

## CONSTITUTIONAL HOME RULE AND JUDICIAL SCRUTINY\*

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*It may, in fact, be the case that cities, in effect, already have expansive powers. But it would be more accurate to say that, because of the ongoing judicial interpretation, no one really knows.*

- Stephen L. Elkin<sup>1</sup>

*Without the benefit of guidance from history, constitutional tradition, or sharply delineated principle, courts have been required to grapple with the questions of what ‘affairs’ are ‘municipal’ and when ‘police, sanitary, or other similar regulations’ are ‘local.’ Acclaim has not been their reward.*

- Terrance Sandalow<sup>2</sup>

### INTRODUCTION

The distribution of powers between levels of government in the state system presents a puzzle for constitutional theory; likewise, it presents a puzzle—actually, more of a ubiquitous governance dilemma—for modern policymaking. The specter of *Hunter v. Pittsburgh* and its injunction that municipalities are best understood as creatures of state government and, therefore, as fundamentally subordinate entities,<sup>3</sup> haunts modern local government law. At the same time, constitutional home rule conceivably upends the standard view by according a sphere of au-

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1. STEPHEN L. ELKIN, *CITY AND REGIME IN THE AMERICAN REPUBLIC* 176 (1987).

2. Terrance Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643, 661 (1964).

3. *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907); see also WILLIAM BENNETT MUNRO, *THE GOVERNMENT OF AMERICAN CITIES* 80 (3d ed. 1920) (“[The] municipal corporation, is the creature of the state. Like all other corporations, it owes its existence to a statute, and it has no powers save those which may be conveyed to it thereby.”); Howard Lee McBain, *The Doctrine of an Inherent Right of Local Self-Government* (pt. 1), 16 COLUM. L. REV. 190, 214 (1916).

thority—indeed, a *sovereignty* of sorts—to municipalities in the state's structure of governance and its constitutional theory. How constitutional home rule can be reconciled with the *Hunter* principle is an enduring puzzle in American local government law.<sup>4</sup> Through scholarship, commentary, and caselaw, informed observers struggle to make sense of this seeming contradiction between the idea of local governments as *suppliants* and the idea of these governments as governance *partners*.<sup>5</sup>

Underlying this enduring theoretical tension is a practical fact on the ground: Defining the scope of this local sovereignty, and thereby shaping the constitutional relationship between state and local governments, is a task that has largely fallen to the state courts.<sup>6</sup> While home rule is the creation of legislatures acting within constitutional conventions or through other mechanisms,<sup>7</sup> the contours and content of home rule have been developed by the courts through adjudication. Home rule doctrine reflects a far-flung effort over more than a century's time to find meaning in the ambiguous phrases "local affairs" and "matters of statewide concern."<sup>8</sup> The result of these efforts has been a highly developed, and still developing, case law, one that involves drawing lines between what is properly the domain of state government and those powers which may be exercised by municipalities free of state preemption.

To be sure, the "disabling" or "immunity" function of home rule, which aims to insulate certain local action from state control, was and is controversial.<sup>9</sup> Indeed, most states disavow this function, either by having no home rule at all<sup>10</sup> or, more commonly, by having "legislative home rule," which authorizes municipalities to exercise only those pow-

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4. See e.g., Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 85-86 (1990) [hereinafter Briffault, *Our Localism*]; Richard Briffault, *Town of Telluride v. San Miguel Valley Corp: Extraterritoriality and Local Autonomy*, 86 DENV. U. L. REV. 1311, 1317 (2009) [hereinafter Briffault, *Extraterritoriality and Local Autonomy*].

5. See e.g., David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2260 (2003); Gerald E. Frug, *Decentering Decentralization*, 60 U. CHI. L. REV. 253, 256 (1993); Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1062-63 (1980) [hereinafter Frug, *Legal Concept*].

6. See Sandalow, *supra* note 2, at 660; Sho Sato, "Municipal Affairs" in California, 60 CAL. L. REV. 1055, 1058 (1972). In nine of the *imperio* home rule states, the home rule provision of the state constitution lists matters that are deemed to be of local concern, though the list is not exclusive. See *infra* Appendix (listing Arkansas, California, Colorado, Connecticut, Kansas, New York, North Dakota, South Carolina, and Utah as those nine states). Even in those states, however, it is ultimately the job of the courts to determine whether a particular exercise of municipal power falls within one of the categories listed in the constitution.

7. See DALE KRANE, PLATON N. RIGOS & MELVIN B. HILL, JR., HOME RULE IN AMERICA 11 (2001); HOWARD LEE MCBAIN, THE LAW AND THE PRACTICE OF MUNICIPAL HOME RULE 112-13 (1916).

8. See *infra* p. 1349.

9. See Frug, *Legal Concept*, *supra* note 5, at 1078; Sato, *supra* note 6, at 1059-60.

10. Five states have no municipal home rule at all: Alabama, Hawaii, Nevada, North Carolina, and Vermont. See *infra* Appendix; see also KRANE ET AL., *supra* note 7, at 24-25 (Alabama), 269-70 (Nevada); 312-13 (North Carolina); 417-19 (Vermont). Hawaii has no municipal governments, but has home rule counties. *Id.* at 112-14; see *infra* Appendix. See generally KRANE ET AL., *supra* note 7, at 476-78.

ers not prohibited by the state legislature.<sup>11</sup> Still, there exists in many other states—including the home state of this law review<sup>12</sup>—a deeply imbedded recognition of the truly “imperium in imperio”<sup>13</sup> quality of constitutional home rule and, with it, an acknowledgment that there are circumstances in which, notwithstanding the *Hunter* principle, local governance is shielded from state intervention.<sup>14</sup>

In this Article we ask: What are courts essentially doing when they review state/local conflicts under the rubric of constitutional home rule? And what insights into larger matters of judicial capability and doctrinal efficacy are afforded by a close examination of this work of the state courts? In Part I, we frame the home rule inquiry by describing in broad outlines the constitutional structure of municipal home rule. In Part II, we undertake some field archeology, involving a close look at how state courts currently decide home rule cases. A better understanding of how the courts approach the potentially difficult task of defining and drawing lines between “local affairs” and “matters of statewide concern” will usefully illuminate both the larger conundrum of *imperium in imperio* home rule and the enterprise of line-drawing in structural constitutional law cases more generally.<sup>15</sup> In Part III, we consider whether and to what

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11. Twenty-three states currently have this form of home rule. The states include Alaska, Arizona, Delaware, Illinois, Indiana, Kentucky, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, and Washington. See *infra* Appendix.

12. Twenty-three states currently have *imperio* home rule. In addition to the nine states listed in note 6, *supra*, the states include Florida, Georgia, Idaho, Iowa, Louisiana, Maine, Maryland, Michigan, Ohio, Rhode Island, Virginia, Wisconsin, and Wyoming. See *infra* Appendix.

13. The phrase means “government within a government,” and is thought to have been coined in the local government context by the U.S. Supreme Court in 1893. In *City of St. Louis v. Western Union Tel. Co.*, the Court observed regarding the City of St. Louis:

It does not, like most cities, derive its powers by grant from the legislature, but it framed its own charter under express authority from the people of the state, given in the constitution. . . .

[A]nd the powers granted by [the charter], so far as they are in harmony with the constitution and laws of the state, and have not been set aside by any act of the general assembly, are the powers vested in the city. . . . The city is in a very just sense an “imperium in imperio.” Its powers are self-appointed, and the reserved control existing in the general assembly does not take away this peculiar feature of its character.

149 U.S. 465, 467-68 (1893) (emphasis added).

14. See, e.g., *Town of Telluride v. San Miguel Valley Corp.*, 185 P.3d 161, 170-71 (Colo. 2008) (holding that the “legislature cannot prohibit the exercise of constitutional home rule powers, regardless of the state interest which may be implicated by the exercise of those powers,” and invalidating, as inconsistent with the constitution’s home rule provision, a statute that would prohibit extraterritorial condemnations of property by home rule municipalities); see also, e.g., LYNN A. BAKER & CLAYTON P. GILLETTE, *LOCAL GOVERNMENT LAW* 298-311 (3d ed. 2004); RICHARD BRIFFAULT & LAURIE REYNOLDS, *CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW* 278-314 (7th ed. 2009); OSBORNE M. REYNOLDS, JR., *LOCAL GOVERNMENT LAW* 111-46 (3rd ed. 2009).

15. For earlier efforts along similar lines, see generally GORDON L. CLARK, *JUDGES AND THE CITIES: INTERPRETING LOCAL AUTONOMY* (1985); Harold H. Bruff, *Judicial Review in Local Government Law: A Reappraisal*, 60 MINN. L. REV. 669 (1976); Frank J. Macchiarola, *Local Government Home Rule and the Judiciary*, 48 J. URB. L. 335 (1971); Sandalow, *supra* note 2. For the most part, these important analyses emphasized normative considerations; that is, they considered whether

extent the work of the state courts described in Part II can be deemed a success. Such an assessment, we believe, has implications not only for home rule and state constitutionalism, but also for the appropriate role of the courts in demarcating and enforcing federal constitutional boundaries of state regulatory immunity.

