

1995

Municipal Home Rule and the Conditions of Justifiable Secession

Joseph P. Viteritti
New York University

Follow this and additional works at: <https://ir.lawnet.fordham.edu/ulj>

 Part of the [State and Local Government Law Commons](#)

Recommended Citation

Joseph P. Viteritti, *Municipal Home Rule and the Conditions of Justifiable Secession*, 23 Fordham Urb. L.J. 1 (1995).
Available at: <https://ir.lawnet.fordham.edu/ulj/vol23/iss1/1>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Urban Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

Municipal Home Rule and the Conditions of Justifiable Secession

Cover Page Footnote

Joseph P. Viteritti, Research Professor at New York University's Robert F. Wagner Graduate School of Public Service, serves as Executive Director of the New York State Charter Commission for Staten Island. I am indebted to numerous friends and colleagues who commented on an earlier draft of this article or previous papers that led me to its conclusions, including Robert Bailey, Richard Briffault, Edward Costikyan, Raymond Fasano, James Jacobs, John Keohane, Frank Macchiarola, Dick Netzer and Rosemary Salomone.

Responsibility for the final product is entirely mine. The contents are not intended to represent the viewpoint of the New York State Charter Commission for Staten Island or any of its members. A portion of this paper was presented at the Conference on "Challenges to Law at the End of the 20th Century," International Association for Philosophy of Law and Social Philosophy, University of Bologna, Italy, June 20, 1995.

MUNICIPAL HOME RULE AND THE CONDITIONS OF JUSTIFIABLE SECESSION

Joseph P. Viteritti*

Contents

Introduction.....	3
I. Philosophical And Legal Foundations Of The Home Rule Principle	7
A. <i>Notions of Democracy</i>	7
1. Autonomous Cities	7
2. Sovereignty and Community.....	8
B. <i>Legal Notions</i>	10
1. State Prerogatives.....	11
2. Home Rule	12
C. <i>New York State Law</i>	13
1. Constitutional History	13
2. <i>Adler and Lawrence</i>	15
3. Staten Island Cases	17
D. <i>Home Rule and Secession</i>	19
1. The Legal Quagmire.....	19
2. Dependent Cities	21
3. The Search for Community	23
II. Secession As A Political And Legal Concept	24
A. <i>The Idea</i>	25
1. And Self-Determination	25
2. And Constitutionalism	27
3. And Legitimacy.....	29
B. <i>The Moral Dimension</i>	32

* Joseph P. Viteritti, Research Professor at New York University's Robert F. Wagner Graduate School of Public Service, serves as Executive Director of the New York State Charter Commission for Staten Island.

I am indebted to numerous friends and colleagues who commented on an earlier draft of this article or previous papers that led me to its conclusions, including Robert Bailey, Richard Briffault, Edward Costikyan, Raymond Fasano, James Jacobs, John Keohane, Frank Macchiarola, Dick Netzer and Rosemary Salomone. Responsibility for the final product is entirely mine. The contents are not intended to represent the viewpoint of the New York State Charter Commission for Staten Island or any of its members.

A portion of this paper was presented at the Conference on "Challenges to Law at the End of the 20th Century," International Association for Philosophy of Law and Social Philosophy, University of Bologna, Italy, June 20, 1995.

1. Reasons For.....	32
a. Liberalist Arguments.....	33
b. Equity Arguments.....	33
c. General Dissatisfaction.....	34
2. Arguments Against.....	37
a. Disintegration.....	38
b. Trapped Minorities.....	38
c. Stranded Majorities.....	39
III. Secession And Local Government: Justifiable Conditions.....	40
A. <i>Essential Properties</i>	41
1. Legitimate Community.....	41
2. Economic Viability.....	42
3. Impact on Original Municipality.....	42
4. Impact on Larger Community.....	42
5. Minority Protections.....	43
B. <i>Relevant Factors</i>	43
1. Historical Grievances.....	43
2. More Efficient Government.....	44
IV. Staten Island: As Part Of, And Apart From New York City.....	45
A. <i>Profile</i>	45
B. <i>From County to City</i>	47
1. Inception.....	47
2. Consolidation.....	48
C. <i>Greater New York</i>	50
1. Structure.....	50
2. The Boroughs.....	52
3. The Board of Estimate.....	53
D. <i>Seeds of Separatism</i>	54
1. The New Charter.....	54
2. Legislative Action.....	56
E. <i>The Staten Island Case</i>	58
1. A Political Community.....	58
2. Desire for Self-Government.....	58
3. Economic Viability.....	59
4. Impact on New York City.....	61
5. Impact on State and Region.....	62
6. Minority Interests.....	63
7. Grievances.....	64
8. Legitimacy.....	66
9. Summary.....	67

Introduction

On the final day of its 1989 session, the New York State Legislature passed a bill that, with subsequent approval by Governor Mario Cuomo, would initiate a process for the Borough of Staten Island to secede from New York City and establish itself as a separate municipality.¹ The bill called for an initial referendum to be held on Staten Island in November 1990 to consider whether the voters sought to move forward in the secession process.² Upon approval by the voters, a State Commission would be appointed to study the issue and write a charter for the new city. A second referendum would be held on Staten Island in November 1993 for the voters to approve the charter and implicitly express their desire to secede.³ If the charter were adopted, the Commission had ninety days to present the Governor and the legislature with a bill that would effectuate Staten Island's separation from New York City. Such legislation would have to pass both houses of the legislature and be signed by the Governor before a new city could be incorporated.⁴

Immediately after the passage of the secession law, New York Mayor Edward Koch instructed his counsel to file suit in state court in an attempt to stop the first referendum. City attorneys launched a two-pronged legal attack.⁵ First, they argued on federal constitutional grounds that by limiting the secession referenda to the voters of Staten Island, the procedure had denied equal protection to the voters of the other boroughs. Second, they claimed that by placing

1. 1989 New York Laws 3291, ch. 773, as amended, 1990 New York Laws 22, ch. 17. Staten Island is the smallest of five boroughs that make up New York City. The others are the Bronx, Brooklyn, Queens and Manhattan. These boroughs correspond to five state counties that respectively include Richmond, Bronx, Kings, Queens and New York.

2. The ballot question read: "Should the borough of Staten Island separate from the City of New York to become the City of Staten Island."

3. The referendum actually posed two questions: (1) Shall the charter for the city of Staten Island proposed by the charter commission for the city of Staten Island be adopted?; (2) Provided that the greatest number of votes cast in said election by voters of the borough 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?

4. The original bill, approved by both houses of the legislature in 1989, would not have required legislative approval after the second referendum in order for secession to occur. 1989 New York Laws 3291, ch. 773.

5. See Brief for the Appellant, *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).

final discretion on the matter with the State Legislature, the law had violated the home rule provisions of the New York State Constitution.

In September 1990, the State Court of Appeals affirmed two lower court decisions upholding the constitutionality of the secession legislation.⁶ Federal claims were dismissed, and both the trial court and the intermediate appellate court found that no home rule message is required because the legislature has plenary power to create governments and determine boundary questions.⁷ The Court of Appeals, the state's highest court, chose not to address the home rule issue directly. It found that since the referendum in question was only advisory in nature, not resulting in the separation of Staten Island from New York City, there was no need to determine at that time how the matter would finally be disposed.

The initial referendum passed with an approval rate of 83% of the Staten Island voters. In February 1991, Governor Cuomo swore in a thirteen member Charter Commission that is chaired by State Senator John Marchi, the senior legislator from the island. The panel, as prescribed in the law, is comprised of five Staten Island legislators, five of their respective appointees, and one appointee each of the Governor, the Speaker of the Assembly and the President Pro Tem of the Senate.⁸ In November 1993, a second referendum was put before the people of Staten Island that was approved by 65% of the voters.

On March 1, 1994, the Commission, in accord with its legislative mandate, submitted a bill in both houses of the legislature that would create a new City of Staten Island apart from New York.⁹ The next day, Assembly Speaker Sheldon Silver announced, on the advice of his Home Rule Counsel, that he could not bring the bill up for consideration in his house without first receiving a home rule message from the City of New York.¹⁰ Because both the

6. *City of New York v. State of New York*, 562 N.E.2d 118, 120 (1990).

7. *City of New York v. State of New York*, 557 N.Y.S.2d 914, 917 (A.D. 1 Dept. 1990), *aff'g* 556 N.Y.S.2d 823, 827 (Sup. Ct. 1990).

8. The original members of the Commission were Senator John Marchi (Chair), Assemblywoman Elizabeth Connelly (Vice-Chair), Allen Cappelli, Senator Martin Connor, Paul Henry, John Lavelle, Martin Lubin, Francis Powers, Paul Proske, Kathryn Rooney, Assemblyman Robert Straniere, Richard Thomas and Assemblyman Eric Vitaliano. Senator Connor was replaced by Senator Christopher Mega on January 1, 1993 as a result of redistricting. Senator Mega left in July of 1993 to take a seat on the bench, and was subsequently replaced by Senator Robert DiCarlo.

9. New York State S.6820, A.9662.

10. Carl Campanile & Craig Schneider, *Assembly Invokes Rule Blocking Secession Vote*, STATEN ISLAND ADVANCE, Mar. 4, 1994, at A1.

Speaker of the New York City Council, Peter Vallone, and Mayor Rudolph Guiliani had already expressed their opposition to secession,¹¹ the prospect for receiving such a request was highly improbable.

The action by the Speaker led to an outpouring of high profile legal commentary and debate. The Counsel to the Governor issued a memorandum stating that a home rule message was not required in order for the legislature to act.¹² The Corporation Counsel for New York City prepared an opinion for the Mayor arguing that a home rule request was necessary under the State Constitution.¹³ In the spring of 1994, the three members of the Assembly from Staten Island, all of whom were Commission members, initiated a lawsuit against the Speaker.¹⁴ The petitioners claimed that the Speaker's action was an unconstitutional delegation of legislative power to New York City.

The case was dismissed by a trial court on January 17, 1995.¹⁵ Citing the separation of powers principle, Judge Robert Williams ruled that the question of whether a home rule message should be received before a bill can be reported out of committee is a legislative matter not subject to judicial review.¹⁶ He did not decide on the issue of home rule. The case is now under appeal. In the meantime, a secession bill has been proposed and passed in the Senate without any impediments put in its way over the home rule question.¹⁷ The new governor, George Pataki, has pledged to sign it.

The Staten Island secession case, the most significant in American urban history, raises several important questions regarding the process of how a territory might detach itself from an established

11. Judy L. Randall, *A Mayor Who Just Keeps Giving... But Secession is Not in His Bag of Gifts for the Island*, STATEN ISLAND ADVANCE, March 28, 1994; Reginald Patrick, *Vallone Finds Fault With Secession*, STATEN ISLAND ADVANCE, May 12, 1993; Carl Campanile & Craig Schneider, *Vallone to Island on Home Rule: Forget About It!* STATEN ISLAND ADVANCE, March 23, 1994.

12. Elizabeth D. Moore, MEMORANDUM TO THE GOVERNOR ON THE SUBJECT OF STATEN ISLAND SECESSION, March 10, 1994.

13. Paul A. Crotty, Opinion No.: 2-94, undated.

14. The suit was initiated by Robert Straniere, who was later joined by Eric Vitaliano and Elizabeth Connelly. Mr. Straniere's counsel Raymond Fasano served as attorney for the petitioners.

15. Straniere *et al.* v. Silver, Index No. 3213-94, January 17, 1995.

16. *Id.*

17. Senate bill S. 3781 was passed by a vote of 36-17 on April 12, 1995. S. 3781, 104TH CONG., 1ST SESS. (1995); Carl Campanile, *Senate OK's Secession*, STATEN ISLAND ADVANCE, April 13, 1995, at A1. Companion bill A. 6436 was introduced in the Assembly, but no action has been taken on it. *Id.*

city and set up its own government. The first question involves who should decide. Specifically, the matter at hand concerns whether the State Legislature has power to determine the issue without seeking a home rule request from the jurisdiction whose boundaries would be altered. This article argues that, based on precedents established in case law, the state legislature does have the plenary power to act and that, based upon more fundamental principles of liberal democracy, these precedents should not be overturned.

A second, more profound question surrounding the issue of municipal secession has not yet become part of the public dialogue: assuming that the state legislature may eventually have to deal with the merits of a secession plea, what criteria should be applied in its deliberations? This is a more difficult problem to address because there is no substantial body of case law on municipal secession. However, given the fact that appeals for independence from existing local governments have become more common in the last decade,¹⁸ there is a need to develop criteria that will allow for fair and responsible decision making. This issue is also addressed.

Most of the literature extant on the subject of secession is found in the field of international jurisprudence. While such scholarship is instructive, it does not fully address the issue in the context of state and local government. To do so, one must conduct a more comprehensive examination of the history and meaning of city government in the United States. This Article demonstrates how issues of constitutionalism that mitigate against secession in an international sphere are resolved in the context of American federalism. It is intended that the standards for review developed in this analysis will have general applicability to other cases of municipal secession. One cannot appreciate the inherent irony involved in juxtaposing home rule and secession without understanding basic precepts from which they were both sprung, namely, popular sovereignty and community.

This Article suggests a uniform standard by which domestic legislatures may decide current and future secession cases. Because Staten Island is an invaluable analytical tool, the Article will apply

18. Attempts at secession have occurred in Boston, Dallas, and San Francisco, but none have advanced so far as the Staten Island case. Regional movements are evident in California, Florida, Louisiana, Idaho, and Indiana. See Elizabeth Niendorf, *The Sweet Smell of Secession*, 7 GOVERNING 22-23 (1993). An interesting case occurred in Boston, where a black community in Roxbury sought to secede and set up its own city. See Roger House, *Mandela Referendum: Blacks in Boston Seek to Secede*, 247 THE NATION 452-56 (1988).

this uniform standard to Staten Island's proposed secession. Part I discusses the philosophical and legal foundations of the Home Rule principle and its relationship to secession. Part II considers secession as a political and legal concept, its underpinnings and the moral arguments on both sides of secession debates. Part III suggests a unified standard by which legislatures may consider secession attempts; and Part IV applies this standard to our prototypical Staten Island case. The article concludes that if the New York State legislature were to apply these uniform criteria to review the Staten Island case, it would approve secession.

I. Philosophical and Legal Foundations of the Home Rule Principle

A. Notions of Democracy

1. *Autonomous Cities*

Western scholars trace the idea of local autonomy to the city states of ancient Greece or Renaissance Italy.¹⁹ It is an impressive legacy. Athenian democracy thrived for nearly a thousand years, as did the Venetian Republic. Michael Libonati traces the first treatise on local government to a thirteenth century Florentine writer by the name of Brunetto Latini.²⁰

Americans discover a more direct lineage to their local governments in the towns of medieval England. Gerald Frug describes these entities as complex political, economic and communal associations created by merchants to avoid jurisdictional claims from English nobility.²¹ The English township was both a product of, and an instrument for, commercial power. The legal autonomy it attained went hand in hand with the town's economic strength and independence. The mercantile class considered local autonomy to be a property right that was synonymous with liberty itself because property was so closely connected to the financial well being of those who ruled the towns.²² This arrangement continued until the

19. See M. ROSTOVITZ, *GREECE 72-73* (1963); JOHN H. MUNDY, *EUROPE IN THE HIGH MIDDLE AGES 1150-1309* 422-31 (1973).

20. See Michael E. Libonati, *Reconstructing Local Government*, 19 *URB. LAW.* 647 n.13 (1987). The original idea of republican democracy as we understand it today is generally attributed to the work of Machiavelli. See JOHN POCOCK, *THE MACHIAVELLIAN MOMENT* (1975).

21. Gerald E. Frug, *The City as a Legal Concept*, 93 *HARV. L. REV.* 1057, 1083 (1980).

22. See C.B. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM* (1962) for an analysis of how the writings of Hobbes, Harrington and especially Locke contributed to an English liberalism based on property rights.

late seventeenth century, when the king, at least temporarily, began to revoke many of the corporate charters.

The tradition of local autonomy also has firm roots in pre-colonial America. Small groups of individuals began forming civil societies in New England in the early seventeenth century. What began as the towns of Providence, Portsmouth, Newport and Warwick only later became the united colony of Rhode Island.²³ In 1648, the General Assembly of Rhode Island granted Providence a "home rule" charter, creating a relationship between the town and the colony resembling that which existed between the colony and the Crown.

Before the Revolutionary War about twenty incorporated cities existed in America.²⁴ However, in New England, where local autonomy was most prevalent, the towns had already ended their subordinate associations with the colonial legislatures and became more independent. These legislative bodies were composed of delegates whose very job it was to represent the interests of the towns.²⁵ The towns derived their governmental legitimacy, not from the legal charters granted to them by the colony, but from the free association of the people who created them-what Jefferson and Tocqueville called popular sovereignty.²⁶

2. *Sovereignty and Community*

The Jeffersonian vision of democracy is that of a decentralized agrarian republic.²⁷ Jefferson imagined a four tier system of government that was structured along the lines of federal, state, county and ward authority. But it was the latter to which he paid most attention. Each ward would encompass five or six square miles, and it was here in these "little republics" that the true foundation of democratic government resided.²⁸ Because sovereignty rests ultimately with the individual, wards must be small enough so that each citizen can act directly and personally. He was particularly enamored with the New England township, declaring it "the wisest

23. The town of Providence came into existence in 1636, Portsmouth (originally Pocasset) in 1638, Newport in 1639, and Warwick in 1643. A parliamentary charter was accepted in 1647. ANWAR HUSSAIN SYED, *THE POLITICAL THEORY OF AMERICAN LOCAL GOVERNMENT* 22-24 (1966).

24. Frug, *supra* note 21, at 1096.

25. See ERNEST GRIFFITH, *HISTORY OF AMERICAN CITY GOVERNMENT: THE COLONIAL PERIOD* (1938) for a comprehensive account of how governmental institutions evolved during this period.

26. CHARLES E. MERRIAM, *HISTORY OF THE THEORY OF SOVEREIGNTY* (1900).

27. See generally, SYED, *supra* note 23, at 38-52.

28. SYED, *supra* note 23, at 38.

invention ever devised by the wit of man for the exercise of self-government."²⁹

Jefferson had little regard for the idea of a historic corporate community created by one's ancestry, insisting that "[t]he dead have no rights!"³⁰ He strongly believed that each generation should have the right to form its own majority and devise its own constitution; thus no governmental arrangement should be expected to endure beyond twenty years. He wrote,

Each generation is as independent as the one preceding, as that was of all which had gone before. It has then, like them, a right to choose for itself the form of government it believes most promotive of its own happiness.³¹

If it was Jefferson who first articulated a theory of American local government, Tocqueville elaborated and popularized it.³² Tocqueville also found the ideal model in the New England township and in it the wellspring of democracy.³³ Other levels of government existed only because local assemblies of sovereign individuals empowered them. For Tocqueville the legitimacy of local institutions is based on the premise that they are natural associations of free people, possessing a "communal freedom."³⁴ He observes,

In America not only do municipal bodies exist, but they are kept alive and supported by town spirit. . . The New Englander is attached to his township not so much because he was born in it, but because it is a free and strong community, of which he is a member, and which deserves the care spent in managing it Their government is suited to their tastes, and chosen by themselves.³⁵

Under this characterization of local government, sovereignty and community are complementary concepts. The town is sovereign because it derives its legitimacy from a community of free individuals; but the community has integrity because it can function as a

29. SYED, *supra* note 23, at 39-40.

30. SYED, *supra* note 23, at 43.

31. SYED, *supra* note 23, at 43.

32. For a perceptive though critical treatment of Tocqueville's work, see GORDON L. CLARK, *JUDGES AND THE CITIES: INTERPRETING LOCAL AUTONOMY* 159-171 (1985).

