that the law could have referred to any other area but New York City.[100] Chief Judge Car-

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have to pass the bill a second time to make it law. N.Y. CONST. art. XII, § 2 (1894) (amended 1923, 1938, repealed 1963).

94. For example, in *People ex rel. Einsfeld v. Murray*, the court of appeals stated that consent by the cities in this case was not needed because of the "liberal spirit" the court could use in interpreting Home Rule. 149 N.Y. 367, 381, 44 N.E. 146, 150 (1896).

95. Only New York City had such a population. Admiral Realty Co. v. City of New York, 206 N.Y. 110, 138-39, 99 N.E. 241, 249 (1912).

96. *Id.* at 139-40, 99 N.E. at 249-50. The following year, in *People ex rel. Unger v. Kennedy*, the court allowed the Bronx to be separated from New York County without a Home Rule message from New York City. *See supra* note 79.

The court in *Matter of McAneny v. Board of Estimate and Apportionment of the City of New York* determined that an amendment to the Rapid Transit Act was not a special law even though it applied only to cities of over one million people. Again the decision rested on the fiction that cities of one million inhabitants is legally distinguishable from specifically naming one or two cities. 232 N.Y. 377, 134 N.E. 187 (1922).

97. Richland, *supra* note 89, at 326; *See* J. D. Hyman, *Home Rule in New York 1941-1965: Retrospect and Prospect*, 15 BUFF L. REV. 335, 342 (1965).

98. N.Y. CONST. art. XII, §§ 2, 4 (1923) (amended 1938, repealed 1963).

99. *Id.* "The Home Rule Amendment. . .of 1923. . .was intended to vest in the cities of the State increased control of their own property, affairs and government." City of New York v. Village of Lawrence, 250 N.Y. 429, 435, 165 N.E. 836, 837 (1929).

100. 246 N.Y. 72, 158 N.E. 24 (1927); *See* 1925 N.Y. Laws 602, §§ 1-2 (the law at issue in this case).

dozo, writing for the court, stated that:

> 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 dictated their adoption. The municipality is to be protected in its autonomy against the inroads of evasion.[101]

In this decision, Cardozo appeared to recognize the significance of Home Rule and the public's desire to see its vigorous implementation. However, while the sweeping language of the court suggested that Home Rule would become an active part of State law, the court soon illustrated that *Matter of Elm Street* was a deviation and not the norm.[102]

In *City of New York v. Village of Lawrence*, the New York State Court of Appeals once again took a more narrow approach to the Home Rule Article.[103] The case involved a State law which changed part of New York City's boundary lines with neighboring communities without a declaration of an emergency by the Governor.[104] In another unanimous decision, the court upheld the law by arguing that "[i]n the absence of express restrictions placed by the [c]onstitution upon the exercise of its legislative powers, the Legislature may create or destroy, enlarge or restrict, combine or divide, municipal corporations."[105] Although the court stated that it can "hardly be doubted" that any law which determines a locality's boundaries is a special law that "affects its property, affairs or government," the court also stated that "[l]egislation relating to the boundaries of political divisions of the State is a matter of state concern, and its benefits extend beyond the limits of the property, affairs and government of the city which is affected."[106] The court concluded that because the law's effect on the City "[was] so slight as to be almost illusory," the state's concern or interest outweighed the effect on the City.[107] As a result, the court

101. *Matter of Elm Street*, 246 N.Y. at 76, 158 N.E. at 25-26.

102. At the same time that *Matter of Elm Street* was decided, the appellate division took a different position. In *Adriaansen v. Board of Education*, the appellate division stated that "[t]he authority of the Legislature over the boundaries of subdivisions of the State is absolute. It may consolidate, add to or take from the territory of a municipality or district, without the consent of the municipality or district affected." 222 A.D. 320, 323-24, 226 N.Y.S. 145, 147 (1927), *aff'd*, 248 N.Y. 542, 162 N.E. 517 (1928).

103. 250 N.Y. 429, 165 N.E. 836 (1929).

104. 1928 N.Y. Laws 802, §§ 1-4.

105. *Village of Lawrence*, 250 N.Y. at 437, 165 N.E. at 838.

106. *Id.* at 439-40, 165 N.E. at 838-39.

