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Principles of Home Rule for the 21st Century

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About the Authors

The National League of Cities (NLC) and the Local Solutions Support Center (LSSC) convened a group of state-and-local-government legal scholars in the fall of 2018 to begin a comprehensive examination of home rule. This working group, led by Fordham Law School Professor Nestor Davidson, included Professor Richard Briffault, Columbia Law School; Professor Paul Diller, Willamette University College of Law; Professor Sarah Fox, Northern Illinois University College of Law; Professor Emeritus Laurie Reynolds, University of Illinois College of Law; Professor Erin Adele Scharff, Arizona State University Law School; Professor Richard Schragger, University of Virginia School of Law; and Professor Rick Su, University of North Carolina Law School. These scholars surveyed historical models and plumbed lessons from how home rule has been enacted and understood in practice across the country. From that review, the working group crafted a proposal that they refined through consultation over the past year with a broad array of local officials, state municipal league leaders, city attorneys, advocates, academics, and other stakeholders.

About the National League of Cities

The National League of Cities (NLC) is the voice of America's cities, towns and villages, representing more than 200 million people. NLC works to strengthen local leadership, influence federal policy and drive innovative solutions.

NLC's Center for City Solutions provides research and analysis on key topics and trends important to cities and creative solutions to improve the quality of life in communities.

About NLC's Local Democracy Initiative

This foundational text is part of NLC's broader Local Democracy Initiative. This Initiative strengthens the capacity and vibrancy of local governance through research and engagement on issues from state preemption to civic engagement. These efforts would not be possible without the support of our funding partners, including the Kresge Foundation, the Open Societies Foundation, the Ewing Marion Kauffman Foundation, the deBeaumont Foundation, and Robert Wood Johnson Foundation. This document was supported by Spencer Wagner, Christiana McFarland, and Alex Jones.

LSSC Local Solutions Support Center

About the Local Solutions Support Center

The Local Solutions Support Center (LSSC) is a national hub that coordinates and creates efforts to counter the abuse of state preemption and strengthen the power of local democracies to advance polices that promote equity, inclusion, public health and safety, and civic participation. Kim Haddow, Director of LSSC, was instrumental in the development of this document.

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Foreword

"Municipal governments can be neither free nor responsible unless they are guaranteed the right (and the compulsion) to decide purely local matters for themselves."

—Carl Chatters, Executive Director of the American Municipal Association (AMA) (1953)

When Carl Chatters wrote those words more than six decades ago in the AMA's influential "Model Constitutional Provisions for Municipal Home Rule," he referred to the strong emotions that local leaders have toward the concept of home rule. That deep desire for local decision-making is the common thread that continues to link municipal officials across time, geography, and political ideology.

The model constitutional provisions from the AMA, which became the National League of Cities in 1964, were a significant advancement for their time, proposing changes to home rule that sought to disentangle earlier approaches from fruitless litigation over the scope of local government authority. The AMA Model made clear that cities have broad authority to govern and are subject to equally broad state oversight. Almost every state that modified their home rule provisions in the decades after the publication of the AMA Model followed its basic approach.

Given how much has changed for cities, towns and villages in the intervening 67 years, it is imperative that we revisit the fundamental legal structure of state-local relations for the twenty-first century. Since the wave of home rule reform that followed the publication

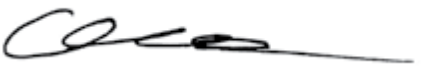
of the AMA Model, our nation has experienced significant changes driven by shifts in the urban landscape. Cities and their metropolitan regions are at the epicenter of America's place in the global economy – and local governments are responding to our nation's deepest and most pressing policy concerns. At the same time, unfortunately, as NLC has documented, states are increasingly interfering with the ability of cities and other local governments to act on the vision and values of their communities.

At this critical juncture, the need to empower cities, towns and villages is clear: constituents are demanding pragmatic local problem solving and they understand the benefits of their communities being true subsidiaries of the federal system – experimentation, policy responsiveness, political accountability, and genuine diversity.

Local democracy has always been important, but the ability of local governments to meet the needs of their communities in today's climate is insufficient. Cities remain far too limited in what they can do to respond to local policy demands – from structuring their democratic processes to securing critically needed revenue to responding to a range of regulatory issues. The time for a new, vigorous vision of home rule has arrived.

This publication, "Principles of Home Rule for the Twenty-First Century," represents the culmination of a year-long process of research, drafting, outreach, and refinement. The principles are a hopeful vision for the future of state-local relations, grounded in the lessons of more than 130 years of experience with home rule. They make clear that cities, towns and villages are fully capable of governing, and that states must have a healthy respect for the institutions of local democracy.

These principles, with their accompanying model provisions and commentary, will spark a new approach to local authority, fostering long-overdue law reform and guiding the vital work of city and state officials as well as stakeholders and advocates. Local democracy needs a reset for the twenty-first century. This document is a leap forward towards achieving it.



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Part I:
Preamble

Introduction

In our trilevel federal system, local governments perform a wide array of crucial governance roles. They are frontline providers of some of the most important services the public relies on every day and increasingly confront the most vexing policy challenges facing our nation. Municipal home rule provides the foundational legal authority for these indispensable responsibilities, reflecting the vitality of local democracy.

Because the federal Constitution is silent about local governments, home rule is defined by state law.[1] Nearly all states have some form of home rule—constitutionally grounded in many states, statutory in others, and often a combination of the two—and courts have always played a central role in explicating the boundaries of state-and-local relations. Unsurprisingly, there is significant variation across and even within states, and the nature of home rule has changed over time as our ever-contested understanding of the proper balance between the state and the local has developed.

In 1953, the American Municipal Association (AMA)—which became the National League of Cities (NLC) in 1964—published the last comprehensive proposed reform of home rule, sparking a wave of constitutional change in the years that followed. As Clarence Anthony notes in his Foreword, however, much has changed about the state-local relationship in the intervening six and a half decades. With cities now at the forefront of governance in our interconnected, global economy, and states seeking to constrain local authority with growing vehemence, the time is ripe to examine home rule anew.

To undertake that task, NLC and the Local Solutions Support Center (LSSC)—an organization created to foster collaboration among those working in support of local democracy—convened a group of state-and-local-government legal scholars in the fall of 2018 to begin a comprehensive examination of home rule. The

[1] The Tenth Amendment to the United States Constitution does acknowledge an internal division of authority below the level of the federal government in its pronouncement that powers "not delegated to the United States," unless otherwise prohibited by the Constitution, are "reserved to the States respectively, or to the people." *See* Jake Sullivan, *The Tenth Amendment and Local Government*, 112 Yale L.J. 1935, 1937 (2003). That disjunctive phrasing, rarely noted by the Supreme Court, clearly implies that the federal Constitution recognizes that state sovereignty and popular sovereignty are not identical, leaving federal constitutional space for the people of each state to delegate their popular sovereignty within their states between state and local-government levels.

scholars brought together by NLC and LSSC surveyed historical models and plumbed lessons from how home rule has been enacted as well as understood in practice across the country. From that review, the working group crafted a proposal that they refined with the help of local officials, state municipal league leaders, city attorneys engaged with state-local dynamics, advocates, and other stakeholders over the past year.

Emerging from that examination is a holistic set of general principles to guide the complex legal issues that define the nature of local autonomy in the modern context. As explained below, these principles are organized around four interrelated propositions: local governments should have the breadth of legal authority necessary to govern; ensuring local fiscal authority is critical to that governance role; states should exercise their authority over local autonomy—a necessary, and at times crucial, power that all states have—with due respect for the local communities whose democratic choices they are displacing; and protecting the choices that communities make about the process of local democracy is at the core of local autonomy.

These principles, detailed in the section that follows this preamble, are not meant to be an abstract guide to local authority and the state-local relationship, although at a minimum they give content to the contemporary meaning of home rule. Rather, the principles are meant to foster a serious conversation about the state-local relationship in order to achieve meaningful legal reform. This publication accordingly also provides, in a third section, a model home rule constitutional article with provisions that correspond to the principles, although sequenced in an order to function as legal text. The model home rule article is accompanied by commentary on the legal foundations and innovations underlying the article's terms, both to guide constitutional change in the states, as the 1953 AMA Model Constitutional Provisions sparked, and to foster judicial understanding as courts consider existing home rule provisions and future reforms.

This preamble provides background and context to understand the principles, model constitutional text, and commentary that follow, situating the new vision for home rule in the sweep of past approaches. It then explains why there is a compelling imperative for reform now, both to recognize the growing importance of local governance and to protect against the rise of state interference that fails to appreciate the positive role of local governments in our state-local system. The preamble concludes with a road map for how officials, advocates, and the people of the states can use this work to advance local democracy and recognize local community.

The Many Paths of Home Rule

In simple terms, home rule seeks to align the legal status of local governments with the foundational role they play in our system of governance.

It is often—too often—said that cities and counties are creatures of state law, even in states with the strongest existing versions of constitutional home rule. That proposition is technically true, but state governments are also creatures of state law and the truism does not reveal anything definitive about how any given state allocates formal legal authority between the state and the local level. That is a question that state, and federal, constitutional law leaves entirely to the people of each state to determine.

To understand, then, what home rule can mean in our current moment, it would be useful first to glance back briefly at the historical development of the concept, and the many divergent paths that home rule has taken in the states.

The inherent right to local self-government was an animating motivation for the American Revolution.[2] Alexis de Tocqueville noted in *Democracy in America* that what he described as "municipal liberty" was the "natural consequence" of this Founding-era principle of "the sovereignty of the people."[3] Indeed, although there was much variation among the colonies and their local governments, there is evidence that local governments in New England were understood to have constituted the states—not the other way around.[4]

However, because federal constitutional silence left the balance between state and local legal authority to be determined within the states, states throughout the nineteenth century sought to assert control over local governance. The legal structure of local autonomy during much of the nineteenth century thus moved toward a predominant, if not uniform, understanding of local governments as formally legally subordinate to the states.[5] In its strongest form,

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[2] Dale Krane, et al., Home Rule in America: A Fifty-State Handbook 8 (2001).

[3] Alexis de Tocqueville, Democracy in America 67 (1835).

[4] *See* Amasa M. Eaton, *The Right to Local Self-Government*, 13 Harv. L. Rev. 441, 447 (1900).

[5] A line of nineteenth-century cases alludes to or relies on an inherent right of local self-government independent of state law. *See id.* at 441, 446–47 (collecting cases, including Judge Cooley's famous concurrence in *People ex rel. Le Roy v. Hurlbut*, 24 Mich. 44, 107 (1871) (Cooley, J., concurring)); *see also* Howard Lee McBain, *The Doctrine*

this subordinated instrumentality view is often referred to as Dillon's or Dillon Rule, after John F. Dillon, who served as an Iowa Supreme Court justice and as a United States circuit judge. In an influential treatise on municipal corporations published shortly after the Civil War and in his jurisprudence, Judge Dillon argued that local governments, as administrative conveniences of the state, had no inherent lawmaking authority, possessing only those powers expressly delegated to them by the state or indispensable to the purposes of their incorporation.[6]

Even in this pre–home rule era, state supremacy was hardly plenary, and legal protection for local democracy found expression in a variety of nineteenth-century state constitutional constraints. For example, advocates of local autonomy moved many states to amend their constitutions to bar or impose procedural constraints on "special" legislation, with some states giving cities power to exempt themselves from special acts.[7] Similar movements focused on limiting classes of local governments, or established threshold numbers for local government units within any given class.[8] And advocates also targeted so-called "ripper" legislation through which states displaced specific local institutions and responsibilities, or even removed local officials from office.[9]

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of an Inherent Right of Local Self-Government, 16 Colum. L. Rev. 190 (1916) (tracing examples of cases invoking the right to local self-government, and arguing that the handful of cases decided on this basis were outliers in the jurisprudence); 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, 1004–06 (1976) (discussing early American jurisprudence); *see generally* David J. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. Pa. L. Rev. 487, 509–22 (1999).

[6] City of Clinton v. Cedar Rapids & Missouri River Railroad, 24 Iowa 455, 475 (1868) ("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. Unless there is some constitutional limitation on the right, the legislature might, by a single act, if we can suppose it capable of so great a folly and so great a wrong, sweep from existence all of the municipal corporations in the State, and the *corporation* could not prevent it. We know of no limitation on this right so far as the corporations themselves are concerned. They are, so to phrase it, the mere *tenants at will* of the legislature."); 1 John F. Dillon, The Law of Municipal Corporations § 9b (2d ed. 1873). Dillon's Rule is also a rule of construction, holding that any delegated authority should be construed narrowly against local authority. *Id.* at § 55. The concept of the legal subordination of local governments to state law has been most clearly recognized in federal law in *Hunter v. City of Pittsburgh*, a Contracts Clause and due process case in which the Supreme Court stated that "[m]unicipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them," as a result of which, the Court concluded, the state "at its pleasure may modify or withdraw all such powers … expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation." 207 U.S. 161, 178-79 (1907).

[7] U.S. Advisory Comm. on Intergovernmental Relations, Measuring Local Discretionary Authority 5 (1981).

[8] *Id.*

[9] *See* Richard Briffault, *Voting Rights, Home Rule, and Metropolitan Governance: The Secession of Staten Island as a Case Study in the Dilemmas of Local Self-Determination*,

After the Civil War, rapid urbanization and growing populations in cities across the country led to movements to vindicate local authority, with reform efforts shifting from incremental constraints on the worst state abuses to a broader engagement with local power. In 1875, these efforts began to bear fruit, ushering in an era challenging the concept of formal legal powerlessness. That year, Missouri became the first state to enshrine home rule in its constitution, leading to a wave of Progressive Era reforms that empowered growing cities across the country to govern.[10]

The basic theory of this first wave of home rule was that state constitutions would empower cities to adopt charters and that cities that did so—St. Louis being the first—would be given the power to act with respect to what were considered "local" or "municipal" affairs. This is what scholars often refer to as the "initiative" or "initiation" authority.[11] But this early approach to home rule also sought corresponding constitutional protection for local governments against state interference in this local realm—the so-called "immunity" function of home rule.[12] For this reason, the model has been described as "*imperio*" home rule, after the Latin phrase *imperium i imperio*—a government within a government.[13]

This approach spread over the course of several decades, with twelve states enacting home rule between 1875 and 1912.[14] Although *imperio* home rule marked an important constitutional milestone, courts encountered some difficulty in defining the realm of the local. Some case law read the scope of local authority narrowly, and

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92 Colum. L. Rev. 775, 805-06 (1992); Lyle Kossis, Note, *Examining the Conflict Between Municipal Receivership and Local Autonomy*, 98 Va. L. Rev. 1109, 1126–27 (2012).

[10] David J. Barron, *Reclaiming Home Rule*, 116 Harv. L. Rev. 2255, 2296-2321 (2003).

[11] *See* Gordon L. Clark, Judges and the Cities: Interpreting Local Autonomy 7 (1985).

[12] *Id*.

[13] Lynn Baker and Daniel Rodriguez have captured the deep constitutional significance of this inversion of the creature-of-the-state conception of local governments:

> [*I*]*mperio* home rule was even more remarkable than constitutional federalism. After all, the latter was built upon the circumstances of the states existing as independent sovereigns that joined together to form the nation, the United States. Constitutional localism, in contrast, was built upon a notion that whatever municipalities the state chose to create should, after creation, be accorded a realm of autonomy from *ex post* control by their creator. As a matter of theory, constitutional home rule represents an unusual and truly radical reconstitution of the traditional model of state/local relations and of the role of the courts in a constitutional system.

Lynn A. Baker & Daniel B. Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, 86 Denv. L. Rev. 1337, 1342 (2009). *See* St. Louis v. Western Union Tel. Co., 149 U.S. 465, 468 (1893) (describing St. Louis as an "imperium in imperio" in Missouri's home rule system).

[14] These states were Missouri (1875), California (1879), Washington (1889), Minnesota (1896), Colorado (1902), Oregon (1906), Oklahoma (1908), Michigan (1908), Arizona (1912), Ohio (1912), Nebraska (1912), and Texas (1912). *See* Howard Lee McBain, The Law and the Practice of Municipal Home Rule 114-17 (1916).

some judges evinced resistance to honoring the immunity function of the local or municipal realm, finding even some admittedly local or municipal matters subject to state override if a given policy area involved both state and local interests.