33. He writes, ". . . municipal institutions constitute the strength of free nations. Town meetings are to liberty what primary schools are to science; they bring it within the people's reach, they teach men how to use and how to enjoy it." ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, VOL. I 63 (Phillips Bradley ed., 1945).

34. CLARK, *supra* note 32, at 160.

35. TOCQUEVILLE, *supra* note 33, at 69-70.

sovereign entity with the power to initiate and execute action without interference, according to its own values. Clark has made the point that even contemporary writers as different as Castells, who is a socialist, and Nozick, a conservative, agree that autonomy is crucial in order for a community to have a sense of definition.³⁶ The Supreme Court has recognized community standards as a legitimate criterion for justifying public policy on matters as diverse as zoning and pornography.³⁷

B. Legal Notions

Notwithstanding the idealized image of local autonomy that has become part of the American ethos, cities have no independent legal standing within the federal constitutional system.³⁸ The great compromise arrived at by the Founders was an arrangement struck between sovereign states and proponents of the centralized national government that was then forming. Local government was not a significant element of the governance equation. Cities were not granted protection in either the Constitution or the Bill of Rights, but were subsumed under the general apparatus of state government. This premise has been maintained by the Supreme Court.³⁹ Any serious claims for local self-determination are generally made against the states, their resolution being a matter of state law.

36. CLARK, *supra* note 32, at 7. MANUEL CASTELLS, *THE CITY AND THE GRASS ROOTS* (1984); ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* (1974).

37. See, e.g., *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981). For a critical review of the Court's application of community standards, see Robert D. Chesler, *Imagery of Community, Ideology of Authority: The Moral Reasoning of Chief Justice Burger*, 18 HARV. C.R.-C.L. REV. 457 (1983).

38. See generally, M. DAVID GELFAND, *FEDERAL CONSTITUTIONAL LAW AND AMERICAN LOCAL GOVERNMENT* (1984); *The Constitutional Position of American Local Government: Retrospect for the Burger Court and Prospect for the Rehnquist Court*, 14 HASTINGS CONST. L. Q. 635 (1987); Joan C. Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law*, 1986 WIS. L. REV. 83 (1986) [hereinafter *Constitutional Vulnerability*]; James E. Herget, *The Missing Power of Local Governments: A Divergence Between Text and Practice in our Early State Constitutions*, 62 VA. L. REV. 999 (1976); Joseph P. Viteritti, *The City and the Constitution: A Study of Institutional Evolution and Adaptation*, 12 J. URB. AFF. 221 (1990) [hereinafter *The City and the Constitution*].

39. *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907). The Court ruled that the State of Pennsylvania had the power to take city property without compensation. See also, *City of Trenton v. New Jersey*, 262 U.S. 182 (1923); *Williams v. Mayor of Baltimore*, 289 U.S. 36 (1933).

1. State Prerogatives

Tocqueville's idea of local autonomy was most prominently translated into legal doctrine by Judge Thomas M. Cooley of Michigan. The distinguished jurist quotes Tocqueville liberally and traced the right of local independence back to the English common law tradition.⁴⁰ However, noting that American towns preceded American states, Cooley argued that these communities did not surrender their natural sovereignty by the act of creating states. In 1871, he wrote in *People v. Hurlbut*:

the constitution [was] adopted in view of a system of local government well-understood and tolerably uniform in character, existing from the very earliest settlement of the country [and] the liberties of the people [were] generally. . . . supposed to spring from and be dependent upon that system.⁴¹

Cooley's thesis developed into a well formulated treatise⁴² that earned the support of other highly regarded legal scholars.⁴³ Ultimately, however, it would not prevail. American jurisprudence accommodated the tradition of local self-governance with state sovereignty defined in the federal Constitution, by drawing a distinction between private corporations founded to promote commercial interests, and public corporations or cities which wielded government power and were subject to state control. Protection for private corporations was enunciated when the Supreme Court refused to allow the state of New Hampshire to violate the charter of Dartmouth College.⁴⁴ Control of cities turned on the assumption that cities were creatures of the state and not to the contrary as Judge Cooley had asserted.⁴⁵ State supremacy was exercised

40. THOMAS MCINTYRE COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 189-90 (1869) [hereinafter CONSTITUTIONAL LIMITATIONS].

41. *People v. Hurlbut*, 24 Mich. 44, 98 (1871).

42. CONSTITUTIONAL LIMITATIONS, *supra* note 40; THOMAS MCINTYRE COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA (1880).

43. See EUGENE MCQUILLIN, A TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS § 64 (1911); Amasa M. Eaton, *The Right to Local Self-Government*, 13 HARV. L. REV. 441 (1900); 14 HARV. L. REV. 20 (1901).

44. *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819).

45. The best historical case study of how a city was transformed from a relatively autonomous corporation to an object of state control is Hartog's examination of New York. See HENDRIK HARTOG, PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730-1870 (1983). See also Hendrik Hartog, *Because All the World Was Not New York City: Governance, Property Rights and the State in the Changing Definition of a Corporation, 1730-1860*, 28 BUFF. L. REV. 91 (1979); Joan C. Williams, *The Invention of the Municipal Corpora-*

through the plenary power enjoyed by the legislature. As articulated in Judge Dillon's famous decision:

Municipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so it may destroy. If it may destroy, it may abridge and control.⁴⁶

Dillon's Rule, developed into a widely read treatise on local government law,⁴⁷ became a benchmark for legal scholarship.⁴⁸ It was generally accepted by the state courts nationally, and the notion of state legislative supremacy over the cities was eventually adopted by the United States Supreme Court.⁴⁹

2. *Home Rule*

To rescue some semblance of power from increasingly aggressive state legislatures, city officials attempted in the late nineteenth century to enact amendments to their state constitutions that would limit the scope of interference in local matters. Frug describes two approaches.⁵⁰ One technique was the prohibition against "special legislation," designed to limit the power of state officials to enact laws that are targeted at less than all cities or a class of cities in the state. Constitutional provisions of this type have not served as an effective instrument for curtailing legislative intrusion at the local level. They merely define the terms of intrusion. The home rule initiative sought to distinguish between inherently local and inherently state concerns, thus reserving certain prerogatives within the state constitution for local government. In 1875, Missouri was the first state to adopt such a provision.⁵¹ Others followed, granting

tion: A Case Study in Legal Change, 34 AM. U. L. REV. 369 (1985), which discusses developments in both New York and Massachusetts.

46. *City of Clinton v. Cedar Rapids & Mo. R.R.*, 24 Iowa 455, 475 (1868).

47. JOHN F. DILLON, *THE LAW OF MUNICIPAL CORPORATIONS* (1872). For a critical analysis of Dillon, see *Constitutional Vulnerability*, *supra* note 38.

48. See FRANK J. GOODNOW, *MUNICIPAL HOME RULE* (1897); HOWARD LEE MCBAIN, *THE LAW AND THE PRACTICE OF MUNICIPAL HOME RULE* (1916); WILLIAM MUNRO, *THE GOVERNMENT OF AMERICAN CITIES* (1923).

49. See *City of Trenton v. New Jersey*, 262 U.S. at 187. The Court ruled that "[i]n the absence of state constitutional provisions safeguarding it to them, municipalities have no inherent right of self-government which is beyond the legislative control of the state." See also *City of Newark v. New Jersey*, 262 U.S. 192 (1923).

50. Frug, *supra* note 21, at 1116-17.

51. MO. CONST. art IX, § 16 (1875).

cities varying degrees of power with different levels of specificity.⁵² The Ohio constitution appropriated "all powers of local government" to local governments.⁵³ California sought to insulate cities from legislative interference in what it called "municipal affairs."⁵⁴ But what did this really mean? Who could draw such a fine distinction between state and local matters? The debate over state and local prerogatives would impose a significant role on the state courts to function as arbiters in the struggle.⁵⁵ Following the lead of Judge Dillon, the courts, more often than not, sided with the state legislature. New York is an illustrative case in point.

C. New York State Law

1. Constitutional History

A decade before Judge Dillon wrote his important decision in Iowa, New York State's highest court articulated a doctrine of legislative omnipotence that set the tone of state and city relations in perpetuity. At issue was a state law enacted in 1857 that abolished the local police departments of New York City and Brooklyn and replaced them with the state controlled Metropolitan Police District.⁵⁶ City attorneys then argued that the law violated Section 2, Article 10 of the State Constitution authorizing local governments to elect and appoint their own officers. The court disagreed holding that the state legislature possesses "the whole law-making power of the state."⁵⁷ Judge Shankland wrote:

[t]he legislative power is omnipotent within its proper sphere. The legislature, in this respect, is the direct representative of the people, and the delegate and depositary of their power. Hence, the limitations of the constitution are not so much limitations of

52. By 1975 every state except Indiana, Alabama and Mississippi had adopted home rule measures either through legislation or constitutional amendment. See J.D. Hyman, *Home Rule in New York 1941-1965: Retrospect and Prospect*, 15 *BUFF. L. REV.* 335 (1965); Kenneth E. Vanlandingham, *Municipal Home Rule in the United States*, 10 *WM. & MARY L. REV.* 269 (1968); *Constitutional Municipal Home Rule Since the AMA (NLC) Model*, 17 *WM & MARY L. REV.* 1 (1975).

53. Michael E. Libonati, *Intergovernmental Relations in State Constitutional Law: A Historical Overview*, 496 *ANNALS AM. ACAD. POL. & SOC. SCI.* 107, 110 (1988) (quoting Ohio Const. art. XVIII, §§ 3, 7).

54. *Id.* (quoting CAL. CONST. art. XI, § 5(a)).

55. Terrance Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 *MINN. L. REV.* 643 (1964); Frank J. Macchiarola, *Local Government Home Rule and the Judiciary*, 48 *U. DET. J. URB. L.* 335 (1971).

56. See JAMES F. RICHARDSON, *THE NEW YORK POLICE: COLONIAL TIMES TO 1901* 82-164 (1970). The Board of Estimate and Apportionment would be created by the state seven years later to assess the finances of the regional police agency.

57. *People ex rel. Wood v. Draper*, 15 N.Y. 532, 543 (1857).

the legislature as of the power of the people themselves, self imposed by the constitutional compact.⁵⁸

The concept of home rule was incorporated into the New York State Constitution in 1894.⁵⁹ Notwithstanding later revisions to the provision designed to enhance the power of local governments, the courts have not found home rule to be a compelling reason to reallocate authority away from the state legislature.⁶⁰ Between 1894 and 1923 the Court of Appeals upheld a number of significant laws that encroached on local power without prior approval by the mayor.⁶¹ For example, in 1913 the court allowed separation of the Bronx from New York County on the strength of a Bronx referendum.⁶² The law from which the split arose required a binding referendum from the Bronx territory exclusive of New York City voters.

In 1923 the state constitution was again amended. Although the new language revoked the temporary veto power of mayors, it provided that any special law affecting "the property, affairs or government of any city"⁶³ would require a message from the Governor declaring an emergency and the concurrence of a two-thirds majority in each house of the legislature.⁶⁴ This amendment was cited in a unanimous Court of Appeals decision striking down a state law affecting New York City. Chief Justice Cardozo, writing for the court, issued well known dictum often cited by advocates of home rule.⁶⁵ Yet, this case would prove to be an only temporary aberration.

58. *Id.* at 549.

59. This required that any special law relating to the "property, affairs, or government" of a city requires a home rule message from the mayor. If the mayor refused, the legislature would have to pass it a second time. N.Y. CONST. art. XII, § 2 (1894).

60. See W. Bernard Richland, *Constitutional City Home Rule in New York*, 54 COLUM. L. REV. 311 (1954) and *Constitutional City Home Rule in New York: II*, 55 COLUM. L. REV. 598 (1955); James D. Cole, *Constitutional Home Rule in New York: "The Ghost of Home Rule,"* 59 ST. JOHN'S L. REV. 713 (1985); Hyman, *supra* note 52.

61. *People ex rel. Einsfeld v. Murray*, 149 N.Y. 367, 44 N.E. 146 (1896); *Admiral Realty Co. v. City of New York*, 206 N.Y. 110, 99 N.E. 241 (1912); *Tenement House Dep't. v. Moeschel*, 179 N.Y. 325, 72 N.E. 231 (1904), *aff'd*, 203 U.S. 583 (1906); *Matter of McAneny v. Board of Estimate and Apportionment*, 232 N.Y. 377, 134 N.E. 187 (1922).

62. *People ex rel. Unger v. Kennedy*, 207 N.Y. 533, 101 N.E. 442 (1913).

63. N.Y. CONST. art. XII, sec. 2 (1923). That same year the City Home Rule Law was passed to support the implementation of the recent constitutional amendment. CITY HOME RULE LAW, ch. 363, 1924 N.Y. Laws 706.

64. N.Y. MUN. HOME RULE LAW § 20 (McKinney 1994).

65. Judge Cardozo wrote, "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

tion in a general pattern of constitutional interpretation that favored the plenary power of the state legislature.⁶⁶

2. Adler and Lawrence

In 1929, the Court of Appeals directly considered the issue of how to resolve the dispute between state and local prerogatives under home rule in *Adler v. Deegan*.⁶⁷ The result of this case, which involved the Multiple Dwelling Law⁶⁸ affecting New York City, was quite unambiguous. The Court of Appeals held that whenever a substantial state concern is at issue, the legislature has the authority to act regardless of the existing weight of local interest.⁶⁹ Because the underlying law might also impact the health and welfare of the rest of the state, the court held that the legislature could act without the impediments of home rule. Writing separately, Judge Cardozo concurred, stating that "the State, acting by local laws and without emergency measure, must keep its hands off unless a State concern is involved or affected, and this in some substantial measure."⁷⁰

Earlier that year, the Court of Appeals ruled in *City of New York v. Village of Lawrence*, a case that involved a boundary dispute between New York City and the Village of Lawrence. The *Lawrence* decision proved particularly relevant to the Staten Island issue. When the city challenged a state law that transferred territory from eastern Queens to Nassau County, the court found that "legislation relating to the boundaries of political subdivisions 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

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." *In re Elm Street*, 246 N.Y. 72, 76, 158 N.E. 24, 25-26 (1927).

66. Almost simultaneously, an appellate division court took a contrary position in a boundary dispute, holding "[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." *Adriaansen v. Board of Education*, 222 A.D. 320, 323-324, 226 N.Y.S. 145, 147 (1927), *aff'd*, 248 N.Y. 542, 162 N.E. 517 (1928).

67. 251 N.Y. 467, 167 N.E. 705 (1929).

68. MULTIPLE DWELLING LAW Ch. 713, 1929 N.Y. Laws 1663.

69. "[I]f the subject be in a substantial degree a matter of State concern, the Legislature may act, though intermingled with it are concerns of the locality." *Adler*, 251 N.Y. at 491, 167 N.E. at 714. See also, *New York Steam Corp. v. City of New York*, 268 N.Y. 137, 197 N.E. 172 (1935).

70. *Adler*, 251 N.Y. at 485, 167 N.E. at 711 (Cardozo, C.J., concurring).

which is affected."⁷¹ In words reminiscent of Judge Dillon, the court ruled that "the legislature may create or destroy, enlarge or restrict, combine or divide, municipal corporations."⁷²

In 1938 the state constitution was amended to eliminate the requirement that the governor declare an emergency to allow for a special law, replacing it with the need for a home rule message from the city.⁷³ Nevertheless, subsequent judicial rulings continued to rely on the *Adler*⁷⁴ and *Lawrence*⁷⁵ opinions as measures of state prerogatives.⁷⁶ A final amendment to the state constitution, this time including a Bill of Rights for Local Governments⁷⁷, bolstered by a supporting statute,⁷⁸ was approved in 1963, again with little effect.

The first significant case arising under the present constitutional standard concerned legislation that created the Adirondack Park Agency.⁷⁹ Although the Court of Appeals recognized that the statute in question interfered with local matters, it drew on legal precedent to determine that

[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. . . . [action] was of sufficient importance to the State, transcendent of local or parochial interests or concerns.⁸⁰

In subsequent cases the state high court upheld laws that required the City of New York to appropriate a certain portion of its

71. *City of New York v. Village of Lawrence*, 250 N.Y. 429, 440, 165 N.E. 836, 839 (1929).

72. *Id.* at 437, 165 N.E. at 838.

73. The amendment expressly granted cities the power to "adopt and amend local laws not inconsistent with the constitution and laws of the state." N.Y. CONST. art. IX, § 2 (1938). Under these provisions a home rule request must be made by either two-thirds of the local legislature or the local chief executive and a majority of the legislature.

74. *Adler*, 251 N.Y. at 491, 167 N.E. at 707.

75. *Lawrence*, 250 N.Y. at 439-40, 165 N.E. at 838-39.

76. *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).

77. N.Y. CONST. art. IX, § 1.

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

79. ADIRONDACK PARK AGENCY ACT, ch. 348, 1973 N.Y. Laws 540.

80. *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).

budget to education,⁸¹ to exempt firefighters in New York City from local residency requirements,⁸² to limit the use of landfills on Long Island,⁸³ and to determine the compensation of local district attorneys.⁸⁴ Common to all these decisions was the underlying claim that a significant state interest existed.

Most recently, a June 1995 decision by the Court of Appeals drew upon the principle of state supremacy to determine that the City of New York lacks the capacity to bring a suit against the state challenging existing school finance formulae.⁸⁵ Writing for a 4-2 majority, Judge Levine found:

Constitutionally as well as a matter of historical fact, municipal corporate bodies—counties, towns, school districts—are merely subdivisions of the State, created by the State for the convenient carrying out of the State's governmental powers and responsibilities as its agents. . . . it followed that municipal corporate bodies cannot have the right to contest the actions of their principal or creator. . . .⁸⁶

3. *Staten Island Cases*

When New York City challenged the Staten Island legislation it cited a litany of facts pointing to the significant local interest that is at stake in the proceeding: secession would mean the loss of nearly 400,000 people (5% of the population) and 19.5% of the city's total land mass;⁸⁷ the City has invested in a large infrastructure on the island;⁸⁸ secession would result in the loss of revenues from property, sales and income taxes collected on the island;⁸⁹ secession

81. *Board of Education v. City of New York*, 41 N.Y.2d 535, 362 N.E.2d 948, 394 N.Y.S.2d 148 (1977).

82. *Uniformed Firefighters Association v. City of New York*, 50 N.Y.2d 85, 405 N.E.2d 679, 428 N.Y.S.2d 197 (1980).

83. *Town of Islip v. Cuomo*, 64 N.Y.2d 50, 473 N.E.2d 756, 484 N.Y.S.2d 528 (1984).

84. *Kelly v. McGee*, 57 N.Y.2d 522, 443 N.E.2d 908, 457 N.Y.S.2d 434 (1982).

85. *City of New York v. State of New York*, 86 N.Y.2d 286, 289, 631 N.Y.S.2d 553 (1995).

86. *Id.* at 289-90, 631 N.Y.S.2d at 554-55.