107. *Id.* at 445-47, 165 N.E. at 841-42. The court, though, did maintain the possibility of local interests superseding State concerns:

upheld the constitutionality of the law, and once again weakened Home Rule.

Whatever glimmer of hope for Home Rule that may have existed after *Village of Lawrence* was snuffed out by the State's highest court that same year. In *Adler v. Deegan*, the New York State Court of Appeals upheld the Multiple Dwelling Law, which only applied to cities with populations of at least 800,000.[108] The law was specifically directed against unsanitary and hazardous slum dwellings.[109] According to the court, the words:

> "property, affairs or government of cities" have become words of art, and were so used in the recent Home Rule Amendment, now known as article [sic.] XII of the Constitution. . . .The fact remains that this court gave to these words. . .a special limited meaning. . . .When the people put these words in article [sic.] XII of the Constitution, they put them there with a Court of Appeals' definition, not that of Webster's Dictionary.[110]

The court stated that "if the subject be in a substantial degree a matter of [s]tate concern, the Legislature may act, though intermingled with it are concerns of the locality."[111] Thus, if the matter was one of state concern, then it automatically did not fall within the "property affairs or government" of a city.[112] The court concluded that the law at issue was a matter of state concern, did not need a Home Rule message, and thus did not violate the state constitution.[113]

After *Adler*, the New York State Court of Appeals used the idea of state concern to uphold a variety of laws. In one case, *New York Steam Corp. v. City of New York*, the State passed a law which ignored Article XII and allowed all cities with a population over one million to pass local tax laws.[114] The court held that since the law was designed to combat high unemployment during an unstable time pe-

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> We recognize that, conceivably, in some cases the effect of a change of the boundaries of a city upon its property, affairs or government might be very serious. Disconnection of territory might render the existing form of government of a city inappropriate to meet the needs of its altered boundaries. It might place outside of the altered boundaries property of the city of substantial value. We do not now pass upon such a situation.

Id. at 445, 165 N.E. at 841.

108. 251 N.Y. 467, 167 N.E. 705 (1929); 1929 N.Y. Laws 713. Once again, the only city the law could apply to was New York City.

109. 1929 N.Y. Laws 713.

110. *Adler*, 251 N.Y. at 473, 167 N.E. at 707.

111. *Id.* at 491, 167 N.E. at 714.

112. *Id.* at 474-78; 167 N.E. at 707-09.

113. *Id.* at 477-78, 167 N.E. at 708-09.

114. 268 N.Y. 137, 197 N.E. 172 (1935).

riod, the matter was one of state concern.[115] The decisions of the court of appeals after 1923 reflected a very narrow interpretation of Home Rule.

In 1938, although the Home Rule Article was amended again, the New York State Court of Appeals continued to interpret it narrowly.[116] Rather than require a gubernatorial emergency message to obtain a special law, the new provision mandated a local request.[117] Yet the 1938 Convention that met to alter Home Rule, desired that the new Home Rule Article, and the concept of "property, affairs and government," be interpreted in the same narrow way by the courts.[118] Therefore, the period from 1938 to 1963 resulted in the continued deterioration of Home Rule in New York.[119]

The Home Rule provision of the state constitution was last altered in 1963.[120] The 1963 Home Rule Amendment to the constitution was "intended to expand and secure the powers enjoyed by local governments."[121] The 1963 Home Rule "package" also included the Municipal Home Rule Law and the Statute of Local Governments. The texts of both statutes mandate that they be "liberally construed."[122] Thus, the amendment appeared to give an affirmative grant of power to local governments to manage their own affairs, while restricting the State Legislature from intruding on local matters. The new Home Rule law, however, once again stated that the legislature could pass any law which did not affect the "property, affairs or government" of a local government.[123] The retention of that key phrase led legal scholars of the time period to predict that "[i]t is unlikely that the

115. *Id.* at 143, 197 N.E. at 173. In *County Securities, Inc. v. Seacord*, the court confirmed the supremacy of the State over the City in regard to taxation. 278 N.Y. 34, 15 N.E.2d 179 (1938).