### I. THE FRAMEWORK OF CONSTITUTIONAL HOME RULE

Home rule developed out of a Progressive era concern with the limited scope and capacity of municipal governments in the state constitutional system.<sup>16</sup> Although prominent scholars and the occasional state judge of the late nineteenth and early twentieth century sent up the trial balloon of inherent local power,<sup>17</sup> the near consensus view in the constitutional law of the times was that municipalities had only those powers delegated to them by state legislatures.<sup>18</sup> Home rule promised a reconfiguration of this structural relationship.<sup>19</sup> The early home rule amendments to state constitutions empowered local governments by according new legal significance to municipal charters and their delineation of local powers and prerogatives.<sup>20</sup> With that, home rule portended a new schema for local governance and, especially, a new relationship between state and local governments.<sup>21</sup> To be sure, these municipal charters existed in the shadow of state constitutions, which had long included a variety of limitations on both state and local power.<sup>22</sup> Yet, the reconfiguration of

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and to what extent judicial scrutiny of state/local conflicts was coherent and sensible (usually the answer offered was “no”). While normative considerations are inescapable, the signal contribution of this Article is to consider more carefully, and with the benefit of recent caselaw, how the courts go about analyzing state/local disputes in constitutional home rule contexts. A fuller analysis of the normative underpinnings of these analytical patterns is beyond the scope of this article.

16. See generally KRANE ET AL., *supra* note 7, at 11-12; Barron, *supra* note 5, at 2277-322; Frug, *Legal Concept*, *supra* note 5, at 1080-119; Joan C. Williams, *The Invention of the Municipal Corporation: A Case Study in Legal Change*, 34 AM. U. L. REV. 369, 392-431 (1985).

17. See, e.g., Hoagland v. City of Sacramento, 52 Cal. 142, 149 (1877); People v. Lynch, 51 Cal. 15, 34 (1875); People *ex rel.* Le Roy v. Hurlbut, 24 Mich. 44, 107-08 (1871) (Cooley, J., concurring); Eugene McQuillin, *Constitutional Right of Local Self-Government of Municipalities, and Principles Applicable to Central Control*, 35 AM. L. REV. 510, 524 (1901). See generally David J. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487 (1999).

18. See BAKER & GILLETTE, *supra* note 14, at 202-03; Frug, *Legal Concept*, *supra* note 5, at 1114-15. See generally HENDRIK HARTOG, PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730-1870 (1983).

19. See, e.g., RODNEY L. MOTT, HOME RULE FOR AMERICA'S CITIES 11 (1949) (“During a large part of the nineteenth century, under the dominant theory of legislative supremacy, cities were considered to be merely creatures of the state legislature. . . . Cities were completely subservient to legislative vagaries and whims . . . . Legislative interference with cities tends to turn state legislatures into spasmodic city councils. Home rule, as a device for returning local business to the city, is the obvious remedy for these evils.”).

20. See KRANE ET AL., *supra* note 7, at 11; see also the state constitutional provisions cited *supra* note 12.

21. See Briffault, *Our Localism*, *supra* note 4, at 10.

22. See BAKER & GILLETTE, *supra* note 14, at 201-243 (discussing state constitutional limitations on state power besides home rule); BRIFFAULT & REYNOLDS, *supra* note 14, at 278-314 (same); Michael E. Libonati, *Local Government*, in 3 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE AGENDA OF STATE CONSTITUTIONAL REFORM 109-27 (G. Alan Tarr & Robert

state/local relations represented by the home rule movement of the Progressive era was a substantial one; it harnessed the (progressive) power of local governments and, not incidentally, gave these governments a legal bulwark against their skeptical masters.<sup>23</sup>

Especially controversial was the protection that the home rule amendments gave localities against state preemption of local laws. The establishment of constitutional home rule, beginning first in Missouri and then spreading among the states most enraptured by Progressive-era lawmaking reforms,<sup>24</sup> reconstituted state/local relations by creating, in essence, an *imperium in imperio*.<sup>25</sup> By putting into a state constitution a guarantee that qualified cities would hereinafter enjoy home rule authority in the area of “local” or “municipal” affairs, the home rule reformers were creating for municipalities both a power of *initiation*—that is, a power to act in the absence of an express state legislative grant—and a power of *immunity*—that is, a power to act in the specified area notwithstanding any conflicting state law.<sup>26</sup> This second sort of power proved controversial, given the substantial tension between *imperium in imperio* and the idea of local governments as creatures of state government. It is one thing to view local governments as spheres of Jeffersonian democracy and as separate institutions of governance in a wider polity;<sup>27</sup> it is another thing to see local governments as sovereign and independent from the states that created them.

Moreover, by establishing a new legal architecture of state/local relations centered on the divide between local and statewide affairs, the constitutional home rule movement was assigning a critical task to

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F. Willams eds., 2006) (discussing historical development of home rule provisions in the larger context of the evolution of state constitutions).

23. See KRANE ET AL., *supra* note 7, at 11-12.

24. *Id.* at 241-42. See generally MCBAIN, *supra* note 7, at 119-99.

25. See *supra* note 17.

26. See BRIFFAULT & REYNOLDS, *supra* note 14, at 331-32 (discussing the distinction between the “initiation” and “immunity” functions of home rule); see also BAKER & GILLETTE, *supra* note 14, at 307-11 (discussing distinction between “investing” and “divesting” functions of home rule).

27. See Briffault, *Extraterritoriality and Local Autonomy*, *supra* note 4, at 1317. A particularly florid statement of this ideal is found in an early decision of the California Supreme Court:

What did [the Constitution’s framers] have in their minds when they spoke of cities and villages? It needed but to recall their origin and history to impress the Constitutional Convention with a conviction that municipalities are invaluable to a great and free people. The enlightened genius of the Roman civilization was planted and fostered by the establishment of colonies with urban privileges. In the Dark Ages the chartered towns in Europe served to curb the turbulence of the more potent of the crown vassals, and to erect barriers for the protection of personal rights against the rude force of the feudal barons. It often happened that from such centres of self-government the spirit of freedom was extended and expanded, and it may be safely be said of the English boroughs—for example—that they were largely instrumental in developing the constitution of government which made that people jealous of the liberty they possessed, and capable of receiving still greater accessions of the same blessing. In our own country the existence of local political corporations began . . . .”

People v. Lynch, 51 Cal. 15, 29-30 (1875).

courts, the task of constitutional interpretation.<sup>28</sup> Courts would now make decisions regarding whether and to what extent a power was to be assigned to localities and shielded from state intervention. In doing so, they were creating a doctrine of constitutional localism<sup>29</sup> that would, in suitable cases, enable and require the courts to invalidate acts of the legislature that intruded on the locality's own preferences. This power reflected the critical but unstartling idea that state legislatures are subject to the fundamental law as interpreted and implemented by courts through judicial review. The power was extraordinary, however, in the further sense that courts would be acting to protect the autonomy of local governments that were historically understood to be mere creatures of the state government. On these terms, *imperium in imperio* 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.<sup>30</sup> 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.<sup>31</sup> 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.

Our focus here, however, is constitutional home rule *in practice*. While constitutional home rule on paper points to a delineated realm of local sovereignty, the record of home rule in the state courts in this regard is more mixed. Over the century of its existence, home rule doctrine has reflected in its structure the inherently difficult nature of the core line-drawing project. In some states, constitutional home rule has never been seriously contemplated; rather, home rule exists by virtue of statutory grant.<sup>32</sup> Indeed, the modern home rule movement, dating roughly from the mid-1960s, is entirely the creature of state legislation.<sup>33</sup> In a few states, home rule does not exist in either statutory or constitutional form.<sup>34</sup> Of the remaining states, in which constitutional home rule exists,<sup>35</sup> some have state courts that have largely declined to subject state legislation to scrutiny under the rubric of home rule; in other words, they

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28. See Sandalow, *supra* note 2, at 712.

29. See Briffault, *Our Localism*, *supra* note 4, at 98-99.

30. See, e.g., DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* 14-15 (1995).

31. It should be noted, however, that not all municipalities within an *imperio* home rule state are eligible for "home rule" status. In some *imperio* states, home rule status is afforded only cities that meet certain minimum population requirements. See REYNOLDS, JR., *supra* note 14, at 108-10. See also, e.g., *infra* Appendix.

32. See, e.g., Briffault, *Our Localism*, *supra* note 4, at 10-11; Kenneth Vanlandingham, *Constitutional Municipal Home Rule Since the AMA (NLC) Model*, 17 WM. & MARY L. REV. 1, 1 n.1 (1975). See also *infra* Appendix (Delaware, Indiana, Mississippi).

33. See Briffault, *Our Localism*, *supra* note 4, at 23; KRANE ET AL., *supra* note 7, at 12-13.

34. See *supra* note 10.

35. See *supra* note 12.

have largely denied any immunity function to home rule.<sup>36</sup> In these states, local governments can act through their home rule powers; but insofar as the state legislature attempts to preempt local action, the state typically wins and local governments lose.<sup>37</sup>

Given the incentives for state courts to defer to statewide interests,<sup>38</sup> to authorize encroachments on local sovereignty in the face of state legislative preferences and demands,<sup>39</sup> it is remarkable that many state courts over the years have accorded certain immunities to local governments despite conflicting state legislation.<sup>40</sup> In the face of considerable obstacles, state courts have undertaken the tough task of sorting local from statewide concerns, and of truly dividing powers between state and local governments. It would surely be interesting to speculate about “why” state courts do this. Our focus in this Article, however, is on “how” the state courts do so and, moreover, on how that line-drawing project fits into larger notions of court/state/local relations.