87. Brief of the Appellant at 10-11, for *City of New York v. State of New York*, 76 N.Y.2d 479, 561 N.Y.S.2d 154 (1990) (on file with the *FORDHAM URBAN LAW JOURNAL*).

88. This allegedly includes "more than 50 schools, more than 25 parks, 18 fire-houses, approximately a dozen libraries. . . . three 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." *Id.* at 11.

89. *Id.* at 12.

would require New York City to restructure its government and to redraw the lines of City Council districts.⁹⁰

Although these claims served to demonstrate that secession affected the "property, affairs and government" of the city, prior interpretations of home rule in New York State demonstrate that local interest is not pivotal in such matters. The key issue is the existence of a significant state interest. It is, therefore, not surprising that the Appellate Division found that

Legislation dealing with matters of state concern, albeit of localized application and having a direct effect on the most basic of local interests, does not violate the Constitution's home rule provisions.⁹¹

The court ruled that the legislature has "plenary" power to act "unfettered by home rule constraints" because the secession of Staten Island is "a matter of State concern by definition."⁹²

Although the Court of Appeals affirmed the appellate ruling, its decision rested on different grounds. It treated the legislation as a purely speculative action that "allows Staten Island to explore its [already] publicized interest in secession stripped of any force without any further act of the Legislature."⁹³ In this sense the court was not ready to concede that there was any interference with the "property, affairs or government" of the city. The state high court was resolute in explaining that it was not at this time disposing of the home rule issue with regard to secession:

"We expressly decline to decide as unnecessary and premature whether genuine secession legislation, if ever it was to come before the legislature, would require a home rule message."⁹⁴

Notwithstanding a century of constitutional and judicial history pointing in the direction of legislative supremacy, some advocates believe that the Court of Appeals latest declaration may allow a home rule challenge if separation is approved by the legislature.⁹⁵ This reading of the case stands in bold contrast to the strong position taken by the Appellate Division which affirmatively ruled on

90. *Id.* at 15.

91. *City of New York v. State of New York*, 158 A.D.2d 169, 173, 557 N.Y.S.2d 914, 916 (App. Div. 1st Dept. 1990).

92. *Id.*

93. *City of New York v. State of New York*, 76 N.Y.2d at 487, 562 N.E.2d at 121, 561 N.Y.S.2d at 157.

94. *Id.*, 76 N.Y.2d at 484, 562 N.E.2d at 120, 561 N.Y.S.2d at 156.

95. See e.g., *id.* at 487, 562 N.E.2d at 121, 561 N.Y.S.2d at 157 (Hancock, J., dissenting).

the secession question.⁹⁶ Nevertheless, the Speaker of the Assembly refused to take up the final measure of secession without a home rule message from the city.

It was a rather curious development for the Speaker to introduce the question of home rule at so late a date. After all, it was the legislature itself that had defined the process of secession which was in the midst of unfolding. The original 1989 bill passed both houses of the legislature, and would have enacted separation upon the passage of the referendum, without either a home rule message or further action from the legislature. Significantly, the Home Rule Counsel of the Assembly, who advised the Speaker to withhold action, testified that some cases in which a significant local concern exists do not require a home rule message.⁹⁷

The trial judge noted that the appellate court "expressly found that a secession bill would not require a home rule message and that this decision was not overturned by the Court of Appeals."⁹⁸ He also recognized that "the Speaker may have misapplied the Constitution."⁹⁹ But, restrained by his interpretation of the separation of powers principle, the judge refused to intervene.

D. Home Rule and Secession

1. *The Legal Quagmire*

The case law has remained constant: when determining local boundaries or the creation or dissolution of a local government, the state legislature rules supreme without any diminution of its prerogatives suffered on the basis of home rule. Imposition of a home rule requirement as a prerequisite to legislative action is a reversal of long standing legal precedents. Some legal scholars argue that if

96. Citing arguments made by the State Attorney General, the court pointed out, "[T]here is no reason to suppose that the legislators who enacted chapter 733 intend to await a home rule message from the City of New York before passing upon the enabling legislation should the process go that far. . . . The State's position is that chapter 773 would be constitutional without a home rule message even if affirmative votes by Staten Islanders in the referenda. . . . were determinative and not merely advisory." *City of New York v. State of New York*, 158 A.D.2d 169, 171-72, 557 N.Y.S.2d 914, 915 (A.D. 1 Dept. 1990).

97. "[S]ome bills do not require a Home Rule Request even though they affect the property, affairs or government of local government because the subject matter implicates a state concern under the doctrine enunciated by the New York Court of Appeals in *Adler v. Deegan*." Affidavit of Karen R. Kaufman, for *Straniere v. Silver*, Index No. 3213-94, at 8, August 11, 1994 (on file with *FORDHAM URBAN LAW JOURNAL*).

98. Kaufman Affidavit, *supra* note 97.

99. Kaufman Affidavit, *supra* note 97, at 10.

ever there were occasion for such a legal "sea change," secession warrants it because nothing goes more to the heart of the "property, affairs or government" of a city than an attempt to remove part of its territory.¹⁰⁰

For example, Richard Briffault, after a comprehensive review of the constitutional case law, argues that the process adopted by the governor and legislature of New York State should be invalidated on home rule grounds and replaced by one he proposes. He would give New York City an opportunity to reject Staten Island secession after the people on the island have voted.¹⁰¹ A final review by the state could overturn a denial by the city "on the basis of the 'overall public interest' of the region."¹⁰² This procedure appears to impose a rather strict limit on state action. Does the legislature have to find that secession is good for the region in order to allow it? Or is it sufficient to show that secession isn't bad? How would one measure the public interest in this case? What if the legislature found that secession would have a neutral impact on the state, the city and Staten Island, but New York City still opposed it? Would the state be prohibited from authorizing secession?

Briffault suggests that the decision making process should favor the status quo and impede secession, especially if the existing city government is against it. His decision making model is based upon the annexation provisions of the New York State Constitution.¹⁰³ The analogy and the process are inappropriate. Annexation is the appropriation of territory from one jurisdiction to another.¹⁰⁴ Secession is a plea for self-government involving a different level of

100. See Richard Briffault, *Voting Rights, Home Rule and Municipal Government*, 92 COLUM. L. REV. 775, 818-822 (1992); Jeffrey Underweiser, Note, *The Legality of Staten Island's Attempt to Secede from New York City*, 19 FORDHAM URB. L.J. 147, 167-69 (1991).

101. Briffault, *supra* note 100, at 818-19.

102. Briffault, *supra* note 100, at 819.

103. *Id.* at 818; cf. N.Y. CONST. art. IX, sec. 1(d). Briffault points out that this process is similar to the "deannexation" procedure that exists in New Jersey. *Id.* See also, *Ryan v. Mayor of Demarest*, 319 A.2d 442, 446-47 (N.J. Sup. Ct. 1974); *West Point Island Civic Ass'n v. Township Committee*, 255 A.2d. 237 (N.J. Sup. Ct. 1969).

Notably, there is a wide variance in annexation laws among the states. M.G. Woodrooff, III, *Systems and Standards of Municipal Annexation Review: A Comparative Analysis*, 58 GEO. L.J. 743 (1970). See also Laurie Reynolds, *Rethinking Municipal Annexation Powers*, 24 URB. LAW. 247 (1992), who suggests that "[p]erhaps the strongest motivating force in determining the shape of state annexation statutes is the notion that individuals should have the right to choose the government under which they live." *Id.* at 266.

104. See generally, Thomas Dye, *Urban Political Integration: Conditions Associated With Annexation in American Cities*, 8 MIDWEST J. POL. SCI. 430 (1964).

interest for the territory in question. Secession is more analogous to incorporation, where a self-contained community with common interests seeks to establish itself as a separate entity.¹⁰⁵ As Briffault explains elsewhere, most state incorporation laws require only the consent of voters in the new city before being approved by the legislature.¹⁰⁶ For either the legislature or the courts to grant the city veto power over secession on the grounds of home rule is to render secession virtually impossible. No jurisdiction is likely to cede territory willingly. However, there may very well be conditions under which pleas for self government by a smaller territory are justified.¹⁰⁷ The contrary may also be true. Under certain circumstances secession may be harmful to the original city jurisdiction, or the state, or even the people in the territory seeking separation. As a matter of public policy, an independent arbiter is needed in such disputes, who is capable of weighing all interests. As a matter of law and tradition, the most reasonable candidate for that deliberative role is the state legislature.

The state legislature provides a forum in which the representatives of all parties can voice their positions on the question at hand. Furthermore, the state legislature is singularly qualified to assess the alternatives from the perspective of what is good for the state. Moreover, in secession cases state concerns are paramount. Rather than provide the exceptional case that legitimizes the suspension of Dillon's Rule, secession is the fundamental issue of local governance which underscores Dillon's wisdom.

2. *Dependent Cities*

The subordination of local government to state government is not just a matter of law - it is a practical consequence of fiscal reality. Contemporary American cities are not analogous to the independent commercial entities that were found in the townships of medieval England or pre-Colonial America. Rather, they are part

105. See *Chesapeake & Ohio Ry. v. City of Silver Grove*, 249 S.W.2d 520 (Ky. Ct. App. 1952). See also GARY J. MILLER, *CITIES BY CONTRACT: THE POLITICS OF MUNICIPAL INCORPORATION* (1981).

106. "In most states, general enabling legislation places municipal incorporation in the hands of local residents or landowners. . . . Neighboring localities, regional entities and residents outside of the boundaries of the territory proposed to be incorporated generally have no role. . . . The principal criterion for deciding whether a municipality will be incorporated is whether the local people want it." Richard Briffault, *Our Localism: Part I-The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 74 (1990) [hereinafter *Our Localism*, I]. See also Daniel Mandelker, *Standards for Municipal Incorporations on the Urban Fringe*, 36 TEX. L. REV. 271 (1958).

107. See *infra* Part III for detailed discussion.

of an elaborate intergovernmental network that shapes local policy and engenders a relationship of fiscal dependence.¹⁰⁸ This dependent relationship is especially pronounced in the larger cities of the Northeast where redistributive fiscal policies designed to assist the poor have resulted in severe financial burdens that can not be supported by local revenues.¹⁰⁹

One of the characteristic themes in the literature on urban government appearing in the last two decades is an emphasis on its limitations. Local government, we are told, is simply too constrained by socio-economic conditions, interest groups, its fiscal capability, the courts, intergovernmental mandates, and a myriad of other political and institutional factors that prevent it from implementing policies that measure up to its problems.¹¹⁰ In order to accommodate an ambitious social agenda, cities have had to rely on a broader revenue base than that which is found within their own borders. This intricate web of financial relationships makes a compelling argument against the notion of local autonomy. Nobody better explains the point than Richard Briffault:

The logic of local legal autonomy assumes local solutions to local problems, with local programs funded by taxes on local property. Many big cities, however, have relatively large social welfare and infrastructure demands. Local political existence, zoning autonomy and taxable property provide neither the regulatory authority nor the revenues necessary to meet these problems. To cope successfully with local needs, these cities must look beyond the city limits to outside public and private actions: intergovernmental aid, additional revenue-raising authority from the state and private investment.¹¹¹

Perhaps the most dramatic illustration of local dependence occurs during a fiscal crisis. When New York City stood at the brink

108. See WILLIAM J. PAMMER, *MANAGING FISCAL STRESS IN MAJOR AMERICAN CITIES* (1990); HELEN F. LADD & JON YINGER, *AMERICA'S AILING CITIES: FISCAL HEALTH AND THE DESIGN OF URBAN POLICY* (1989); KATHARINE L. BRADBURY ET AL., *URBAN DECLINE AND THE FUTURE OF AMERICAN CITIES* (1982); ROY W. BAHL, *FINANCING STATE AND LOCAL GOVERNMENT IN THE 1980'S* (1984).

109. See Joseph P. Viteritti & Thomas W. Matteo, *The Political Economy of City Life Cycles: A Comparative Analysis of Services, Expenditures and Revenues*, 6 PUB. BUD. & FIN. MGMT. 519 (1994); Richard P. Nathan & Charles F. Adams, *Four Perspectives on Urban Hardship*, 104 POL. SCI. Q. 483 (1989); Nathan & Adams, *Understanding Central City Hardship*, 91 POL. SCI. Q. 47 (1976).

110. See PAUL KANTOR, *THE DEPENDENT CITY* (1988); PAUL E. PETERSON, *CITY LIMITS* (1981); DOUGLAS YATES, *THE UNGOVERNABLE CITY* (1977), all of which develop the theme of local dependency.

111. Richard Briffault, *Our Localism: Part II-Localism and Legal Theory*, 90 COLUM. L. REV. 346, 349-50 (1990) [hereinafter *Our Localism, II*].

of bankruptcy in 1976, a major restructuring of the governmental apparatus took place that centralized decision making under state authority.¹¹² It was assumed at the time that the bulk of the burden for the city's recovery would fall upon state officials. The state government would bear a similar weight of responsibility in the case of municipal secession. If the separation resulted in financial calamity for either the original jurisdiction or the new territory, the state would be expected to execute a rescue. It is for this reason that the state has a paramount interest in secession.

3. *The Search for Community*

I do not suggest that the fiscal dependence of cities is sufficient reason to snuff out the tradition of localism that gave rise to home rule. The issue is one of balance. The spirit of community discovered by Jefferson and Tocqueville is a well established American value, a part of our civic culture. Secession movements, however, may be as much an expression of that value as is home rule. Large impersonal bureaucratic municipalities have been as much, and perhaps a greater frustration to the community spirit as has state government. The behavioral evidence supporting this point is quite persuasive.

The "community revolution"¹¹³ that encompassed urban areas during the nineteen sixties and seventies was a reaction to big city government. Community activists sought to bring decision making down to the neighborhood so that government could become more responsive and operate on a human level. New York City has a long history of attempts at decentralization.¹¹⁴ The instinct to engender community within a local governmental structure that has in excess of 200,000 public employees and a budget of more that

112. This institutional restructuring is described in ROBERT W. BAILEY, *THE CRISIS REGIME* (1984). See also, ESTER R. FUCHS, *MAYORS AND MONEY: FISCAL POLICY IN NEW YORK AND CHICAGO* (1992); MARTIN SHEFTER, *POLITICAL CRISIS, FISCAL CRISIS* (1985).

113. The term is taken from Daniel Bell & Virginia Held, *The Community Revolution*, 16 *PUB. INTEREST* 142 (1969). See ALAN A. ALTSHULER, *COMMUNITY CONTROL* (1970); MILTON KOTLER, *NEIGHBORHOOD GOVERNMENT* (1969). For a critical assessment of this movement see JOSEPH P. VITERITTI, *BUREAUCRACY AND SOCIAL JUSTICE* (1979).

114. See Joseph P. Viteritti & Robert F. Pecorella, *COMMUNITY GOVERNMENT AND THE DECENTRALIZATION OF SERVICES, REPORT TO THE NEW YORK CITY CHARTER REVISION COMMISSION* (1987); Robert F. Pecorella, *COMMUNITY POWER IN A POST-REFORM CITY* (1994) [hereinafter *COMMUNITY POWER*]; JOHN MUDD, *NEIGHBORHOOD SERVICES* (1984).

\$30 billion is readily understandable. However, the institutional obstacles to success are overwhelming.

It is difficult to foster a localism that is personal and that promotes community ideals, in a governmental apparatus which is larger than all but two states.¹¹⁵ Recent attempts at borough governance, at community policing and at school based decision-making are further manifestations of a frustrated community idealism.¹¹⁶ So is secession,¹¹⁷ which ultimately is an appeal by a community with a particular set of political values to create a government that is more responsive to its needs. It is an attempt at local self determination. Invoking home rule as a weapon to defeat secession is the ultimate irony in American local government law and politics.

II. Secession As A Political and Legal Concept

The state legislature is the appropriate governmental institution to assess the merits of an appeal for secession by a territory from an existing municipality.¹¹⁸ The next order of business is to determine what criteria should be adopted to conduct a fair review. While existing principles of state law regarding incorporation and to a lesser extent annexation are somewhat relevant on the matter, they are of limited value. A more enlightening literature on secession is found in the field of international affairs. Here again, however, the application of political and legal principles is not direct. It is necessary to transpose these principles so that they are useful in the context of American state and local government.

115. Only the states of New York and California employ a governmental apparatus larger than that of New York City. See ALMANAC OF THE 50 STATES, 38, 262 (E. Horner ed., 1995).

116. See Joseph P. Viteritti, *Decentralization in New York City: A Three Dimensional Perspective* (paper presented before the Citizens Union of New York City, July 21, 1994). During 1993, the borough president of Brooklyn proposed a plan that would decentralize several municipal functions to the borough level, while the borough presidents of Queens and Manhattan put forward a borough plan for school governance.

117. The former Democratic party leader of New York County, Edward Costikyan, attributes the de-personalization of city government in part to the decline of the party system which provided many services to people when the party organization served as a conduit to the agencies. He writes, "[o]nce [party] leaders lost. . . . access to government, people lost access to government. Ever since then, there has been a continuing unhappiness in the remoteness and inaccessibility of government. This unhappiness, from time to time, has led to efforts to decentralize, and today has led to an effort by Staten Island to secede and a likely similar effort in Queens." Edward N. Costikyan, *Politics in New York City: A Memoir of the Post-War Years*, 74 N.Y. HIST. 432 (1993).

118. See *supra* note 49 and accompanying text.

A. The Idea. . . .

1. *And Self-Determination*

As encountered in the discussion of home rule, the concept of secession arises from the principle of self-determination, which has roots in the political concept of popular sovereignty.¹¹⁹ To assert that self-determination has a place in American political thought is an understatement. It is the very principle upon which the republic was founded. As Thomas Jefferson himself wrote in the *Declaration of Independence*:

We hold these truths to be self-evident, that all men. . . . are endowed by their Creator with certain inalienable Rights. . . . That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or abolish it, and to institute new Government. . . .¹²⁰

Based on the French Revolution's *Declaration of the Rights of Man*, Jefferson saw self-determination as a natural human right that existed prior to the formation of any system of government.¹²¹ Thus, Jefferson was sympathetic to secession. Even Abraham Lincoln, who staunchly defended the preservation of the Union during his Civil War Presidency, supported the concept of secession earlier in his life. Commenting on the war with Mexico in 1848, he said that

Any people anywhere, being inclined and having the power, have the *right* to rise up, and shake off the existing government, and form a new one that suits them better. This is a most valuable, - a most sacred right. . . . Nor is this right confined to cases to which the whole people of an existing government, may choose to exercise it. Any portion of such people *can, may* revolutionize, and make their *own*, of so much of the territory as they inhabit.¹²²

119. See discussion, *supra* Part I.A.

120. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

121. Sureda writes, "The history of self-determination is bound up with the history of the doctrine of popular sovereignty proclaimed by the French Revolution: government should be based on the will of the people. . . . and people not content with the government of the country to which they belong should be able to secede and organize themselves as they wish." A. RIGO SUREDA, THE EVOLUTION OF THE RIGHT OF SELF-DETERMINATION 17 (1973).

122. Speech in the U.S. House of Representatives, The War With Mexico, January 12, 1848, 1 THE COLLECTED WORKS OF ABRAHAM LINCOLN 431, 438 (R. Basler, ed. 1953), as cited in LEE C. BUCHHEIT, SECESSION: THE LEGITIMACY OF SELF-DETERMINATION 111 (1978). After his election as President, of course, Lincoln equated secession with the "essence of anarchy." First Inaugural Address, 4 COLLECTED WORKS OF LINCOLN, *supra*, at 262, 268, as cited in BUCHHEIT, *supra*, at 110.