116. N.Y. CONST. art. IX, § 11 (1938) (repealed 1963).

117. *Id.*

118. W. Bernard Richland, *Constitutional City Home Rule in New York: II*, 55 COLUM. L. REV. 598, 605 (1955).

119. *See*, Connolly v. Stand, 192 Misc. 872, 83 N.Y.S.2d 445, *aff'd without opinion*, 274 A.D. 877, 82 N.Y.S.2d 922, *aff'd without opinion*, 298 N.Y. 658, 82 N.E.2d 399 (1948); Ainslee v. Lounsberry, 275 A.D. 729, 86 N.Y.S.2d 857, *appeal denied*, 275 A.D. 865, 89 N.Y.S.2d 240 (1949). *See also*, Hyman, *supra* note 97, at 335; Richland, *supra* note 118, at 610-12.

120. N.Y. CONST. art. IX, §§ 1-3.

121. *Wambat Realty Corp.*, 41 N.Y.2d at 496, 362 N.E.2d at 585-86, 393 N.Y.S.2d at 953-54. Section 1, for example, is entitled the "Bill of Rights for Local Governments." N.Y. CONST. art. IX, § 1.

122. N.Y. MUN. HOME RULE LAW § 51 (McKinney 1963); N.Y. STAT. LOCAL GOV'TS LAW § 20 (McKinney 1963).

123. N.Y. CONST. art. IX, § 3. The constitution expressly provides that the Legislature retains plenary power over "matters other than the property, affairs or government" of municipalities. *Id.*

new amendment will have the effect of changing a single significant court decision dealing with home rule."[124] Subsequent state court rulings proved this prediction to be accurate.

Wambat Realty Co. v. State of New York, the most important post-1963 New York State Court of Appeals case concerning Home Rule, completely reaffirmed the *Adler* line of cases, and maintained a very narrow interpretation of Home Rule.[125] After stating that the 1963 Home Rule Amendment was intended to increase power to local governments, the court then concentrated on the Legislature's retention of the language "property, affairs or government" in the new article.[126] The court believed that the intentional use of these words once again meant that its previous decisions concerning Home Rule were still relevant.[127] Referring to *Adler*, the court stated that if a substantial degree of state concern exists, then the State will not be paralyzed from acting if the matter also touches upon the "property, affairs, or government" of a locality.[128] In fact, "[i]t mattered not that in each of these cases there was encroachment upon local concerns; the vital distinction was that the subject matter in need of legislative attention was of sufficient importance to the State, transcendent of local or parochial interests or concerns."[129] Thus, even though the 1963 Home Rule Amendment was intended to increase power to the localities, the court of appeals chose once again to take a very restricted view of Home Rule.

Later that same year, the high court of New York in *Board of Education v. City of New York* confirmed that if a significant degree of state concern existed, then the State could act unfettered by Home Rule.[130] In *Board of Education*, the State passed a law ordering the City of New York to appropriate a specific percentage of its budget to education.[131] The court first stated that Article IX, § 3, expressly exempted Home Rule restrictions from laws dealing with education.[132]

124. Hyman, *supra* note 97, at 335-36 (quoting Grad, *The New York Home Rule Amendment—A Bill of Rights for Local Governments?*, 14 LOC. GOV'T L. SERVICE LETTER 9 (1964)) (also quoting Lazarus, *Constitutional Amendment and Home Rule in New York State*, N.Y.L.J., Oct. 13, 1964, at 1, 4).

125. 41 N.Y.2d 490, 362 N.E.2d 581, 393 N.Y.S.2d 949 (1977).

126. *Id.* at 493-97, 362 N.E.2d at 583-86, 393 N.Y.S.2d at 951-54.

127. *Id.* at 496-97, 362 N.E.2d at 585-86, 393 N.Y.S.2d at 953-54.

128. *Id.* at 494, 362 N.E.2d at 584, 393 N.Y.S.2d at 952.

129. *Id.*, 362 N.E.2d at 584, 393 N.Y.S.2d at 952. The court stated that "neither [c]onstitution nor statute was designed to disable the State from responding to problems of significant State concern." *Id.* at 497, 362 N.E.2d at 586, 393 N.Y.S.2d at 954.

130. 41 N.Y.2d 535, 362 N.E.2d 948, 394 N.Y.S.2d 148 (1977).

131. 1976 N.Y. Laws 132.