In considering how state courts deal with home rule controversies, we leave for another day the larger questions of the constitutional status of local governments. The structure of state/local relations involves complex political considerations, as well as difficult constitutional questions. A full-bodied account of constitutional home rule in modern

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36. See, e.g., Libonati, *supra* note 22, at 115 (“Courts in several jurisdictions where a constitutional grant of home rule initiative is qualified by the adjective ‘local’ or ‘municipal’ have not been shy in holding that the subject matter in question is susceptible to redefinition as a matter of statewide concern when the state legislature has so spoken.”); James D. Cole, *Constitutional Home Rule in New York: “The Ghost of Home Rule,”* 59 ST. JOHN’S L. REV. 713, 715 (1985) (“The balance between state and local powers [in New York] has tipped away from the preservation of local authority toward a presumption of state concern.”); Eliot J. Kirshnitz, *City of New York v. State of New York: The New York State Court of Appeals, in Declaring the Repeal of the Commuter Tax Unconstitutional, Strikes another Blow against Constitutional Home Rule in New York*, 74 ST. JOHN’S L. REV. 935, 947-48 (2000) (contending that “under the ‘state concern’ doctrine [crafted by New York courts], even if legislation relates to the property, affairs, or government of a city, if the legislation is also a matter of state concern, home rule is not implicated and the legislature may act through ordinary legislative process”).

37. See, e.g., Kirshnitz, *supra* note 36, at 945-48 (citing and discussing New York cases); KRANE ET AL., *supra* note 7, at 304 (noting that the highest court in New York “has consistently rendered decisions ‘protecting the Legislature’s power to act by ordinary legislation if a “matter of state concern” is involved,’” and that the “courts ‘have found state concerns even in seemingly local matters’”); *id.* at 368 (noting regarding Rhode Island that “a series of decisions that struck down municipal efforts to use charter language to secure substantive authority” has resulting in the constitutional phrase “in all local matters” meaning “the structural aspects of local government and little more”).

38. See, e.g., Daniel B. Rodriguez, *Localism and Lawmaking*, 32 RUTGERS L.J. 627, 639 (2001) (“state courts are most frequently made up of state judges who stand for election or reelection; they are beholden to state voters, and not local governments, for their decisions”).

39. Courts compromise local sovereignty either by narrowing the scope of local governments’ initiation power, or by limiting their immunity power, or both.

40. See, e.g., Briffault, *Our Localism*, *supra* note 4, at 15 (“Despite the standard contention that a crabbed judicial interpretation of the ‘municipal affairs’ language in home rule provisions has limited local power to initiate measures, the most comprehensive study of the first decades of home rule found that the courts generally permitted ‘a fairly wide latitude of action on the part of the city in its so-called capacity as an organization for the satisfaction of local needs.’”) (quoting MCBAIN, *supra* note 7, at 671).

America requires engagement with both constitutional and political criteria; for now, we explore only the question of how courts manage doctrine where state and local power is in conflict. As the quotation from Dean Sandalow preceding the introduction indicates, the conventional wisdom is that courts have lurches in several directions in considering home rule matters. The reality, however, is more nuanced, as we will show in the next Part.

## II. WHAT ARE COURTS DOING WHEN THEY DO HOME RULE?

The structure of constitutional home rule doctrine rests upon an obligation of the court to draw lines between what is properly state and properly local. This obligation emerges directly from the court's duty to interpret the pertinent language in the state constitution.<sup>41</sup> Where the state constitution grants localities sovereign power in the area of local affairs, the task falls to the court to discern just what is or is not a local affair. The nature of the project is necessarily ad hoc: The courts are asked to evaluate specific exercises of municipal power against the background of language, typically "local affairs" or "municipal affairs," that is notoriously ambiguous.<sup>42</sup> And even where home rule power is defined in a state constitution by resort to categories of activities,<sup>43</sup> holding that the activity or regulation in dispute falls within the scope of a specified category is not the end of the court's inquiry where assertions of local immunity are made.<sup>44</sup>

What makes a potentially unwieldy judicial project manageable is the state courts' development and use of certain criteria, of general standards, against which the prerogatives of state and local governments can be measured. We examine those standards and the courts' doctrines—*how* the courts do home rule—in Part III below. First, however, it is important to understand *what* the courts are doing when they do home rule. As we explain in this Part, we believe that courts are undertaking and accomplishing three objectives when they resolve constitutional home rule controversies: first, they are dividing the total sum of governmental power between two levels of government and thereby assigning functions (and, indeed, responsibilities) to these separate governments. Second, in defining and delimiting the categories of local and statewide affairs, the courts are making analytical judgments about which institutions are, and traditionally have been, best suited to perform certain tasks and functions. And, lastly, the courts are unavoidably making

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41. We use duty here in its weak sense, that is, the "duty" to undertake constitutional interpretation, taking no position upon whether and to what extent the constitution's text is the sole source of information about the meaning of one or another state's home rule doctrine.

42. See, e.g., Sandalow, *supra* note 2, at 651, 660-61; Sato, *supra* note 6, at 1060, 1075-76.

43. The imperio home rule provisions of some state constitutions include non-exclusive lists of these categories. See *supra* note 6.

44. See, e.g., KRANE ET AL., *supra* note 7, at 304 (discussing New York Constitution and cases); *id.* at 79 (discussing Connecticut Constitution and cases).



substantive regulatory choices. Whether or not intentionally, judges are choosing one regulatory result over another by the act of assigning the regulatory prerogative to one level of government, or governmental institution, rather than another.

Home rule decisions involve conflicts between a locality insisting that it has exclusive authority to act and the state government insisting that this is incorrect. In resolving such conflicts, courts make what are fundamentally distributive decisions involving the quantum of state and local power. We offer two insights here: First, the courts conceive of their role as separating spheres of authority between state and localities. Thus viewed, power becomes a zero-sum game; either the state can preempt local initiatives, thereby giving the state the last word, or else localities can trump state interests and thereby become the final authority.<sup>45</sup> The judgment in favor of one or another level of government therefore is a strong judgment about the nature of constitutional authority. That is, the ultimate prerogative to act is within the province of one authority or the other; governmental powers are exclusive, not shared.

Second, in allocating power between different levels of government, the courts are also allocating authority among institutions of governance. Where, for example, local governments proceed through administrative agencies and special purpose governments, they claim immunity through home rule just as if they had proceeded through the city council rather than through unelected officials. By contrast, state decisionmaking is, in the main, decisionmaking by and through the state legislature. The state legislature is made up of a large number of representatives, each of whom is directly elected in a single-member district.<sup>46</sup> In addition, the state legislature is configured to engage in compromise, conflict, logrolling, and other institutionally salient activities characteristic of a general purpose decisionmaking body.<sup>47</sup> Local administrative agencies and special purpose governments, in contrast, are centralized decisionmakers that each act within a confined area of authority and competence pur-

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45. One particularly significant question, to which we offer no answer in this Article, is whether and to what extent the state legislature's express judgment that a matter is in fact one of statewide concern is typically outcome determinative in *imperio* home rule states. Compare, e.g., *Bishop v. City of San Jose*, 460 P.2d 137, 141 (Cal. 1969) ("[T]he fact, standing alone, that the Legislature has attempted to deal with a particular subject on a statewide basis is not determinative of the issue as between state and municipal affairs . . . the Legislature is empowered neither to determine what constitutes a municipal affair nor to change such an affair into a matter of statewide concern."), with *Oelbermann Assoc. Ltd. P'ship v. Borov*, 535 N.Y.S.2d 315, 318-19 (Civ. Ct. N.Y. County 1988) (holding that a state statute exempting loft apartments from local zoning requirements was valid as applied to properties within a home rule city, notwithstanding language in New York Constitution reserving to home rule governments the power to regulate "its property, affairs or government").

46. See Rodriguez, *supra* note 38, at 646-55.

47. Cf. *id.* at 648-58 (describing structural differences between state and local institutions and some implications of these differences); Daniel B. Rodriguez, *Turning Federalism Inside Out: Intrastate Aspects of Interstate Regulatory Competition*, 14 YALE L. & POL'Y REV. 149, 172-75 (1997).

suant to ideals of transparency and rational rulemaking. The result is that home rule decisions favoring local authority are, in certain cases, favoring institutions that are neither directly accountable to the affected electorate nor concerned with the simple aggregation of the electorate's preferences.