In 1953, as noted, the American Municipal Association sparked a second wave of home-rule reform, with a fundamentally different approach to local legal autonomy in the Model Constitutional Provisions.[15] The principal drafter of the AMA Model, then–University of Pennsylvania Law School Dean Jefferson B. Fordham, began with the proposition that state constitutions should delegate (or direct state legislatures to so delegate) to general-purpose local governments the full range of state legislative authority. However, that initiative power was to be accompanied by broad state authority to structure or preempt local law, at least if done so by laws that were general in their terms and effects.[16] For this reason, the AMA Model is often referred to (somewhat confusingly) as "legislative" home rule—legislative not in the sense that the source of authority is statutory (it is usually constitutional), but in the sense that the state legislature retains nearly plenary power to modify home rule, subject to other constitutional constraints such as generality mandates, bans on special legislation, and procedural requirements.[17]

The AMA Model proved quite influential, with all states amending their constitutions' local government articles or adopting new constitutions after 1953 (with the exception of Oregon's county home rule amendmen 1958) following a version of the AMA Model.[18] In practice, the AMA Model largely accomplished the drafters' primary goal of shifting the presumption of home rule toward broader local initiative power; although states were not entirely consistent in providing the full breadth of that local authority, at times reserving specific powers to the state level.[19] And while state discretion to shape local authority proved mostly workable over the course of the next several decades, the underlying bargain at the heart of the model, as discussed below, is under increasing strain as states are taking more aggressive steps to override local policies.

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[15] *See* Barron, *supra* note 10, at 2325-29.

[16] Am. Mun. Ass'n, Model Constitutional Provisions for Municipal Home Rule 6 (1953).

[17] Some states require that the state legislature preempt local authority expressly. *See* City of New Orleans v. Bd. of Comm'rs, 640 So. 2d 237, 243 (La. 1994).

[18] U.S. Advisory Comm., *supra* note 7, at 6. In 1968, another civic organization, then called the National Municipal League (NML), today known as the National Civic League, promulgated its own model home rule constitutional provision that largely embraced the AMA approach, but offered the explicit limitation that state legislatures could preempt local authority only by general law. Nat'l Mun. League, Model Constitution § 8.02 (1968). *See* Paul Diller, *Intrastate Preemption*, 87 B.U. L. Rev. 1113, 1125 n. 59 (2007).

[19] *See* U.S. Advisory Committee, *supra* note 7, at 6.

This long historical development has left quite a varied landscape of home rule. States have adapted and modified the two main historical models, at times blending aspects of each, and often applying approaches differently across types or categories of local governments. Whatever the baseline constitutional authorization, moreover, legislation in every state regularly modifies the scope of local authority. And courts have always played a central role in interpreting what are often open-ended constitutional and statutory provisions framing home rule.

Today, a few states—Alabama, Delaware, Indiana, Kentucky, Mississippi, Nevada, North Carolina, Vermont, and Virginia—have constitutions that do not directly delegate (or direct their legislatures to delegate) police power to local governments, leaving the scope of local authority to their state legislatures.[20] All others enshrine home rule in their constitutions in some fashion.[21] Any simple taxonomy is surprisingly difficult to construct given the variation within many states and the often-muddled judicial gloss on constitutional provisions, but home rule states seem roughly split between those that primarily follow *imperio* home rule and those that primarily follow some version of the AMA Model.[22]

Ultimately, as Judge David Barron has astutely noted, constant contestation over the purposes of home rule and the nature of the local role has generated targeted state interventions alternating between particular grants of, and limitations on, local authority. These legal structures have been designed not to vindicate some general theory of the allocation of power between states and local governments, but generally to advance specific policy or governance goals.[23] Home rule has never existed in a vacuum, making the need for first principles that much more compelling.

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[20] *See generally* Ala. Const. art IV, §89; Del. Code Ann. tit. 22, § 802 (2019); Ind. Const. art. IV, § 23; Ky. Const. § 156b; Miss. Code Ann. §§ 21-17-1(1), 21-17-5 (2019); Nev. Const. art. VIII, § 8 (2019); N.C. Const. art. VII, § 1; Vt. Stat. Ann. tit. 17, § 2645 (2019); Va. Code Ann. § 15.2-1102 (2019).

[21] Most state constitutional home rule provisions address cities and counties, although the scope of local authority and autonomy often varies between these forms of local government. The constitutions of Georgia and Arkansas, however, establish home rule for counties, but not for municipalities. *See generally* Ga. Const. art. IX, §§ II, para. I – para. II; Ark. Code Ann. § 14-42-307 (2019); Ark. Const. art. 12, § 3; Ark. Const. amend. 55, § 4. Hawaii takes the same approach as a functional matter, in that other than the combined city/county of Honolulu, the state formally recognizes only county-level political subdivisions of general jurisdiction. *See* Haw. Const. art. VIII, § 1.

[22] *See* Baker & Rodriguez, *supra* note 13, at 1338–39 (cataloguing 21 legislative home rule states and 25 *imperio* home rule states); Diller, *supra* note 18, at 1126–27 (citing authority that tallies 26 legislative states and 19 *imperio* states).

[23] *See* Barron, *supra* note 10, at 2296–2328.

The Imperative to Reform Home Rule

Why is it necessary to revisit home rule now? There are strong reasons that grow from the evolving role of the local in our national system of governance—in terms of the role of cities and other local governments in the global economy; the leading role that local governments now play in policy innovation; and increasing diversity at the local level. There is also an imperative for reform grounded in the increasing sense that state oversight is no longer serving the constructive, collaborative role in the state-local legal relationship that it should.

To begin, in the more than sixty-five years since the American Municipal Association published its Model Constitutional Provisions in 1953, the foundation of the nation's economic strength has become undeniably and increasingly urban in an increasingly global economy. In 2017, for example, the nation's ten highest-producing metro economies combined generated a record $6.8 trillion in economic value in 2017—more than the collective output of 37 states.[24] Metro economies were responsible for almost all of the growth (99.5 percent) in real GDP in 2017.[25] Their combined output exceeded all the nations of the world except China (and, of course, the United States itself).[26]

Metropolitan areas are also the engines of their states' economies. In 2017, the metro share of Gross State Product (GSP) exceeded 90 percent in 21 states and 80 percent in 32 states.[27] In only four states (Montana, North Dakota, Vermont, and Wyoming) was the metro contribution to GSP lower than 50 percent of the state economy.[28]

The contemporary economic centrality of cities and their metropolitan regions has been matched in recent decades by the growing role that local governments are playing as the locus of innovation across many policy domains. Local governments of all stripes—rural, suburban, and urban—are at the forefront of almost every major policy concern facing the nation.

Cities, counties, and towns have been advancing new approaches

[24] U.S. Conference of Mayors, *U.S. Metro Economies: Economic Growth and Full Employment, Annual GMP Report* 1 (2018), http://www.usmayors.org/wp-content/uploads/2018/06/Metro-Economies-GMP-June-2018.pdf.

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

to economic development, public safety, health, housing, labor and employment, climate change and environmental protection, technology, antidiscrimination, broadband service, immigrant rights, and election-law reform among other examples of local policy experimentation. Local governments have always played an important regulatory role in areas such as land use and public health, but the breadth of the exercise of the local police power in recent decades reflects the reality that people are turning more and more to local governments to solve pressing policy concerns.[29]

In the six decades since the AMA Model, moreover, urban metropolitan areas as well as rural areas have grown in population and have experienced significantly changing demographics. According to the U.S. Census Bureau, 64 percent of Americans lived in urban areas in 1950.[30] By 2010, that figure had climbed to 81 percent.[31] Those numbers are expected to increase. Indeed, by 2050, 90 percent of the U.S. population is projected to live in urban areas.[32]

America's urban and rural population have also grown dramatically more diverse since 1950, when, according to the Census, urban areas were 89.9 percent white and 9.7 percent nonwhite.[33] In contrast, the 2010 Census form included 15 separate response categories for race.[34] According to the Brookings Institution's analysis of the latest data from the U.S. Census Bureau, in 2016, America's cities were 58.4 percent white, 19.3 percent Hispanic, 13.2 African American, and 9.1 percent Asian-American, Native American, Alaska Native, and other ethnicities.[35] Non-urban areas are also growing more

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[29] *See, e.g.*, Richard Briffault, *The Challenge of the New Preemption*, 70 Stan. L. Rev. 1995, 1999–2002 (2018).

[30] U.S. Census Bureau, *Statistical Abstract of the United States* 26 (1953), https://www2.census.gov/library/publications /1953/compendia/statab/74ed/1953-02.pdf.

[31] *Geography Program: Urban Areas Facts*, U.S. Census Bureau, https://www.census.gov/programs-surveys/ geography/guidance/geo-areas/urban-rural/ua-facts.html.

[32] World Urbanization Prospects 2018, United Nations Population Division, https://population.un.org/wup/DataQuery/ (query "Annual Percentage of Population at Mid-Year Residing in Urban Areas"; filter to "North America" and then "United States of America").

[33] U.S. Census Bureau, *supra* note 30, at 35.

[34] *See, e.g.*, *The 2010 Census Questionnaire: Seven Questions for Everyone*, Population Resource Bureau, https://www.prb.org/questionnaire.

[35] William H. Frey, *Census Shows Nonmetropolitan America Is Whiter, Getting Older, and Losing Population*, The Brookings Institution, (June 27, 2017), https://www.brookings.edu/blog/the-avenue/2017/06/27/census-shows-nonmetropolitan-america-is-whiter-getting-older-and-losing-population/;*see also* William H. Frey, *Six Maps That Reveal America's Expanding Racial Diversity*, The Brookings Institution, (Sept. 5, 2019), https://www.brookings.edu/research/americas-racial-diversity-in-six-maps/?utm_campaign=Metropolitan%20Policy%20Program&utm_source=hs_email&utm_medium=email&utm_content=76495918#cancel.

diverse, albeit at a slower pace, with about a tenth of bothsuburban counties (10 percent) and rural (11 percent) counties now being majority nonwhite.[36]

Given all of these changes in the nature and role of local governments, arguments for devolution and decentralization have taken on renewed life. The case for localism consists of several related themes that center on democratic theory, community engagement, responsive governance, and the values of pluralism and diversity—all of which are growing more important in the current environment.

Local legal autonomy has long been understood, for example, to foster participation and engagement by giving force to the outcome of local democracy, and de Tocqueville rightly saw the pragmatic give-and-take of local governance as a vital means to instill public spirit. In a nation that seems to be ever more polarized and fragmented, people still place faith in the institutions of local governance. Without abandoning the need to find national common ground, home rule provides space for a broader range of communities to be heard in governance, giving voice to pluralism in a time of global interconnection.

The immediacy of governance at the local level likewise brings a distinctive responsiveness and ability to shape policy to respond to the particular needs of communities. Whether responding to the opioid crisis, homelessness, sea-level rise, the transformation of the economy brought by disruptive technology, or any of a range of other long-standing and emerging challenges, local governments—urban, suburban, and rural—are where the impacts of new technology and social change are felt first and most deeply.

If there are strong reasons to modernize home rule that derive from the evolving role that local governments are playing in governance, there are equally important reasons that grow out of the shortcomings of extant approaches to home rule. Both first-wave *imperio* home rule and the later AMA Model reserved (or were interpreted by the courts to reserve) a great deal of discretion on the part of state legislatures to restructure the metes and bounds of local authority, whatever initiative power local governments enjoyed.

States, however, are increasingly violating the spirit of this oversight

[36] Kim Parker, et al., *What Unites and Divides Urban, Suburban and Rural Communities*, Pew Research Ctr. (May 22, 2018), https://www.pewsocialtrends.org/2018/05/22/demographic-and-economic-trends-in-urban-suburban-and-rural-communities.

authority. North Carolina's preemption in the spring of 2016 of an ordinance passed by Charlotte that would have extended the city's antidiscrimination protections to gay, lesbian, bisexual, and transgender people brought national attention to current state-local conflicts; similar examples have become commonplace. At least twenty-five states, for example, currently use their authority to preempt local minimum wage laws while twenty-two states prohibit local paid sick leave ordinances. In the public health arena, thirteen states now ban local food and nutrition policies, ten states prevent local governments from regulating e-cigarettes, and forty-three states limit the authority of local governments to regulate firearm safety. Similar statistics can be found for policies as diverse as civil rights, the environment, and emerging technologies (such as broadband and autonomous vehicles), not to mention core local governance functions such as municipal finance and local elections.[37]

Indeed, the fiscal health of local governments has been undermined by a structural landscape that constrains their ability to raise revenue while imposing burdens from the state level without adding corresponding fiscal capacity. Home rule in many states explicitly limits local revenue authority, and other state laws, such as California's Proposition 13 and Colorado's Taxpayer's Bill of Rights, impose substantive and procedural limitations on local fiscal power.[38] And states frequently use their preemption authority to target specifi local revenue sources, such as fees on plastic bags and congestion pricing.[39] These trends pose challenges both for thriving cities and for struggling local communities, often rural, with far fewer resources from which to draw.

Perhaps the most challenging aspect of contemporary state efforts to cabin local policy and fiscal authority has been the notable rise in "punitive preemption," with states enacting legislation that seeks to punish local governments and local officials over policy disagreements. Some states, for example, now have statutes that withhold critical local funding if local governments maintain preempted policies on the books. Some states have created novel avenues of civil liability for cities. And states are now increasingly

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[37] *See generally* Richard Briffault, Nestor M. Davidson & Laurie Reynolds, The New Preemption Reader: Legislation, Cases, and Commentary on the Leading Challenge in Today's State and Local Government Law (2019); *see also* Nestor M. Davidson, *The Dilemma of Localism in an Era of Polarization,* 128 Yale L.J. 954, 965–69 (2019) (surveying a sample of state preemption statutes).

[38] *See* Erin Adele Scharff, *Powerful Cities?: Limits on Municipal Taxing Authority and What to Do about Them*, 91 N.Y.U. L. Rev. 292, 296 (2016).

[39] *Id.* at 297.

exposing individual local officials to removal from office, personal civil penalties, and even potential criminal liability in preemption conflicts.[40]

Trends in states cabining local self-governance also raise concerns about disproportionate harm to, or constraints on, communities of color and women.[41] In cases like those involving efforts to raise the minimum wage in Birmingham, Alabama, and St. Louis, Missouri, for example, majority-white state legislatures overruled the choices of cities with large minority, if not majority-minority, populations.[42] And advocates have argued that local policies around issues like "paid sick days, wages, and affordable housing" as well as predictive scheduling rules have "outsized influence over the day-to-day experiences of women, due to historical, structural, and cultural factors," with preemption of local policies in those areas perpetuating existing gender inequities.[43]

States surely have a constructive role to play in dealing with interlocal inequities, responding to the spillover effects of unduly restrictive local regulation, and organizing regional solutions to problems of regional scope. But that role must be part of a properly integrated state-local system in which all levels of government together advance the goals of effective, equitable, and responsive governance. That may lead to appropriately targeted curbs on local power. But it also surely requires that democratically elected and locally accountable local governments generally be given greater authority to pursue the goals of their communities.

In short, both the central importance of cities and other local governments in contemporary governance, and the need to

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[40] *See, e.g.,* Ga. Code Ann. § 20-3-10 (2017) (withholding of state funding for entities found to violate state requirements around cooperation with immigration authorities); Tex. Gov't Code Ann. §§ 752.053, 752.056 (2017) (specifying monetary penalties for violations of state law).

[41] *See, e.g.*, Tracy Jan, *Why Nearly 350,000 Workers in Mostly Red States Aren't Seeing Wage Increases, Even Though Their Local Lawmakers Passed Them*, Wash. Post (July 3, 2019, 11:31 AM),https://www.washingtonpost.com/business/2019/07/03/why-nearly-workers-mostly-red-states-arent-seeing-wage-increases-even-though-their-local-lawmakers-passed-them/;Lucas Guttentag, *In Alabama, Challenging Hidden Racial Discrimination*, N.Y. Times (Aug. 20, 2018), https://www.nytimes.com/2018/08/20/opinion/politics/minimum-wage-discrimination-alabama.html.

[42] *See, e.g.*, P'ship for Working Families, *States Preempting Local Laws Are an Extension of Jim Crow* (Aug. 29, 2017), https://www.forworkingfamilies.org/blog/states-preempting-local-laws-are-extension-jim-crow.

[43] P'ship for Working Families, For All of Us, By All of Us: Challenging State Interference to Advance Gender and Racial Justice 3 (2019), https://www.forworkingfamilies.org/sites/default/files/publications/PWF%20Gender%20Preemption_0.pdf.

respond to state overreach, together create great urgency for reexamining the fundamental structure of home rule with broad guiding principles that recognize the value of local democracy, innovation, resilience, and responsiveness. No level or type of government is perfect and there can be legitimate governance concerns at the local level. Local governments can be parochial or insular and some have undoubtedly used their authority for invidious exclusion. As much as these issues must be addressed—they must and can through a variety of appropriately targeted legal doctrines—it is still critical not to let specific local challenges be a reason to disenfranchise local governments generally.

A Road Map to the Principles for Home Rule, the Model Constitutional Home Rule Article, and the Commentary to the Model Article

This publication, as noted, is organized in two sections following this preamble. The first details four core, closely related, general principles that seek to coalesce the most important aspects of what home rule should mean in the contemporary environment. The following section then translates those principles into a model constitutional home rule article, with commentary designed both to facilitate the adoption of the model's provisions in state law and to shed light on ways to approach the often open-ended constitutional and statutory texts that make up the current landscape of home rule.