Notwithstanding such notable endorsements from the summit of American political philosophy, the idea of secession is complex and potentially problematic. When applied to an international perspective, for example, it takes on other connotations. Some of these applications are not directly relevant to the context of American state and local governments; nevertheless, they can be informative in helping us to sort out the circumstances under which secession may be justified.

Secession is a form of political action that is usually embarked upon as a remedy for historic injustices. Whether or not one abides by the legitimacy of self-determination claims, alternative forms of political action are available to aggrieved groups. Brilmayer distinguishes between the separatist and the refugee.¹²³ The latter seeks to flee the territory of an oppressive government, the former wants to occupy and control a part of it. In this sense, secession is a much more aggressive form of action than pursuing the "exit" option.¹²⁴

Secession must by definition involve a territorial dispute asserting the moral superiority of self-determination over the preservation of political boundaries. Brilmayer disagrees with the appropriateness of this assertion, claiming that while liberal democracy is based on the theory of consent, it does not incidentally imply the right to secede.¹²⁵ Therefore the notion that there is such a thing as a legal right to secede in the liberal state is at best debatable.¹²⁶ Even the right to rebel, which has strong roots in liberal theory, does not necessarily involve an action against a territory; instead, it is directed primarily at the regime that controls the government.¹²⁷

Self-determination, as this Article contemplates it, is not immediately transferable to an international context. This is because, as a product of liberal democratic thought, self determination is commonly associated with the rights of individuals rather than groups, peoples or nations.¹²⁸ Conversely, where secession is on a global

123. Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 YALE J. INT'L L. 177, 187-89 (1991).

124. See generally, ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY (1970).

125. Brilmayer, *supra* note 123, at 184-87.

126. See MICHLA POMERANCE, SELF-DETERMINATION IN LAW AND PRACTICE (1982).

127. The idea of a right to rebel is especially identified with Locke. See JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 134-48 (Richard H. Cox ed., 1982)

128. See ALLEN BUCHANAN, SECESSION: THE MORALITY OF POLITICAL DIVORCE FROM FORT SUMTER TO LITHUANIA AND QUEBEC 34-81 (1991).

scale, it is impossible to separate the concept of self-determination from that of nationalism, and with it the ethnic and cultural bonds that form a people into a unified state.¹²⁹

In reviewing the history of the United Nations, Buchheit found that the principle of self-determination was primarily accepted as a defense for decolonization rather than secession.¹³⁰ The distinction is important. Although there is support in the international community for people to assume control of their own territory from a colonial power (an act of nationalism in itself), there is little sympathy for attempts that violate the territorial integrity of established governments.¹³¹ To tolerate such action is to jeopardize the viability of the nation state, compromising constitutional government as we know it. From a legal viewpoint separatist appeals are generally viewed as being highly suspect and undesirable in the international community.

2. *And Constitutionalism*

The possibility of secession is a rather unsettling prospect from the perspective of constitutional government. As Sunstein argues, it creates incentives for strategic behavior in democratic systems and promotes instability.¹³² The threat of separation provides minorities with a potent weapon that undermines the principle of majority rule.¹³³ If a minority is dissatisfied with the *status quo*, it can break off and shatter the entire political arrangement. Sunstein would have us believe that within a constitutional framework, there can be no legal right to secede. For him secession violates the "pre-commitment strategy" of the governmental system, which forecloses debate on certain questions for the sake of the union itself.¹³⁴ The thought is, as one scholar puts it, inherently anarchistic.¹³⁵

Nevertheless, moral precedent exists for the fragile social arrangement of the right to secede. We find it in what Aristotle de-

129. See generally, ERNEST GELLNER, *NATIONS AND NATIONALISM* (1983).

130. BUCHHEIT, *supra* note 122, at 87.

131. Brilmayer points out that even though anti-colonial movements were propelled by the ideal of self-determination, some of the new governments did not afford their own minority groups the same rights. Brilmayer, *supra* note 123, at 182.

132. Cass R. Sunstein, *Constitutionalism and Secession*, 58 U. CHI. L. REV. 633, 634 (1991).

133. See also BUCHANAN, *supra* note 128, at 98-99.

134. See Stephen Holmes, *Precommitment and the Paradox of Democracy*, in *CONSTITUTIONALISM AND DEMOCRACY* 195 (Jon Elster & Rune Slagstad eds., 1988).

135. See BUCHANAN, *supra* note 128, at 102-04.

scribed as the basic political unit,¹³⁶ the family. Given the high divorce rate in the United States,¹³⁷ one must concede that Americans have accepted or at least tolerated instability in the most fundamental of social institutions under the protection of legal sanctions. Given the relatively low incidence of secession among democratic states, the evidence suggests that political systems are far less vulnerable. The most glaring example of a constitutional right to secede among modern states was found in the former Soviet republic. Yet despite the underlying constitutional right, the eventual demise of the Soviet Union arose primarily from the overall lack of legitimacy that plagued the government itself.¹³⁸

The threat that secession poses to constitutional government is overstated, the fear of its consequences widely misplaced. Assume, for instance, that a particular minority seeks to separate itself from a government. Does the majority have an inherent right to refuse? Certainly to grant such a prerogative to the majority creates another kind of problem, one that is more symptomatic of democratic government, its capacity to neglect the interests of a minority. The fundamental dilemma of democratic government is not the threat it poses to the majority, but a phenomenon that Tocqueville¹³⁹ and Madison¹⁴⁰ referred to as the "tyranny of the majority."

The Madisonian construct that undergirds American constitutionalism is based upon a professed faith in pluralism.¹⁴¹ Madison believed that in a large and diverse republic, political interests would be transitory in nature.¹⁴² I may stand with a losing minority on one issue, but I stand securely with the majority on the next question. One accepts the decision rules of majoritarian government because one does not expect to reside in the losing camp in perpetuity. This affords the system legitimacy. There is a consider-

136. THE POLITICS OF ARISTOTLE 1-38 (Ernest Barker ed., 1962).

137. About half the marriages in the United States end in divorce. Susan Chira, *Struggling to Find Stability When Divorce Is a Pattern*, N.Y. TIMES, Mar. 19, 1995 § 1, at 1.

138. See *infra* part II.A.3 for further discussion.

139. TOCQUEVILLE, *supra* note 33, at 264-80.

140. ALEXANDER HAMILTON, JAMES MADISON AND JOHN JAY, THE FEDERALIST PAPERS 77-84 (Clinton Rossiter ed., 1961).

141. Madison wrote, "[e]xtend the sphere and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists it will be more difficult for those who feel it to discover their own strength and act in unison with each other." *Id.* at 83.

142. See Joseph P. Viteritti, *Unapportioned Justice: Local Elections, Social Sciences, and the Evolution of the Voting Rights Act*, 4 COR. J. L. PUB. POL'Y 199, 265-70 (1994) [hereinafter *Unapportioned Justice*].

able amount of empirical evidence on interest group politics in America supporting these basic assumptions.¹⁴³ Unfortunately, however, these assumptions do not always hold true.

Perhaps the most dramatic historic example of a flaw in the Madisonian construct is found in our racial politics.¹⁴⁴ But there may be others that are less profound. Permanent minority status in a political process may be determined by ethnicity, religion, gender, sexual orientation, geography or a host of other fact-specific circumstances. To offer secession as a strategic option available in ordinary political conflict is highly provocative and potentially disruptive to the political order. However, in the context of American federalism, the prospect is far less threatening than it is on a national or international scale.

The constitutional crisis described by Sunstein hangs over the nation-state because there is usually no deliberative mechanism to resolve a separatist dispute within a sovereign state, other than the sheer force of interest exercised by the parties to the controversy. Therefore the nature of the encounter is inherently anarchistic. The stakes that are at risk in American local government are different and potentially less damaging to the political order. Since the ultimate determination of a secession appeal lies with the state legislature,¹⁴⁵ the resolution of the dispute is not directly in the hands of the adversarial parties. Notwithstanding a tradition of home rule, state constitutional law protects the sovereignty of the state and thereby avoids the constitutional crisis that is apparent in a national or international sphere. Existing decision rules empower the legislature to arbitrate between two conflicting claims for local self-determination, and to balance these claims against the paramount interests of the state. In the end, the idea of secession is compatible with American state constitutional law.

3. *And Legitimacy*

Even Sunstein, who strongly opposes the suggestion of a constitutional right to secede, acknowledges that certain circumstances may provide moral justification for secession.¹⁴⁶ It is essential to

143. See, e.g., JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* (1962); BUCHANAN & TULLOCK, *LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* 120-124 (1962); WILLIAM H. RIKER, *THE THEORY OF POLITICAL COALITIONS* 102-23 (1962).

144. See generally, LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* (1994).

145. See *supra* note 49 and accompanying text.

146. Sunstein, *supra* note 132, at 654-69.

define those criteria that state legislatures should apply in reviewing an appeal for secession by a subunit of an existing municipality. Such considerations are crucial to the development of fair, intelligent and responsible policy making with regard to an issue that has great ramifications for state and local governments.

Legitimacy is that property of a political system or regime that motivates citizens to accept the procedures and the outcomes of the governmental process.¹⁴⁷ Acceptance implies an understanding that the system is just and that the benefits of support and participation outweigh whatever burdens the system may impose.¹⁴⁸ I do not suggest that legitimacy is an absolute value, or that a loss of it immediately triggers a justification for secession. Political systems may have varying degrees of legitimacy. In cases where a government does not warrant a high level of support, citizens may respond with a variety of actions. These include passive responses, such as non-participation in elections,¹⁴⁹ ordinary political activity designed to defeat incumbent office holders, and radical forms of action such as revolution. Nevertheless, political legitimacy is comprised of factors that warrant examination in order to understand the motives behind secession.

Weatherford developed a formal model for measuring political legitimacy.¹⁵⁰ He identifies four macro level variables that pertain to the systemic properties of a government. These include:

1. *Accountability*. Are rulers accountable to the governed via a process that allows wide effective participation?
2. *Efficiency*. Is the government set up to accomplish society's ends without undue waste of time or resources?
3. *Procedural Fairness*. Is the system structured to ensure that issues are resolved in a regular, predictable way and that access to decisional arenas is open and equal?
4. *Distributive Fairness*. Are the advantages and costs allocated by the system distributed equally or else (are) devia-

147. See ROBERT A. DAHL, *MODERN POLITICAL ANALYSIS* 31-32 (1963).

148. One of the most extensive discussions on the concept of political legitimacy appears in DAVID EASTON, *A SYSTEMS ANALYSIS OF POLITICAL LIFE* 278-310 (1965).

149. There is significant empirical literature in political science that analyzes the relationship between voter turnout and political alienation. See for example, Paul R. Abramson & John H. Aldrich, *The Decline of Electoral Participation in America*, 76 AM. POL. SCI. REV. 502 (1982); Warren E. Miller, *Disinterest, Disaffection, and Participation in Presidential Politics*, 2 POL. BEHAVIOR 7 (1980).

150. M. Stephen Weatherford, *Measuring Political Legitimacy*, 86 AM. POL. SCI. REV. 149 (1992).

tions. . .explicitly justified. . .in terms of some long run, overarching equality principle?¹⁵¹

The factors contained in Weatherford's model incorporate the most essential ingredients of representative democracy.¹⁵² For example, as an individual who pledges support to a government, I need assurance that I will have a fair opportunity to participate in public decision making, and I expect my actions to be effective in advancing my interests. I want my government representatives to respond to my concerns, to provide me with a fair share of public goods and services, and to make these rewards available in a cost-effective way. The distinction between a fair opportunity to participate and effective participation in governing is significant, especially in light of majoritarian politics. As a member of a minority group, I may have a fair opportunity to let my voice be heard; but if I regularly find myself in the minority on those issues that are most important to me, then I may not really have an effective voice.¹⁵³

Weatherford's criteria are applicable at any level of government, whether it be local, state, national or international.¹⁵⁴ His model is of particular utility to us here because it facilitates the analytic transition from a strictly constitutional and legal realm to a moral realm. This distinction is not easy for those who understand the

151. *Id.* at 149. Weatherford also explored a micro level perspective that encompassed individual citizen beliefs including, political interest and involvement, beliefs about interpersonal and social relations relevant to collective action, and optimism about the responsiveness about the political system. *Id.* at 150.

152. For an excellent analysis of the concept of political representation and its varying manifestations, see HANNA F. PITKIN, *THE CONCEPT OF REPRESENTATION* (1967). See also Heinz Eulau & Paul D. Karpis, *The Puzzle of Representation: Specifying the Components of Responsiveness*, 2 *LEGIS. STUD. Q.* 233 (1977); Heinz Eulau et al., *The Role of the Representative: Some Empirical Observations on the Theory of Edmund Burke*, 53 *AM. POL. SCI. REV.* 742 (1959); John A. Fairlie, *The Nature of Political Representation*, 34 *AM. POL. SCI. REV.* 236 (1940).

153. In an essay on voting, Pamela Karlan makes an important distinction between voting as participation, voting as aggregation and voting as governance. See, Pamela S. Karlan, *The Rights To Vote: Some Pessimism About Formalism*, 71 *TEX. L. REV.* 1705, 1709-20 (1993). See also Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 *MICH. L. REV.* 1077 (1991); Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 *VA. L. REV.* 1413 (1991).

154. Two recent works are relevant to the concept of legitimacy. See ROBERT D. PUTNAM, *MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY* (1993) (which analyzes regional government in Italy to find civic communities that are bolstered by a high level of trust and volunteerism among the people); ALLAN KORNBERG & HAROLD D. CLARKE, *CITIZENS AND COMMUNITY: POLITICAL SUPPORT IN A REPRESENTATIVE DEMOCRACY* (1992) (which examines the conditions of political support in Canada).

law as the codification of ethical standards. However, it is particularly relevant to this issue on account of the paucity of legal precedents with regard to domestic secession. Even on a global level where the issue of secession is more prominent, there exists no body of statutes from which to draw direction.¹⁵⁵ Thus, secession is more an ethical question than it is a legal one.

B. The Moral Dimension

In assessing the morality of secession, it is useful to examine the general arguments offered for and against secession in the international sphere, and determine their applicability to local government in the context of American federalism. Defenses of separatist motives are generally tied to the properties, or the lack of, contributing to political legitimacy already discussed.¹⁵⁶ The arguments against secession go beyond the constitutional and legal issues raised above and strike at the core of moral reasoning.

1. Reasons For

The most comprehensive treatment of secession as a moral issue is presented by Buchanan, whose primary objective is to demonstrate that separation can be justified under certain conditions.¹⁵⁷ Buchanan finds the absence of a normative theory of secession to be a major flaw in liberal political philosophy, and contends that, given the value premises of liberalism, one might assume a basic sympathy for the right to secede among liberal thinkers.¹⁵⁸ Buchanan's arguments may be classified into three basic categories: liberalist arguments, equity arguments and a general dissatisfaction with the status quo.

155. International law is a set of negotiated compacts among sovereign states rather than an authoritative standard of conduct. See generally L.H.L. OPPENHEIM, INTERNATIONAL LAW (1912); HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW (1952).

156. See *supra* note 150 and accompanying text.

157. BUCHANAN, *supra* note 128, at 27-28.

158. Buchanan writes, "[t]he lack of either a normative theory of secession or an argument to show why one is not needed is especially embarrassing for liberal political theory. . . . The recognition of a right to secede (though not necessarily an unqualified or unconditional right) would seem to be something to which liberalism is at least *prima facie* committed. Surely a political philosophy that places a preeminent value on liberty and self-determination, highly values diversity, and holds that legitimate political authority in some sense rests on the consent of the governed must either acknowledge a right to secede or supply weighty arguments to show why a presumption in favor of such a right is rebutted." BUCHANAN, *supra* note 128, at 4.

a. *Liberalist Arguments.*

As noted previously, liberalism is a political philosophy that is based on individual rights and obligations. Liberalist arguments constitute those ethical claims that liberal theorists would proffer if they were inclined to think in terms of group rights. Among the arguments Buchanan makes that fall under this category are: protection of liberty,¹⁵⁹ preservation of liberal purity,¹⁶⁰ the limited goals of political association¹⁶¹ and consent.¹⁶² All are based on the notion that participation in a political community is a voluntary and temporary commitment which, under the assumption of natural rights, cannot be enforced against the free will of people. Such claims ring particularly loud at the local level of government because localities do not enjoy the legal sovereignty that is bestowed on state and national governments in this federalist system. They are mere creatures of the state, whose existence arises from the demands of local communities.

b. *Equity Based Arguments*

Equity based arguments for secession portray separation as a form of corrective action. Buchanan lists two such claims: (i) escaping discriminatory redistribution¹⁶³ and (ii) rectifying past injustices.¹⁶⁴ Let us take them in reverse order. Since secession always involves a territorial dispute in the international sphere, separatist actions are often based upon a claim that the territory in question was originally acquired by unjust means. Although such protests are conceivable at the local level, they are generally uncommon, since most incorporation and annexation procedures ensure the consent of those living within the acquired territory. In both global

159. "If we begin with the general presumption in favor of liberty, it seems to carry with it a presumption in favor of a right to secede." BUCHANAN, *supra* note 128, at 29.

160. "The tolerant framework of liberalism allows the growth of communities. . . . that may eventually shatter the liberal framework, destroying the state-enforced system of political and civil rights." BUCHANAN, *supra* note 128, at 34.

161. "This argument for a right to secede rests upon two assumptions: first, that the goals for which a political union is forged can be quite specific; and second, that once these goals are secured, it is permissible for a group to withdraw itself from the political union. BUCHANAN, *supra* note 128, at 35.

162. "[I]f one agrees that consent is a necessary condition for legitimate political authority, then one must recognize a right to secede." BUCHANAN, *supra* note 128, at 70.

163. BUCHANAN, *supra* note 128, at 38-45.

164. BUCHANAN, *supra* note 128, at 67-70. See also Brilmayer, *supra* note 123, at 189-191.

and local contexts, claims of past injustices are more likely to result from a set of long term official practices that are deemed to be unresponsive to the needs of the separatist group. The existence of such long standing grievances are usually symptomatic of a larger systemic problem that goes to the heart of the legitimacy issue: the capacity of a group to effectively represent its interests. This problem may exist even when a group enjoys fair representation.¹⁶⁵

Historical grievances may also involve assertions that the distribution or redistribution of tangible goods and services by the government is unfair. Such a claim requires close scrutiny in order to be validated as an ethical justification for secession. To begin with, liberal social theory does not presume an equal allocation of public resources to all people. To the contrary, liberalism promotes a redistributive policy agenda that obliges the more advantaged to help the disadvantaged.¹⁶⁶ In order to make a justifiable case for secession, a group would need to demonstrate either that redistributive policies constitute a form of economic exploitation,¹⁶⁷ or that the distribution of public resources they receive is inadequate to meet their reasonable expectations of government.

c. *General Dissatisfaction*

Resorting to the marital analogy, Buchanan denies that unfair treatment is the only justification for a political divorce; general dissatisfaction with the arrangement should suffice.¹⁶⁸ In a practi-

165. Sunstein suggests that a moral claim exists when civil rights or civil liberties are abridged or denied. However he qualifies the point with the requirement that normal political channels be exhausted first, before separatist action may ensue. Of course, he also recognizes that normal political action is not likely to lift the yoke of an oppressive regime: Sunstein, *supra* note 132, at 655-59.