It is also important to recognize that as the courts separate spheres of authority, local governments gain immunity powers—and, thereby, discretion—at the expense of state authority. By contrast to the relationship between the federal government and the states, in which state authority is today subject to nearly ubiquitous federal control even when the states seemingly prevail under the Tenth Amendment,<sup>48</sup> the effect of a state court decision upholding local prerogatives in the face of state authority is to cordon off localities from state authority in a strong sense. States may resort to more draconian mechanisms of control to be sure, but localities can maintain a reasonable capacity for resistance notwithstanding the state's various options. Consider, for example, the authority of local governments to generate their own revenue to further local objectives. While local taxing authority is curtailed in extraordinary and rare circumstances—most notably, California after Proposition 13<sup>49</sup>—the ordinary baseline is broad local autonomy to carry out local initiatives so long as the capacity for local revenue-generation exists.<sup>50</sup> When courts put their imprimatur on local authority of this sort, the practical effects of immunity are considerable indeed.

Further, court decisions that assign an entire category of powers to local prerogative may distribute governmental power in a way that is difficult for state legislatures to revisit. The California Supreme Court's decision in *Johnson v. Bradley*<sup>51</sup> is an example of this phenomenon. In that case, the state court accorded to the City of Los Angeles the broad authority to create its own regulations for municipal elections, including limitations on campaign contributions, the provision of partial public funding for city political campaigns, and spending limits on candidates who accept public funds.<sup>52</sup> The bell cannot be easily unrung; where es-

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48. Although the "anti-commandeering" doctrine set out by the Court in *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898, 933 (1997), has chipped away at the seemingly plenary powers of Congress under the Tenth Amendment, see *infra* notes 177-79 and accompanying text, the spending power remains an easy end run around any restrictions that the Constitution might be interpreted to impose on Congress's ability to regulate the states. See Lynn A. Baker, *Conditional Federal Spending after Lopez*, 95 COLUM. L. REV. 1911, 1914 (1995); Lynn A. Baker, *The Spending Power and the Federalist Revival*, 4 CHAPMAN L. REV. 195, 195 (2001) [hereinafter Baker, *Spending Power*]; Lynn A. Baker & Mitchell N. Berman, *Getting off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 IND. L.J. 459, 460 (2003).

49. See CAL. CONST. art. XIII A (imposing various limitations on the real property assessment and taxing powers of state and local governments).

50. See Kirk Stark & Jonathan Zasloff, *Tiebout and Tax Revolts: Did Serrano Really Cause Proposition 13?*, 50 UCLA L. REV. 801, 814 (2003).

51. 841 P.2d 990 (Cal. 1992).

52. *Id.* at 991-92.

essential attributes of municipal government are configured around judicial decisions upholding local power in light of home rule, state decisionmaking in those areas must be adjusted to take account of this new reality.<sup>53</sup>

Unavoidably, division of powers through judicial decree frames governmental choices going forward. It is hard to imagine state governmental actors easily acquiescing to court decisions shielding local governance from state control and limiting state flexibility. Yet, while the process is a predictably dynamic one, with state government tacking and adjusting in response to judicial decisions, those decisions importantly alter the terrain on which subsequent adjustments are made. Local governments are rightly viewed not only, or even especially, as creatures of state governments; they are also competitors with the states. In both their regulatory and proprietary roles, local government frequently have economic and political interests that may collide in discernible ways with the interests of their state government. In distributing powers, courts are regulating the rules of this competition. A truly comprehensive effort (which this Article is not) to evaluate the efficacy of home rule in the courts needs to tackle squarely the question of how the courts' choices in the allocation of power between state and local governments impact the governance strategies of state and local officials.

In addition to allocating powers between different levels and institutions of government, the courts' home rule decisions reflect and implement substantive regulatory choices. When, for example, a Colorado court struck down the town of Telluride's attempt to impose residential rent control on new development within the town, the scope of local regulatory choice was curtailed.<sup>54</sup> In ruling that the Colorado law prohibiting municipalities from imposing residential rent control trumped Telluride's ordinance imposing such a regime,<sup>55</sup> the court was not only affirming the state's power to regulate in this area. It was also ultimately reinforcing the legislature's substantive regulatory preference that residential rental properties within the state not be subject to rent control.

Consider a different example, involving an ordinance of the Illinois village of Morton Grove that banned the possession by civilians of all operable handguns.<sup>56</sup> Those challenging the ordinance contended that it violated the Illinois Constitution, which provided that "*Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed.*"<sup>57</sup> When the Illinois Supreme Court upheld the ordinance, it reaffirmed the power of localities to choose whether and

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53. Or the state constitution must be amended to redefine the affected areas as "matters of state concern."

54. *Town of Telluride v. Lot Thirty-Four Venture, L.L.C.*, 3 P.3d 30 (Colo. 2000).

55. *Lot Thirty-Four Venture*, 3 P.3d at 40.

56. *Kalodimos v. Vill. of Morton Grove*, 470 N.E.2d 266, 269 (Ill. 1984).

57. *Id.* (emphasis added).

how to regulate in this area. But in doing so, the court also reinforced the village's regulatory preference for more stringent firearms control.

At some level, this is a banal insight—*of course* home rule decisions involve substantive regulatory choices by the courts. But our point here is a deeper one: How we evaluate and assess the resulting home rule doctrine is bound up with our views about the substantive regulations involved.

Consider the underlying regulatory choice in the 2008 case of *Town of Telluride v. San Miguel Valley Corp.*<sup>58</sup> The town of Telluride made the bold decision to use eminent domain to expand its extraterritorial regulatory terrain. While the locality's underlying motivation was not entirely transparent, it appeared that the citizens of Telluride had a strong pre-existing commitment to maintaining a protective barrier of open space land at the boundaries of their community.<sup>59</sup> Local government control over the land, including control over the location and extent of any proposed private development, was a sensible way for the strongly pro-environmental citizens of Telluride to realize and enforce their policy preferences. The four private corporations that owned the 572 acres at issue, meanwhile, were interested developing the land in the future, and had successfully lobbied the Colorado legislature for a statute of general applicability that would block Telluride's ability to acquire the Valley Floor via eminent domain.<sup>60</sup> The court's inquiry into whether Telluride exceeded its powers under Colorado's home rule doctrine was ultimately no more nor less than a choice between two very different regulatory policies—would the Valley Floor be developed or would it remain open space? Home rule disputes, and their resolution, can often be characterized thusly.

It is important to note, however, that these substantive regulatory choices are not naked ones. As we discuss in greater detail in the next section of this Article, courts typically offer more than a fig leaf for the regulatory preferences of the state and local officials who prevail in home rule disputes. In addition, the courts are rightly cautious and incremental in their implementation of these substantive regulatory choices. Judgments regarding the character of certain local decisionmaking and the operationalization of the standard home rule criteria are both connected to prior decisions involving the same or similar matters. In sum, the structure of home rule decisions and the criteria employed by the courts in resolving disputes in difficult cases reveals a reasonably nuanced approach to regulatory decisionmaking.

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58. 185 P.3d 161(Colo. 2008).

59. For example, the Court noted that the citizens of Telluride, "for years have allocated twenty percent of the town's annual revenue to fund the acquisition of the Valley Floor" for open space and park purposes. *Id.* at 164.

60. *Id.* at 163-64.

### III. THE STRUCTURE OF JUDICIAL SCRUTINY

We have discussed what the courts are doing when they do home rule: they allocate powers between different levels and institutions of government, and they implement substantive regulatory choices. In this Part, we explore *how* the courts make those decisions. That is, we examine the standards and criteria that the courts apply in these cases, and the legal doctrine(s) that result.

State courts typically approach home rule questions through a set of standards that are framed around three core questions:

- Is the activity or regulation at issue a local affair?
- Is it a matter of statewide concern?
- Is it a mixed matter that is of both statewide and local concern?

We begin this Part by examining the doctrines that the state courts of California, Colorado, and Illinois have crafted around the three core questions. We discuss the four factors that the courts typically invoke in resolving state-local conflicts, and give special attention to the two factors that seem to loom largest in the courts' decisionmaking: the extra-territorial effects of the local regulation, and the need for statewide uniformity in the relevant regulatory area. We then explore the possibility that the subject matter at issue affects the courts' decisionmaking; that is, that cases *within* a given substantive "category" are treated similarly, while the categories are treated somewhat differently.