To briefly summarize the principles elaborated in the next section, their starting point is the proposition that local governments are vital places of self-governance and that local democracy should play a central role in state constitutional law. The first principle accordingly ensures that local governments of general jurisdiction are delegated, within their jurisdiction, the full range of policymaking authority available to the state. Not all local communities will need the entire breadth of the initiative power to solve the policy problems they face, and there may be good reason to limit local discretion in some situations. But moving toward this broad policy authority was a hallmark of the AMA Model and should be reaffirmed and strengthened in contemporary home rule.

Closely related to this is a second overarching principle that singles out local fiscal authority as a particularly important aspect of home rule, recognizing that the authority to act may have little meaning without the necessary fiscal capacity. This means that local governments should be able to choose how to raise and deploy revenue free from unreasonable state mandates. But it also means that states should recognize that they have an affirmative role to play in making sure that communities have a baseline of resources to meet at least the most basic needs of their residents.

These commitments to local policy discretion and local fiscal authority require rethinking when states may displace local action. As noted, the Progressive Era attempt to discern a core realm of

"local" or "municipal" affairs that would be immune from state interference proved challenging and courts have often allowed states to prevail in conflicts with local governments by asserting overriding statewide interests. The 1953 AMA Model's essential bargain of broad local initiative authority coupled with broad state preemption authority is breaking down in the face of the recent preemption trends, which often seem to prioritize the short-term policy, political, or ideological goals of current state-legislative majorities over the long-term health of maintaining a proper state-local balance.

Contemporary home rule thus requires a recalibration of this critical aspect of the state-local relationship. There are important reasons why states might limit or override local democracy, such as the need to address policy issues that are best tackled at a regional scale or ensuring a minimum standard for individual rights across an entire state. But, as the third principle requires, states should be prepared to articulate those reasons clearly through processes that recognize how disruptive it is to displace local governance, and courts should not accept policy disagreement alone as a reason to vindicate state-level preferences.

Finally, a fourth principle recognizes that contemporary home rule must accord its highest protection—in terms of authority and constraints on state displacement—to the core of local democracy, namely the choices communities make in how they structure and exercise their governance. States should have an extremely strong reason to displace local decisions about representation and governmental structure, as well as the choices that local governments make about their personnel and property. And punitive state preemption, which threatens to translate policy disagreement into a deep disincentive for public service, should play no part in contemporary home rule.

Following the elaboration of these overarching principles, the model constitutional home rule article that follows seeks to translate the vision for home rule into the starting point for practical reform. The article is structured around functional legal categories that embody the four principles, for clarity in support of law reform efforts. The model constitutional home rule article, finally, is accompanied by commentary that explains the ways in which the model's terms are grounded in, but also improve on, the experience of home rule in states today.

Conclusion

What Dean Fordham said in introducing the AMA Model in 1953 remains true today: the "challenge to improve our governmental arrangements is unending."[44] The principles and the model constitutional provisions that accompany them below take up that challenge, reflecting lessons learned over nearly a century and a half's experience adopting and implementing home rule. The principles and model provisions reaffirm and clarify the best of what home rule has become in some states, particularly the breadth of policy discretion available to local governments and protection from capricious state override for choices communities make about how to govern themselves. But in many ways, the principles seek to advance the possibilities for home rule, particularly by elevating state responsibility for local fiscal stability and the necessity of caution—and clear justification—when states preempt local governments.

This holistic vision of a revitalized home rule not only is important for local democracy but is also a foundation for states and local governments to form a more constructive partnership in governance. Governing together for the benefit of everyone in a state requires mutual respect, which in turn requires formal legal recognition that each level of government has its own vital role to play.

Cooperation between local governments is critical as well, given the larger scale of so many policy challenges; these principles and model provisions can foster that cooperation by placing local governance on a solid footing. The federal government's frequent engagement with states and local governments in cooperative governance equally requires the clarity in the scope of local legal autonomy that this publication seeks to foster.

The principles and their accompanying provisions undergird the formal, legal recognition of the importance of local democracy and ensure that state governments exercise their necessary authority over local communities with care and precision—in other words, a home rule for the twenty-first century.

[44] American Municipal Ass'n, *supra* note 16, at 7.

Part II:
The Principles Summarized

Introduction

The Principles of Home Rule for the Twenty-First Century are organized around four interrelated propositions: home rule should reinforce the breadth of authority local governments need to solve the range of challenges they face; home rule should advance the critical value of local fiscal authority; home rule should ensure that states have sufficiently strong reason to displace local authority; and home rule should respect the central importance of local democracy. This Part articulates and explains the core idea of each of these Principles, while Part III, in turn, translates this holistic understanding of home rule into a model constitutional home rule article.

The Local Authority Principle

The Principle: A state's law of home rule should provide local governments full capacity to govern within their territorial jurisdiction, including the power to adopt laws, regulations, and policies across the full range of subjects—and with the powers—available to the state.

This Principle addresses what is often described as the initiative power and is meant to empower local governments of general jurisdiction, as a default matter, to address any policy area or pursue any policy tool available to the state, subject to state oversight that meets the terms of the Presumption Against State Preemption Principle described below. Local-government initiative authority is not limited to—nor does it call on courts to discern—matters of "local affairs" or similar formulations.

This understanding of the authority of local governments to act eliminates the traditional "private-law exception" to home rule found in some states, in favor of relying on state oversight if local regulation unduly interferes with contract, property, and tort. This Principle similarly presumes full competence over criminal matters but allows states to appropriately constrain that local authority. And this Principle recognizes that home rule governments are fully empowered to act jointly in cooperation with other local governments.

This Principle is reflected in Sections A and B of the Model Constitutional Home Rule Article.

The Local Fiscal Authority Principle

The Principle: Home rule should guarantee local fiscal authority and recognize the value of fiscal stability at the local level. This principle accordingly includes local power to raise revenue and manage spending consistent with local budgets and priorities. To support local fiscal authority, a state should ensure adequate intergovernmental aid for general welfare at the local level and be prohibited from imposing unreasonable unfunded mandates.

This Principle recognizes that fiscal capacity and fiscal autonomy are critical to local governance. Accordingly, the Principle ensures not just clear initiative authority in local fiscal matters, but also a limitation on local revenue restrictions imposed by the state consistent with the scope of state preemption authority that pertains to other local policymaking. That protection includes a specific prohibition on unreasonable unfunded state mandates directed at local governments and constraints on state tax overrides.

However, given the often widely divergent capacity of local governments to adequately address the general welfare of those subject to their jurisdiction, local fiscal stability also requires that the state ensure an appropriate structure of local funding to allow all local governments to meet those obligations.

This Principle is reflected in Sections A, B, and D of the Model Constitutional Home Rule Article. In particular, the grant of clear initiative authority in local fiscal matters can be found in Section B.1, while Section E both provides a constitutional guarantee of adequate intergovernmental aid and prohibits unreasonable unfunded mandates.

The Presumption Against State Preemption Principle

The Principle: To appropriately balance state and local authority, a system of home rule should provide that states may only act with respect to home rule governments expressly. And to exercise the power to preempt, the state must articulate—and, in the case of state-local conflict, must demonstrate—a substantial state interest, narrowly tailored. Moreover, state laws displacing local authority should be general, not unreasonably singling out individual local governments or groups of local governments.

This Principle recognizes that there is a legitimate role for states to play with respect to local authority in a regime of home rule: to ensure, for example, the uniform operation of a well-structured statewide regulatory regime or to remedy significant inter-local spillovers. States, moreover, retain the ability to set regulatory floors and protect individual rights, but local governments correspondingly retain the ability to pursue local policies that advance those regulatory regimes and are rights-protective above the state baseline.

However, ensuring the appropriate balance between state and local authority—recognizing the important role that each level of government plays—requires ensuring that states do not unintentionally displace local governance. Hence, preemption should be express. Moreover, the state must articulate the substantial state interest at issue and state action must be narrowly tailored to that state interest. It is not enough for a state simply to decry the lack of uniformity, as local variation is inherent to any regime of home rule. Indeed, courts adjudicating conflicts between states and local governments should not simply defer to a statement of state interests; rather, it is important that the state bear the burden of demonstrating the state interest that justifies displacing local authority and that the given state interference with local democracy is narrowly tailored. In many instances, meeting that burden will not be difficult, but courts should not review state-local conflicts under a presumption of the validity of state preemption.

Finally, respect for local democracy in a regime of home rule requires that state laws that displace local authority meet a standard of generality. State laws that unreasonably single out individual local governments or groups of local governments without sufficient, clearly articulated justification would be invalid.

This Principle is reflected in Sections A and C of the Model Constitutional Home Rule Article.

The Local Democratic Self-Governance Principle

The Principle: A state's law of home rule should ensure that local governments have full authority to manage their own democratic process and structure of governance. Local democratic self-governance includes a local government's authority over its personnel and property. Home rule should also protect local officials from individual punishment by the state for the exercise of local democracy. This protection includes barring states from holding local officials personally liable or removing local officials from office in the case of state-local policy conflicts. In addition, state "speech or debate" immunity should extend to local lawmakers. And states should only act with respect to local democratic self-governance through express and general state laws that articulate an overriding state interest that is narrowly tailored to that interest.

This final Principle addresses the core of local democracy, including issues such as the structure of local governments—mayoral power, the function of local legislative bodies, the scope of local administrative agencies, and sub-delegation within local governments—as well as procedural democratic questions, such as districting and voting rights. It also addresses the functioning of local democracy, including the terms and conditions of the employees of home rule governments and the role of home rule governments as property owners and market participants. Although this Principle is as broad in terms of initiative as a local government's general governmental and proprietary powers, local choices about governmental structure and democratic process are still subject to state oversight, but protected by a higher standard—overriding state interest, narrowly tailored—than for ordinary local legislation and fiscal authority.

State laws that seek to punish individual local legislative and executive officials as a means of resolving policy conflicts—including removal from office, fines, and even criminal liability—are an increasingly significant element of contemporary state preemption and illegitimately undermine local democracy. This Principle of home rule would make clear that such provisions are barred and would similarly extend state "speech or debate" protection to local legislators.

This Principle is reflected in Sections A and D of the Model Constitutional Home Rule Article.

Part III:
A Model Constitutional Home Rule Article and Commentary

Introduction

This Part of the Principles of Home Rule for the Twenty-First Century provides a model constitutional home rule article as a starting point for reform, as well as commentary to illuminate where the provisions draw on existing examples of home rule in practice and where the proposed language innovates.

As with the AMA Model Constitutional Provisions, the language below will have to be tailored to any state that seeks to integrate these terms with existing state-and-local-government law, whether in part or through a process of more holistic constitutional reform. In addition, states and local governments can use the model language and commentary below as a guide for reforming existing home rule, given the tremendous variety in contemporary approaches and the open-ended nature of many current home-rule provisions.

The model provisions below are organized as a single home rule constitutional article, with five sections. Section A articulates the foundational starting point that the state constitution guarantees local democratic self-government through the creation of home-rule governments. Existing home rule often varies significantly between municipalities and counties, and generally does not apply in the same way to special-purpose units of local governments, such as school districts, utility districts, and the like. The extent to which the provisions below should apply to the entire range of general-purpose local governments is a design choice left to states reforming their system of home rule or adopting one anew for states that do not have home rule, recognizing that considerations vary within states as to which types of political subdivisions play which kinds of roles.

To preserve this flexibility, the model provisions below use the term "home rule government" to cover every local government that the state decides has home rule pursuant to Section A. This can include all municipalities, or municipalities above a certain size, recognizing that some states have set threshold population levels for home rule governments or, in some instances, varied the extent of home rule by population tiers. It can also include some or all counties. By the same token it excludes non-home-rule localities, such as non-qualifying municipalities, non-qualifying counties, and special districts. Whether an entity is a home rule government will turn on the relevant state's constitution and laws.

Sections B, C, and D then provide the core of what home rule means in terms of empowering local governments and balancing state-and-local authority. Section B provides for general regulatory and revenue initiative authority for home rule governments and rules of interpretation for all home rule authority. Section C creates a presumption against preemption, requiring that any state intervention in a home rule government be express, not implied, and only by general law. Section C also requires that state action with respect to home rule authority provided in Section B be necessary to serve a substantial state interest and be narrowly tailored.

Section D provides a set of related provisions on terms of local democracy, specifying that a home rule government have an elected local body and the power to provide for and regulate local elections. It also provides that home rule governments have the power to specify the structure and organization of their local government, as well as their physical facilities, personnel, and property. And the section provides a higher threshold for states to meet if acting with respect to this core of local democracy—namely, that the state is acting to advance an overriding state concern and only if the action is narrowly tailored to that interest, in addition to the general law constraint on all state action with respect to home rule governments.

Finally, Section E of the model home rule constitutional article specifies two important obligations on the state in support of local democracy. The first part of the section mandates that the state provide a system of adequate intergovernmental aid to local governments, given the essential responsibilities the state has devolved to local governments, home rule and otherwise. The second part of the section conversely prohibits state unfunded mandates on local governments, under conditions specified in the provision. Both parts of Section E apply to local governments generally, without regard to whether they have home rule. Without the fiscal authority provided by home rule, these protections may be even more critical to non-home-rule governments.

As detailed as these model provisions are, there are constitutional design choices that are too granular to include in a model, leaving some technical aspects of home rule open to states adopting and adapting this model. For example, in many states, going back to the very first example of formal home rule in Missouri, adoption of a city charter has been the vehicle local governments use to claim home rule authority and immunity. The AMA Model shifted from viewing charters as instruments through which states could grant

local authority to instruments of limitation, which is to say that local governments did not need a charter to claim home rule. In some states, indeed, the empowerment of local governments does not turn on the adoption (or nonadoption) of charters but instead is inherent in municipal status. The provisions contained below are thus agnostic on the use of charters as the vehicle for granting or limiting home rule, instead articulating the appropriate scope and texture of local authority, however technically implemented, although constitutional reformers could choose to return to the charter as an instrument through which local democracy is advanced.

Questions, moreover, of incorporation, annexation, de-annexation, consolidation, and the like interact with home rule in many important ways and impact the nature of local democracy. The 1953 AMA Home Rule Model explicitly acknowledged the need at times for local boundaries to change in response to changing conditions of population and need. In response to that need, the Model recommended that "[t]he legislature shall, by such law, facilitate the extension of municipal boundaries to the end that municipal territory may readily be made to conform to the actual urban area." Beyond that, the provision acknowledged that to keep the boundaries of home rule units immutable would be to make metropolitan responses impossible.

Because the model provisions below primarily set forth a structure to balance state and local authority, they do not address boundary issues directly, although they do specify that the state must have home rule governments. As with charters, state constitutional reform could include modifying how a state approaches boundary questions, and nothing below is meant to suggest that there might not be a substantial interest in any given instance in scaling aspects of governance to the needs of a metropolitan region.

The commentary to the provisions notes other, similar technical and design choices left to states in implementing the model terms. What is important about the model is that it seeks to articulate and provide means for enacting a state and local legal relationship on the right general grounds, acknowledging that variation across and within states is not only inevitable, but entirely appropriate.

Finally, it bears noting that transitioning to a new model of home rule, or adopting home rule in the first place, poses the question of the effect of new constitutional structures on existing state and local statutes and charters, as well as precedent interpreting those

legal documents. These questions are familiar from past reform efforts, whether from Dillon's Rule to home rule, or from one version of home rule to another, and that history is instructive.

In reforming home rule, states have had to consider the effect of new regimes on existing statutes that either empower or constrain local governments. In Missouri, for example, courts determined that the adoption of the AMA Model of home rule shifted the role of pre-existing municipal charters from a grant of municipal power to a restriction on municipal power. *See State ex inf. Hannah ex rel. Christ v. City of St. Charles*, 676 S.W.2d 508, 512 (Mo. 1984). By contrast, the Louisiana Constitution of 1974 explicitly declared that the transition to a uniform statewide system of home rule would not diminish the powers of existing home rule governments. *See City of New Orleans v. Bd. of Comm'rs of Orleans Levee Dist.*, 640 So. 2d 237, 241 (La. 1994).

Similarly, state courts have had to reconcile precedent established under prior home rule or Dillon's Rule systems with new law. In some states the courts have fully imported prior precedent, declaring in effect that constitutional change had no substantive effects. *See, e.g.*, *City of Philadelphia v. Schweiker,* 858 A.2d 75, 84 (Pa. 2004) (finding that the 1968 Constitution did not invalidate precedent regarding home rule despite a transition from an *imperio* system to AMA Model home rule). In other states, there have been limited transitions where certain categories of precedent or existing legislation have been found invalidated by the new constitutional order. *See, e.g.*, *Caulfield v. Noble*, 420 A.2d 1160, 1163 (Conn. 1979) (holding that municipal charters adopted following the ratification of a home rule amendment supersede any preexisting special legislation governing the municipality).