132. *Board of Education*, 41 N.Y.2d at 542, 362 N.E.2d at 954, 394 N.Y.S.2d at 154. Article IX specifically states that nothing in the Article "shall restrict. . .the legislature in

Even if education was not expressly exempted from Home Rule, the court concluded that "legislation dealing with matters of State concern even though of localized application and having a direct effect on the most basic of local interests does not violate the constitutional home rule provisions."[133]

The more recent case of *Kelley v. McGee* elaborated on the power of the State.[134] In *Kelley*, the court held that a state law which required that certain full-time District Attorneys be paid at the same salary levels as County Court Judges in those same counties, did not violate Article IX of the state constitution.[135] The court once again stated the consistent theme that "in areas of State-wide significance, the State may freely legislate, notwithstanding the fact that the concern of the State may also touch upon local matters."[136] Even though the court acknowledged that Article IX specifically grants power to local governments to control the salaries of its officers, the court argued that the State could pass any law controlling these salaries as long as the law is a general one.[137] According to the court, once a minimum state interest is found, a classification among local governments is acceptable as long as the classification is "reasonable and related to the State's purpose."[138] The court concluded that since "[c]lassifications based upon the population of members of the class have long been held reasonable," that the law at issue was constitutional.[139] As a

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relation to. . .[t]he maintenance, support or administration of the public school system. . . ." N.Y. CONST. art. IX, § 3.

133. *Board of Education*, 41 N.Y.2d at 542, 362 N.E.2d at 954, 394 N.Y.S.2d at 154. The court in *Hotel Dorset v. Trust for Cultural Resources*, addressed a law which only benefitted cultural institutions of over 50,000 square feet in property and with an average of at least an annual admission of 500,000 people. 46 N.Y.2d 358, 385 N.E.2d 1284, 413 N.Y.S.2d 357 (1978). While acknowledging that the law could only apply to the Museum of Modern Art, the court maintained its old position that the law is not a special law because it could apply to more than one entity in the future. *Id.* at 368-69, 385 N.E.2d at 1288-89, 413 N.Y.S.2d at 361-62. The court also stated that even if the law were a special one, it would be constitutional because a state concern always exists when the law acts to preserve an entity of importance to the State. *Id.* at 373, 385 N.E.2d at 1291, 413 N.Y.S.2d at 364-65.

134. 57 N.Y.2d 522, 443 N.E.2d 908, 457 N.Y.S.2d 434 (1982).

135. *Id.* at 530, 443 N.E.2d at 909, 457 N.Y.S.2d at 435.

136. *Id.* at 538, 443 N.E.2d at 913-14, 457 N.Y.S.2d at 439-40.

137. *Id.* at 539 n.14, 443 N.E.2d at 914 n.14, 457 N.Y.S.2d at 440 n.14.

138. *Id.* at 540, 443 N.E.2d at 915, 457 N.Y.S.2d at 441. In the case of *Matter of Town of Islip v. Cuomo*, the court of appeals addressed a State law designed to protect the drinking water of part of the State. 64 N.Y.2d 50, 473 N.E.2d 756, 484 N.Y.S.2d 528 (1984). After reciting the law, as has been consistently interpreted by the court for decades, the court ruled that the law was general, of state concern, and that it did not violate the Home Rule provision. *Id.* at 52-58, 473 N.E.2d at 757-61, 484 N.Y.S.2d at 529-33.

139. *Kelley*, 57 N.Y.2d at 540, 443 N.E.2d at 915, 457 N.Y.S.2d at 441. The court of

result, the court of appeals has taken a consistently strict view of Home Rule since its inception, regardless of changes in the constitution.

B. A Summary of the New York State Court of Appeals' Present View of Home Rule

The current interpretation of Home Rule, which for all intents and purposes has been the same one since *Adler*, can be analyzed as a series of rules. General laws are unaffected by the Home Rule Article, while special laws are subject to the doctrine. A special law that directly affects the property, affairs or government of a locality is unconstitutional unless the matter is one of a substantial or significant degree of state concern. Even if the law affects basic local interests, it is constitutional as long as state concern is also present.