#### A. *Imperio Home Rule Doctrine*

Study of three courts in *imperio* home rule states reveals that they approach the three core questions in a similar, and admittedly ad hoc, manner. The Colorado Supreme Court, for example, begins its inquiry in a 1990 decision by noting that

We have not developed a particular test which could resolve in every case the issue of whether a particular matter is "local," "state," or "mixed." Instead, we have made these determinations on an ad hoc basis, taking into consideration the facts of each case. . . . We have considered the relative interests of the state and the home rule municipality in regulating the matter at issue in a particular case.<sup>61</sup>

In a later decision, the Colorado Court elaborated:

"There is no litmus-like indicator for resolving whether a matter is of local, statewide, or mixed concern." . . . Courts should take the totality of the circumstances into account in reaching this legal conclusion. . . . As part of the totality of the circumstances, this court has

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61. *City & County of Denver v. State of Colorado*, 788 P.2d 764, 767-68 (Colo. 1990).

considered a number of issues, all directed toward weighing the respective state and local interests implicated by the law.<sup>62</sup>

The Illinois Supreme Court has articulated similar views:

Whether a particular problem is of statewide rather than local dimension must be decided not on the basis of a specific formula or listing set forth in the Constitution but with regard [to various factors].<sup>63</sup>

And the California Supreme Court has taken a comparable approach:

“No exact definition of the terms “municipal affairs” can be formulated and the courts have made no attempt to do so, but instead have indicated that judicial interpretation is necessary to give it meaning in each controverted case.” . . . At the same time, however, we noted that “our decisions have also strived to confine the element of judicial interpretation by hedging it with a judicial procedure intended to bring a measure of certainty to the process. . . .”<sup>64</sup>

The “judicial procedure” mentioned by the California Court begins with a presumption that local ordinances are of “local concern” (and therefore presumptively valid), thereby putting the burden of proof on those contending that the local ordinance must yield to a conflicting state law:

If . . . the court is persuaded that the subject of the state statute is one of statewide concern and that the statute is reasonably related [and ‘narrowly tailored’] to its resolution, then the conflicting charter city measure ceases to be a ‘municipal affair’ pro tanto and the Legislature is not prohibited by [the Constitution’s home rule provision] from addressing the statewide dimension by its own tailored enactments.<sup>65</sup>

The Colorado court starts from a somewhat different point, stating that if “the matter is one of mixed local and statewide concern,” and if the action of the home rule city conflicts with the state legislature’s action, then “the state statute supersedes the home rule authority.”<sup>66</sup> The court adds that “[e]ven if a home rule city has considerable local interests at stake, a particular issue may be characterized as ‘mixed’ if sufficient state interests are also implicated.”<sup>67</sup> Lest this be interpreted as a strong presumption in favor of the state in close cases, an earlier opinion of the court suggests otherwise: “even though the state may be able to suggest a plausible interest in regulating a matter to the exclusion of a home rule

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62. *Town of Telluride v. Lot Thirty-Four Venture, L.L.C.*, 3 P.3d 30 (Colo. 2000).

63. *Kalodimos v. Vill. of Morton Grove*, 470 N.E.2d 266, 274 (Ill. 1984).

64. *Johnson v. Bradley*, 841 P.2d 990, 995-96 (Cal. 1992).

65. *Id.* at 996.

66. *Lot Thirty-Four Venture*, 3 P.3d at 37.

67. *Id.* at 37.

municipality, such an interest may be insufficient to characterize the matter as being even of ‘mixed’ state and local concern.”<sup>68</sup>

The Illinois court in *Kalodimos*, meanwhile, staked out a starting point somewhere between those of the California and Colorado courts. The Illinois court contrasts *imperio* home rule to “a free-wheeling preemption rule” that “a subject is preempted whenever it is of significant concern to the State . . . .”<sup>69</sup> “Home rule,” the court clarifies,

is predicated on the assumption that problems in which local governments have a legitimate and substantial interest should be open to local solution and reasonable experimentation to meet local needs, free from veto by voters and elected representatives of other parts of the State who might disagree with the particular approach advanced by the representatives of the locality involved or fail to appreciate the local perception of the problem.<sup>70</sup>

This seemingly strong presumption in favor of local autonomy is importantly tempered by the Illinois Court’s subsequent observation that the local diversity intentionally fostered by home rule is subject to the proviso “that the legislature has taken no affirmative steps to circumscribe the measures that may be taken and that the measures taken [by the locality] are reasonable.”<sup>71</sup>

Notwithstanding these somewhat different starting points, each of the courts goes on to identify some variant of the following factors as being at the core of its analysis:

- the need for statewide uniformity of regulation;
- the impact of the measure on individuals living outside the municipality;
- historical considerations concerning whether the subject matter is one traditionally governed by state or local governments; and
- whether the state Constitution specifically commits the particular matter to state or local regulation.<sup>72</sup>

Each of the courts makes clear that the multi-factor analysis is not a formula but rather a kind of balancing test: “All of these factors are intended to assist the court in measuring the importance of the state inter-

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68. *City & County of Denver v. State of Colorado*, 788 P.2d 764, 767 (Colo. 1990).

69. *Kalodimos v. Vill. of Morton Grove*, 470 N.E.2d 266, 274 (Ill. 1984).

70. *Id.*

71. *Id.* at 275-76.

72. *Lot Thirty-Four Venture*, 3 P.3d at 37; see also *City & County of Denver*, 788 P.2d at 768 (discussing same four factors); *Kalodimos*, 470 N.E.2d at 274 (identifying as the relevant factors “the nature and extent of the problem, the units of government which have the most vital interest in its solution, and the role traditionally played by local and statewide authorities in dealing with it”); *Johnson*, 841 P.2d at 996, 1001 (identifying as central to the home rule analysis a focus on “extramunicipal concerns” and an interest in statewide uniformity).

ests against the importance of the local interests in order to make the ad hoc decision as to which law should prevail.”<sup>73</sup>

Although at least some of the factors just described are mentioned in nearly every home rule case, a close examination of constitutional home rule cases over the years discloses that some of these factors play a more significant role than others. Especially important in home rule analysis are the questions of how much weight to give the state’s interest in uniformity and how to view local regulations which arguably have extraterritorial effects. Not surprisingly, the need for statewide uniformity and concerns about extraterritorial effects of local decisions loom large as factors in home rule analyses.<sup>74</sup>

At a basic level, the inquiries into uniformity and extraterritoriality raise the common question of comparative institutional competence, to wit: Would states or localities be better decisionmakers with regard to a particular issue? For example, in *Town of Telluride v. Lot Thirty-Four Venture, L.L.C.*,<sup>75</sup> the Colorado Supreme Court decided that the citizens of Colorado have an interest in consistent, uniform landlord-tenant regulation.<sup>76</sup> “Uniformity in landlord-tenant relations,” said the court, “fosters informed and realistic expectations by the parties to a lease, which in turn increases the quality and reliability of rental housing, promotes fair treatment of tenants, and could reduce litigation.”<sup>77</sup> Embedded in this judgment is a belief that states would in fact maintain a consistent structure of landlord-tenant law. To the extent that the law would have general application statewide, this seems a realistic assumption.

Less clear, however, is the state’s willingness and ability to craft a law that assures “informed and realistic expectations” for the parties. Forbidding localities from adopting residential rent control, for example, does not assure uniformity in rents across localities; indeed it may well facilitate the opposite. And there is little reason to believe that there is consistency across a given state’s localities in the supply of, and demand for, different types of real estate. Uniformity in this context simply

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73. *Lot Thirty-Four Venture*, 3 P.3d at 37; see also *id.* at 39 (“On the whole, we cannot conclude that this matter is so discretely local that all state interests are superseded” and acknowledging “the legitimacy of both the state interests and [the municipality’s] interests”); *City & County of Denver*, 788 P.2d at 768 (“We have considered the relative interests of the state and the home rule municipality in regulating the matter at issue in a particular case”); *id.* at 770 (comparing “the asserted state interests” with “the asserted local interests”); *Kalodimos*, 470 N.E.2d at 274 (“Whether a particular problem is of statewide rather than local dimension must be decided not on the basis of a specific formula . . . but with regard for [various factors.]”); *Johnson*, 841 P.2d at 997 (“the hinge of the [home rule] decision is the identification of a convincing basis for legislative action originating in extramural concerns . . .” and “the sweep of the state’s protective measures may be no broader than its interest”).

74. See, e.g., *Fraternal Order of Police, Colo. Lodge #27 v. City & County of Denver*, 926 P.2d 582, 588-90 (Colo. 1996); *City & County of Denver v. State*, 788 P.2d 764, 768-69 (Colo. 1990).

75. 3 P.3d 30 (Colo. 2000).

76. *Id.* at 38.

77. *Id.*



means that municipalities cannot pursue their own localized judgments about whether and to what extent rents ought to be capped—judgments that presumably can be readily known by both residential landlords and their prospective tenants and thus in no way preclude “informed and realistic expectations by the parties to a lease.”

Thus, the court’s true concern in *Lot Thirty-Four Venture* appears to be a simple distrust that localities will craft and carry out their own real estate policies with sufficient concern for safeguarding the policies that the state deems essential for all lease parties within the state. This is, at base, a judgment about substantive policy preferences and the comparative competence of different levels of government rather than a fundamental interest in statewide uniformity.<sup>78</sup>

A similar consideration is at work in home rule decisions in which local policies arguably raise concerns about extraterritorial effects. In *Denver & Rio Grande Western Railroad Co. v. City & County of Denver*, for example, the Colorado Supreme Court invalidated under its constitutional home rule doctrine a local law that provided for the construction of a viaduct on the ground that this law would generate a potential ripple effect outside the municipality.<sup>79</sup> The local law did not, by its own terms, have an extraterritorial reach. But the court viewed it as creating externalities, as effecting an extraterritorial impact, and therefore implicating a matter of statewide concern. Interestingly, the Colorado court in the 2008 Telluride decision considered a challenge to a local ordinance that, by design, had an extraterritorial impact.<sup>80</sup> Yet the court approved this assertion of extraterritorial local power in the face of a conflicting state statute.<sup>81</sup>

Extraterritorial impact has considerable traction and appeal as a home rule criterion; it is difficult to see municipal legislation as dealing with purely local concerns when it explicitly or predictably affects individuals outside the municipality.<sup>82</sup> However, the juxtaposition of clearly and intentionally extraterritorial legislation (as in *Telluride v. San Miguel*)<sup>83</sup> and facially local legislation that ultimately also impacts individuals outside the jurisdiction suggests that the criterion is not, and cannot be, applied mechanically. Rather, the principal consideration at work here, as in the case of concerns about a need for statewide uniformity, is

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78. This is reinforced by Chief Justice Mullarkey’s dissenting opinion in which she insists that the Telluride ordinance “is fundamentally a land use regulation,” and therefore is properly local. *Id.* at 45 (Mullarkey, C.J., dissenting). Chief Justice Mullarkey argues that the majority goes wrong by narrowing the scope of what is a land use decision. “Land use policy,” she says, “is not limited to the mere definition of permissible uses; rather, land use policy encompasses conditions implemented within the rubric of zoning and planning decisions.” *Id.*

79. 673 P.2d 354, 362 (Colo. 1983).