Finally, some state courts evaluating home-rule reform have declared a clean break with pre–home rule precedent. *See, e.g.*, *Kanellos v. Cook Cty.*, 290 N.E.2d 240, 243–44 (Ill. 1972) (holding that the 1970 Illinois Constitution fundamentally reshaped the constitutional order between municipalities and the state and thus prior restrictions on municipal power were invalid).

As this brief discussion makes clear, there will be a range of technical questions any state transitioning its system of home rule will have to work through and it is beyond the scope of the model constitutional home rule article below to work through the myriad of state-specific variations that law reform will present. Should a state transition, for example, from a system in which charter

adoption is required for home rule to one in which home rule is not tied to charters, the state will have to address the impact of existing charters. Should a state transition from a system in which charters are not required for home rule to one in which they are, some provision should be made to allow local governments the opportunity to adopt or amend existing charters to conform. Many similar transition choices will be present in any reform effort.

Given that states have reformed home rule repeatedly since Missouri adopted the first constitutional home rule provision in 1875, this is hardly a new challenge, and the task of reconciling new law with existing statutes and precedent is not unique to home rule by any means. From past transitions, however, there is much to commend states that have taken seriously the effect of new law—not simply reinstating prior precedent—for the genuine reform that such constitutional change has brought.

Model State Home Rule Constitutional Article

Section A Commentary is on page 38.

Section A.
Home Rule and Local Self-Government

1. The state shall provide for the establishment of general-purpose home rule local governments that provide the people with local self-government under the terms of this Article.

Section B Commentary is on page 40.

Section B.
Local Authority

1. A home rule government may exercise any power within its territorial limits not prohibited by this constitution or by a state law that complies with Section C of this Article. This grant of authority to home rule governments includes the authority both to raise and to spend funds, as well as to determine the provision of public goods and services.

2. A home rule government may exercise the full extent of its home rule authority when acting jointly with any other unit of local government. Any laws governing the abilities of home rule governments to engage in inter-local cooperation shall be construed in favor of allowing such cooperation. Where a home rule government acts in cooperation with any other unit of government, or where inter-local cooperation results in the creation of a new governmental entity, the participating governments or resulting entity may exercise any power that any one of the participating units of government has the power to exercise separately.

3. Interpretation of Local Authority

- **a.** The rule of law that any doubt as to the existence of a power of a home rule government shall be resolved against its existence is abrogated, to the extent that any such rule was ever recognized in this jurisdiction.
- **b.** Any doubt as to the existence of a power of a home rule government shall be resolved in favor of its existence. This rule applies even when a statute granting the power in question has been repealed.

Section C.
The Presumption Against Preemption

Section C Commentary is on page 53.

1. The state shall not be held to have denied a home rule government any power or function unless it does so expressly.

2. The state may expressly deny a home rule government a power or function encompassed by Section B of this Article only if necessary to serve a substantial state interest, only if narrowly tailored to that interest, and only by general law pursuant to Section C.3 of this Article.

3. To constitute a general law, a statute must

- **a.** be part of a statewide and comprehensive legislative enactment;
- **b.** apply to all parts of the state alike and operate uniformlythroughout the state;
- **c.** set forth police, sanitary, or similar regulations, rather than purport only to grant or limit legislative power of a home rule government to set forth police, sanitary, or similar regulations; and
- **d.** prescribe a rule of conduct upon citizens generally.

4. A home rule government may exercise and perform concurrently with the state any governmental, corporate, or proprietary power or function to the extent that the Legislature has not preempted local law pursuant to the preceding paragraphs. In exercising concurrent authority, a home rule government may not set standards and requirements that are lower or less stringent than those imposed by state law, but may set standards and requirements that are higher or more stringent than those imposed by state law, unless a state law provides otherwise.

Section D Commentary is on page 62.

Section D.
Local Democratic Self-Government

1. The lawmaking body of every home rule government shall be locally elected.

2. A home rule government shall have the power to determine the structure and organization of its government, including providing for local offices and determining the powers, duties, manner of selection, and terms of office of its officers; the power to determine the terms and conditions of its employees; and the proprietary power.

3. Subject to the other provisions of this constitution, a home rule government shall have the power to provide for and regulate its elections.

4. The elected officials of a home rule government shall enjoy the same immunities from suit for their official votes, statements, and actions as are provided to elected officials of the state government. Home rule governments shall have the same immunity from suit for the exercise of their governmental functions as is provided to the state.

5. With respect to any aspect of local democratic self-government specified in this Section D, the state may not displace a home rule government's authority unless the state is acting to advance an overriding state concern, only if narrowly tailored to that interest, and only by general law pursuant to Section C.3 of this Article.

Section E.
State Support for Local Democracy

Section E Commentary is on page 72.

1. Intergovernmental Aid

a. The state shall provide equitable access to adequate intergovernmental aid to local governments in recognition of the state's decision to delegate the provision of essential services to local governments. The state shall not place conditions on such intergovernmental aid except as those conditions relate to expenditure of that aid and the state shall not use the removal of such aid as a penalty for the exercise of a local government's home rule authority.

2. Prohibiting Unfunded Mandates

a. The state shall not require local governments to provide additional services or undertake new activities without providing an additional appropriation that fully funds the newly mandated service or activity.

The preceding restriction shall not apply in the case of additional services or new activities:

i. Imposed by federal law;

ii. Imposed by court order or legal settlement;

iii. Imposed at the option of local governments;

iv. Imposed as an incident to the state adding new criminal statutes; or

v. Imposed on both government and non-government entities in the same or substantially similar circumstances.

Only local governments shall have standing to enforce the prohibition on unfunded mandates. The legislature shall assign responsibility to adjudicate local government claims under this provision to an independent state agency.

Commentary to the Model State Home Rule Constitutional Article

Section A.
Home Rule and Local Self-Government

1. LOCAL SELF-GOVERNMENT.

Local self-government has long been part of the American way of life. In the colonial era, many towns exercised broad powers and enjoyed relative independence from provincial governments. Indeed, local governments may have helped to create colonial "state" governments rather than the other way around. In the early nineteenth century, Alexis de Tocqueville famously placed the local self-government exemplified by the New England town meeting at the heart of his study of democracy in America. Even in the middle decades of the nineteenth century, leading jurists like Chief Justice Thomas M. Cooley of the Michigan Supreme Court emphasized "the vital importance which in all the states has so long been attached to local municipal governments by the people of such localities, and their rights of self-government." *People ex rel Leroy v. Hurlbut*, 24 Mich, 44, 66 (1871). To be sure, over the course of the second half of the nineteenth century most jurists and legal scholars came to reject the idea of an *inherent* legal right to local self-government, and to treat the scope of local self-government as a matter for the states to determine. Yet, even then, state constitutions sought to carve out some space for local self-government. State constitutions barred special state laws that targeted individual local governments, and some adopted bans on state creation of special commissions to take over local functions. Most importantly, the states began to take the first steps toward recognizing the form of local self-government known as "home rule."

"Home rule" is the term conventionally applied to local governments that have been given relatively broad powers of self-government. States differ with respect to the determination of which local governments are granted home rule. Most states grant most of their municipalities home rule, although some require that the

municipality have reached a threshold population before it is eligible for home rule. These thresholds range between 100 and 25,000, with 2,000 to 5,000 people the most common. Many states grant all or some of their counties home rule, as well. *See* Dale Krane, Et Al., Home Rule in America: A Fifty-State Handbook (2001). Table A1 indicates that thirty-four states provide all their municipalities with home rule, and that an additional ten provide home rule to municipalities above a population threshold. Table A2 indicates that thirty-one states provide all counties with home rule; five states provide home rule to a limited number of counties. *Id.* at 476–78. Although this Article may apply broadly to local government, and some of its provisions, such as those in Section E, apply to all local governments, this Article as a whole is focused on those local governments that have been granted home rule.

Section B.
Local Authority

1. LOCAL AUTHORITY.

a. The initiative power. This provision addresses what is often described as the initiative power—usually understood as the power to initiate legislation—and is meant to empower home-rule governments of local government, as a default matter, to address any subject of public policy or use any enforcement tool available to the state. It also encompasses local decision-making with respect to the content and scope of local public goods and services. The authority granted to home rule governments in Section B is subject to state oversight consistent with the standards set forth in Section C of this Article.

The grant of authority in Section B.1 is drafted to reject drawing a distinction between "local" and "statewide" powers. Some home-rule provisions grant municipalities power over "local and municipal matters." *See, e.g.*, N.D. Cent. Code § 40-05.1-06(16) (2017). At times, judges have invoked this language to hold that a city has exceeded its grant of initiative authority. *See* Terrance Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 Minn. L. Rev. 643, 668 (1964). In order to ensure maximum flexibility for home-rule governments to innovate with respect to public policy and address matters of importance to their residents, and given the inherent vagueness and manipulability of the concept of "local" or "municipal" matters, this provision makes clear that the initiative authority is not limited to such matters.

As explained below, Section B.3 also explicitly rejects the Dillon's Rule approach to the allocation of local power and its judicial interpretation.

b. Power delegated beyond "police." Many state home-rule provisions include the "police power"––that is, the power to promote the health, safety, welfare, and morals of the community—among the powers delegated to local governments. *E.g.*, Utah Const. art. XI, § 5 (delegating "the authority to adopt, and enforce within its limits, local police, sanitary, and similar regulations"). Some legal authorities consider the "police power" a subset of the plenary power to legislate that state legislatures enjoy; other, separate powers include taxing (revenue-raising) and eminent domain. *See*

Walter Wheeler Cook, *What Is the Police Power?*, 7 Colum. L. Rev. 322, 329 (1907) (noting that the police power, like eminent domain and the power of taxation, is a "residuary power[] of government possessed by the States in our system"); *State Regulation—Police Power—City Ordinance—City of Selma v. Till, 42 So. 405 (Ala.)*, 16 Yale L. J. 445, 445–46 (1907) (distinguishing the police power from "eminent domain or taxing power"). By referring broadly to "any power," this provision includes governmental powers in addition to the police power, such as taxation and eminent domain.

With respect to eminent domain, most states have statutes that expressly delegate that power to local governments. These statutes often impose procedural requirements on a city's use of eminent domain. *E.g.*, Wis. Stat. § 32.05 (2018) (describing procedure to be used in condemnation by any entity exercising the delegated power of eminent domain). Due to concerns about the taking of private property, some state courts construe delegations of eminent domain strictly, *e.g.*, *Orsett/Columbia Ltd. P'ship. v. Superior Court ex. rel. Maricopa County*, 83 P.3d 608, 610 (Ariz. Ct. App. 2004), a practice that would contravene Section B.3 of this Article.

This provision pointedly does not include a "private law exception" to local power, as was common in earlier home rule provisions, including the 1953 AMA Model Constitutional provision, and remains in a few state constitutions today. *E.g.*, Mass Const. art. II, § 7, *amended by* Mass. Const. art. LXXXIX (preventing cities from "enact[ing] private or civil law[s] governing civil relationships except as incident to an exercise of an independent municipal power"). Massachusetts's provision and others like it used the wording of the 1953 AMA proposal, which awkwardly attempted to "split the baby" between giving cities full or highly limited power over private law. *See* Am. Mun. Ass'n, Model Constitutional Provisions for Municipal Home Rule 18–19 (1953).

The private law exception has proved unwieldy and inconsistent in application and, in some states, circumventable through formalistic means. *E.g.*, *New Mexicans for Free Enter. v. City of Santa Fe*, 126 P.3d 1149 (N.M. Ct. App. 2005). For criticism of the "private law exception," *see* Paul A. Diller, *The City and the Private Right of Action*, 64 Stan. L. Rev. 1109 (2012), and Gary T. Schwartz, *The Logic of Home Rule and the Private Law Exception*, 20 UCLA L. Rev. 671 (1973). This provision intends to eradicate the private law exception as a subject-based limit on local power, again affirming that home-rule governments may address any subject matter of legislation or regulation of their choosing.

c. Fiscal authority. The 1953 AMA Model Constitutional Provisions did not explicitly address local fiscal authority. In the succeeding years, it has become clear that home rule requires local governments to have the power to raise revenue. Nevertheless, fiscal authority remains limited in home-rule jurisdictions. State law often places stringent limits on local government efforts to generate own-source resources, even in jurisdictions that have the fiscal capacity to raise more revenue. Richard F. Dye & Therese J. McGuire, *The Effect of Property Tax Limitation Measures on Local Government Fiscal Behavior*, 66 J. Pub. Econ. 469, 485 (1997) ("In the past 25 years the nature of state government involvement in local government finances has become more constraining rather than facilitating.").

In many states, limits of fiscal authority are inherent in the state's grant of home rule authority, or in other provisions of a state's constitution. *See, e.g.*, Ga. Code Ann. § 36-35-6(a)(3); Iowa Const. art. III, § 38A; N.Y. Const., art. XVI. In other states, courts have concluded that the police powers granted under the state's home rule provisions do not include taxing authority. *See, e.g., Arborwood Idaho, L.L.C. v. City of Kennewick*, 89 P.3d 217, 221 (Wash. 2004); *City of Plymouth v. Elsner*, 135 N.W.2d 799, 801–02 (Wis. 1965).

Even in states that grant local governments more expansive tax authority, other restrictions can limit local fiscal control. First, many state laws broadly preempt local taxing authority. For example, Kansas grants taxing authority under its home rule provisions, but the state preempts local governments from imposing excise taxes other than sales taxes and corresponding use taxes. *See Heartland Apartment Ass'n, Inc. v. City of Mission*, 392 P.3d 98, 105 (Kan. 2017). Local taxing authority has also been attacked as part of the new wave of preemption. *See* Eric Crosbie, et al., *State Preemption to Prevent Local Taxation of Sugar-Sweetened Beverages*, JAMA Internal Med. (2019) (listing preemption efforts in nine states). *See also State Plastic and Paper Bag Legislation*, Nat'l Conference of State Legislatures (Nov. 1, 2019), www.ncsl.org/research/environment-and-natural-resources/plastic-bag-legislation.aspx (identifying thirteen states that prohibit the regulation of plastic bags, including bag taxes and fees).

Thus, even the explicit provision for local fiscal authority in Section B.1 must also be protected by the strong presumption against preemption contained in Section C of this Article. As in other areas, the transition to local fiscal home rule will raise questions about the relationship between local authority and existing state constitutional and statutory law. Under this provision, prior

legislation that grants local governments taxing authority on the condition that they adhere to state-imposed constraints should no longer bind local governments' tax-design choices. Rather, this provision provides independent authority for local governments' taxing authority. State laws, however, that explicitly preempt local taxing authority or condition such authority on adherence to state-imposed procedural standards should be evaluated under the terms of Section C of this Article.

Of particular concern for many local governments are state-imposed tax and expenditure limitations. Some of these restraints impose onerous rules on localities seeking to impose new taxes or to raise tax rates. For example, under Colorado's Taxpayer's Bill of Rights, local governments must generally seek voter approval for "any new tax, tax rate increase, mill levy above that for the prior year, valuation for assessment ratio increase for a property class, or extension of an expiring tax, or a tax policy change directly causing a net tax revenue gain to any district." Colo. Const. art. X, § 20(4). *See also* Mich. Const. art. IX, § 25; Mo. Const. art. X, 11(c), §16.

State laws also frequently impose particular restrictions on property tax revenue. As of 2010, all but six states imposed some limits on local property taxation. David Brunori, Local Tax Policy: A Federalist Perspective 59 (3d ed. 2013). The limits vary widely in substance. Some provisions limit growth in assessed valuations, while others limit increases in property tax rates, and some address both. Some states have also limited revenue growth directly. *See* Lincoln Inst. on Land Policy, *Tax Limits*, https://www.lincolninst.edu/research-data/data-toolkits/significant-features-property-tax/topics/property-tax-limits (providing a manipulated table listing tax limits by state, type, and year of enactment). Even as residents consistently support raising property tax levy limits in local elections, there have been few serious efforts to revoke these limits, and states continue to pass them. In 2019, Texas enacted a restriction requiring voter approval for jurisdictions to raise their property tax revenue by more than 3.5 percent in a year. Tex. Tax Code Ann. § 26.08.

Historically, local governments in the United States have relied on the property tax base to fund local services, and it remains the dominant source of local own-source revenue. *See State and Local Finance Initiative*, Urban Inst., https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-localbackgrounders/state-and-local-revenues#local.

As a result, these limits are significant constraints on local fiscal authority. In states with the most onerous restrictions, property tax revenue decreased 15 percent or more after implementation. *See* Brunori, *supra* at 59.