C. The Home Rule Article of the Constitution Will Not Prevent the Secession of Staten Island

Based upon the past decisions of the New York State Court of Appeals, the State Legislature can allow Staten Island to secede without a Home Rule message from New York City. First of all, the City has to overcome a very high standard in order to prove that a state law is unconstitutional. "Legislative enactments carry an exceedingly strong presumption of constitutionality, and while this presumption is rebuttable, one undertaking that task carries a heavy burden of demonstrating unconstitutionality beyond a reasonable doubt. . . ."[140] Any final act that would allow Staten Island, via Chapter 773, to secede from New York City would be a special law because the law would only affect one area: New York City. The special law would affect the property, affairs or government of New York City.[141] The

appeals as recently as 1989 reaffirmed its position on Home Rule in *Kamhi v. Town of Yorktown*, 74 N.Y.2d 423, 547 N.E.2d 346, 548 N.Y.S.2d 144 (1989). After once again stating that the Home Rule Article should be interpreted "liberally," the court then proceeded to state the traditional line that a local law is invalid if it is "inconsistent with the [c]onstitution or any general law." *Id.* at 428-29, 547 N.E.2d at 348-49, 548 N.Y.S.2d at 146-47.

140. Elmwood-Utica Houses v. Buffalo Sewer Authority, 65 N.Y.2d 489, 495, 482 N.E.2d 549, 551-52, 492 N.Y.S.2d 931, 933-34 (1985); *Hotel Dorset*, 46 N.Y.2d at 370, 385 N.E.2d at 1289-90, 413 N.Y.S.2d at 362-63; People v. Epton, 19 N.Y.2d 496, 505, 227 N.E.2d 829, 834, 281 N.Y.S.2d 9, 16 (1967); Town of Monroe v. Carey, 96 Misc. 2d 238, 242, 412 N.Y.S.2d 939, 941-42 (1977).

141. The loss of Staten Island would have a dramatic affect on New York City. To begin with, the secession of Staten Island would result in the removal of almost 400,000 people from the City, and a reduction of 19.5 percent of the City's total land area. In addition, the City of New York owns properties in Staten Island worth billions of dollars.

State, though, also considers this an important State issue.[142] Issues concerning the boundaries of a political subdivision are matters of state concern, and state action may be needed in some cases. When almost 400,000 residents of the State are so angered by their local government that they wish to secede from it, the State is the most reasonable political force available to maintain a degree of stability. Therefore, based upon the court of appeals' view of Home Rule, the State Legislature may remove Staten Island from New York City without a Home Rule message from the City.

The one lingering problem concerns the future of Home Rule. Almost since its inception, Home Rule has been interpreted by state courts as a shadow in the constitution. Instead of preserving local authority, Home Rule has created "a presumption of state concern."[143] Yet the possible secession of Staten Island could very well toll the final death knell of Home Rule. At no time has the very existence of Home Rule been so fundamentally tested. What could affect the property, affairs or government of a city more than the dismembering of that city? State courts, however, have not hesitated in ignoring the Home Rule mandate in the constitution and the express will of the State Legislature. If the planned secession of Staten Island does not violate the Home Rule provision, then nothing will. The state courts must invoke the doctrine of Home Rule to prevent the secession of Staten Island and the destruction of Home Rule.

V. Conclusion

According to federal and state case law, Chapter 773 and a future law allowing Staten Island to secede from the City of New York without participation by the entire City is or would be constitutional. The equal protection rulings, and the idea that localities only exist at the whim of the State are clear and understandable. What does not ap-

Brief for the Corporation Counsel for the City of New York, *supra* note 32, at 10-11. "There are more 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" all located in Staten Island and owned by the City of New York. *Id.* at 11. The City has also spent millions of dollars on equipment for the police and fire departments and the schools. *Id.* at 12. In addition, the City disposes almost all of the refuse it collects each day in the Fresh Kills Landfill located in Staten Island. *Id.* at 11. Finally, the loss of Staten Island would lead to a reduction in income to New York City from sales and taxes, and greatly inhibit the City's ability to raise money and pay off debts. *Id.* at 12-13.

142. Governor Cuomo and both houses of the State Legislature overwhelmingly supported Chapter 773. *See supra* note 24.

143. Cole, *supra* note 92, at 715.

pear cognizable is the purpose of the Home Rule Article of the New York State Constitution. If the state courts, regardless of legislative intent or amendments to the constitution, will interpret the doctrine as an apparition, then why should it exist at all? As Chief Judge Cardozo feared, the Home Rule Doctrine has become a form of words and little else. The secession of Staten Island is Home Rule's last stand. If Home Rule fails to survive the attempted secession of Staten Island, then it is truly a dead article of the New York State Constitution.

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