80. *Town of Telluride v. San Miguel Valley Corp.*, 185 P.3d 161, 163-64 (Colo. 2008).

81. *Id.* at 171.

82. See Briffault, *Extraterritoriality and Local Autonomy*, *supra* note 4, at 1324-25.

83. *San Miguel Valley Corp.*, 185 P.3d at 163-64.

how best to view the relative competence of localities and the state. Under what circumstances, if at all, can localities reasonably be expected to enact legislation whose effects are restricted to the locality's boundaries? Can and will states do a better job than individual localities at balancing the local and external effects of particular policy preferences?

The central insight of most academic treatments of externalities, collective action problems, and races to the bottom that view them through a political economy lens is that some central mechanism is necessary to regulate intergovernmental competition.<sup>84</sup> Yet home rule doctrine pushes back against this insight. Protecting a sphere of local sovereignty requires the courts to roll up their sleeves and analyze state/local conflicts with a richer vocabulary and greater nuance than political economy would provide. The criteria of statewide uniformity and extraterritorial effects invite consideration of the comparative institutional competence of state and local governments: What are the best institutions to implement intrastate public policy? The answer, of course, is "sometimes the state, sometimes local governments." The courts' ad hoc home rule inquiries, guided by principles and illuminated by precedent, may in fact be the best and most reliable route to the right answer when disputes arise.

One cannot overlook the fact, however, that assessing the comparative institutional competence of state and local governments requires some baseline. For example, what do we mean by "competence"? The prevailing conception of local governments and their functions has shifted considerably over time; what might have been seen as a competent regime of local governance in, say, the early twentieth century may not seem so today. To a significant degree, local governments were historically viewed as mechanisms for implementing state goals. State legislatures had plenary powers including the police power; municipalities were viewed as little more than the instruments for ensuring that the states' policy choices were realized. The home rule movement of the early twentieth century (and also as it evolved later) reconfigured this idea; local governments were, to be sure, implementation mechanisms, but they were also increasingly viewed as institutions that possessed a police power in their own right. Indeed, home rule made concrete, and legally salient, the notion that many basic police power functions—including the protection of health, safety, and general welfare—were well within the competence of, and even perhaps best effectuated by, municipal governments.<sup>85</sup> Courts reliably sustained local authority to regulate private conduct in order to protect social aims and to ensure the

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84. See, e.g., Clayton P. Gillette, *Fiscal Home Rule*, 86 DENV. U. L. REV. 1241, 1249-50 (2009).

85. The "good government" movement of the Progressive era, described ably in Barron, *supra* note 5, at 2291, was the administrative-political analogue of the home rule doctrine of this early period.

welfare of their citizens. And, strikingly, the courts did so notwithstanding influential doctrines such as Dillon's Rule that would have otherwise narrowed greatly the scope of local power.<sup>86</sup>

This changing conception of local governments will necessarily impact what one means by competent local governance. Likewise, the changing dynamic of state/local relations will affect what one means or does not mean by competent state governance. Any comparison of these competencies requires agreement on a baseline; we need to frame the issue of state and local competence around ideas and ideals of state and local governance in operation. While state courts typically, and properly, elide identifying a theoretical baseline and implementing a judgment about comparative institutional competence, the most analytically sophisticated home rule cases do bear down on the question of how effectively state and local institutions each fulfill the regulatory objective(s) at issue.

### *B. Home Rule and Regulatory Categories*

Notwithstanding the self-professed "ad hoc" nature of the courts' home rule decisions, the factors on which their inquiries are based can be expected to yield patterns and consistencies in the eventual decisions. In addition, both the nature of the factors and of the most frequent areas of regulatory conflict between localities and the states suggest that one might expect to find that cases *within* a given substantive "category" are treated similarly, while the various categories are treated somewhat differently. To be clear, we make no claim that the courts are deciding home rule cases exclusively, or even especially, with reference to the regulatory categories at issue. As mentioned above, the essential structure of analysis is organized around multi-faceted inquiries into state and local competence and, to some degree, historical exegesis. Yet, when one looks at a large body of home rule cases covering the terrain of regulatory policymaking, one sees that the regulatory categories matter, and in ways that previous analyses of constitutional home rule insufficiently credit. Therefore, in this section, we preliminarily explore the possibility that the regulatory categories explain some of the pattern of home rule decisions. We make no attempt to offer a comprehensive picture; rather, we look closely at a few cases in some key substantive areas.

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86. Dillon's Rule is a canon of statutory construction that calls for the narrow interpretation of local government authority. See BAKER & GILLETTE, *supra* note 14, at 244 (setting out Dillon's Rule); See also, e.g., BRIFFAULT & REYNOLDS, *supra* note 14, at 314-17 (describing inception of Dillon's Rule); David J. Barron, *supra* note 17, at 506-09 (explaining Dillon's Rule and its application); Joan C. Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law*, 1986 WIS. L. REV. 83, 88-90 (1986) (discussing Cooley's theory of inherent local sovereignty).

### 1. Health, safety, and welfare cases

In many cases, courts are called upon to resolve disputes between state and local governments in which localities assert authority to regulate pursuant to their police power, the scope of which is ordinarily spelled out in their municipal charter. These cases have involved a range of issues, such as health codes, quarantines, curfews, and the batch of issues that arose with the growing urbanization of the U.S. These cases have seldom implicated the “immunity” function of home rule; after all, states have been generally receptive to localities’ efforts to promote health, safety, and welfare. In the few cases in which localities have gone many steps further than what the state deemed acceptable, the courts have worked hard to reconcile state and local authority. Where no reconciliation was possible, the courts have frequently upheld municipal police power regulations in the face of state efforts at control.<sup>87</sup> In this way, courts across a range of constitutional home rule states have made clear that regulating the “health, safety, and welfare” of a locality is squarely within the scope of local affairs.

Given the well-established plenary powers of state legislatures and the correlative police powers vested in the state (as opposed to the national) government, it is by no means obvious that localities possess anything like these police powers. Yet, the state courts have long affirmed the police powers of home rule local governments to promote health, safety, and welfare, sometimes on the grounds set out by Justice Lehman in the early home rule case of *Adler v. Deegan*:<sup>88</sup>

It cannot be gainsaid that in this section of the Constitution cities receive not from the Legislature but from the sovereign people of the State, authority to exercise some part of the police power of the State and the exercise of that authority is made the function not of a designated local legislative body or city officer but of the city itself. Its exercise does not rest upon delegation of power by the Legislature. Within its limited scope it is derived from the same fundamental law, from which the Legislature derives its own general power. The state . . . has not surrendered its police power but it has to some extent divided it between the Legislature and the cities and clearly the exercise of the function bestowed on cities is a matter of city government.<sup>89</sup>

To be sure, Justice Lehman’s observation does little to resolve situations of state and local conflict. To say that local governments have some measure of police power and can thereby undertake to protect

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87. See, e.g., *Porter v. City of Santa Barbara*, 35 P.2d 207, 207-08 (Cal. Dist. Ct. App. 1934); *Ex parte Hitchcock*, 166 P. 849, 849-51 (Cal. Dist. Ct. App. 1917); see also William Carey Jones, “Municipal Affairs” in *the California Constitution*, 1 CAL. L. REV. 132, 144 (1913); Sato, *supra* note 6, at 1094-98.

88. 167 N.E. 705 (N.Y. 1929).

89. *Id.* at 715 (Lehman, J., dissenting).

health, safety, and welfare in their communities is a far cry from viewing the resulting regulations as addressing solely matters of local concern. Some state courts, however, have built upon this acknowledgement of local police power authority a case for some local prerogative in certain instances.