At the state and local level, remedies for the denial of such fundamental rights are more extensive. American constitutional law is replete with examples where oppressed local groups have effectively sought recourse at the state and federal levels to protect their civil rights. *See generally*, ROBERT F. WILLIAMS, *STATE CONSTITUTIONAL LAW: CASES AND MATERIALS* 151-364, 423-479 (1993) (discussing state case law); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 546-559 (1988) (discussing federal case law).

166. The most systematic and compelling argument in support of a redistributive public agenda in the liberal state is found in JOHN RAWLS, *A THEORY OF JUSTICE* 54-117, 258-332 (1971). *See also* BRUCE ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980); AMY GUTMANN, *LIBERAL EQUALITY* (1980).

167. *See* Sunstein, *supra* note 132, at 660-61.

168. "Why should one assume that the only justification for divorce is that one's spouse has wronged one, violated one's rights, treated one unjustly? There might be other quite respectable reasons to end the union: It is not satisfying the needs or aspirations for which it was undertaken, one or both parties have changed in fundamental ways, and so on." BUCHANAN, *supra* note 128, at 7.

cal sense one must ask whether it is worthwhile to perpetuate a union when it has become unsatisfying or dysfunctional for one or both of the parties involved. It is a reasonable question at any level.

Two lines of reasoning fall within this category. The first involves economic efficiency;¹⁶⁹ the second, nationalist notions of self-determination¹⁷⁰ and cultural identity. The relevance of economic efficiency to local government is obvious, but intensifies in periods of severe fiscal constraint. Particularly in large cities, municipalities may be so over-extended that breaking up the municipal unit is a reasonable economic proposition. It may be too big to operate cost-effectively. Divorce in this context may benefit not only those who want to leave, but those who remain as well.¹⁷¹ Such claims require careful analysis, but are empirically verifiable.

Self-determination as an expression of cultural or ethnic identity, while common in the international sphere,¹⁷² is problematic as a rationale for local separatism. Diversity is a cherished ideal within the liberal tradition. Given this value premise, one can not make an ethical case for secession based upon an attempt to create or preserve a homogeneous community. To do so would promote segregation. In an American context, the issue of cultural identity is extremely complex, for it provokes tension among a number of deeply held political values, including community, self-determination and diversity.

Notwithstanding the philosophical commitment to diversity that Americans claim to have, our political and legal history has been shaped by ambivalence, contradiction and sometimes downright hypocrisy on the issue.¹⁷³ Constitutionally, the Supreme Court has rejected segregation in a number of areas.¹⁷⁴ Conversely, however,

169. BUCHANAN, *supra* note 128, at 45-48.

170. BUCHANAN, *supra* note 128, at 48-52.

171. Although Sunstein believes that secession is justifiable on economic grounds, his assertion is qualified. Any plea for separation based on economic self-interest must be assessed in terms of its impact on those left behind. If an economically privileged segment of the population set up its own jurisdiction, it could create a hardship on those left behind. This, under most circumstances, is ethically indefensible. See Sunstein, *supra* note 132, at 659-60.

172. These are typical criteria applied in an international context. Buchheit notes, "criteria of selfness could include elements of a religious, historic, geographic, ethnologic, economic, linguistic, and racial character." BUCHHEIT, *supra* note 122, at 10.

173. See *infra* notes 174-78 and accompanying text.

174. In the landmark desegregation decision, *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), the Supreme Court focused on the practice of establishing separate educational facilities for black and white children. This decision gave momentum to desegregation of other public facilities. See *e.g.*, *New Orleans City Park*

the Supreme Court has upheld the use of racial classifications for crafting electoral districts.¹⁷⁵ The Court has also accepted the use of community values as a legitimate criterion for local policy making,¹⁷⁶ despite the fact that localities have often invoked "community standards" to surreptitiously exclude people on the basis of race and other subjective characteristics.¹⁷⁷ Briffault has soundly argued how local zoning ordinances in suburban communities have served as an effective instrument for racial segregation, in the face of a judicial reluctance to interfere with community prerogatives on such matters.¹⁷⁸ It is a relevant observation to keep in mind when considering secession.

As indicated in several recent Supreme Court decisions, race remains an extremely sensitive issue in American law that requires balanced judgement and is bound to provoke controversy.¹⁷⁹ Whether we like it or not, however, demographic homogeneity is one factor that tends to matter in the development of community, be it defined by religion, class, ethnicity or race. This is the great paradox of a plural society. What the Court seems to be saying is that there is nothing inherently wrong or illegal with such inclinations, so long as they are not indulged to entertain discriminatory

Improvement Assn. v. Detiege, 358 U.S. 54 (1958) (public parks); Gayle v. Browder, 352 U.S. 903 (1956) (busses); Holmes v. Atlanta, 350 U.S. 879 (1955) (golf courses); Mayor and City Council of Baltimore v. Dawson, 350 U.S. 877 (1955) (beaches).

175. Not only has the Supreme Court allowed racially defined districts under the provisions of the Voting Rights Act, the Court has actually imposed it as a remedy for vote dilution and other forms of discrimination at the polls. See e.g., United Jewish Organizations of Williamsburgh Inc. v. Carey, 430 U.S. 144 (1977).

Although in more recent decisions the Court has set stricter standards for the use of racial criteria in districting, at no point has it absolutely prohibited their use. See e.g., Miller v. Johnson, — U.S. —, 115 S. Ct. 2475, 132 L. Ed. 2d 762 (1995); Shaw v. Reno, — U.S. —, 113 S. Ct. 2816, 125 L. Ed. 2d 511 (1993).

176. See e.g., Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974).

177. See NANCY BURNS, THE FORMATION OF AMERICAN LOCAL GOVERNMENTS: PRIVATE VALUES IN PUBLIC INSTITUTIONS (1994); KENNETH T. JACKSON, CRABGRASS FRONTIER (1985); JON TEAFORD, CITY AND SUBURB: THE POLITICAL FRAGMENTATION OF METROPOLITAN AMERICA (1979); MICHAEL N. DANIELSON, THE POLITICS OF EXCLUSION (1976).

178. Briffault, *Our Localism, I*, *supra* note 106, at 39-72.

179. See Adarand Constructors, Inc. v. Peña, — U.S. —, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995) (requiring the application of strict scrutiny regarding racial classifications in federal highway contracts); Missouri v. Jenkins, — U.S. —, 115 S. Ct. 2038, 132 L. Ed. 2d 63 (1995) (discussing racial composition in school districts); Miller, 115 S. Ct. 275; Shaw, 113 S. Ct. 2816.

purposes.¹⁸⁰ There are no easy solutions to how one judges such matters.

In reviewing a plea for independence by a sub-section of a local jurisdiction, state legislators must examine secession claims from a variety of perspectives. The first consideration is whether the group making the appeal constitutes a legitimate political community. As in the international sphere, such factors as a commonality of history, values, interests and territory are pertinent in making such a determination, especially when it can be shown that these features distinguish the group from the remaining population. While racial, ethnic or religious homogeneity do not provide the basis for a valid request, neither should they serve as *prima facie* cause to dismiss the claim. The appeal becomes problematic in the face of evidence that it is motivated by a segregationist agenda. When these suspicions arise, it becomes even more compelling for secessionists to demonstrate the validity of their broader claims.

2. *Arguments Against*

Buchheit has delivered among the most comprehensive statements against the act of political secession. While he distinguishes between the legal and extra-legal arguments, it is clear from Buchheit's presentation that the two categories are closely related.¹⁸¹ After beginning with a presumptive recognition that secession compromises the interests of the sovereign state against which it is directed,¹⁸² he approaches the question from two broad perspectives. First he examines the impact secession will have on the parties to the immediate dispute. Second, he examines its effect upon the larger international community. He offers three arguments: disintegration; trapped minorities; and stranded majorities.

180. See *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977) (holding that discriminatory intent must be shown to hold a zoning plan unconstitutional).

181. Buchheit takes up the legal considerations first in making a case against secession. See BUCHHEIT, *supra* note 122, at 21-27.

182. He writes, "[a]s a general principle, entities blessed with recognition as independent States by their sister States in the world community are reluctant to permit part of their population or territory to be removed from their boundaries. Secession will almost invariably result in a diminution of the unified State's wealth, resources, and power, thereby lowering its economic stamina, defensive capability, and potential international influence." *Id.* at 27.

a. *Disintegration*

Referring separately to the "fears" of "balkanization," "indefinite divisibility" and "infirm states," we learn from Buccheit that the threat of anarchy encountered above in the discussion of constitutionalism¹⁸³ may be taken beyond the borders of a single government.¹⁸⁴ Indeed, secession can "result in injury to both the internal social harmony of these territories and the general international order."¹⁸⁵ Moreover, if the disintegration of economically vital states goes unchecked, it may leave the remainder of the international community with a severe financial burden.

This example is a corollary to state and local contexts. One can imagine that successful separation from a municipality might encourage similar movements, in the same or nearby jurisdictions. A string of such events within a short time frame and in the same area will cause political and economic instability for both the state and the region. At the local level, however, there is an authoritative third party available to resolve such disputes. The most effective safeguard against unbridled domestic governmental disintegration is responsible decision-making by state legislatures, which would presumably examine each case on its merits.

The lessons to be drawn from this consideration are quite apparent. In evaluating a separatist appeal, legislators must consider the economic viability of the proposed new municipality and the impact of secession on the political and economic stability of the larger metropolitan region in which it occurs. Ultimately, however, the legislature must consider the effect on the state, which has final jurisdiction on the question, and which must bear responsibility for the ultimate consequences of the action.

b. *Trapped Minorities*¹⁸⁶

Buccheit refers to the situation—not unusual in the international arena—where a the group that carries out a successful secession is a homogeneous population, religiously, racially, ethnically or culturally.¹⁸⁷ His concern in this case is for two types of minorities. First, there is the plight of those members of the separatist group who are left behind because they live on the outlying area of

183. See *supra* notes 132-145 and accompanying text.

184. BUCCHEIT, *supra* note 122, at 28-29.

185. BUCCHEIT, *supra* note 122, at 28.

186. BUCCHEIT, *supra* note 122, at 29-30.

187. BUCCHEIT, *supra* note 122, at 29-30.

the new state.¹⁸⁸ Then, there are those people living in the new state who do not share a common identity with the separatist population.¹⁸⁹ Pointing to the Hindus remaining in Pakistan and the Moslems in India after the division, Buchheit is troubled by the potential for political oppression.¹⁹⁰ According to the historical record,¹⁹¹ his fears are well founded. Particularly in the wake of a separatist controversy, those left behind on either side run a risk that their civil rights will be lost or abridged.

If we were to follow the normative prescription established above, the threat is less certain in local government. Because separatism based on demographic identity would not be tolerated, it is less probable that secession will result in two homogeneous jurisdictions. But what if by chance a political divorce does lead to polarization? What if, beneath the surface of apparently justifiable claims for separation, lies a deep seated racial animosity, as was often the case in annexation and incorporation proceedings?

While, hopefully, such ill-founded motivations surface under careful legislative scrutiny, this is not guaranteed. It is, therefore, essential for the legislature to ascertain that provisions have been made within the new separatist government to accommodate the needs of minorities. Specific attention must be given to the political process adopted by the secessionist government. It is important to guarantee that all groups have a fair opportunity to participate in the electoral process and to achieve representation within the new government. While such protections are provided by the federal government under the provisions of the Voting Rights Act,¹⁹² litigation is required to remedy violations. The legislature has a special responsibility to ascertain before the fact that the situation is not created from the outset.

c. *Stranded Majorities*¹⁹³

On an economic rather than political level, adverse circumstances are created when a small minority that controls a state's wealth cuts itself off and sets up a new government. The remaining majority may find it difficult to support itself, and in the worst of

188. BUCHEIT, *supra* note 122, at 29-30.

189. BUCHEIT, *supra* note 122, at 29-30.

190. BUCHEIT, *supra* note 122, at 29-30.

191. See BUCHANAN, *supra* note 128, at 16-17. Buchanan discusses the dangers that arise when a "better off group" secedes from a "worse off group," leaving the "have-not's" without essential benefits.

192. See, *Unapportioned Justice*, *supra* note 142, at 206-214.

193. BUCHEIT, *supra* note 122, at 30-31.

cases can become a burden to the international community. This problem is similar to that discussed above in relation to disintegration,¹⁹⁴ only now the focus is on the viability of the original state and the remnant population. The parallel to a local context is clear because this situation could arise in domestic as well as international contexts.

It is not unusual for secession to be pursued by a relatively prosperous part of a community to escape the financial burdens of providing public goods and services to the poor.¹⁹⁵ In some cases, an economic motivation for divorce is more justified than others, depending on the severity of the burden imposed upon wealthier citizens.¹⁹⁶ Nevertheless, before separation can be permitted by the legislature, it must first evaluate what impact the action would have on the economic livelihood of the original municipality. If severe economic risk is found, then it may be necessary to explore other remedies to the unfair economic burdens that exist.

III. Secession And Local Government: Justifiable Conditions

Secession is a disturbing idea; it is psychologically unsettling, institutionally disruptive and politically provocative. Nevertheless, certain conditions may justify it. In its ideal form, secession is a manifestation of the most fundamental instincts of self-government, entirely compatible with the principles upon which American democracy was found.¹⁹⁷ For an existing local government, the prospect of carving out a new municipality from its territory must be perceived as a terrifying intrusion of state power, but it is not inherently unfair. When marshalled by the wrong forces, separatism also provides immeasurable opportunity for political mischief. Secession is a serious matter requiring deliberate, intelligent, and objective consideration by the legislature. This section defines the criteria for assessing local appeals, which will be applied to the case of Staten Island in Part IV.

194. See *supra* note 180 and accompanying text.

195. According to public choice economists, middle class individuals and families regularly exercise the exit option through residential mobility in order to avoid tax burdens imposed because of redistributive fiscal policies in cities. See Charles Tiebout, *A Pure Theory of Local Government Expenditures*, 64 J. POL. ECON. 416 (1956); James Buchanan, *Principles of Fiscal Strategy*, 4 PUB. CHOICE 1 (1971).

196. Sunstein makes a distinction between motivations based on pure economic self-interest, and motivations designed to avoid economic exploitation. While he finds the latter more justified than the former, he also emphasizes the need to assess the impact of secession on those who are left behind. See Sunstein, *supra*, note 132, at 659-660.

197. See *supra* note 120 and accompanying text.

A. Essential Properties

The criteria that state legislators should apply to judge the merits of secession pleas are based on previously discussed moral considerations. Essential conditions are those conditions that are absolutely required in order to justify an act of separation. Relevant conditions refer to considerations that are germane to the general assessment of a situation, but not necessarily essential in order to make a moral case. We begin with the liberal assumption that self-governance at the community level is a worthy goal that should be accommodated, unless it is otherwise proven to undermine the larger public interest.

1. *A Legitimate Community Expresses A Desire For Self-Government*

The first order of business is to determine who might secede. Recognizing the value of community self-governance is not the same as promoting a political climate that encourages local fragmentation. Secession should not be understood as a normal political option for any group or temporary alliance dissatisfied with the outcome of a particular contest or controversy.¹⁹⁸ The threat of separation should not be seen as a form of strategic action.¹⁹⁹ In a practical sense, it should be noted that many political alliances are temporary and issue oriented; therefore, they do not provide the basis for the formation of a community.

Although there are no rigorous standards for defining a legitimate political community, some of the properties accepted in the international community are useful. Any group that shares a common territory, history, interest or values might be considered a legitimate political community, so long as this identity is not projected with the intention of advancing racial, ethnic or religious segregation.²⁰⁰ Because political communities are often built around homogeneous groups,²⁰¹ intent is not always easy to sort out. This is why separatist appeals must be evaluated according to the full merits of each case. As is true with incorporation, annexation and zoning decisions, homogeneity can not be viewed by the legislature as a proxy for segregationist intent when making the evaluation.

198. See Holmes, *supra* note 134.

199. See Sunstein, *supra* note 132.

200. See BUCHHEIT, *supra* note 122, at 10.

201. See Brilmayer, *supra* note 123, at 191-92. See also Sunstein, *supra* note 132, at 664-66.

As with incorporation, free choice is an essential ingredient for the creation of a new government. The referendum is the most common procedure used for providing citizens with a democratic instrument to express their sentiments.

2. *The Proposed New Municipality Demonstrates Economic Viability*

Creating a government that is unable to support itself is contrary to the interests of the state and the population of the territory in question. A judgement on the economic viability of the new municipality can be made by assessing such factors as the existing revenue base, the current cost of providing municipal services, the capacity of the new government to enter the bond market, and the overall health of the local economy. Given that the territory in question is part of an existing municipality, there already exists a revenue flow and service delivery system on which to base such estimates. These factors will appear more tangible when reviewing the Staten Island case.

3. *No Significant Adverse Effects Are Anticipated For The Municipality Against Which The Separatist Action Is Directed*

It is assumed that the loss of people, territory and resources by a municipality would be viewed as a setback for the jurisdiction against which secession is directed. This is a particularly safe assumption in a situation where it has been determined that the seceding territory is economically viable. The legislature must be reasonably certain that secession does not seriously compromise the economic and political stability of the original government before it can let the action go forward. This would involve a similar examination of revenues, expenditures and other financial considerations - only this time the analysis is targeted for the original government.

4. *No Significant Adverse Effects Are Anticipated For The Larger Political Community*

The larger political community here contemplates the state government and those local entities existing within the vicinity of the proposed new municipality, which may be influenced by political or economic instability in the region. A safeguard against such risk is the assurance that both the new territory and the original jurisdiction would remain secure after the separation. However, the

state legislature retains an affirmative obligation to anticipate to the extent possible, the impact of secession on the general region beyond the impact on the larger and seceding communities.

5. *The Legitimate Interests Of Minorities Are Protected*

It is not within the power or responsibility of the state legislature to resolve the dilemma that a majoritarian form of republicanism poses for political minorities. However, faced with the prospect of a jurisdictional division, the legislature must be vigilant in assuring that minorities on both sides of the divide have a fair opportunity to represent their interests in the political process. If the architects of the new government fail to provide for basic civil rights or procedural safeguards that allow for meaningful political participation, then it should serve as a warning sign of suspicious intentions behind the move. Because a split might have a substantial impact on political dynamics in the original jurisdiction, legislators must also be aware of the need to maintain the same protections there.

B. **Relevant Factors**

1. *The Existence Of Historical Grievances*

Although historical grievances may not be a necessary ingredient for constructing a moral case for secession, it is difficult to find a separatist movement that is not propelled by such claims.²⁰² Certainly such claims make the case for separation stronger, and they serve to diffuse or at least rebut, accusations of ill intent that are hurled against separatists by their opponents.²⁰³ Grievances may focus on the responsiveness of the existing municipality to group needs, the distribution of resources or services, the distribution of financial burdens, and occasionally the abridgement of civil rights.²⁰⁴ More subtle assertions by minorities might concern their capacity to have an effective voice in a majoritarian government, even though procedural safeguards exist to provide for fair participation.