Reforming these limits is a critical step in ensuring local fiscal authority. Nevertheless, these model provisions do not address property tax limitations directly. Of course, to the extent that these provisions are statutory, Section C of this Article applies to constrain such state statutes. Many of these restrictions, however, are imposed by state constitutions. For those constitutional restrictions, this model assumes changes should be addressed by separate constitutional reform, given the prominence of these provisions in the politics of the various jurisdictions.

Finally, many states grant more expansive local authority to impose fees, as an extension of the grant of general police powers. States vary widely in the terminology they use to describe such fees and in the way they define and limit local authority over them. Local governments across the country, however, have faced litigation challenging their authority to impose various fees by alleging that they are disguised taxes. *See generally* Erin A. Scharff, *Green Fees: The Challenge of Pricing Externalities Under State Law*, 97 Neb. L. Rev. 168 (2018). For a discussion of the challenges in defining user fees in a particular jurisdiction, *see* Hugh D. Spitzer, *Taxes vs. Fees: A Curious Confusion*, 38 Gonz. L. Rev. 335 (2003) (discussing judicial efforts in Washington state to differentiate between taxes and fees).

Courts, for example, have struggled to categorize stormwater fees imposed by local jurisdictions to pay for infrastructure improvements to their storm drainage systems. *See Bolt v. City of Lansing*, 587 N.W.2d 264, 266 (Mich. 1998) (finding stormwater charge a tax); *Zweig v. Metro. St. Louis Sewer Dist.*, 412 S.W.3d 223, 248–49 (Mo. 2013) (finding stormwater charge a tax); *compare Teter v. Clark County*, 704 P.2d 1171, 1181 (Wash. 1985) (finding stormwater charge a fee); *Vandergriff v. City of Chattanooga*, 44 F. Supp. 2d 927, 941 (E.D. Tenn. 1998) (finding stormwater charge a fee); *Church of Peace v. City of Rock Island*, 828 N.E.2d 1282, 1286 (Ill. App. Ct. 2005) (finding stormwater charge a fee); *McLeod v. Columbia County*, 599 S.E.2d 152, 155-56 (Ga. 2004) (finding stormwater charge a fee). In granting local authority to raise revenue, this provision provides broad authority for local governments to impose both taxes and fees and seeks to reduce litigation of these definitional questions, which can be especially challenging.

In the wake of the Department of Justice's investigation of Ferguson, Missouri, moreover, there has been significant attention, and criticism, of local fee authority, especially in the criminal justice system. *See, e.g.*, Beth Colgan, *Reviving the Excessive Fines Clause*, 102 Calif. L. Rev. 277 (2014); Neil L. Sobol, *Charging the Poor: Criminal Justice Debt & Modern-Day Debtors' Prisons*, 75 Md. L. Rev. 486 (2016). While these provisions grant local governments broad revenue authority, they must use their revenue authority consistent with other principles of state and federal law and with due regard for the potentially serious consequences of the exercise of that authority. To the extent that local governments are turning to onerous criminal justice fees because of their otherwise limited fiscal authority, this provision should also relieve some of that pressure.

d. Executive power. In home-rule governments with a chief executive such as a mayor, the municipality may choose to grant that chief executive powers comparable to those enjoyed by the state's governor. The precise division of legislative and executive power is a matter of core governmental design for local governments to decide in the first instance. *See* Section D.2 of this Article. The extent of the chief executive's powers may be delineated in the home rule government's charter or defined by ordinary legislation of the government's lawmaking body. Such executive powers might include declaring emergencies, imposing quarantines, and pardoning those persons convicted of municipal crimes. *See* Jim Rossi, *State Executive Lawmaking in Crisis*, 56 Duke L.J. 237 (2006) (discussing gubernatorial emergency powers). As with zoning and eminent domain, states have delegated some of these powers to local executives by statute, and courts have relied on these more specific statutes to define the contours of local executive power. *E.g.*, Mo. Rev. Stat. § 77.360 (The mayor shall have power to … grant reprieves and pardons for offenses arising under ordinances of the city"); *Ervin v. State*, 163 N.W.2d 207 (Wis. 1968) (upholding Milwaukee mayor's curfew proclamation that was in compliance with state statute so authorizing). Under this provision, such statutory delegations are no longer necessary, although states may preempt or constrain local executive power expressly, under the constraints of Section C of this Article. *Contra Walsh v. City of River Rouge*, 189 N.W.2d 318 (Mich. 1971) (holding that a mayor's power to declare an emergency was impliedly preempted by a state statute that gave the governor the exclusive power to declare an emergency).

e. Judicial power. Counties often already play a role in funding and staffing trial courts, but these courts are generally the first level of a state unified judicial system. In some states, cities have the option to create municipal courts, often for the primary purpose of prosecuting violations and misdemeanors committed within the city's jurisdiction. *E.g.*, Ore. Rev. Stat. § 221.339 (allocating to municipal courts "concurrent jurisdiction with circuit courts and justice courts over all violations committed or triable in the city where the court is located" and over most misdemeanors). This model provision would allow home-rule governments to create municipal courts, with the understanding that any such courts would be under the control of a unified state court system, which would have authority over matters like rules of procedure and the disciplining of attorneys and judges.

Due to concerns regarding some cities' aggressive use of their police and court systems to raise revenue by assessing fines on both residents and nonresidents, as noted above, municipal courts should aid cities' enforcement powers, not serve as an independent means for raising revenue. *See, e.g.*, Henry Ordower et al., *Out of Ferguson: Misdemeanors, Municipal Courts, Tax Distribution, and Constitutional Limitations*, 61 How. L.J. 113, 127 (2017) (describing as "troubling" the practice of "[s]ome St. Louis County municipalities deriv[ing] a substantial, regular, and predictable portion of their municipal revenue from the fines, costs, and fees imposed by … municipal courts").

f. Enforcement mechanisms, including private rights of action and criminal law. Most cities and counties enforce their ordinances through civil fines, and such enforcement would be consistent with this provision. Moreover, any state limitations on such authority would be subject to the terms of Section C of this Article. With respect to civil enforcement, this provision presumes that home-rule governments have the authority to create private rights of action that can be enforced in municipal or state court. This dynamic may raise concerns about local governments commandeering state courts, but the state legislature, of course, retains the power to preempt under Section B of this Article and to establish rules of jurisdiction for state court. Moreover, cities and counties may establish administrative agencies to hear local civil actions in the first instance, as is common in the antidiscrimination context. Diller, *City and the Private Right, supra* at 1150 (discussing local human rights commissions that adjudicate complaints of housing, employment, and public accommodations discrimination); David B.

Goldin & Martha I. Casey, *New York City Administrative Tribunals: A Case Study in Opportunity for Court Reform*, 49 Judges' J. 20, 20 (2010) (discussing the breadth of administrative tribunals in New York City); *see also* Nestor M. Davidson, *Localist Administrative Law*, 126 Yale L.J. 564 (2017).

With respect to criminal law, the current landscape for local enforcement is more mixed. In some states, some cities and counties use the criminal law as an additional means to enforce ordinances, generally through misdemeanors. 9A McQuillin Mun. Corp. § 27:6 (3d ed. July 2019 update) (discussing criminal and "quasi-criminal" nature of municipal enforcement). In some of these instances, cities re-criminalize behavior that is already criminalized by state law, although because cities are considered arms of the state under federal constitutional law, double jeopardy bars trying a defendant for both the municipal and state versions of the same crime. *See Waller v. Florida*, 397 U.S. 387 (1970). In other instances, cities criminalize behavior beyond that which is already criminalized by state law, thus adding to the potential criminal liability of individuals and firms. In New York City, for instance, it is a potential criminal offense for subway passengers to put their feet up on another subway seat. *See* 21 NYCRR, ch. XXI, § 1050(7)(j)(2); *see also* Joseph Goldstein & Christine Haughney, *Relax, if You Want, but Don't Put Your Feet Up*, N.Y. Times (Jan. 6, 2012), https://www.nytimes.com/2012/01/07/nyregion/minor-offense-on-ny-subway-can-bring-ticket-or-handcuffs.html (noting that officers can enforce this provision through violation tickets, but nonetheless arrested 1,600 people for this crime in 2011).

Because it can deprive an individual of liberty and impose collateral consequences for life, the criminal law is an extremely powerful tool for any level of government to wield. *Cf. State v. Hutchinson*, 624 P.2d 1116, 1128 (Utah 1980) (Maughan, J., dissenting) ("The police power is awesome, for it confers the right to declare an act a crime and to deprive an individual of his liberty or property in order to protect or advance the public health, safety, morals, and welfare."). Hence, it is understandable that cities seeking maximum flexibility would want the option of enforcing their policy choices through the criminal law.

There are, however, legitimate concerns that allowing cities to create misdemeanors may ensnare uninformed persons, especially nonresidents passing through often-imperceptible municipal boundaries. *See*, *e.g.*, Francis H. Bohlen & Harry Shulman, *Arrest With and Without a Warrant*, 75 U. Pa. L. Rev. 485, 491–92 (1927)

("Even that outworn and discredited fiction that every man knows the law has never been pushed to such an extreme as to justify imposing [criminal] consequences upon an ignorance of the local ordinances of the myriads of small communities through which modern men constantly pass."); Wayne A. Logan, *The Shadow Criminal Law of Municipal Governance*, 62 Ohio St. L.J. 1409 (2001). Local criminal lawmaking authority might also continue the baleful trend of over-criminalization of conduct that some states and the federal government have begun to attempt to reverse. Concerns about "over-criminalization," or the use of criminal law to pursue public policy objectives for which it is poorly suited, are at least 50 years old. *E.g.*, Sanford Kadish, *The Crisis of Overcriminalization*, 374 Annals Am. Acad. of the Political & Soc. Sci. 157 (1967). In the last decade, the massive size of the nation's prison population, increased recognition of racial and economic disparities in criminal enforcement, and heightened awareness of lifelong collateral consequences for even the most minor crimes have sparked much discussion and some progress toward reducing the criminal law's massive footprint. *See* Michelle Alexander, The New Jim Crow (2010); Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 Mich. L. Rev. 259, 261–62 (2018) (discussing the concepts of "mass incarceration" and "overcriminalization" and efforts to address).

Whether rooted in these concerns or not, several states prohibit their local governments—even those that possess some version of "home rule"—from criminalizing any behavior. *See, e.g.*, *State v. Thierfelder*, 495 N.W.2d 669, 673 (Wis. 1993) (holding that "municipalities cannot create crimes"). Even in some states where local criminal lawmaking is allowed, several expressly disallow the creation of local felonies. *See, e.g.*, 22 Del. Code. § 802 ("This grant of power does not include the power … to define and provide for the punishment of a felony"); Mass Const. art. II, § 7, *amended by* Mass. Const. art. LXXXIX (preventing cities from "defin[ing] and provid[ing] for the punishment of a felony or … impos[ing] imprisonment as a punishment for any violation of law"). The 1953 AMA Model Home Rule Provision also forbade local felonies, without providing justification. *See* Am. Mun. Ass'n, *supra*, at 21 ("It has been considered desirable to make it clear that [the power to define and provide for the punishment of offenses] stops short of serious offenses which fall in the felony category"). Oregon takes a uniquely skeptical approach to local criminal lawmaking authority that is based on the idiosyncratic wording of its home-rule provision: courts presume that local criminal ordinances *are* preempted, whereas local ordinances that are civilly enforced are

not. *See* Or. Const. art. XI, § 2 ("The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the State of Oregon"); Paul A. Diller, *The Partly Fulfilled Promise of Home Rule in Oregon*, 87 Or. L. Rev. 939, 949–955 (2009) (reviewing cases involving municipal criminal law).

For maximum flexibility and logical consistency, this provision permits home-rule governments the same extent of criminal lawmaking as the state. This language is included in the model Article, however, with awareness of the serious concerns regarding local criminal lawmaking, and policymakers should think carefully about the tradeoffs before enacting the proposed language.

g. Territorial limits of power. The model provision makes clear that the powers granted by it apply only within the city's or county's territorial jurisdiction. For a home-rule unit to exercise its governmental powers outside of its territory, additional statutory permission would be required. This approach stands in contrast to that of at least one state, which guarantees extraterritorial eminent domain authority to home-rule municipalities in its constitution. *See Town of Telluride v. San Miguel Valley Corp.*, 185 P.3d 161 (Colo. 2008) (upholding town's extraterritorial use of eminent domain as against countervailing state law in light of Colorado constitutional provision read to guarantee such powers).

2. HOME RULE AND INTER-LOCAL COOPERATION.

The local authority protected by this provision empowers home rule governments to take a variety of actions, and Sections C and D of this Article provide a sphere of autonomy vis-à-vis state government. Local governments will use that authority to take action on a variety of issues. While many local policies will have purely local impact, others will have extra-local ramifications without being directly extraterritorial. This provision makes clear that with the local autonomy and flexibility set out in these provisions, home rule governments also have the authority to work with other units of government to address significant cross-boundary issues and to fulfill extra-local obligations.

Some courts—particularly in policy areas such as housing and the environment—have reminded local governments of their affirmative obligation to consider the impact of local policy on others outside the jurisdiction who might be significantly affected by the government's exercise of its delegated police power authority. *See,*

e.g., *Associated Homebuilders, Inc. v. City of Livermore*, 557 P.2d 473, 487 (Cal. 1976) (holding that "the proper constitutional test [for whether a public ordinance relates to the public welfare] is one which inquires whether the ordinance reasonably relates to the welfare of those whom it significantly affects… . [if] the ordinance may strongly influence the supply and distribution of housing for an entire metropolitan region, judicial inquiry must consider the welfare of that region."); *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel*, 336 A.2d 713, 725, 726 (N.J. 1975) (noting that "a zoning regulation, like any police power enactment, must promote public health, safety, morals or the general welfare," including the welfare of those outside the boundaries of a particular locality, and that "when regulation does have a substantial external impact, the welfare of the state's citizens beyond the borders of the particular municipality … must be recognized and served"). The Supreme Court too has recognized the possibility that extra-local impacts may impose limits on local governments. *See Vill. of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 390 (1926) (noting that its decision upholding a local government's exercise of its zoning authority did not "exclude the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way").

In short, this provision acknowledges the general welfare limits embodied in many state constitutions as a possible limit on local authority exercised in accordance with this Article. *See* Nestor M. Davidson, *The Dilemma of Localism in an Era of Polarization*, 128 Yale L.J. 954, 990–92 (2019). Moreover, states may have a substantial interest in ensuring that home rule governments share in the social, economic, environmental, or other responsibilities of a metropolitan area or region in which they are located, and that state interest could meet the requirements of Sections C and D of this Article, if tailored appropriately.

Provisions authorizing home rule governments to engage in cooperative regimes are common in the states, although some states include not just interlocal cooperation but also cooperation with persons, corporations, Native American tribes, and other public or private agencies. *See, e.g.*, Fla. Stat. § 163.01; Kan. Stat. Ann. § 12-2904; Mich. Comp. Laws §§ 124.501-124.512; Mo. Rev. Stat. § 70.220; Tex. Gov. Code § 791.011. This provision leaves open to states the choice of how broadly to grant cooperating authority.

Some states provide for specific processes that must be complied with when local governments enter into cooperative

intergovernmental agreements (IGAs). For example, Washington requires all IGAs to be filed with the county auditor or, alternatively, to be "listed by subject on a public agency's web site or other electronically retrievable public source." Wash. Rev. Code § 39.34.040. Utah also requires specific approval processes for certain kinds of intergovernmental agreements. Utah Code Ann. § 11-13-202.5 (requiring intergovernmental agreements related to law enforcement or contracts for services to comply with specified procedures for approval). A number of other states require that all intergovernmental agreements be approved by a state official before the agreement may enter into force. *E.g.*, Ark. Code Ann. § 25-20-104 (requiring approval by state attorney general); Kan. Stat. Ann. § 12-2904(g) (requiring approval by state attorney general); Ky. Rev. Stat. § 65.260 (requiring approval by state attorney general or Department of Local Government); Okla. Stat. Ann. tit. 74, § 1004 (requiring approval by state attorney general). This provision assumes local initiative in the absence of state procedural oversight. Any such state limitations would be subject to Section C of this Article.