Consider, for example, the 1984 case of *Kalodimos v. Village of Morton Grove*, in which the Illinois Supreme Court considered whether a local handgun regulation was properly within the scope of local affairs.<sup>90</sup> The court was strongly inclined to protect the local regulations from any claimed state interest in displacing local prerogative in the area of gun control. The court's analysis took as its starting point the notion just described, that matters of health and safety are properly viewed as local. However, the Illinois court stopped short of proclaiming that local gun control can be completely shielded from state intervention. The justices ended their opinion with the qualification that local handgun laws are within the scope of municipal home rule "provided that the legislature has taken no affirmative steps to circumscribe the measures that may be taken . . . ."<sup>91</sup>

## 2. Land use/zoning

Zoning power, post-*Village of Euclid*,<sup>92</sup> was quickly and aggressively asserted by local governments to be a matter within their prerogative.<sup>93</sup> To a great extent, states sat back and let municipalities make these decisions about how best to regulate local (and especially urban) space. Local authority to regulate land uses was, predictably, challenged by individuals and businesses adversely affected by these regulations. Home rule localities typically responded that zoning was a quintessentially local affair. To a great extent, courts agreed. Since the 1970s, however, the issue has become more complicated due to two (at least) major developments: (1) the rise of environmental protection efforts at the state level which implicated local initiatives. The problem here, usually, was with the *absence* of zoning laws at the local level; and, relatedly, (2) the anti-sprawl movement.<sup>94</sup>

Although the issue has become messier in recent decades, the courts still generally side with local governments in zoning disputes, in part no doubt because the core idea of local control over land use has become a deeply embedded norm. Classic zoning cases illustrate well the reluc-

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90. *Kalodimos v. Vill. of Morton Grove*, 470 N.E.2d 266, 269 (Ill. 1984).

91. *Id.* at 276.

92. *Vill. of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926).

93. Kenneth A. Stahl, *The Suburb as a Legal Concept: The Problem of Organization and the Fate of Municipalities in American Law*, 29 CARDOZO L. REV. 1193, 1266-68 (2008); Richard Briffault, *Our Localism Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 366 (1990); Charles M. Haar, *In Accordance with a Comprehensive Plan*, 68 HARV. L. REV. 1154, 1154-56 (1955).

94. *See, e.g.*, Barron, *supra* note 5, at 2259-63.

tance of state courts to displace local decisionmaking in land use contexts.<sup>95</sup> Local zoning power is generally upheld against state intervention.<sup>96</sup>

Colorado cases over the course of the last 100 years reveal the courts' grappling with the problem of how to reconcile a broad local power in regulating land use with a variety of legitimate statewide interests including the state's interest in uniformity across localities. This issue was at the heart of two recent Colorado Supreme Court cases involving the town of Telluride. First, in *Town of Telluride v. Lot Thirty-Four Venture, L.L.C.*,<sup>97</sup> the court in 2000 considered whether a local ordinance seeking to ensure the availability of affordable housing could be shielded from a general legislative prohibition against rent control.<sup>98</sup> The state legislature made its intentions clear in the statute: "The general assembly finds and declares that the imposition of rent control on private residential housing units is a matter of statewide concern."<sup>99</sup> Although it recognized that land use policy is "an area traditionally regulated by local government[,],"<sup>100</sup> the court concluded that rent control has both local and statewide implications.<sup>101</sup> As such, the state legislature was within its prerogative, consistent with Colorado's constitutional home rule provision, to displace Telluride's ordinance with its conflicting state law.

For Chief Justice Mullarkey in dissent, the principal flaw in the *Lot Thirty-Four Venture* majority's reasoning was its re-characterization of the local law as being not strictly a land use regulation because "the ordinance does not dictate permissible uses of real property."<sup>102</sup> Tacit in Chief Justice Mullarkey's dissent is the view that *if* the local ordinance were properly viewed as a land use regulation, then the state's interests would be required to give way to the interests of the municipality.<sup>103</sup>

Although Chief Justice Mullarkey's position did not prevail in the 2000 Telluride case, the basic structure of her argument won the day in the more recent Telluride case of *San Miguel Valley Corp.*<sup>104</sup> Here, as was discussed above, the issue was the municipality's exercise of eminent domain authority for open space/park purposes.<sup>105</sup> There could be little dispute that the regulation at issue was a "land use policy." Given

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95. See, e.g., *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977); *City of Eastlake v. Forest City Enters.*, 426 U.S. 668 (1976); *Warth v. Seldin*, 422 U.S. 490 (1975); *Vill. of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

96. See Barron, *supra* note 5, at 2378-79; Briffault, *Our Localism*, *supra* note 4, at 39-58.

97. 3 P.3d 30 (Colo. 2000).

98. *Id.* at 32.

99. COLO. REV. STAT. ANN. § 38-12-301 (West 2000).

100. *Lot Thirty-Four Venture*, 3 P.3d at 39 n.9.

101. *Id.* at 39.

102. *Id.* at 45 (Mullarkey, C.J., dissenting).

103. See *id.*

104. 185 P.3d 161 (Colo. 2008).

105. *Id.* at 163.

the Colorado court's earlier decision in *Lot Thirty-Four Venture*, one might have anticipated, nonetheless, that the court would proceed to consider whether this local land use policy conflicted with matters of statewide concern and therefore whether this was a case of mixed local and statewide interests. Not so. The court, incredibly, held the local government's land use policies to be shielded from state control whether or not statewide interests were implicated.<sup>106</sup> Justice Rice declared:

[N]o analysis of competing state and local interests is necessary where a statute purports to take away home rule powers granted by the constitution. . . .

[Therefore] we decline here to evaluate the statewide interests implicated by the extraterritorial condemnation of property by home rule municipalities for open space and parks. The legislature cannot prohibit the exercise of constitutional home rule powers, regardless of the state interests which may be implicated by the exercise of those powers.<sup>107</sup>

As these two cases illustrate, the force of the "land use is local" principle is a strong one.<sup>108</sup> At the same time, the structure of the Colorado Supreme Court's reasoning pivots on what exactly is meant by a "land use policy." In a general sense, most local regulations dealing in some way with real property can be characterized as land use regulations; by this logic (conspicuous in Chief Justice Mullarkey's dissent in the 2000 case<sup>109</sup> and in the majority's opinion in the 2008 Telluride case<sup>110</sup>), the states are quite limited in their ability to displace local regulations dealing with land. In a more specific sense, however, courts frequently look at what issues are implicated at the statewide level by a particular local regulation of land. The issues of extraterritorial effects and of the state interests in uniformity are central to this inquiry. Indeed, as was noted in Part III.A above, these two interests are two of the four criteria against which the Colorado Supreme Court evaluates constitutional home rule "immunity" claims. It is by no means clear, after the 2008 Telluride decision, whether the Colorado courts have decisively cordoned off from state interference local laws dealing with land. Indeed, given the wide swath of issues implicated by local land use regulation, one might expect that controversies will continue to arise in this area under Colorado law.

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106. *Id.* at 170.

107. *Id.* at 169-70.

108. *See, e.g., id.* at 167 (emphasis added): "[U]pon review of pertinent Colorado law, and considering our *state tradition* of conducting land planning at the local level, we conclude that condemnation for open space and parks is in fact a lawful, public, *local, and municipal* purpose within the scope of article XX."

109. *Lot Thirty-Four Venture*, 3 P.3d at 45 (Mullarkey, C.J., dissenting).

110. *San Miguel Valley Corp.*, 185 P.3d at 171.

Despite this longstanding preference for local prerogative in the area of zoning, there are some signs that the balance may ultimately shift in the direction of the state, in Colorado and elsewhere. Most notable in this regard are the expansion of state interests in environmental protection in recent decades, and the post-*Kelo*<sup>111</sup> property rights movement, which, at the state level, undertakes to limit significantly the discretion of local governments to engage in redevelopment takings.<sup>112</sup> Both of these movements have the potential to reshape considerably the legal relationship between state and local governments in the area of land use regulation without necessarily requiring any change in the courts' core view of land use regulation as a local affair. Time will tell whether and to what extent the courts ultimately reconstitute the relationship between state and local governments in the area of land use.

### 3. Employer/employee relations

Courts typically assert that employer/employee relations implicate matters of statewide concern, and require localities to defer to state legislative judgments in this area.<sup>113</sup> This tendency is a bit surprising in light of the fact that the extraterritorial impact of, and the state interest in uniformity in, local employer/employee relations are not apparent.<sup>114</sup> The state government's interest in this area is really an anti-interest, that is, an interest in resisting local experimentation. Local decisionmakers, to be sure, maintain a strong prerogative to set terms and hours of work and of wages in the first instance; yet, where state law intervenes, courts almost

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111. *Kelo v. City of New London*, 545 U.S. 469 (2005) (5-4 decision holding that city's exercise of eminent domain power to further an economic development plan satisfies the "public use" requirement of the Fifth Amendment).

112. See Marci A. Hamilton, *Political Responses to Supreme Court Decisions*, 32 HARV. J.L. & PUB. POL'Y 113, 120-21 (2009) (discussing response to *Kelo*, including fact that 13 states included takings initiatives on their ballots in 2006); Amnon Lehavi, *The Property Puzzle*, 96 GEO. L.J. 1987, 1988-89 (2008) (observing that *Kelo* "resulted in legal backlash in many states in the form of new legislation increasing restrictions on the use of eminent domain for private economic development and in judicial rulings interpreting state legal limits on the use of eminent domain more stringently than *Kelo*'s reading of the federal Constitution").