202. See Brilmayer, *supra* note 123, at 189-91. Although they are exceptional there have been cases of secession on the international scene that were pacific. Among the most notable are the separation of Norway and Sweden in 1905, the separation of Senegal from the Mali federation in 1960, the separation of Singapore from the Malaysian federation in 1965, and the separation of Syria from the United Arab Republic in 1961. BUCHHEIT, *supra* note 122, at 97-100.

203. Such accusations are typically claims of racial, ethnic or religious segregation. See BUCHHEIT, *supra* note 122.

204. As stated above aggrieved groups have recourse through the federal and state courts to resolve such violations.

2. *The Opportunity For More Efficient Government*

This argument becomes more compelling when separation is tied to the variable of size. This assertion is that some municipalities are so large that their cumbersome administrative structures prohibit them from utilizing resources in an efficient way, resulting in a poor quality of service at higher costs. A body of empirical evidence suggests that when organizations reach a certain size, the economies of scale realized by early growth reverse and cause diseconomies.²⁰⁵ Such claims must be substantiated on a case by case basis. The prospect for savings is particularly attractive at a time when state and local governments are faced with severe financial constraints. Evidence that separation might serve to improve the opportunities for more efficient government also decreases its risks - for the original jurisdiction, for the new municipality, for the state and even for the region.

Economics aside, one might also argue that a smaller municipality may provide an opportunity for better governance from a political perspective. Perhaps the term efficient is less appropriate in this context than the term effective. Recalling the Jeffersonian vision of small local republics, we are directed to an important research literature in political science that examines this very issue empirically.²⁰⁶ Indeed, one of the great challenges that big government poses for democracy is the difficulty of creating political mechanisms that facilitate meaningful political participation.²⁰⁷ We have already observed that in large cities, activists have attempted

205. Empirical support for the concept of "diseconomies of scale" can be found in two distinct literatures. Some organizational research indicates that as organizations grow, a larger portion of their resources becomes absorbed in overhead functions, decreasing efficiency. See Seymour Melman, *The Rise of Administrative Overhead in Manufacturing Industries in the United States 1899-1947*, 3 OXFORD ECON. PAP. 62 (1951); G. E. Hendershot & T. F. James, *Size and Growth as Determinants of Administrative-Production Ratios in Organizations*, 37 AM. SOC. REV. 140 (1972); John D. Kasarda, *The Structural Implications of Social System Size: A Three-Level Analysis*, 39 AM. SOC. REV. 19 (1974).

Evidence from economics literature is more qualified, suggesting that whether economies or diseconomies of scale take effect is dependent on the type of service or organization. See Werner Hirsch, *Expenditure Implications of Metropolitan Growth and Consolidation*, 41 REV. ECON. & STAT. 232 (1959); ROBERT BISH, *THE POLITICAL ECONOMY OF METROPOLITAN AREAS* (1971); Viteritti & Matteo, *supra* note 109.

206. The most significant comparative study on this subject is ROBERT A. DAHL AND EDWARD R. TUFTE, *SIZE AND DEMOCRACY* (1973).

207. Two different and interesting approaches to the problem are JAMES S. FISHKIN, *DEMOCRACY AND DELIBERATION: NEW DIRECTIONS FOR DEMOCRATIC REFORM* (1991); BENJAMIN BARBER, *STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE* (1984).

to address this problem with calls for decentralization and community government. Although far more drastic and less common, the division of a municipality into smaller jurisdictions can be understood as a response to the same problem.

IV. Staten Island: As Part Of, And Apart From New York City

A. Profile

If Staten Island attained independence, it would become the second largest city in New York State. With a population of nearly 380,000, it is larger than Buffalo and similar in size to cities like Miami, Pittsburgh, Denver or Minneapolis. Nevertheless, by New York City standards, it is small, comprising about five percent of the population.²⁰⁸ Containing a land mass of 60.2 square miles, Staten Island is an island, at no point attached to the rest of New York City.²⁰⁹

Although it has been part of New York City for nearly a century, Staten Island has always been viewed as a remote and distinct place by its own residents and by other city dwellers. Its original bridge connections to the rest of the metropolitan region did not appear until the late nineteen twenties - and these extensions, three in all, were made to New Jersey, not to New York City.²¹⁰ Construction of the Verrazano Narrows Bridge that tied the island to Brooklyn was not completed until 1964. Today the six dollar toll that one must pay for passage to and from the island remains an important point of dissention among residents, who perceive it as tangible evidence of their isolation from the rest of New York City.²¹¹ It costs only four dollars to cross the bridges into New Jersey, and one can attain free access between all four of the other boroughs of the city.

One might argue that the long two mile car ride across the Verrazano is a stark symbol of the differences that really separate Staten Island from the rest of New York. Thinking about New York City, one is struck by images of skyscrapers, busy streets, cor-

208. According to the 1990 census, the population of Staten Island is 378,077; that of Brooklyn is 2.3 million; Queens, 1.9 million; Manhattan, 1.5 million, and the Bronx, 1.2 million. See Nadia H. Youssef, *Changing Population Dynamics on Staten Island: From Ethnic Homogeneity to Diversity*, CENTER FOR MIGRATION STUDIES 3 (1991).

209. *Id.* at 20.

210. The Outerbridge Crossing and the Goethals Bridge were built between Staten Island and New Jersey in 1928, the Bayonne Bridge was erected in 1931.

211. See Craig Schneider, *Secession Won't Cut High Tolls*, STATEN ISLAND ADVANCE, Aug. 24, 1992, at A13; Sharon Hoey, *The Bridges*, STATEN ISLAND ADVANCE, May 16, 1993.

porate headquarters, and an exaggerated version of all that is grand and all that is despairing about contemporary urban life. Staten Island is more suburban-like, almost rural in places.²¹² It is simply different. It is the only borough in the city that has its own daily newspaper. The *Staten Island Advance*, the flagship paper of the Newhouse publishing conglomerate, outsells all the other dailies combined on the island.²¹³

Today less than half the population of New York City is categorized racially as non-Hispanic white. Eighty percent of Staten Islanders fit that category.²¹⁴ Much of the population is Catholic. The average family income in New York is \$34,360; for Staten Island it is \$50,664.²¹⁵ However, it would be misleading to portray the place as prosperous. Most of the population is composed of lower to upper middle class people, who work in service industries or for government.²¹⁶ The high income averages are driven up by the fact that there is relatively little poverty on the island. Approximately 14.8% of New Yorkers receive public assistance, where only 5.9% of Staten Islanders do.²¹⁷

The distinct demographics of the island also provide it with its own mix of politics. By New York City standards, Staten Island is decidedly more conservative politically. As New York has historically been considered a Democratic party town, Staten Island is

212. For a recent portrait, see Chip Brown, *Escape From New York*, N.Y. TIMES, Jan. 30, 1994, § 20 (Magazine), at 22; Joseph P. Viteritti, *Should Staten Island Leave the City*, 2 CITY JOURNAL 9 (1992). Of its 38,507 acres of land, 5,744 (15%) is parkland. THE 1993-94 GREEN BOOK: THE OFFICIAL DIRECTORY OF THE CITY OF NEW YORK 604 (1994).

213. According to data made available to the author in 1993 by the Marketing Division of Advance Publications, the daily sales for the ADVANCE is approximately 80,000. Those for other daily newspapers are: DAILY NEWS, 22,500; NEW YORK POST, 11,175; NEW YORK TIMES, 8,000. These figures only reflect sales on the island and do not account for newspapers that are purchased elsewhere by those residents that commute.

214. Eighty percent of Staten Islanders are classified as non-Hispanic white, as compared to 43.2% of all New York City residents and 39.1% of those living in the four other boroughs. The remainder of Staten Island's population is 7.4% black, 8.0% Hispanic, 4.4% Asian and 0.3% other according to the 1990 U.S. Census.

215. The average for the other four boroughs excluding Staten Island is \$33,373 according to the 1990 U.S. Census.

216. Approximately 22% of the Staten Island workforce is composed of government employees. *What if We Vote Yes?*, STATEN ISLAND ADVANCE, Oct. 5, 1993, at A21.

217. For the four other boroughs excluding Staten Island, the rate is 15.3%. These figures include recipients of Aid for Dependent Children, Home Relief and Supplemental Security Income. Information was obtained from the New York City Human Resources Administration, Public Assistance Data.

truly bi-partisan.²¹⁸ Republicans there control the borough presidency, three out of five state legislative seats and two out of three city council positions. The district attorney is a Democrat. Partisanship has played a role in the political maneuvering behind secession, and it is an easy temptation for those who have not seriously studied the issue to reduce appeals for separation to a gross manifestation of white flight.²¹⁹ However, beyond such simplistic explanations of this phenomenon, there are serious underlying issues of governance.

B. From County To City

1. Inception

The first settlements on Staten Island date back to 1661 when Dutch and French farmers set up a community on South Beach.²²⁰ Four years later the British Governor Richard Nicolls created the shire of Yorkshire which included Long Island, Westchester and Staten Island.²²¹ In 1675, "by reason of the Separacon by water," the government of Staten Island became self-contained.²²² Then, in 1683 Governor Thomas Dongan, through an act of the first Provincial Assembly, established the County of Richmond.

It was always a place that had its own mind, remaining sympathetic to the Tories during the American revolution.²²³ Even General George Washington understood that he could expect little support in the War of Independence from the people there, who "after the fairest professions, have shown themselves our most inveterate enemies."²²⁴ When the British General William Howe sailed his fleet through the Narrows in July of 1776, his troops

218. In 1992, 69% of the registered voters in New York City were registered as Democrats, 14% were Republican and 17% were other. On Staten Island, 48% were Democrat, 31% were Republican and 21% were other. See *THE GREEN BOOK*, *supra* note 212, at 612-13.

219. See Peter Overby, *We're Outta Here: From the Redwood Forest to Staten Island, America Suffers from Separation Anxiety*, *COMMON CAUSE MAGAZINE*, Winter 1992.

220. The definitive history of Staten Island is CHARLES W. LENG & WILLIAM T. DAVIS, *STATEN ISLAND AND ITS PEOPLE: A HISTORY 1609-1929* (1930). See also IRA K. MORRIS, *MEMORIAL HISTORY OF STATEN ISLAND* (1898); RICHARD M. BAYLES, *HISTORY OF RICHMOND COUNTY* (1887); JOHN J. CLUTE, *ANNALS OF STATEN ISLAND FROM ITS DISCOVERY TO THE PRESENT TIME* (1877).

221. HENRY G. STEINMEYER, *STATEN ISLAND 1524-1898*, at 22 (1950, rev. 1987).

222. *Id.* at 25. At this point the government consisted of a justice, a clerk, a constable and five overseers. *Id.* at 24-25.

223. *Id.* at 37.

224. STEINMEYER, *supra* note 221, at 38.

found themselves among a friendly population.²²⁵ The last remnants of the British army did not leave Staten Island until two years after Cornwallis surrendered at Yorktown in 1781.²²⁶

The transition from colony to republic came with relative ease, because the island already had a functioning county government. Throughout the nineteenth century, an elaborate system of towns and villages developed, the end of which saw the loss of its rural character as factories, breweries and shipyards appeared.²²⁷ As immigration began to peak in the middle of the nineteenth century, the crowded dwellings of Manhattan became a breeding ground for contagious diseases.²²⁸ Remote Staten Island was a convenient location to isolate the sick, giving rise to quarantine hospitals in Tomkinsville, where infectious steerage passengers arriving from Europe could be deposited.²²⁹

State officials understood by 1870 that Staten Island was not experiencing the same rate of growth enjoyed by Long Island and Westchester. That year the legislature appointed a commission to inquire why.²³⁰ After nine months of study, the group identified two major factors: a high incidence of malaria and poor ferry service to Manhattan.²³¹ The first point led to a more rigorous focus on the need to improve sanitation, sewage and other health related standards. The latter reflected a growing inclination to foster closer ties with New York as a route to enhanced economic vitality.²³²

2. Consolidation

The movement to consolidate the cities of New York and Brooklyn with the towns located in Staten Island, western Queens and southern Westchester was instigated by businessmen in the region.²³³ Real estate, banking and a host of other mercantile interests were enthusiastic about the prospect of having a single government control New York harbor and its environs.²³⁴ Consoli-

225. *Id.*

226. *Id.* at 53.

227. *Id.* at 59, 74.

228. STEINMEYER, *supra* note 221, at 74.

229. *Id.*

230. *Id.* at 90.

231. *Id.*

232. *Id.*

233. For a description of the forces that led to the movement for consolidation, see E. HAGMAN HALL, *THE SECOND CITY OF THE WORLD* (1898); see also ROBERT E. HAGGER, ET AL., *THE RULERS AND THE RULED* (1964).

234. STEINMEYER, *supra* note 221, at 97.

dition was a sure way for promoting the economic prosperity of the emerging metropolitan area. Staten Islanders were particularly receptive, hoping that the powerful financial establishment of New York City would allow access to economic resources valuable to developing the sagging infrastructure of the island.²³⁵

The first significant step towards consolidation came in 1888 when the New York State Chamber of Commerce put forward a plan that would become a lifelong obsession of business leader Andrew H. Green.²³⁶ Two years later, Green persuaded the State Legislature to appoint a Greater New York Commission to study the issue. The panel included six appointees of the Governor, including Green, and one appointee each of the mayors of New York and Brooklyn and the county supervisors of Kings, Queens, Westchester and Staten Island.²³⁷ Despite strong support in some business circles, the process of consolidation would prove to be long and difficult.²³⁸

Civic leaders in New York and Brooklyn, the two largest jurisdictions affected by the plan, were particularly wary of losing their independent identities in this large metropolitan experiment.²³⁹ Green had failed twice (1892 and 1893) to persuade the State Legislature to pass a bill that would allow an advisory referendum to be held in the areas affected by the proposed plan.²⁴⁰ Finally the question was put before the voters in 1894, barely succeeding in Brooklyn by a margin of 277 ballots.²⁴¹ The largest measure of support came from Staten Island, where 79% of the voters approved the proposal.²⁴²

235. STEINMEYER, *supra* note 221, at 97.

236. For an account of the important role that Green played in the consolidation cause see ALBERT E. HENSCHEL, *MUNICIPAL CONSOLIDATION: A HISTORICAL SKETCH OF THE GREATER NEW YORK* (1985) and JOHN FOORD, *THE LIFE AND PUBLIC SERVICES OF ANDREW H. GREEN* (1913).

237. DAVID C. HAMMACK, *POWER AND SOCIETY: GREATER NEW YORK AT THE TURN OF THE CENTURY* 357 (1982).

238. For an account of the process, see HAMMACK, *id.* at 186-229; *see also* ALLAN NEVINS & JOHN A. KROUT (EDS.), *THE GREATER CITY: NEW YORK 1898-1948* (1948).

239. In 1900 the population of New York City was 3,437,202. This was divided as follows: the Bronx, 200,507; Brooklyn, 1,166,582; Manhattan, 1,850,093; Queens, 152,999; Richmond, 67,021. WALLACE S. SAYRE & HERBERT KAUFMAN, *GOVERNING NEW YORK CITY* 18 (1960).

240. HAMMACK, *supra* note 237, at 203-204.

241. HAMMACK, *supra* note 237, at 204.

242. The outcome of the referendum was: in New York County, 96,938 for, 59,959 against, 9,608 defective; Kings, 64,744-64,467; Queens, 7,712-4,741; Richmond, 5,531-1,505; Westchester, 374-206; Eastchester, 620-621; Pelham, 251-153. HAMMACK, *supra* note 237, at 206.

The first attempt at passing a consolidation bill failed in the Senate in 1895, with every senator from New York City and Brooklyn voting against the measure.²⁴³ It took the remarkable efforts of Republican leader Thomas Platt to get the bill passed on the second try.²⁴⁴ Inspired by the considerable patronage that would become available downstate after consolidation, the party boss finally won the issue over.²⁴⁵ The next stage of the battle involved the home rule provisions of the State Constitution that was adopted in 1894.

Under the new provisions of a New York State Constitution, any bill "relating to the property, affairs, or government" of a city required the approval of that jurisdiction.²⁴⁶ If the bill were not approved it would have to be resubmitted to the legislature and be passed by a simple majority of both houses. When the consolidation bill was sent to the mayors of New York City and Brooklyn, they both rejected it. Nevertheless, even against seemingly overwhelming odds, Boss Platt's persuasive talents again prevailed and the bill was passed.

In 1897, the State Legislature overrode another veto by the mayor of New York City to adopt a charter for Greater New York that would take effect in 1898.²⁴⁷ In Richmond County the positions of county treasurer and supervisor were eliminated, as were the village governments that had been in existence.²⁴⁸ The county government was preserved, but with only the functions performed by the county clerk and district attorney.²⁴⁹ George Cromwell was elected as the first Borough President of Staten Island.²⁵⁰

C. Greater New York

1. Structure

The original government of the consolidated city had three principal institutions: a bicameral Municipal Assembly; a mayor; and a

243. HAMMACK, *supra* note 237, at 217.

244. HAMMACK, *supra* note 237, at 217-223.

245. For a record of Platt's tenure see HAROLD F. GOSNELL, *BOSS PLATT AND HIS NEW YORK MACHINE* (1969).

246. N.Y. CONST. OF 1894, art. XII, sec.2 (1894). Under this provision any bill affecting a single city or less than the entire group of cities in one of three classes would be considered a "special law" requiring approval by the locality(s).

247. 1898 N.Y. Laws 378.

248. STEINMEYER, *supra* note 221, at 97.

249. STEINMEYER, *supra* note 221, at 97.

250. STEINMEYER, *supra* note 221, at 97.

Board of Estimate and Apportionment.²⁵¹ While membership in the lower house of the legislature was determined by population, the upper house apportioned seats by boroughs.²⁵² Power in this government, however was concentrated in the hands of the mayor who was the chief administrator of the city and who controlled three out of five seats on the Board of Estimate and Apportionment.²⁵³ It was the latter body which prepared the city budget and approved all franchises, debts, taxes and assessments.²⁵⁴

In 1900, an alliance of Republicans and Brooklyn Democrats convinced Governor Theodore Roosevelt and the state legislature to re-consider the charter and wrest control of the city government from the corrupt Tammany Democrats of Manhattan.²⁵⁵ Thus a new charter in 1901 allocated a significant amount of authority to the other boroughs.²⁵⁶ The most substantial alteration was the change of membership on the Board of Estimate and Apportionment. Under the new plan, the mayor's two appointees on the Board were removed, and the five borough presidents were added. The two other citywide officials remained. Each of the three citywide officials were given three votes, the borough presidents of Manhattan and Brooklyn were given two votes each, and the borough presidents of Queens and Staten Island were granted one each.

As a result of the new charter, the borough presidents were also given a substantial degree of discretion over the construction and maintenance of public works and the power to enforce the building

251. For a historic overview of charter development in New York City, see Joseph P. Viteritti, *The Tradition of Municipal Reform: Charter Revision in Historical Context*, in *RESTRUCTURING THE NEW YORK CITY GOVERNMENT* 16 (Frank J. Mauro & Gerald Benjamin eds., 1989) [hereinafter *The Tradition of Municipal Reform*].

252. The upper house had twenty-nine members elected in ten districts. There were five districts in Manhattan, three in Brooklyn and one each in Queens and Staten Island (the Bronx was still part of New York County at that time). Each district in Manhattan and Brooklyn elected three members, and Queens and Staten Island elected two each. The mayor also held one seat. ALFRED R. CONKLING, *CITY GOVERNMENT IN THE UNITED STATES* 224-96 (1897). See also FREDERICK SHAW, *HISTORY OF THE NEW YORK CITY LEGISLATURE* 4 (1954).