3. INTERPRETATION OF LOCAL AUTHORITY.

a. Breadth of authority. Section B.1 phrases its grant of initiative power in the broadest possible terms. Sections B.3.a and b, in turn, clearly repudiate Dillon's Rule as applied to home-rule governments and require any ambiguity with respect to local authority to be read in favor of the authority of home rule governments. Courts have historically invoked Dillon's Rule to construe grants of authority to local governments narrowly. *See* 2 McQuillin Mun. Corp. § 4:11 (3d ed. July 2019 update) (discussing the history of Dillon's Rule and modern applications). Prominent examples of states that retain Dillon's Rule include Nevada and Virginia. *See id.* (discussing Dillon's Rule as administered in Virginia, Vermont, Arkansas, and Mississippi); Louis V. Csoka, *The Dream of Greater Municipal Autonomy: Should the Legislature or the Courts Modify Dillon's Rule, a Common Law Restraint on Municipal Power?*, 29 N.C. Cent L.J. 194, 204 (2007) (noting that "legal authorities have consistently applied Dillon's Rule to all cities and counties in Nevada"). Some states have expressly repudiated Dillon's Rule, either by statute or judicial opinion. *E.g.*, Ind. Code Ann. § 36-1-3 (abrogating Dillon's Rule by statute); *State v. Hutchinson*, 624 P.2d 1116, 1127 (Utah 1980) (holding that Dillon's Rule no longer applies to counties). Many other states intended to abrogate Dillon's Rule through their state constitutional home-rule provisions; while mostly successful,

in a few of these states, the judiciary has clung to Dillon's Rule nonetheless. *See, e.g.*, Hugh Spitzer, *"Home Rule" vs. "Dillon's Rule" for Washington Cities*, 38 Seattle U. L. Rev. 809, 858–59 (2015) (noting that in Washington, despite its constitutional home rule provision, Dillon's Rule "lives on in judicial discourse" and seeps into decisions involving municipalities to which it should not apply). In conjunction with Sections C and D of this Article, this provision makes clear that Dillon's Rule is no longer applicable as a matter of power allocation or judicial interpretation.

b. Statutory grant of authority unnecessary. To the extent that state statutes already delegate certain powers to home-rule units, such delegations are likely no longer necessary after this provision is added to a state's constitution. For instance, a home-rule unit would have the power to zone property within its jurisdiction regardless of whether such power was specifically previously delegated by a zoning enabling act. However, prior delegations that contained procedural limitations or requirements, *see, e.g.*, Wis. Stat. § 32.05 (2018) (describing procedure to be used in condemnation by any entity exercising the delegated power of eminent domain), would have to be tested against the standards articulated in Section C of this Article, unless such conditions infringed on the structure and organization of the home-rule government, in which case they would be subject to the terms of Section D. States adopting this provision, therefore, would be encouraged eventually to repeal or revise such previous delegations that this provision makes superfluous. To facilitate such potential statutory housecleaning, section B.3.b makes clear that the repeal of what was previously a statutory grant of authority does not derogate the constitutional powers granted by the provision.

Section C.
The Presumption Against Preemption

Introduction: Home Rule and the Problem of State Preemption.

Without meaningful limits on the ability of state legislatures to override local laws, constitutional home rule provisions can easily be circumvented, and the concept of home rule as an enforceable division of authority can lose its meaning. While home rule *initiative* permits local governments to act without prior authorization from the legislature, the need for some level of home rule *immunity* from state legislative overreach has become increasingly apparent.

This Section responds to the need for a constitutional check on state law preemption of local laws. The state retains broad authority to legislate on all matters within its competence, but state legislation has increasingly been used to target local laws, effectively undercutting local governments' basic ability to govern, often in areas that only minimally implicate state interests. *See, e.g.*, Richard Briffault, *The Challenge of the New Preemption*, 70 Stan. L. Rev. 1995, 1999–2008 (2018); Richard C. Schragger, *The Attack on American Cities*, 96 Tex. L. Rev. 1163, 1169–1183 (2018). The provision provides several constitutional checks on state legislative efforts to control local governments through preemptive legislation by barring implied preemption, setting a substantive standard by which to evaluate the constitutionality of state legislative action that displaces local laws, adopting a generality requirement for state legislation, and providing for concurrent regulation. Each part of the provision is designed to address a particular aspect of the rise in state legislative preemption of local government action. Examples of recent local regulations that likely would be insulated from state override under this provision include local minimum wage laws, plastic bag bans, and antidiscrimination ordinances.

As the size and needs of home rule governments have multiplied in the last century, so too have the number of preemption cases stemming from conflicts between state and local laws. When such conflicts arise, courts must determine if and to what degree state law expressly or implicitly preempts the local law. In the majority of states, state law can be found to preempt local law either way. *See* Paul Diller, *Intrastate Preemption*, 87 B.U. L. Rev. 1113, 1140–42 (2007). Where state law expressly preempts the local law, the court's job is

a fairly easy one, but where there is no express preemption, courts are faced with the frustrating job of determining whether or not a state law implicitly preempts a local law and to what degree. *See* Diller, *Intrastate Preemption*, *supra* (describing the vast, complex, and largely unsatisfactory way in which courts consider implied preemption); Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 262–64 (2000) (noting the difficulty of differentiating between "express" and "implied," let alone determining what is and is not "implied").

1. NO IMPLIED PREEMPTION.

This provision avoids much of this difficulty by providing that the state may only rely on express forms of preemption to restrict the power of home rule governments—implied preemption may not be used. This obviates the need for courts to undertake the fraught task of speculating about the intentions and motivations of state legislators to determine if state law preempts the local law. Following this approach, courts need only ask if state law expressly preempts the local law. This "express-only" approach to state preemption is currently enshrined to varying degrees in several state constitutional and statutory home rule regimes. *See, e.g.*, Ill. Const. Art. VII, §§ 6(g)-6(h) (establishing that the state may only preempt the authority of home rule governments by laws specifically crafted for that purpose); Fla. Stat. § 166.021 (2019) (municipalities "may exercise any power for municipal purposes, except when expressly prohibited by law"); Me. Stat. tit. 30-A, § 3001 (2017) ("The Legislature shall not be held to have implicitly denied any power granted to municipalities under this section unless the municipal ordinance in question would frustrate the purpose of any state law.").

"Express-only" preemption not only simplifies the role of the courts in resolving issues of state and local law conflict, it also protects the power of home rule governments by raising the bar for a finding of preemption and significantly limiting the degree to which the judiciary can read preemptive intent into state constitutional or statutory text. *See D'Agastino v. City of Miami*, 220 So.3d 410, 422 (Fla. 2017) ("a finding of express preemption—that the Legislature has specifically expressed its intent to preempt a subject through an explicit statement—is a very high threshold to meet"); *Scadron v. City of Des Plaines*, 606 N.E.2d 1154, 1163 (Ill. 1992) (observing that the "express-only" approach adopted in Illinois's constitution was designed to "eliminate or at least reduce to a bare minimum the circumstances under which local home rule powers are preempted by judicial interpretation of unexpressed legislative intention"). As

a result, where the "express-only" approach is employed, home rule governments have successfully blocked preemptive findings in state court. *See, e.g.*, *Palm v. 2800 Lake Shore Drive Condo. Ass'n*, 988 N.E.2d 75, 81 (Ill. 2013) ("If the legislature intends to limit or deny the exercise of home rule powers, the statute must contain an express statement to that effect"); *Neri Bros. Const. v. Vill. of Evergreen Park*, 841 N.E.2d 148, 152 (Ill. 2005) (refusing to find that a state regulation regarding gas lines implicitly preempted the authority of local home rule governments and remarking "that any limitation on the power of home rule units by the General Assembly must be specific, clear, and unambiguous" and that "absent such a limitation, [courts] will not find preemption"); *Cincinnati Bell Telephone Co. v. City of Cincinnati*, 693 N.E. 2d 212 (Ohio 1998) (rejecting implied preemption in assessing the municipal taxing power).

2. SUBSTANTIAL STATE INTEREST AND NARROW TAILORING.

Institutional designers as well as courts have employed differing approaches to determining when a state law preempts a local law. In some states, conflicts between state and local laws are always resolved in favor of the state, which has the absolute power to preempt local laws. *See* Diller, *Intrastate Preemption*, *supra*. In other states, courts determine whether the state law concerns a matter of purely local concern, a matter of state concern, or a matter of mixed state and local concern. *See, e.g., City of Northglenn v. Ibarra*, 62 P.3d 151 (Colo. 2003). If the conflicting state law concerns a matter of exclusively local concern, then the local law will prevail. The drawback of the first approach is obvious—it imposes no limits on the state's preemptive power. The drawback of the second approach is that it requires courts to determine what issues are of local, mixed, or statewide concern. In cases of conflict, states can readily argue that any given area of regulation has statewide implications. The judicial determination thus tends to rubber-stamp the legislature's asserted justification.

A different approach employs procedural barriers to state preemptive laws, either requiring a supermajority vote of the state legislature, *see* Ill. Const. art. VII, § 6(g); *see also City of Rockford v. Gill*, 388 N.E.2d 384, 386 (Ill. 1979), or by requiring that any preemption measure be enacted during one legislative session and then re-enacted during a successive legislative session before it becomes valid. *See, e.g.*, N.Y. Const. art. IX, § 2(a)(1). These legislative barriers to the adoption of preemptive legislation are often narrowly construed, which reduces their effectiveness. *See*

Wambat Realty Corp. v. State, 41 N.Y.2d 490, 494-95 (N.Y. 1977) (reading the state constitution's successive session requirement narrowly and allowing the legislature to diminish local power after only one session where "the subject matter in need of legislative attention was of sufficient importance to the State, transcendent of local or parochial interests or concerns"). Nonetheless, for those concerned with a heightened judicial involvement in weighing the propriety of preemption, a procedural mechanism for constraining preemption may be preferred.

This provision instead adopts a substantive standard for when a state may override local laws. That standard does not attempt to distinguish between local and statewide affairs, but instead permits the state to override local laws only when it has a substantial state interest and only if the state law is narrowly tailored to that interest. It thus adopts from state and federal case law a proportionality requirement: the ends must be justified as well as the means. *Cf. Johnson v. Bradley*, 841 P.2d 990 (Cal. 1992) (adopting a narrow tailoring requirement). Even if the state's interests are appropriately substantial, if the state can achieve its interests without preempting local authority, then it should be required to do so. Overbroad state restrictions on home rule government authority would be impermissible under the narrowly tailoring requirement.

The substantiality standard is appropriately high. It requires that the state come forth with independent, substantial reasons for statewide regulation. Simply expressing a policy disagreement with local governments is not sufficient.

This standard reflects the view that regulatory diversity is a benefit and not a cost. State officials and courts frequently point to a state's interest in uniformity as a justification for the preemption of local law. *See, e.g.*, *City of Laredo v. Laredo Merchants Ass'n*, 550 S.W.3d 586, 604 (Tex. 2018) (Guzman, J. & Lehrmann, J., concurring) ("[V]ariations come with associated costs of production and compliance[,] [a] patchwork of disparate local regulations has the practical effect of allowing the most restrictive local ordinance to set the state-wide standard"). Because a diversity of regulatory approaches is one of the benefits of local self-government, courts should evaluate skeptically claims that statewide uniformity is necessary in any given context. Uniformity alone is not a sufficient reason for state law preemption. Disuniformity has to be "so pervasive" as to cause substantial and demonstrable harm. *See New Mexicans for Free Enter. v. City of Santa* Fe, 126 P.3d 1149 (N.M. Ct. App. 2005).

That is not to say that comprehensive regulatory schemes are never useful because of their consistent and uniform application. Rather, the standard recognizes that the aggregate benefits from laboratories of regulatory experimentation may outweigh whatever costs may be imputed to a lack of uniformity, *see New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932), and that state preemption may not by justified by mere recitation of concerns about "economic balkanization" or a "patchwork" of regulations. *Cf. Dep't of Revenue of Kentucky v. Davis*, 553 U.S. 328, 338 (2008) ("[T]he Framers' distrust of economic balkanization was limited by their federalism favoring a degree of local autonomy").

Obviously, courts will need to provide guidance in determining when a state law meets the required standard. In determining whether an area of regulation is a local or statewide concern, some courts have considered whether a local law imposes costs or has effects outside the local jurisdiction. *See, e.g., City of Northglenn v. Ibarra*, 62 P.3d 151 (Colo. 2003); *Webb v. City of Black Hawk*, 295 P.3d 480 (Colo. 2013). The claim that a given local law has external effects should also be evaluated skeptically, however. Almost all local regulation can be said to have some broader regional or statewide effects. The question for the court is whether those effects are both demonstrable and substantial and thus sufficient to override the local government's presumption of authority. *Cf. New Orleans Campaign for a Living Wage v. City of New Orleans*, 825 So. 2d 1098 (La. 2002) (Johnson, J., dissenting) (observing that there was no empirical evidence to support the state's conclusion that a variation in the minimum wage would be detrimental to the state's interests). An extra-territorial effects test, while relevant to determining the permissibility of state preemptive law, should be weighed in favor of local authority.

In weighing state and local regulatory interests, some courts have also looked to the areas of policy that have traditionally been allocated either to local or to state authorities. *See, e.g., Kalodimos v. Vill. of Morton Grove*, 470 N.E.2d 266 (Ill. 1984). This factor seems misplaced in an era when the types and range of government activities pursued on both the state and local levels have expanded considerably. Categories of traditional state or local competence do not track the relative capacities of local or state governments, nor their respective interests. A forward-looking presumption against preemption does not rely on a traditional government functions test.

A better approach is for courts to take a "hard look" at the state's asserted interest in relation to a background presumption of local competence. One such interest may be the state's concern for protecting vulnerable populations or vindicating norms of equal treatment. When a state establishes that statewide regulation is necessary to remedy significant discriminatory inequalities, the substantial state interest test will be met. *Cf. Ammons v. Dade City, Fla.*, 783 F.2d 982 (11th Cir. 1986) (discriminatory street paving); *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel*, 336 A.2d 713 (N.J. 1975) (housing discrimination).

Where the state is merely overriding local policy preferences in the absence of a statewide regulatory regime and without attention to the specific interests advanced by the state override, the standard will not be met. State laws that deregulate entire swaths of activity will often be overbroad. *Cf.* Ky. Rev. Stat. Ann. § 65.870 (barring all local firearms regulation). So, too, state laws that address particularistic, narrow interests should have difficulty meeting the substantial interest test, *see* Fla. Stat. § 500.90 (preventing the local government from regulating Styrofoam products), unless the state can show that there are real, tangible, and durable negative effects of local regulation.

3. THE GENERAL LAW REQUIREMENT.

As a further safeguard of local power, Section C.2 includes language requiring that express preemption measures may only be imposed by general law. The use of generality requirements in state constitutions to suppress the pernicious use of special legislation and "ripper" bills is not new; the first such requirement appeared in Ohio's state constitution in 1851, *see* Ohio Const. of 1851, art. XIII, § 1 ("The General Assembly shall pass no special act conferring special corporate powers"), and many states followed suit shortly thereafter. *See* Charles Chauncey Binney, *Restrictions Upon Local and Special Legislation in the United States*, 41 Am. L. Reg. & Rev. 1109, 1109-13 (1893). The home rule movement of the late nineteenth and early twentieth centuries eventually supplanted the use of generality requirements to protect local power from special legislation and "ripper" bills in most states, but the requirements are still a valuable tool for protecting home rule governments and local power.

Many current home rule provisions provide state legislatures some way of regulating local government through general law. *See, e.g.*, Ma. Const. amend. art. II, § 8 ("The general court shall have the

power to act in relation to cities and towns, but only by general laws which apply alike to all cities, or to all towns, or to all cities and towns, or to a class of not fewer than two"); Ohio Const. art. XVIII, § 3 ("Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws"). While such provisions are likely well-intended, they raise the difficult task of determining which laws fall under the umbrella of general law and can be used to preempt local law, and which do not and therefore cannot be used to preempt local law.

The provision answers this question, in Section C.3, by adopting a version of the understanding of general law expounded by the Ohio Supreme Court. *See Canton v. State*, 766 N.E.2d 963, 968 (Ohio 2002) ("[T]o constitute a general law for purposes of home-rule analysis, a statute must (1) be part of a statewide and comprehensive legislative enactment, (2) apply to all parts of the state alike and operate uniformly throughout the state, (3) set forth police, sanitary, or similar regulations, rather than purport only to grant or limit legislative power of a municipal corporation to set forth police, sanitary, or similar regulations, and (4) prescribe a rule of conduct upon citizens generally"). Despite the recent growth in preemptive legislation, this approach to general law has remained a largely effective way of preserving local power. Relying on this approach, home rule governments have stymied state efforts to preempt a range of local legislation. *See Dayton v. State*, 87 N.E.3d 176 (Ohio 2017) (local use of automated traffic-enforcement systems); *Cincinnati v. Baskin*, 859 N.E.2d 514 (Ohio 2006) (local ordinances banning high-capacity magazines for semi-automatic firearms); *City of Cleveland v. State*, 989 N.E.2d 1072 (Ohio Ct. App. 2013) (local regulations restricting the serving of foods containing industrially-produced trans fats at local food shops).

To be sure, the *Canton* test is more robust than many states' general-law requirements. In application, however, the *Canton* test does not prohibit all state regulation of local governments *qua* local governments, nor does it require that state law apply equally to local governments and to citizens generally. The test is instead intended to describe the nature and characteristics of a state's police-power enactment that would be appropriate to override the constitutional delegation of authority to home rule governments. The specification of the essential characteristics of an appropriately "general" exercise of the police power—including

the concept that the state cannot solely single out local authority in order for state legislation to be considered "general"—provides courts with functional criteria and prevents the state from disabling local authority in the absence of a legitimate statewide regulatory purpose. It also prevents the targeting of specific jurisdictions. According to this understanding of general law, the state bears the burden of showing that the statute in question is a general law. By imposing a high bar on the state to demonstrate that the statute is a general law, the provision limits the number of laws that will be immune to local action and ensures a greater degree of local power over a broader array of issues.