253. The Board consisted of the mayor, his two appointees (the president of the Department of taxes and Assessments and corporation counsel), and two elected officials (the comptroller and president of the city council). It took five-sixths a majority of both houses of the legislature to override a mayoral veto. The mayor also appointed a city chamberlain (treasurer) and a majority of the Board of Public Improvements, which oversaw public works and planning. CONKLING, *supra* note 252, at 19-20.

254. SHAW, *supra* note 252, at 165.

255. SHAW, *supra* note 252, at 10-13.

256. 1901 N.Y. Laws 466.

code. By its third year of operation the government of Greater New York was reconstituted to accommodate the long standing interests of the counties (now boroughs) that pre-dated consolidation.

2. *The Boroughs*

Prior to the adoption of the 1901 charter, the borough presidents held little sway in New York, except to sit on the Board of Public Improvements controlled by the mayor and to chair local community boards that had no real power.²⁵⁷ Charter reforms enacted throughout the twentieth century had generally enhanced the power of the mayor, but never to the level of dominance that prevailed under the original charter. Because the city historically had a weak legislature, the only real rival to executive power was the Board of Estimate and Apportionment. Thus, the Board was also a base of leverage for the boroughs.

In 1905, responsibility for preparing the expense budget moved from the Board to the mayor. Initial preparation of the capital budget was moved to a newly created City Planning Commission, whose majority was controlled by the mayor. In 1916 the Board of Estimate and Apportionment was given authority over zoning, which made the borough presidents significant players in decisions involving land use. The Board also retained the authority to approve the final budgets.

Charter changes made in 1938 and 1961 effectively removed the executive power that borough presidents enjoyed over city agencies, most notably in the area of public works. The 1961 charter created a new system of community government,²⁵⁸ which gave the borough presidents considerable influence over neighborhood based planning and the monitoring of local services.²⁵⁹ But the single most important source of power for the borough presidents and their constituencies remained the Board of Estimate, which retained discretion over the budget, land use and city franchises.

257. Although the borough presidents sat on this board, each was only allowed to vote on projects concerning their respective boroughs. See, *The Tradition of Municipal Reform*, *supra* note 251, at 22-27.

258. This system would have been fully implemented in 1975.

259. See COMMUNITY GOVERNMENT AND THE DECENTRALIZATION OF SERVICES, *supra* note 114.

3. *The Board of Estimate*

One can trace the ebb and flow of institutional power in and around New York City by examining the history of the Board of Estimate.²⁶⁰ The board was originally created in 1864 for the purpose of assessing the costs of the Metropolitan Police District in New York, Brooklyn, Westchester and Richmond.²⁶¹ Its membership included the four police commissioners in the district, all of whom were appointees of the governor, and the city comptrollers of New York and Brooklyn.²⁶² Both the board and the district were part of a larger apparatus through which the Republican dominated state government exercised control over the city.²⁶³ As early as 1857, the legislature enacted laws that allowed it to appoint the heads of departments in city government. A state controlled Board of Health and a Board of Excise had also been established in 1866.²⁶⁴

After a brief interlude under the first consolidated government in which the Board of Estimate and Apportionment served as an instrument for mayoral control, the board became a potent vehicle for borough representation through the membership of the borough presidents.²⁶⁵ In 1958, the weighted voting scheme that favored the larger boroughs of Manhattan and Brooklyn was changed. Each borough president was given two votes and the three citywide officials were granted four votes apiece.²⁶⁶ The reallocation of votes especially bolstered the position of tiny Staten Island, which did not exercise much leverage in a local legislature apportioned by population, and whose county based political parties were no match for those in the other boroughs in determining the outcome of mayoral elections. A system of reciprocity had developed among the borough presidents on the board which allowed

260. This theme is developed in *The Tradition of Municipal Reform*, *supra* note 251.

261. See EDWARD DANA DURAND, *THE FINANCES OF NEW YORK CITY* (1898) (reviewing the early history of the Board of Estimate and Apportionment).

262. *Id.* at 253.

263. See JAMES F. RICHARDSON, *THE NEW YORK POLICE: COLONIAL TIMES TO 1901* 82-164 (1970) (analyzing the important role played by the Metropolitan Police District in defining state and city relations).

264. SAYRE & KAUFMAN, *supra* note 239, at 11-12.

265. SAYRE & KAUFMAN, *supra* note 239, at 638-39.

266. SAYRE & KAUFMAN, *supra* note 239, at 639. The system was revised again in 1978 when each citywide official, i.e., the mayor, council president, and comptroller, was given two votes and the borough presidents one apiece. R. Alta Charo, *Designing Mathematical Models to Describe One-Person, One-Vote Compliance By Unique Governmental Structures: The Case of the New York City Board of Estimate*, 53 *FORDHAM L. REV.* 735, 737-38 (1985).

them to trade votes with citywide officials on matters that were of local interest.

In 1986, the Eastern District of New York ruled that the voting scheme of the Board of Estimate which granted equal power to the boroughs violated the Equal Protection Clause of the federal Constitution.²⁶⁷ The decision was subsequently affirmed by the Second Circuit Court of Appeals²⁶⁸ and the United States Supreme Court.²⁶⁹ Noting that the board exercised broad governmental powers and shared legislative and fiscal powers, the Supreme Court found that it was required to abide by the one person one vote standard.²⁷⁰ A voting system which allowed Staten Island to have equal weight with Brooklyn, which had a population that was five times larger, was not in compliance with the existing Constitutional standard.

D. Seeds of Separatism

1. A New Charter

The momentous Supreme Court ruling required New York City to restructure its government.²⁷¹ While there was some consideration given to developing a system of weighted voting to preserve the board, attorneys advising the Charter Revision Commission argued against it.²⁷² They claimed that to do so would violate the

267. *Morris v. Board of Estimate*, 647 F. Supp. 1463 (E.D.N.Y. 1986). Initially the district court dismissed claims that the Board was subject to the one person one vote standard, accepting arguments that its members were not elected but appointed by virtue of their election to other positions. *Morris v. Board of Estimate*, 551 F. Supp. 652 (E.D.N.Y. 1982). However this determination was rejected by the Second Circuit, which held that the Board was subject to the Fourteenth Amendment standard, and remanded the case back to the trial level for a determination of facts. *Morris v. Board of Estimate*, 707 F.2d 686 (2d Cir. 1983).

268. *Morris v. Board of Estimate*, 831 F.2d 384 (2d Cir. 1987).

269. *Board of Estimate v. Morris*, 489 U.S. 688 (1989).

270. *Id.* at 703. On the one person one vote standard, see *Reynolds v. Sims*, 377 U.S. 533, 567 (1964); *Maryland Committee for Fair Representation v. Tawes*, 377 U.S. 656 (1964); *Lucas v. Forty-Fourth General Assembly of Colorado*, 377 U.S. 713 (1964).

271. For a critical review of the process and the results, see Joseph P. Viteritti, *The New Charter: Will it Make a Difference?* in *URBAN POLITICS NEW YORK STYLE* 413 (Jewel Bellush & Dick Netzer eds., 1990) [hereinafter, *The New Charter*].

272. M. David Gelfand & Terry E. Albritton, *Voting Rights and the Board of Estimate: Prospects and Pitfalls*, in *RESTRUCTURING THE NEW YORK CITY GOVERNMENT*, supra note 251, at 70; Katherine Butler, *An Evaluation of Whether a Weighted Voting System on the Board of Estimate Would Comply With Section 5 of the Voting Rights Act*, in *VOTING RIGHTS AND THE BOARD OF ESTIMATE: COMPILATION OF ADVISORY OPINIONS, MEMORANDA CORRESPONDANCE AND RELATED MATERIALS* 108 (Frank J. Mauro ed., 1988).

provisions of the Voting Rights Act.²⁷³ Although not all attorneys reviewing the case agreed with this opinion,²⁷⁴ the Commission ultimately decided to abolish the Board of Estimate.²⁷⁵ The result was a new government cast in the classic mold of a mayor-council system. For the first time in Greater New York's history, the local legislature did not share its budgetary role with another body, and it assumed the land use functions once held by the Board. To accommodate the increasingly diverse interests of the city, the size of the City Council was expanded from 35 to 51 members whose districts were defined by a separate districting commission.²⁷⁶

While the City Council was the principal beneficiary of the new charter, the borough presidents suffered the greatest losses. Under the new plan the borough presidents collectively appointed five members of a thirteen member City Planning Commission, and each was given discretion over five percent of their borough budgets. This was a poor exchange for the demise of the powerful executive body which had provided the institutional basis from which the borough presidents represented their local constituents. Borough governance, which had been a prominent aspect of New York's civic culture for nearly a century, simply was not counted as an important part of the political equation for the framers of the new government.²⁷⁷

No borough was penalized by the new arrangement as greatly as Staten Island. Once an equal player in the policy deliberations of the Board of Estimate, its political needs were now represented by three members in a fifty-one person legislature. Since the charter

273. For a critical examination of the Voting Rights Act and its enforcement in local elections, see *Unapportioned Justice*, *supra* note 142; CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE (Bernard Grofman & Chandler Davidson eds., 1992).

274. One prominent attorney involved in the case argued for the preservation of the Board of Estimate as a form of regionalism. See Edward N. Costikyan, *New York's Board of Estimate: Don't Lose it Without a Fight*, N.Y. TIMES, Dec. 17, 1986, at A31.

275. Alan Finder, *The 1989 Elections: Charter—Putting New Government in Place Will Take Time*, N.Y. TIMES, Nov. 4, 1989, at B11.

276. For a description of the process undertaken, see Frank J. Macchiarola & Joseph G. Diaz, *The 1990 New York City Districting Commission: Renewed Opportunity for Participation in Local Government or Race-Based Gerrymandering*, 14 CARDOZO L. REV. 1175 (1993); Frank J. Macchiarola & Joseph G. Diaz, *Decisionmaking in the Redistricting Process: Approaching Fairness*, 19 J. LEGIS. 199 (1993).

277. One advisor to the Districting Commission actually recommended council members should be elected at-large by borough through a system of cumulative voting, but the proposal was never acted upon. See Judith Reed, *Of Boroughs, Boundaries and Bullwinks: The Limitations of Single Member-Districts in a Multiracial Context*, 19 FORDHAM URB. L.J. 759 (1992).

amendment, two out of three of these seats have been filled by Republicans in a legislative body that continues to be dominated by Democrats.²⁷⁸

2. *Legislative Action*

Serious legislative activity promoting secession began as a direct result of the federal litigation that challenged the constitutionality of the Board of Estimate. In 1983, Senator John Marchi issued a Finance Committee report stating Staten Island's legal and financial capacity to establish itself as an independent city if its representation within New York City government were compromised by the abolition of the Board.²⁷⁹ Secession bills were introduced in the Senate and the Assembly during every legislative session between 1983 and 1989, but passage was not attempted until the Supreme Court decided the Board of Estimate case in the spring of 1989.²⁸⁰

Meanwhile, political leaders from Staten Island and the other boroughs joined in urging the Charter Revision Commission to find a legal remedy that allowed some maintenance of the Board of Estimate. Until the final passage of the secession legislation Senator Marchi declared that separation was an act of last resort to a crisis in governance which denied his small borough an effective voice in local affairs.²⁸¹

278. In the present 51 member City Council, there are 45 Democrats and 6 Republicans. THE 1993-94 GREEN BOOK, *supra* note 212, at 38-41.

279. NEW YORK STATE SENATE FINANCE COMMITTEE, REMEDIES OF A PROUD OUTCAST: THE LEGAL PROBABILITY AND IMPLICATIONS OF RESTRUCTURING THE GOVERNMENT AND BOUNDARIES OF THE CITY OF NEW YORK (1983) (report to the Chairman of the New York State Finance Committee). A second study, AN INQUIRY INTO SELF-DETERMINATION: STATEN ISLAND COMMITTEE FOR THE REVIEW OF SECESSION (1987), was commissioned by Borough President Ralph Lamberti. The Senate Finance Committee later commissioned another financial report: BARUCH COLLEGE GRADUATE SCHOOL OF POLITICAL MANAGEMENT, A STUDY OF THE FEASIBILITY OF AN INDEPENDENT STATEN ISLAND (1990).

280. The bills were sponsored in the assembly by members Elizabeth Connelly, Robert Straniere and Eric Vitaliano. NEW YORK STATE CHARTER COMMISSION FOR STATEN ISLAND, REPORT TO THE GOVERNOR AND THE LEGISLATURE (1993).

281. "While I was one of the leaders of the secession movement, I made it clear from the outset that I regarded separation as a measure of last resort. As a lifelong New York City [Staten Island] resident and a long-time state senator who made two tries for the mayoralty, I believe my affection for and loyalty to this city is well established. It is only when the courts took away our voice in the city government that I proceeded to move the secession legislation. Throughout the court deliberations, I had nursed the hope that Staten Island would somehow achieve the equity it deserves. But it was not to be, at least in the tribunals." Letter from New York State Senator John J. Marchi, to the Editor of THE NEW YORK LAW JOURNAL, Feb. 13, 1991, at 2.

The original bill that passed both houses of the legislature would have made the 1993 referendum final in determining Staten Island's disengagement.²⁸² However, before putting his signature to the statute, Governor Cuomo asked for an amendment that would assign final resolution on the matter to the legislature stating, "it is reasonable to conclude that separation concerns everybody in this State and not just Staten Island voters."²⁸³ The governor was unequivocal in his belief that Staten Islanders had a right to consider this question and in his understanding of the governance issue that generated a plea for independence. Upon signing the legislation he stated:

The legislature has decided — overwhelmingly on both sides of the aisle and in both houses — that the people of Staten Island should have the opportunity to vote on the question whether they should be allowed to create a new and separate city. It appears universally accepted that they are justified in wanting to consider separation from the City of New York. They have been part of the City since 1898. But a recent decision by the Supreme Court of the United States dramatically changed Staten Island's participation in city governance, reducing its equal vote on the Board of Estimate to a relatively small participation in a new legislative body. That changed circumstance, added to a long list of grievances by the people of the island over the years, moved the legislature to adopt this bill.²⁸⁴

However, not everyone was in agreement with the governor. Upon signing of the bill, outgoing-Mayor Edward Koch likened the state legislation to "plunging a dagger into the city's heart."²⁸⁵ Incoming-Mayor David Dinkins immediately announced his opposition to secession,²⁸⁶ and continued the legal debate initiated by Koch on the home rule provisions of the State Constitution. That discussion is ongoing.²⁸⁷

282. This bill passed by a margin of 58-1 in the Senate, and 117-21 in the Assembly.

283. Executive Memorandum approving L.1989, ch. 773, Dec. 15, 1989, Session Laws of New York 2438 (McKinney 1989). The final vote was 51-6 in the Senate and 94-36 in the Assembly.

284. *Id.*

285. Craig Schneider and Carl Campanile, *Koch: Island Would Be Better Off Splitting From City, But Former Mayor Remains Opposed to Secession*, STATEN ISLAND SUNDAY ADVANCE, August 8, 1993, at A17.

286. Craig Schneider, *Mayor Paints Secession as Nightmare for Island*, STATEN ISLAND ADVANCE, July 29, 1992, at A11.

287. See Briffault, *supra* note 100; Florence L. Cavanna, Note, *Home Rule and the Secession of Staten Island: City of New York v. State of New York*, 8 TOURO L. REV. 795 (1992); Underweiser, *supra* note 100.

E. The Staten Island Case

1. A Political Community

Staten Island has existed as a political community for more than three hundred years. Prior to the consolidation of Greater New York it functioned as an independent county with a burgeoning system of towns and villages.²⁸⁸ Subsequently, it maintained its identity as one of five boroughs, which represented its interests through New York City's powerful Board of Estimate.²⁸⁹ Boroughs, defined by geography and history, have always been an important part of the political culture of New York.²⁹⁰ Even with the demise of the Board of Estimate, they remain a part of the political landscape. Each borough has its own elected president with limited budgetary prerogatives and the power to appoint members to important policy making bodies such as the City Planning Commission, the Board of Education and local community boards.²⁹¹

Staten Island's distinct identity has been reinforced by its physical separation from the city, which has made it relatively inaccessible from the other boroughs. Notwithstanding a century old plan of consolidation, it is only within the last thirty years that it has been connected by a bridge. To describe the political community of Staten Island as insular is more than a metaphor. It is unique in its bipartisanship, and the more conservative leanings of its voters. No other borough supports its own daily newspaper.

2. Desire For Self-Government

Staten Islander's have had a number opportunities to consider self-government.²⁹² In a referendum held in November 1990, 83% of the voters elected to perform a study and initiate a process of secession.²⁹³ In February 1992 the Commission hired a consultant from the City University of New York to conduct a scientific poll of

288. LENG & DAVIS, *supra* note 220.

289. *The Tradition of Municipal Reform*, *supra* note 251.

290. *See supra* note 251.

291. *See supra* note 251. These are small remnants of power, given the central role that the borough presidents played on the Board of Estimate, where they were able to trade votes with each other and the citywide officials in order to advance constituency interests. However the retention of these offices speaks to the important role that boroughs play in defining the political identities of New Yorkers, especially those residing outside of Manhattan. *See also The New Charter*, *supra* note 271.

292. REPORT TO THE GOVERNOR AND THE LEGISLATURE, *supra* note 280 at 4-7.

293. *Supra* note 280, at 7-8.

the population.²⁹⁴ Based on a random sample of 750 adult residents, 58% of those asked said they favored secession (25% were opposed, 16% were undecided).²⁹⁵ Among those polled, 49% stated that they would be willing to pay higher taxes as the price for secession.²⁹⁶ Between October 1991 and October 1993, the Charter Commission held twelve public hearings in addition to monthly open meetings. In November 1993, after two years of study, deliberation, discussion and debate, 65% of those Staten Islanders participating in a second referendum voted to adopt a city charter drafted by the Commission and secede from New York City.

3. *Economic Viability*

Several studies were performed on behalf of the State Charter Commission in order to make a judgement about whether Staten Island could support itself as an independent city.²⁹⁷ In general, financial feasibility is determined by a number of key factors: the revenue generating potential of the community, the anticipated costs of delivering local services, and the ability of the new city to enter the bond market.²⁹⁸ The first two questions were initially addressed in a report by a group of economists from New York University.²⁹⁹ They found, based on actual receipts for the 1991 fiscal year, that Staten Island had a revenue base of \$955.4 million.³⁰⁰ A second study, designed to assess the strength of the revenue base, indicated the overall health of island economy and a rate of growth exceeding that of the other boroughs.³⁰¹

294. DOUGLAS MUZZIO, *STATEN ISLANDERS ON SECESSION, A REPORT SUBMITTED TO THE NEW YORK STATE CHARTER COMMISSION FOR STATEN ISLAND* (1992).

295. *Id.* at 1. Among those who expressed an opinion, supporters of secession outnumbered opponents 70% to 30%. *Id.*

296. Of those polled, 49% said they would accept a 25% increase in property taxes, 25% said they would accept a 26-50% increase, and 13% would accept a 51-100% increase. *Id.* at 2-3.

297. See Joseph P. Viteritti, *BRIEFING PAPER: FINANCES, NEW YORK STATE CHARTER COMMISSION FOR STATEN ISLAND* (1992) (an overview and synthesis of the major economic studies) [hereinafter *FINANCES*].

298. See *infra* notes 299-327 and accompanying text.

299. Robert Berne, Dick Netzer and Leanna Stiefel, *STATUS QUO FISCAL STUDY: AN ANALYSIS OF NEW YORK CITY EXPENDITURES AND REVENUES ON STATEN ISLAND, REPORT TO THE NEW YORK STATE CHARTER COMMISSION FOR STATEN ISLAND* (1992).

300. This figure included property taxes, income taxes, commercial taxes, non-tax revenues and intergovernmental aid. *Id.* at 39.

301. This report, written by a former senior analyst for the Port Authority of New York and New Jersey, indicated that Staten Island is one of the fastest growing counties in the metropolitan region, based on population, employment and labor force

Estimating expenditures was a more complicated task. Based on actual spending for 1991, it was found that the cost for delivering local services (municipal and educational) on the island was \$670 million.³⁰² While this figure is considerably lower than the revenues received (\$955.4 million), it did not include the costs of overhead functions for New York City or the delivery of local services that originated in other boroughs. If Staten Island were to assume a proportional share of these costs under the current service structure, then total expenditures would be brought to \$1.1 billion, resulting in a deficit.³⁰³ However, there was substantial evidence from other analyses performed for the Commission indicating that such an assumption was not valid.³⁰⁴

Subsequent studies of select services indicated that Staten Island could perform these off-island functions at a much lower cost if it were an independent city.³⁰⁵ A twenty-five city survey of municipalities that are similar in size to Staten Island showed that the average cost for local services was \$833.1 million,³⁰⁶ considerably lower than the revenue base enjoyed by Staten Island. This report also highlighted the uniquely broad menu of local services that Staten Island was providing as part of New York City, suggesting

data. Using data from 1980-1990, the report projected continuing growth through the year 2010. Hugh O'Neill, *THE STATEN ISLAND ECONOMY: PROSPECTS FOR DEVELOPMENT IN THE 1990'S AND BEYOND*, REPORT TO THE NEW YORK STATE CHARTER COMMISSION FOR STATEN ISLAND (1992).

302. Berne, Netzer & Stiefel, *supra* note 299, at 28-31.

303. Berne, Netzer & Stiefel, *supra* note 299, at 28-31.

304. *See infra* notes 305-07, and accompanying text.

305. The Commission engaged Richard Koehler a professor at the John Jay College of Criminal Justice, who had previously served as New York City Commissioner of Corrections and as Chief of Personnel in the New York City Police Department to conduct studies on the costs of operating a jail, an emergency communications system and a police academy. These are three major functional areas not physically present on the island. *See* Richard J. Koehler & Thomas W. Matteo, *JAILS, 911, AND POLICE TRAINING: REPORTS TO THE NEW YORK STATE CHARTER COMMISSION FOR STATEN ISLAND* (1993).

306. Thomas W. Matteo, *STATE OF NEW YORK CHARTER COMMISSION FOR STATEN ISLAND, SERVICES, EXPENDITURES AND REVENUES: A COMPARISON OF TWENTY-FIVE CITIES* (1992). This survey targeted cities that were within a population range of 25% higher or lower than Staten Island. The cities included Albuquerque, Anaheim, Atlanta, Austin, Buffalo, Charlotte, Cincinnati, Denver, Fresno, Fort Worth, Kansas City, Long Beach, Miami, Minneapolis, Oakland, Omaha, Pittsburgh, Portland, Sacramento, St. Louis, St. Paul, Toledo, Tucson, Tulsa, and Virginia Beach. *Id.* A subsequent calculation added six more cities so that all municipalities in this population range would be included. These were Colorado Springs, Mesa City, Newark, Oklahoma City, Santa Ana City, and Wichita. This brought the average service cost, including education, down to \$783.9 million. *Id.*

opportunities for cost savings if the new government chose to function more like other municipalities in the nation.³⁰⁷

Perhaps there is no better indicator of a city's financial viability than the willingness of the financial community to extend it credit. In order to assess the capability of a newly incorporated City of Staten Island to enter the bond market, representatives of the Commission, including its bond counsel,³⁰⁸ arranged a meeting with an Executive Vice President from Moody's Investor's Service.³⁰⁹ As a major credit rating institution for the City of New York,³¹⁰ Moody's analysts were familiar with the revenue potential and service costs of Staten Island. The firm's analysts were also provided access to the financial reports that had been performed for the Commission. Although a formal credit rating was not possible for a hypothetical city, an informal assessment indicated that a City of Staten Island would be credit worthy, and suggested that it might even merit a rating higher than New York City because of its more modest service needs.³¹¹

As a result of the various financial studies that were performed, a sub-committee of the Commission found that the establishment of a separate City of Staten Island was financially feasible.³¹² This conclusion was accepted by a separate statutory panel established by the state legislature and the governor,³¹³ and was unanimously endorsed by the full membership of the Commission.³¹⁴

4. *Impact on New York City*

Severing Staten Island from New York would mean the loss of population, land, revenues and infrastructure for the latter.³¹⁵ It would require New York to restructure its government and re-draw the lines of its councilmanic districts.³¹⁶ These are substantial

307. *Id.*

308. The Commission retained John J. Keohane of Orrick, Herrington & Sutcliffe.

309. MEMORANDUM FROM JOHN J. KEOHANE TO THE STATE OF NEW YORK CHARTER COMMISSION FOR STATEN ISLAND WORKING GROUP ON FINANCE 1 (Mar. 25, 1993) (on file with the FORDHAM URBAN LAW JOURNAL) [hereinafter, WORKING GROUP].

310. *Id.*

311. *Id.* at 2.

312. NEW YORK STATE CHARTER COMMISSION FOR STATEN ISLAND, STATEMENT OF THE WORKING GROUP ON THE BUDGET (1993).

313. NEW YORK STATE CHARTER COMMISSION FOR STATEN ISLAND, REPORT OF THE ADVISORY COMMITTEE ON TAX AND FINANCE 4 (1993).

314. NEW YORK STATE CHARTER COMMISSION FOR STATEN ISLAND, REPORT TO THE GOVERNOR AND THE LEGISLATURE (1993).

315. *See supra* notes 87-89.

316. *See supra* note 90.

changes. However they do not pose any apparent threat to the viability or stability of New York. On the financial side, Staten Island is too small to constitute a significant loss for New York. If the city were to lose all the revenues which flow from Staten Island (\$955.4 million including intergovernmental aid), and save only on those expenses that are derived from direct on-island services (\$670 million), New York would suffer a net operating loss of \$285.4 million per year.³¹⁷ This is a rather absurd assumption, however, because the city would save some overhead costs and expenses incurred from providing services that originate in other boroughs. Nevertheless, if it were true, the net operating losses realized would amount to less than 1% of the city budget,³¹⁸ hardly enough to set New York on the route to financial calamity.

In the course of its deliberations, the Commission received two legal opinions from private counsel which held that subsequent to separation, the City of Staten Island would be held liable for a portion of the New York City debt that was incurred prior to the divorce.³¹⁹ The Commission built this assumption into its financial analyses and projections for the prospective new city. The legislation proposed by the Commission (and passed by the Senate) includes a provision that the City of Staten Island would assume a portion of the New York debt.³²⁰ In accord with recommendations made by the Commission's bond counsel, the proposed legislation imposes joint and several liability on Staten Island and New York for debt incurred prior to separation; and this debt is allocated in proportion to assessed valuation between Staten Island and the remaining four boroughs.³²¹

5. *Impact on State and Region*

The effect that Staten Island secession will have on the state and region is largely a function of its own economic viability, and the impact that the divorce will have on New York City. Staten Island presents us with one of those rare cases where an economically

317. FINANCES, *supra* note 297.

318. FINANCES, *supra* note 297, at 18.

319. John Keohane, for Orrick, Herrington & Sutcliffe, REPORT ON CERTAIN MATTERS WITH RESPECT TO INDEBTEDNESS IN THE CONTEXT OF AN INDEPENDENT CITY OF STATEN ISLAND 4 (undated) [hereinafter, INDEBTEDNESS]; Roger Furman & Ronald A. Jackson, for Kaye, Scholer, Fierman, Hayes & Handler, MEMORANDUM ON CONTINUING LEGAL OBLIGATIONS, 31-32 (1993) (both prepared for the New York State Charter Commission for Staten Island).

320. *See supra* note 17.

321. INDEBTEDNESS, *supra* note 319.

viable territory can separate from an existing municipality without posing a serious financial threat to the remaining city.³²² Therefore secession does not seem to represent a risk either to the state or the region. The action will result, it is expected, with the existence of two relatively large and robust cities in the metropolitan region.

Whether the departure of Staten Island would instigate further separatism within New York is speculative. Certainly such demands have already been heard in the borough of Queens. A bill was passed in the State Senate in April, 1992 that would allow Queens to initiate a similar process of study, followed by a referendum.³²³ Nevertheless, it remains to be proven that Queens has the resources to support itself as an independent city. If such a case were to actually materialize, which is unlikely, then the legislature would have to consider it on the merits and make a judgement regarding its potential impact on the city, state and region. At this point in time, the only other borough that clearly has the capability to support itself is Manhattan. But the prospect of Manhattan's separating would represent such a serious financial threat to the remainder of the city, that it would be disallowed under the standards developed in this Article. Thus, there is no reason to expect that the separation of Staten Island will lead to the disintegration of New York City or the destabilization of the region.

6. *Minority Interests*

Secession has been opposed by the organized black community of Staten Island.³²⁴ Many black leaders feel that their interests would be better accommodated in a consolidated city where racial minorities constitute a majority of the city population. Black and Hispanic politicians in the other boroughs, however, have been receptive to the idea.³²⁵ Many of the latter express a basic sympathy with the idea of self-determination, while others pragmatically proclaim that the loss of predominantly white Staten Island will bolster the political fortunes of minority office seekers citywide.³²⁶ The future of secession should not be determined by the political

322. See *supra* note 297.

323. The bill has been given little hope of passing through the Assembly. Thus, it is unlikely at this time that Queens' secession will be studied seriously. Kevin Sack, *State Senate Passes Bill to Allow Queens to Begin Secession Effort*, N.Y. TIMES, Apr. 29, 1992, at B4.

324. Craig Schneider & Carl Campanile, *NAACP Opposes Secession*, STATEN ISLAND ADVANCE, Oct. 27, 1993, at A15.

325. *Black Pols Rethinking Secession*, N.Y. DAILY NEWS, Nov. 26, 1993.

326. *Id.*

fortunes of any group or party. However, there is a need to assure that the rights of all groups are protected, and that minorities have a fair opportunity to participate in the political process after secession.

If Staten Island were to become an independent city, its residents would be afforded the same constitutional protections by the New York State and federal Constitutions that they currently have in the larger city. The issue here is to create a local political process that provides a small minority population with access, voice and representation at the new city hall. The State Charter Commission was both diligent and creative in exploring a variety of governance options that would allow the minority community to maximize its influence in the local political process. For example, while the original inclination of the Commission was to create a city manager form of government to improve efficiency, that proposal was eventually dropped in favor of a mayor-council system in order to achieve better representation for minorities.³²⁷ The Commission was especially innovative in the creation of a new school district, where in order to respond to minority concerns, it chose a method of school board elections utilizing cumulative voting.³²⁸ Both the city council and school board plans were arrived at after consultation with attorneys in the United States Department of Justice.³²⁹

7. Grievances

It is clear from the pronouncements of Senator Marchi when proposing the original secession legislation,³³⁰ of Governor Cuomo

327. A staff report indicated that the adoption of a city manager system with a small legislative body would make it difficult to create a minority district in a city with a small black and Hispanic community. As an alternative the Commission, in its proposed city charter, chose to set up a mayor-council system with 15 legislative districts. This would make it possible to carve out at least one, or possibly two, minority districts. See Barbara Lawrence, BRIEFING PAPER: FORMS OF GOVERNMENT AT THE LOCAL LEVEL, NEW YORK STATE CHARTER COMMISSION FOR STATEN ISLAND (Dec. 6, 1991).

328. This recommendation was the result of a comprehensive staff report that had examined a variety of alternative and the social science literature that reviewed the advantages and disadvantages of the options. In the process of the study, the staff had consulted with a number of nationally recognized experts on the subject. See Nat Cipollina and Barbara Lawrence, BRIEFING PAPER: THE SCHOOL BOARD ELECTION PROCESS, NEW YORK STATE CHARTER COMMISSION FOR STATEN ISLAND (March 30, 1993).

329. See *id.* at 21.

330. See *supra* note 281.

when signing it,³³¹ and in the preamble to the recent legislation passed by the State Senate,³³² that the driving force behind the move was the elimination of the Board of Estimate. This is not a historic grievance, because it only emerged in response to a decision by a federal appellate court in 1983.³³³ Nor has it been put forward as a denial of civil rights. For Staten Islanders, the key issue seems to be one of effective representation in a majoritarian system where they perceive themselves as a distinct minority.³³⁴ For them, the only route to meaningful home rule is independence. The case is a classic manifestation of what was referred to above as the dilemma of majoritarian democracy.³³⁵

In addition to the crisis in governance that accompanied charter reform, Staten Islanders harbor some historic grievances against New York City. Paramount among these is the existence of an open landfill at Fresh Kills, where the city disposes of 10,000 tons of solid waste daily.³³⁶ This is a longstanding issue for residents. The first secession bill was submitted to the legislature in 1947 by Assemblyman Edmund Radigan to protest the opening of the garbage dump.³³⁷ Since 1960, the City of New York has closed eleven such facilities throughout the boroughs, with only this one remaining.³³⁸ In his report to the Commission, pollster Muzzio commented, "Staten Islanders feel 'dumped on' both figuratively and literally."³³⁹ He added, "Fresh Kills appears to be both a tangible example and potent symbol of Staten Islander's disaffection."³⁴⁰

331. *See supra* note 283.

332. The legislative findings of the bill read: "the New York State constitution entitles the people of Staten Island to 'effective local self-government'. . . the existing charter of the city of New York does not provide meaningful representation to the borough of Staten Island. . . given the constraints of the Supreme Court articulated in *Board of Estimate v. Morris*, the only viable alternative to providing 'effective local self-government' is legal disengagement from the city of New York and the creation of the new city of Staten Island." *Supra* note 17, at 3.

333. *Supra* note 267.

334. In the poll taken on the island, 84% stated that their interests were not adequately represented in city government, and 41% felt that the elimination of the Board of Estimate made the city less responsive to the island's needs. MUZZIO, *supra* note 294.

335. *See supra* notes 139-40.

336. Among those polled, the landfill was the most frequently cited problem facing the island, with 21% listing it first, and 10% listing it second. MUZZIO, *supra* note 294, at 7.

337. S. 3781, *supra* note 17.

338. *See* REPORT TO THE GOVERNOR AND THE LEGISLATURE, NEW YORK STATE CHARTER COMMISSION FOR STATEN ISLAND, at 5-6 (1992).

339. *Id.* at 7.

340. *Id.* at 18.

Among the other grievances observed by Muzzio is that Staten Islanders feel "neglected" and "abused," seeing themselves as paying more than their fair share of taxes, and receiving less than an equitable share of services.³⁴¹ Such citizen perceptions might be found in many parts of New York City, and they are certainly contestable. However, in addition to the landfill, there are certain historic claims that island residents can validly list in making a case for unique treatment by the municipal government. Transportation has always been a problem. Not only is it difficult and expensive to travel between the other boroughs and the island,³⁴² Staten Island, with its large land mass, is the only borough without a subway system for internal travel. Likewise Staten Island is the only borough without a primary care public hospital; and many homes on its south shore are still without sewers.

8. *Legitimacy*

Underlying reasonable assertions that New York is institutionally incapable of effectively representing the needs of Staten Islanders, and some tangible evidence of managerial inefficiencies that are indigenous to the nation's largest municipality, there is the basic problem of public confidence. If ever there were an institutional structure that epitomized the diseconomy and impersonality of scale, it is the government bureaucracy of New York. Staten Islanders do not exhibit much faith in New York or its future, and feel that they have more to look forward to if they go it alone.³⁴³

Perhaps the point is best made from the positive side, in terms of what Staten Islanders aspire to in appealing for independence. This sentiment is best stated in the preamble to the proposed city charter, written personally by Senator John Marchi:

We consent to be governed by the new municipality in the belief that smaller, localized city government may effectively and responsibly balance the needs of the people with the cost of providing municipal service.³⁴⁴

341. Of those polled, 72% claim that they pay more than their fair share of taxes, and 80% claim they do not get an equitable share of services. *Id.* at 4.

342. See *supra* notes 210-11 and accompanying text.

343. "Staten Islanders do not have much confidence in New York City government. Nearly half (48%) have no confidence; the other half (49%) have some. They are pessimistic about the future of New York (68% believe New York will be a worse place to live in five years) and Staten Island's place in it (55% say Staten Island will be worse five years hence if it stays part of New York City). They see a rosier picture in an independent Staten Island (60% see a better Staten Island in five years if it succeeds)." Muzzio, *supra* note 294.

344. S. 3781, *supra* note 17, at 5.

9. *Summary*

By the standards developed in this paper, Staten Island has a justifiable claim to secede from New York City. It is a legitimate political community defined by geography, history and values that distinguish it from the rest of New York. It has expressed a strong desire for self-government. Although it has the economic means to support itself, separation from New York will not jeopardize the stability of the latter. Therefore, secession will not pose any serious risks for the state or the region. The framers of its proposed government have been vigilant in protecting the legitimate interests of minorities within the jurisdiction of the new city. While such institutional safeguards can never be expected to resolve the dilemma faced by minorities in a majoritarian system, they should provide minorities with a fair opportunity for access, participation and representation. Staten Islanders have articulated many grievances against the government of New York City, but their major concern is a lack of effective representation resulting from the demise of the Board of Estimate. In the final analysis, Staten Islanders lack confidence in the government and future of New York City, and are more inclined to provide support and legitimacy to a smaller more proximate government of their own making.

Conclusion

A political debate has ensued in New York that pits the home rule doctrine against an attempt at municipal secession. The absurdity of the controversy is underscored by the fact that, as political concepts, both home rule and secession are derived from the same yearning for local self-government - a cherished value within the American political tradition, but not an absolute right. Our localism, bereft of constitutional standing, is one that is modified and moderated by state government. Based on Dillon's Rule, there is a rich body of case law that subjects home rule to the plenary power of the legislature. There are no such legal guidelines regarding municipal secession. Nevertheless, given the severity of separatist claims and the impact they can have on a city, a region or a state, there is a need to develop standards for reviewing such appeals. Because it is the state that must bear the consequences of a political divorce locally, the state, through the power of the legislature, must judge the appeal.

The literature on international jurisprudence provides us with the material for defining criteria to determine the conditions under

which municipal secession can be morally justified. When applied in the context of American federalism, guided by the principles of liberal democracy, these criteria support the notion of community self-determination at the local level, so long as it does not jeopardize the larger public good, and the legitimate interests of concerned minorities are protected. These standards are put forth with the full knowledge and understanding that big city politics and bureaucracy are as much a threat to meaningful community government as is the aggressive exercise of power at the state level. These standards have general applicability to other American cities. If the New York State legislature were to apply them to the case made by Staten Islanders, it would support their plea for self-government.