4. CONCURRENT AUTHORITY AND REGULATORY STANDARDS.

Drawing on language from the Illinois state constitution, the provision ensures that concurrent exercises of local power are not deemed to be in conflict with state law unless the state has clearly declared the state's exercise of that power to be exclusive. *See* Ill. Const. art. VII, § 6(i); *City of Chicago v. Roman*, 705 N.E. 2d 81 (Ill. 1998) (upholding a local mandatory minimum sentencing ordinance that was not provided for in the state's criminal code). In other words, if a state initiates a regulatory undertaking, that state action will not be read to impliedly preempt the field or set a ceiling for the extent of regulation that is appropriate. States that enact this provision should expect administrative cost savings from this rule-like approach.

Furthermore, in cases in which local governments and the state do enjoy concurrent authority, the provision provides a "one-way ratchet" clause that treats state standards as regulatory floors and protects the authority of local governments to strengthen regulations. *See* Iowa Code § 364.3(3)(a). This one-way ratchet is another means of ensuring laboratories of regulatory experimentation that are responsive to a variety of local interest and contexts. For example, this latter clause helps local governments promote interests that are important to them—such as raising minimum wage requirements, broadening labor benefits, or strengthening environmental protections—but blocks local governments from acting to weaken state regulatory standards. *See, e.g.*, *Jancyn Mfg. Grp. v. Cty. of Suffolk*, 518 N.E. 2d 903 (N.Y. 1987) (permitting more stringent local regulation of chemical additives than state law); *American Fin. Services Ass'n v. City of Cleveland*, 858 N.E.2d 776, 792 (Ohio 2006) (Resnick, J., joined by Pfeifer, J., dissenting) (arguing that local governments may adopt predatory lending laws that are more stringent than the state's).

5. ABILITY OF HOME-RULE UNITS TO ADJUDICATE PREEMPTION.

In order to determine whether a state statute or statutory scheme violates any of these provisions, it is expected that home-rule units can avail themselves of a state's judicial procedure for declaratory judgment actions. Implicit in this expectation, therefore, is the notion that home-rule units are not precluded from suing the state for violations of the constitution despite their being in some sense "creatures of the state." *Cf. Rogers v. Brockette*, 588 F.2d 1057, 1068 (5th Cir. 1979) (rejecting argument that a municipality lacks standing to sue its state). Moreover, whereas the jurisdiction of federal courts is limited by the federal Constitution's relatively stringent "case or controversy" requirement of Article III, state courts have significantly more flexibility with respect to their jurisdiction under state constitutions. *See* Hans A. Linde, *The State and the Federal Courts in Governance: Vive La Différence!*, 46 Wm. & Mary L. Rev. 1273, 1274–75 (2005) ("[S]tate courts entertain and decide disputes between state or local officials when federal courts would dismiss comparable cases for lack of 'standing' or 'ripeness' or some other shibboleth"). Hence, cases challenging preemption that might be considered "unripe" in the federal courts might lie comfortably within the jurisdiction of states' judicial systems.

Section D.
Local Democratic Self-Government

1. LOCAL ELECTIONS.

At the heart of the concept of local democratic self-government is the accountability of local officials to the local community that results from local popular election of local lawmakers. Local election distinguishes local self-government from rule by state appointees, or from control by an electorate outside the locality. Local election is, however, required only for local legislators. A local government could choose to have appointed judges or to adopt the council-manager system, with an appointed manager rather than an elected mayor. But local self-government must ultimately be rooted in local voter control of the local government. The centrality of local elections has long been recognized in state constitutions. *See, e.g.*, Fla. Const., art. VIII, § 2(b) ("[e]ach municipal legislative body shall be elective"); N.Y. Const., art. IX, § 1(a) ("[e]very local government, except a county wholly included within a city, shall have a legislative body elective by the people thereof"). And state courts have likewise recognized this centrality. *See, e.g., People v. Lynch*, 51 Cal. 15, 31 (Cal. 1875) ("the very idea of an American city involves the notion of a local government, of local officers selected by local inhabitants, and reflecting the wants and wishes of the inhabitants"); *State v. Denny*, 21 N.E. 252, 257-58 (Ind. 1882) (under the "principles of local self-government" the people enjoy "the right to select their own local officers").

2. LOCAL CONTROL OF THE STRUCTURE AND ORGANIZATION OF LOCAL GOVERNMENT.

A core feature of local self-government under home rule is the ability of local people to determine the basic features of their government. This is a purely local matter, having little or no extralocal effect, and it is one that local people are best suited to determining. This principle has been recognized in several state constitutions. The strongest is in Colorado, which provides that a home rule government may supersede within its territorial limits conflicting state laws concerning "the creation and terms of municipal officers, agencies, and employments; the definition, regulation, and alteration of the powers, duties, qualifications and terms or tenure of all municipal officers, agents and employees". Colo. Const. art. XX, § 6(a). Other states give their home rule governments broad power

over the structure of their local governments, subject to general state laws. *See, e.g.* Hawaii Const., art. VIII, § 2 ("Charter provisions with respect to a political subdivision's executive, legislative, and administrative structure shall be superior to statutory provisions, subject to the authority of the legislature to enact general laws allocating and reallocating powers and functions"); Ill. Const. art. VII, § 6(f) ("A home rule unit shall have the power subject to approval by referendum to adopt, alter or repeal a form of government provided by law … . A home rule municipality shall have the power to provide for its officers, their manner of selection, and terms of office only as approved by referendum or authorized by law"); La. Const. art. VI, § 5(E) ("A home rule charter adopted under this Section shall provide the structure and organization, powers, and functions of the local government subdivision, which may include the exercise of any power and performance of any function necessary, requisite, or proper for the management of its affairs, not denied by general law or inconsistent with this constitution"). *Accord* W. Va. Stat. § 8-12-2(a)(1) (home rule powers include but are not limited to "the creation or discontinuance of departments of the city's government and the prescription, modification or repeal of their powers and duties").

This section's grant of power also includes the "proprietary power," or the local government's power to act as a property owner, employer, market participant, and contracting party. *See*, *e.g.*, *Proprietors of Mt. Hope Cemetery v. City of Boston*, 33 N.E. 695, 698 (1893) (describing a city-owned cemetery as falling "within the class of property which the city owns in its private or proprietary character"); *see also* Christy Mallory & Brad Sears, *An Evaluation of Local Laws Requiring Government Contractors to Adopt LGBT-Related Workplace Policies*, 5 Alb. Gov't L. Rev. 478 (2012).

States, of course, have an important role to play in the design of the internal structure of local governments. State laws may appropriately provide for model forms of local government; address the size and role of the local legislative body and other local offices; prescribe local legislative, budgetary, and administrative procedures; and require local governments to comply with freedom of information, open meetings, conflict of interest, ethics, and other basic good government principles. Many local communities are quite willing for these state laws to apply to their local governments. However, under this provision and Section D.5 of this Article, home rule governments should generally be able to vary the rules that determine the structure and organization of local government

in light of local preferences and circumstances. In a sense, this is just a special application of the provisions of Section C of this Article, but in which the presumption against preemption is likely to be especially strong because the decisions concerning local government structure and organization are particularly unlikely to have extralocal consequences.

3. LOCAL REGULATION OF LOCAL ELECTIONS.

Election laws both reflect local democratic values and shape the substantive local policies and decisions in democratic systems. Like the organization and structure of local government, local elections are of predominant local concern with little or no effect beyond local borders. Moreover, local governments have long taken a leadership role in writing the rules for local elections and, in so doing, expanding the franchise. In the late eighteenth and early nineteenth centuries, some local governments dropped property ownership requirements for voting before their states did. *See generally* Alexander Keyssar, The Right to Vote: The Contested History of Democracy in the United States 19–20 (2000). Again, in the late nineteenth and early twentieth centuries, some municipalities granted women the right to vote in municipal elections, before the passage of the Nineteenth Amendment. *See id*. at 186–87. *See also State ex rel. Taylor v. French*, 117 N.E. 173 (Ohio 1917) (holding that the City of East Cleveland had home rule authority to give women the vote in municipal elections). In recent years, some local governments have extended the vote in local elections to people under the age of 18, to noncitizens, and to nonresidents. *See generally* Joshua Douglas, *The Right to Vote Under Local Law*, 85 Geo. Wash. L. Rev. 1039, 1052–67 (2017). *See also May v. Town of Mountain Village*, 969 P.2d 790, 793–94 (Colo. Ct. App. 1998) (sustaining home rule authority of resort community to extend the vote to nonresident property owners; "the qualification of voters in local and municipal elections is a matter of local, not statewide, concern"). *But see Wash. Att'y Gen. Op. 2018 No. 6*, 2018 WL 4492838 (local governments cannot allow people under eighteen to vote in local elections).

A number of state constitutions provide for local control over local elections, and, similarly, many state courts have recognized local authority to write local election rules, including some that conflict with state law. *See, e.g.*, Cal. Const. art XI, § 5(b)(3) (municipal home rule specifically includes the power to regulate the "conduct of city elections"); Colo. Const. art. XX, § 6(d) (municipal home rule extends to "all matters pertaining to municipal elections … including the calling or notice and the date of such election or

vote, the registration of voters, nominations, nomination and election systems, judges and clerks of election, the forms of ballots, ballots, challenging, canvassing, certifying the result, securing the purity of elections, [and] guarding against abuses of the elective franchise"). Some state courts have upheld local decisions to hold partisan elections when a state mandates non-partisan ones. *See, e.g., City of Tucson v. State*, 273 P.3d 624 (Ariz. 2012); *Hoper v. City & Cty. of Denver*, 479 P.2d 967 (Colo. 1971); *Johnson v. City of New York*, 9 N.E.2d 30 (N.Y. 1937) (permitting the use of a proportional representation system to elect local legislators); *In the Matter of Blaikie v. Power*, 13 N.Y.2d 134 (N.Y. 1963 (permitting the adoption of limited voting for the election of local legislators).

Local power to regulate local elections has also been held to include the power to adopt local campaign finance laws. *See, e.g.*, *Johnson v. Bradley*, 841 P.2d 990 (Cal. 1992) (City of Los Angeles may provide for public funding of candidates for municipal office notwithstanding state law banning such public funding systems); *McDonald v. New York City Campaign Fin. Bd.*, 117 A.D.3d 540 (N.Y. Ct. App. 2014) (sustaining City's contribution limits, which were more restrictive than state law); *Nutter v. Dougherty*, 938 A.2d 401 (Pa. 2007) (sustaining City ordinance limiting campaign contributions to candidates for municipal office); *State v. Hutchinson*, 624 P.2d 1116 (Utah 1980) (sustaining local campaign finance disclosure requirement); *Elster v. City of Seattle*, 444 P.3d 590 (Wash. 2019) (sustaining City's voucher public funding ordinance).

As with the determination of the structure of organization of local governments, states may also legislate with respect to local elections, and, again, many local communities may be entirely willing to follow the state rules. Here, as with local government structure, the purpose of the provision is to affirm the right of local governments to vary election rules in light of local preferences and circumstances, and should be protected by the particularly high burden this Section places on any state action in a setting that deals particularly with the ability of a local government to speak for its community.

To be sure, even though local elections are usually a distinctively local concern, the question of local variation in election law may raise issues that differ from those posed by local variation in government structure. Many state constitutions directly address the right to vote or include equal protection principles that directly bear on local voting and local elections. State laws adopted pursuant to these provisions that seek to protect the vote, particularly with respect

to the voting rights of minorities, may supersede local voting rules that have been found to improperly burden voting rights or dilute minority votes. *See, e.g.*, *Jauregui v. City of Palmdale*, 226 Cal. App. 4th 781 (Cal. Ct. App. 2014) (California Voting Rights Act's vote dilution provision applies to charter city). So, too, local variations may impose administrative costs for other governments, as when, for example, municipal elections are administered by county boards of elections and states could regulate in this situation if the specific action meets the overriding state interest and narrow tailoring requirements of Section D.5.

4. PROTECTION FROM PUNITIVE PREEMPTION.

In recent years, a number of states have adopted laws that impose harsh penalties on local officials—civil and sometimes criminal penalties, exposure to private suits, or removal from office—for implementing or even simply proposing or endorsing local laws that may be subject to state preemption. Some states have adopted similar measures making local governments subject to civil liability for the enactment of local laws that are subject to preemption. Such punitive preemption laws are completely inconsistent with the principle of local democratic self-government. Many preemption laws are vague around the edges; some may violate the state constitution or legal doctrines. Local officials and home rule governments interested in advancing local policies or values may want to test the permissible scope of preemption by calling for or enacting measures that will lead to a judicial resolution of the issue. Even when the local measure is clearly subject to preemption, democratic values are still served when a local government enacts a measure that expresses its particular views on a subject, even if that will have no legal effect, in order to spark a broader public debate. Actions that penalize local officials for their views and votes, thus, threaten to chill both local self-government and democratic discussion within the state as a whole.

Recognizing the fundamental importance of elected officials being able to speak and vote freely on behalf of their constituents, the federal constitution and the constitutions of forty-three states include Speech or Debate Clauses that immunize legislators from being sued because of their votes, statements during legislative debate, and other actions connected to their legislative work. *See, e.g.*, U.S. Const., Art. I, § 6, cl. 1; Steven F. Huefner, *The Neglected Value of the Legislative Privilege in State Legislatures*, 45 Wm. & Mary L. Rev. 221 (2003). Most states also provide their legislators and elected executives with similar common law immunities. *See*

id. at 235. The state constitutional provisions do not protect local legislatures, but several state supreme courts have extended legislative immunity to local legislators, either through interpretation of their Speech or Debate Clauses or as a matter of common law. As the Washington Supreme Court explained, although the state constitution's Speech or Debate Clause "on its face applies only to the State Legislature … the necessity for free and vigorous debate in all legislative bodies is part of the essence of representative self-government" and thus extends to city councils. *Matter of Recall of Call*, 749 P.2d 674, 677 (Wash. 1988). A Tennessee appeals court put the matter particularly well:

> [City councils] make important social and economic decisions that many times affect our lives to a greater degree than do decisions made by our state legislators and congressmen. If the utterances of members of the legislative bodies such as city councils are not cloaked with an absolute privilege, an unwarranted consideration—personal monetary liability—will be interjected into a councilman's decisionmaking process. This, we feel, would have the unavoidable effect of inhibiting the independent and forceful debate out of which decisions which best serve the interests of the populace are borne.

Cornett v. Fetzer, 604 S.W.2d 62, 63 (Tenn. Ct. App. 1980). As the United States Supreme Court put it in holding that local legislators are absolutely immune for their legislative activities from liability under the federal civil rights act, 42 U.S.C. § 1983, "Regardless of the level of government, the exercise of legislative discretion should not be inhibited by judicial interference or distorted by the fear of personal liability." *Bogan v. Scott-Harris*, 523 U.S. 44, 52 (1998). *See also NPR Holdings LLC v. City of Buffalo*, 916 F.3d 177, 190-92 (2d Cir. 2019) (discussing scope of local legislative immunity and applying it to cover mayor's role in local legislative process).

Local officials may, of course, be legally liable for their misconduct in appropriate cases. The thrust of this section is simply that local officials should also enjoy the same immunities for their official acts as are enjoyed by their state-level counterparts.

Subjecting local governments to liability for the enactment of laws subject to preemption also chills democratic self-government. In an appropriate case, preemption would nullify the effect of a

local law and any burden it might create on a private party. Civil liability punishes the local government for even raising the issue. Local governments, of course, should not be immune for harmful misconduct. But, traditionally, both states and local governments have enjoyed some "governmental function" immunity for their general legislative acts. The scope of this immunity can be uncertain at the margins, and often involves application of difficult "governmental vs proprietary" or "discretionary vs ministerial" distinctions. The point, however, is that as with the liability of local legislative officials, home rule governments should receive the same type of governmental function liability as the state.

5. HEIGHTENED BURDEN ON THE STATE FOR DISPLACING THE CORE OF LOCAL DEMOCRACY.

Section D assumes that local people will, through local democratic institutions, be able to make the decisions about the essential core of local self-government. That requires local control over local elections and the structural organization of the local government, local management of local public facilities and infrastructure, and local decisions over the workforce that provides local governance.

Many court decisions recognize a local government's power to adopt or alter basic features of its governance structure, including occasions when the local action is at odds with state law. *See, e.g.*, *Strode v. Sullivan*, 236 P.2d 48, 54 (Ariz. 1951) (an Arizona charter city has the power to frame its own laws, including the power to determine "who shall be its governing officers and how they shall be selected"); *Cawdrey v. City of Redondo Beach*, 19 Cal. Rptr.2d 179 (Cal. Ct. App. 1993) (local government may adopt term limits for local officials); *Trader Sports, Inc. v. City of San Leandro*, 93 Cal. App. 4th 37 (Cal. Ct. App. 2001) (city may change the vote necessary for the local legislature to place a proposed tax increase on the local ballot); *Bruce v. City of Colo. Springs*, 252 P.3d 30 (Colo. Ct. App. 2010) (city may adopt a single-subject rule for local ballot initiatives); *Cook-Littman v. Bd. of Selectman of Town of Fairfield*, 184 A.3d 253 (Conn. 2018) (town charter provision for filling vacancy in town governing board prevails over conflicting state law); *Resnick v. Cty. of Ulster*, 44 N.Y.2d 279 (N.Y. 1978) (similar); *Baranello v. Suffolk Cty. Legislature*, 985 N.Y.S.2d 557 (1st Dep't 1987) (similar); *Bd. of Educ. v. Town and Borough of Naugatuck*, 843 A.2d 603 (Conn. 2004) (town may hold separate referenda on education and general town budgets, notwithstanding state law requiring a single referendum); *Windham Taxpayers Ass'n v. Windham*, 662 A.2d 1281 (Conn. 1995) (town charter, not state legislation, determines criteria

for submitting legislation to a town meeting); *Town of Cedar Lake v. Alessia*, 985 N.E.2d 55 (Ind. 2013) (town had authority as a matter of home rule to abolish its parks and recreation department and board); *State ex rel. Haynes v. Bonem*, 845 P.2d 150 (N.M. 1992) (home rule municipality may create a legislative commission larger than that provided for by state law); *Bareham v. City of Rochester*, 246 N.Y. 140 (N.Y. 1927) (home rule gives city power to adopt council-manager form of government); *State ex rel. City of Bedford v. Bd. of Elections of Cuyahoga Cty.*, 577 N.E.2d 645 (Ohio 1991) (home rule city has power to call advisory election to consider whether to switch from council-manager system to mayor-council system).

This principle reflected in this Section D.5 was also clearly articulated in a handful of state supreme court actions in the nineteenth and early twentieth century considering and occasionally invalidating as inconsistent with local self-government state laws that made decisions concerning certain local services or facilities—the police, municipal waterworks and sewers, local parks—or transferred control over them to state-controlled agencies. *See, e.g.*, *People v. Lynch*, 51 Cal. 15, 34 (Cal. 1875) (invalidating state law that "order[ed] an improvement within the limits of an incorporated city, and lev[ied] an assessment to pay for it"); *State v. Denny*, 21 N.E. 252, 258 (Ind. 1882) (invalidating law that placed "exclusive control of all the streets, alleys, lanes, thoroughfares, bridges, and culverts of the city of Indianapolis" in three men appointed by the state); *State ex rel. White v. Barker*, 89 N.W. 204 (Iowa 1902) (invalidating a state law that took from the city of Sioux City control of its waterworks and vested it in an independently appointed board of trustees); *People ex rel. Bd. Of Park Commr's of Detroit v. Common Council of Detroit*, 28 Mich. 228 (Mich. 1873) (invalidating state law that took control of the city's parks away from the elected local government and vested it in a state-appointed commission); *Rathbone v Wirth*, 150 N.Y. 459 (N.Y. 1896) (invalidating state law that deprived Albany common council of control over the city's police department).

These decisions repeatedly recognized the superior authority of the state legislature but found that state actions taking away local control of key local facilities and services violated the principle of local self-government, which these courts determined was an implicit, even if unwritten, tenet of state governance. Similarly, in response to these so-called "ripper" bills, many states amended their constitutions to prohibit the legislature from delegating to "any special commission" "any power to make, supervise or interfere with any municipal improvement, money, property or effects … or to perform any municipal functions whatever." These special

commission bans remain in the constitutions of at least eight states today. Other state constitutions also protect local control of certain local functions. *See, e.g.*, Cal. Const. art. XI, § 5(a) (authorizing charter cities to provide for "the constitution, regulation, and government of the city police force"). They also protect local management of the local public workforce. *See, e.g.*, Colo. Const. art. XX, § 6 (a) (a charter city has "power to legislate upon, provide, regulate, conduct and control … the definition regulation and alteration of the powers, duties, qualifications, and terms or tenure of all municipal officers, agents, and employees.")

To be clear, local control of the proprietary aspects of local governance and the municipal workforce is not absolute. Problems with the quality of local public goods and services, for example, may have significant extra-local consequences in some instances. States may likewise want to require local governments to meet reasonable, generally applicable environmental, energy, equity, or labor standards, although costly state mandates should generally be accompanied by state aid and be subject to the terms of Section E of this Article. Doctrinally, courts parsing the state constitutional special commission bans have had difficulty determining what is a "special commission" and especially what is necessarily a municipal function. So, too, courts have divided on the state constitutionality of state laws that affect municipal labor relations. *See, e.g.*, *State Bldg. & Constr. Trades Council v. City of Vista*, 279 P.3d 1022 (Cal. 2012) (invalidating the application of state prevailing wage law to municipal contractors); *Fraternal Order of Police, Colo. Lodge #27 v. City & Cty. of Denver*, 926 P.2d 582 (Colo. 1996) (holding that the state cannot impose certain peace officer training and certification requirements on home rule city's deputy sheriffs); *People ex rel. Seal Beach Police Officers Ass'n v. City of Seal Beach*, 685 P.2d 1145 (Cal. 1984) (sustaining law requiring home rule cities to "meet and confer" with public employee union); *City of Roseburg v. Roseburg City Firefighters, Local No. 1489*, 639 P.2d 90 (Ore. 1981).

The provision recognizes the legitimacy of state action in this area but emphasizes the centrality to local self-government of local control over local public facilities and personnel, as well as the structures of governance. The state may act with respect to matters encompassed by this Section D only by establishing an overriding state concern for state action, narrowly tailored to that concern—a standard that is more exacting than the burden on the state established more generally for displacing local authority under Section C.2 of this Article. Overriding state concerns could include significant public health and safety that extend beyond the

affected local governments; the equity and efficiency benefits of regional service delivery; evidence of inadequate local performance; and evidence of significant extra-local effects of a particular local structure or policy. What these concerns are and what is necessary to establish them will have to develop over time. But the point of the provision is that the burden is on the state to prove the need for an intervention that displaces preexisting local control.

Similarly, states also have a role to play in dealing with situations of local fiscal distress, which may result from the interaction of national economic conditions, regional socio-economic declines, overly fragmented regional tax bases, and local (mis)management. The Great Recession of 2007–09 created fiscal crises for many localities, leading to some state intervention into local governance. Some state actions, such as the appointment of financial oversight boards, emergency financial managers, or receivers, may be appropriate, especially when tied to additional state financial support. But states should be careful to limit the scope of any such interventions, to limit the role of control boards or emergency managers to fiscal issues, and to provide for the end of any such intervention after the financial emergency has been resolved. For a critique of excessive state intervention and suggestions for appropriate limits, *see* Michelle Wilde Anderson, *Democratic Dissolution: Radical Experiments in State Takeovers of Local Governments*, 39 Fordham Urb. L.J. 577 (2012). For further discussion of state responsibilities with respect to local fiscal affairs, *see* Section E.1 and its commentary.

Section E.
State Support for Local Democracy

1. ADEQUATE INTERGOVERNMENTAL AID.

Of all the provisions contained in this Article, this provision is perhaps the most innovative. No state home-rule provisions make such a guarantee, and this provision is explicitly not limited to home-rule governments, as independent fiscal authority is often insufficient to address the spending needs of all local governments. As Richard Briffault has observed, "without local wealth adequate to local needs, formal authority is of limited usefulness, and the structure of local power may prove to be an empty shell." Richard Briffault, *Our Localism: Part I: The Structure of Local Government Law*, 90 Colum. L. Rev. 1, 3 (1990).

The passage of time has only exacerbated the fiscal challenges facing local governments. Facing dramatic budget shortfalls during the Great Recession, states made deep cuts in intergovernmental aid. Pew Charitable Trusts American Cities Project, *The Local Squeeze: Falling Revenues and Growing Demand for Services Challenge Cities, Counties, and School Districts,* 5–8 (2012), https://www.pewtrusts.org/~/media/assets/2012/06/pew_cities_local-squeeze_report.pdf. While such declines are typical during recessions, this most recent round of state budget cuts was noticeable not only for the size of the cuts but for their duration. In fact, some local governments continued to see declines in state support well into the economic recovery. *See, e.g.*, Pew Charitable Trusts, *Brief: Fiscal Health of Large U.S. Cities Varied Long After Great Recession's End 3* (2016), https://www.pewtrusts.org/~/media/Assets/2016/04/FiscalHealthofLargeUSCitiesVariedLongAfterGreatRecessionsEnd.pdf.

As a result, it is important that twenty-first century home rule explicitly address the role of the state in providing instrastate aid and the state's obligation to ensure adequate fiscal capacity for local governments to fund services that a state chooses to have local governments provide.

This provision is modeled on educational adequacy provisions contained in many state constitutions. Advocates have had mixed success in suits seeking to enforce these provisions and even

when litigants prove successful in court, permanent solutions to education funding have proven elusive. *See* Joshua E. Weishart, *Transcending Equality Versus Adequacy*, 66 Stan. L. Rev. 477, 516–22 (2014) (reviewing state constitutional educational adequacy jurisprudence). Given this precedent, this provision is not designed as a panacea to disputes about intergovernmental aid. Nevertheless, this language suggests the importance of the state commitment to the role of the state in supporting local service delivery.

There are four components to this provision:

Equitable access. Local governments within a state can vary significantly in their fiscal capacity and the cost of providing government services will vary across the state. Such differences should be taken into account in assessing intergovernmental aid formulas.

Local public services. There is significant variation in what services are provided by local governments as well as which local governments provide these services. Typically, general purpose local governments have primary responsibility for funding first responders, including fire, police, and ambulance services. Other types of basic services (including water and sewer maintenance) may be provided by general purpose governments or special districts. The language of this provision is designed to apply regardless of which government provides these services.

Adequate intergovernmental support. This provision does not define adequacy. It assumes that legislatures and—to the extent the issue is litigated—courts will develop the appropriate criteria. Under this provision, the state has an obligation, at the least, to collect and disseminate information about the cost of providing public services at the local level and about the differing fiscal capacities of jurisdictions.

The intergovernmental aid guaranteed by this provision shall be treated as a floor for local budgets. This intergovernmental aid will not relieve local governments of the need to raise own-source revenue, but would ensure that all state residents have the opportunity for local government to provide a basic minimum set of services. There is no legally prescribed minimum set of services. *See* Michelle Wilde Anderson, *The New Minimal Cities*, 123 Yale L.J. 1118, 1195–1205 (2014) (offering heuristics to guide stakeholders in "developing their own locally appropriate priorities and values").

Anti-coercion. This provision also explicitly addresses recent efforts to impose dramatic fiscal sanctions on localities for alleged failures to comply with state policy. The most draconian of these efforts, Arizona's S.B. 1487, strips state shared revenue from an Arizona city or town without judicial oversight when the state's attorney general decides the local government is acting in contradiction of state law. Ariz. Rev. Stat. Ann. §§ 41-194.01(B)(1)(a), 42-5029(L), 43-206(F).

Other states have adopted similar penalty provisions in the context of specific preemption laws or enacted other types of fiscal sanctions. *See, e.g.*, Ga. Code Ann. § 20-3-10 (2017) (providing for withholding of state funding for entities found in violation of state's requirement of cooperation with federal immigration officials); Tex. Gov't Code Ann. §§ 752.053, 752.056 (2017) (providing a penalty of not less $1,000 for an initial violation of state and law and $25,000 for subsequent violations).

This provision would make such penalties unlawful. Of course, the state would retain the ability to develop program-specific grants to local governments, but funding requirements should be related to the purpose of such programs. This principle reflects the logic of the federal anti-coercion cases. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 580 (2012) ("Conditions that do not here govern the use of the funds, however, cannot be justified on that basis. When, for example, such conditions take the form of threats to terminate other significant independent grants, the conditions are properly viewed as a means of pressuring the States to accept policy changes.").

2. UNFUNDED MANDATES.

States limit local home rule not only by restricting the revenue raising authority of local governments and providing insufficient intergovernmental aid. States also restrict local decision-making about spending priorities by delegating responsibility for state programs to local governments. These state mandates require local governments to support policy priorities at the state level with local funds.

Local governments have long decried such unfunded mandates. Reflecting these traditional concerns, the AMA Model contained its own unfunded mandate provision, and several states have imposed constitutional restraints on the state's ability to control local spending in this manner. *See, e.g.*, Ala. Const. art. IV, § 111.05; Cal. Const. Art. XIII B; Fla. Const. art. VII, § 18; Me. Const. art. IX, § 21; Mich. Const. art. IX, § 29; Mo. Const. art. X, § 21; N.H. Const. pt.

1, Art. 28-a; N.J. Const. Article VIII, § II, para. 5. Other states have addressed the issue by statute. *See, e.g.*, Colo. Rev. Stat. Ann § 29-1-304.5(1); 30 Ill. Comp. Stat. Ann. 805/1 et seq.; Mass. Gen. Laws Ann. ch. 29, § 27C; Nev. Rev. Stat. Ann. § 354.599; Rev. Code Wash. 43.135.060. The majority of states, however, offer local governments no such protection.

This model unfunded mandate provision draws from existing provisions, though critics, including local elected officials, have criticized many of these provisions as insufficient. Following these criticisms, this provision does not provide the legislature with the ability to use a super-majority to override the restriction on unfunded mandates. *See, e.g.*, Me. Const. art. IX, § 21 (allowing unfunded mandated with a two-thirds legislative majority; N.J. Const. art. VIII, § II, paragraph 4 (allowing unfunded mandates with a three-fourths legislative majority).

The exceptions listed attempt to balance the need to protect local decision-making with that of providing the state with the ability to respond to mandates outside its control (though imposed by federal law and litigation) and the ability to promote the general welfare (by enacting new criminal statutes or imposing regulations that burden both the public *and* private sectors). The application of these exceptions will not always be clear. For example, local governments in California have challenged the state's determination that certain mandates are actually imposed by federal law. In California, "if federal law gives the state discretion whether to impose a particular implementing requirement, and the state exercises its discretion to impose the requirement by virtue of a 'true choice,' the requirement is not federally mandated." *Dep't of Fin. v. Comm. on State Mandates*, 378 P.3d 356, 368 (Cal. 2016). Under this test, the California Supreme Court found that costs associated with Clean Water Act permitting of municipal stormwater drains were mandates reimbursable by the state. *Id.* However, in providing a list of exceptions, the provision attempts to limit litigation about implied exceptions. *See Durant v. State*, 566 N.W.2d 272, 281 (Mich. 1997) (finding no implied exception for federal mandates under Michigan's unfunded mandate provision); *Los Angeles v. California*, 729 P.2d 202, 212 (Cal. 1987) (holding that legislation applicable to both public and private employees is not a new program or higher level of services, as required to trigger California's unfunded mandate provision).

The model provision allows only local governments to sue under this provision. In this, the provision departs from other models that

explicitly authorize taxpayer standing. *See, e.g.*, Mo. Const. art. X, § 21. While unfunded mandates threaten local decision making about spending priorities, allowing taxpayers to challenge such statutes opens to the doors to legal challenge in situations where there is no local government opposition to the mandate.

At the same time, the provision reflects the fact that litigation costs may be a barrier to challenging state mandates. The model language addresses this concern by creating an agency adjudication system for unfunded mandate claims, to allow local governments to challenge state laws both more quickly and more cost-effectively. Both California and Massachusetts have created such systems. In Massachusetts, the Office of the State Auditor performs this role. In California, a dedicated agency, the Commission on Mandates, adjudicates such disputes. Individual states adopting this model can choose whether to create a new agency for this purpose or assign responsibility to an existing state agency. Depending on the preferences of the adopting state, this delegation could be done in the constitution itself or (as the model language suggests) by the delegation of authority to the legislature. Agency adjudication would, of course, subject to judicial oversight.

Finally, in keeping with existing unfunded mandate laws, this provision applies to all local governments and not just those with home rule. Broader application is important because unfunded mandates have an outsized impact on non–home rule jurisdictions. For example, school districts, facing limited funds to meet new state requirements, have brought many of the lawsuits under current unfunded mandates provisions. Further, jurisdictions without home rule will lack the fiscal authority provided to home rule governments under this model.

"Local democracy has always been important, but the ability of local governments to meet the needs of their communities in today's climate is insufficient...The time for a new, vigorous vision of home rule has arrived."

-Clarence Anthony, CEO & Executive Director,
National League of Cities


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