113. See, e.g., *Healy v. Indus. Accident Comm'n*, 258 P.2d 1, 3 (Cal. 1953); *Wilson v. Walters*, 119 P.2d 340, 344 (Cal. 1941); *City of Pasadena v. Charleville*, 10 P.2d 745, 748, 750 (Cal. 1932); *Shewbridge v. Police Comm'n of S.F.*, 149 P.2d 429, 431 (Cal. Dist. Ct. App. 1944); *People ex rel. Drake v. Mahaney*, 13 Mich. 481, 493, 495-96 (1865); *Uniformed Firefighters Ass'n v. City of New York*, 405 N.E.2d 679, 680 (N.Y. 1980); *City of Rocky River v. State Employment Relations Bd.*, 530 N.E.2d 1, 4-5 (Ohio 1988). But see *Sonoma County Org. of Pub. Employees v. County of Sonoma*, 591 P.2d 1, 12-13 (Cal. 1979) ("[B]oth the language of the Constitution and prior authority support the proposition . . . that the determination of the wages paid to employees of charter cities as well as charter counties is a matter of local rather than state-wide concern."); *Prof'l Fire Fighters, Inc. v. City of Los Angeles*, 384 P.2d 158, 166-69 (Cal. 1963); *Popper v. Broderick*, 56 P. 53, 55 (Cal. 1899) ("We are of opinion that the pay of firemen and policemen clearly falls within the term 'municipal affairs.'"). See generally MCBAIN, *supra* note 7, at 255 n.4; Briffault, *Our Localism*, *supra* note 4, at 16 n.53.

114. See *New Mexicans for Free Enter. v. City of Santa Fe*, 126 P.3d 1149, 1163-64 (N.M. Ct. App. 2005).



always rule that local interests give way to state interests in a general labor law.<sup>115</sup>

A recent case in California presents an interesting and relatively rare counter-example. In *County of Riverside v. Superior Court*,<sup>116</sup> the California Supreme Court sought to balance the state's interest in uniform employment laws with the prerogative of home rule counties to set salaries for county employees. At issue was whether a state statute which required stalled labor negotiations to be submitted by a locality to binding arbitration violated the county's prerogative to set Sheriffs' salaries.<sup>117</sup> The court answered "yes" and, in upholding local home rule authority in this area, reaffirmed that categorizing and balancing statewide concerns and local affairs in the area of labor and employment law is the province of the courts.<sup>118</sup> Notwithstanding *County of Riverside*, the categorical preference for statewide labor relations law seems as robust and well embedded in the strong home rule state of California as elsewhere nationally.<sup>119</sup>

Finally, at least one court has taken care to sort out employment matters from matters which, while nominally about employment, impinge significantly on the core political structure and organization of municipalities.<sup>120</sup> In a 1978 case involving certain Oregon cities' challenge to a state law requiring police and firemen employed by any city to be members of the state's Public Employees Retirement System, the Oregon Supreme Court in *City of La Grande v. Public Employees Retirement Board* upheld the state law.<sup>121</sup> The court distinguished between permissible state laws "addressed primarily to substantive social, economic, or other regulatory objectives of the state," and more troublesome state laws addressing "the structure and procedures of local agencies."<sup>122</sup> The court concluded that:

While the statewide retirement and insurance plans do displace other plans that local agencies have made, or might make, for these objectives, they are not irreconcilable with the freedom to charter their own governmental structures that are reserved to the citizens of Astoria and LaGrande by [the state constitution's home rule provision].<sup>123</sup>

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115. See, e.g., BRIFFAULT & REYNOLDS, *supra* note 14, at 390-91 (noting that although some state courts "have been particularly protective of local control over the local employment relationship," that "in most states, state law continues to play a major role in regulating the terms of municipal employment").

116. 66 P.3d 718 (Cal. 2003).

117. *Id.* at 721.

118. *Id.* at 721, 728.

119. See the cases cited in Briffault, *Our Localism*, *supra* note 4, at 17 n.54.

120. *City of La Grande v. Pub. Employees Ret. Bd.*, 576 P.2d 1204, 1215 (Or. 1978).

121. *Id.* at 1215.

122. *Id.*

123. *Id.*

#### 4. Civil rights laws

The issues with respect to local efforts to protect civil rights in the face of state laws that seek hegemony over such decisions are difficult ones that, by and large, have not been settled in the state courts under constitutional home rule. True, local anti-discrimination ordinances have frequently been held to be consistent with municipal home rule.<sup>124</sup> But the more difficult question of constitutional construction is whether these laws are immune from displacement by the state. In many of the modern home rule cases, the state courts manage to reconcile state and local law, and thereby uphold local civil rights laws, without needing to consider the question of whether the matter is one of purely local concern.

The most conspicuous and contentious context in which these issues have arisen is in the context of gay rights. Several state courts have upheld domestic partner ordinances under home rule, despite the shadow cast by the state's traditional regulation of marriage and divorce.<sup>125</sup> More direct interference by localities with traditional marriage, however, has not been well received by the courts. In *Lockyer v. City & County of San Francisco*,<sup>126</sup> for example, the California Supreme Court struck down the effort of San Francisco's mayor, Gavin Newsom, to issue marriage licenses to same-sex couples despite a clearly conflicting state law that authorized the granting of marriage licenses only to couples comprised of one man and one woman.<sup>127</sup> The court considered and rejected the possibility that the issuance of marriage licenses by local officials was a local affair that fell within the scope of California's broad home rule provision.

[T]he Legislature has enacted a comprehensive scheme regulating marriage in California, establishing the substantive standards for eligibility for marriage and setting forth in detail the procedures to be followed and the public officials who are entrusted with carrying out these procedures. In light of both the historical understanding reflected in this statutory scheme and the statutes' repeated emphasis on the importance of having uniform rules and procedures apply throughout the state to the subject of marriage, there can be no question but that marriage is a matter of "statewide concern" rather than a "municipal

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124. See BRIFFAULT & REYNOLDS, *supra* note 14, at 353 (observing that "[s]ome state courts have upheld local antidiscrimination ordinances that are more expansive than state antidiscrimination laws" and surveying cases); *id.* at 354-56 (observing that "[m]ost courts that have considered [domestic partnership and other measures protecting gays and lesbians against discrimination] have found that a state's constitutional or statutory grant of home rule power provides local governments with the authority to adopt them" and surveying cases).

125. See *id.* at 348-57 (surveying cases); see also Richard C. Schragger, *Cities as Constitutional Actors: The Case of Same-Sex Marriage*, 21 J.L. & POL. 147, 167-77 (2005).

126. 95 P.3d 459 (Cal. 2004).

127. *Id.* at 472.

affair” . . . and that state statutes dealing with marriage prevail over any conflicting local charter provision, ordinance, or practice.<sup>128</sup>

Viewed broadly, conflicts over local civil rights protection and state regulation are resolved by state courts on a theory of home rule that appears to privilege local creativity and initiative but, importantly, regards states as the principal in delineating and shaping civil rights protections. Ordinarily, states will not endeavor to displace local initiatives by declaring that certain groups are *not* protected—although there are noteworthy contrary examples, including the Colorado constitutional initiative struck down in *Romer v. Evans*<sup>129</sup> in 1996, and California’s Proposition 187<sup>130</sup> concerning illegal immigration. Rather, states will appeal to a general law that, they argue, is in conflict with specific local laws. Where the conflict is unavoidable, states typically win; where the conflict can be ameliorated with certain judicial constructions, the courts usually find that local law can rest alongside state law. As local governments continue to experiment with civil rights protections, we can expect more difficult home rule cases to come to center stage.

#### 5. Taxing authority

Many conflicts between state and local governments arise in the area of revenue generation through taxation, and much of the early home rule caselaw, therefore, concerns such conflicts.<sup>131</sup> Broadly speaking, the tendency of the courts in this area has been to defer to local judgments. The basic theory is that two bites at the economic apple are generally fine. So long as local governments do not make life more difficult for those who impose and collect state taxes, the courts are inclined to accord deference to local efforts to generate a revenue base.

A key taxation case is *California Federal Savings & Loan Ass’n v. City of Los Angeles*<sup>132</sup> in which the City of Los Angeles imposed a business license tax on all corporations, including commercial banks, doing business in the jurisdiction.<sup>133</sup> This municipal tax arguably conflicted with the state’s scheme of taxation for financial institutions. In striking down the local tax, the court deemed the taxation of financial institutions to be a matter of statewide concern and, therefore, *pro tanto*, not a municipal affair.<sup>134</sup> The principal basis for this holding was that the California legislature had revealed an interest in imposing a similar, state-

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128. See *id.* at 471.

129. 517 U.S. 620, 625 (1996).

130. See *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1300 (9th Cir. 1997).

131. See, e.g., *Weekes v. City of Oakland*, 579 P.2d 449, 573 (Cal. 1978); *Ex Parte Braun*, 74 P. 780, 780-81, 783-84 (Cal. 1903); *Century Plaza Hotel Co. v. City of Los Angeles*, 87 Cal. Rptr. 166, 167-70 (Cal. Ct. App. 1970); *City & County of Denver v. Sweet*, 329 P.2d 441, 442-43 (Colo. 1958); *Angell v. City of Toledo*, 91 N.E.2d 250, 251-52 (Ohio 1950).

132. 812 P.2d 916 (Cal. 1991).

133. *Id.* at 917-18.

134. See *id.* at 925.

wide tax, and that Los Angeles's efforts to independently tap this revenue source would undermine the state's program.<sup>135</sup>

One troubling aspect of the court's decision is that it presupposes that claiming goodies for itself and, correspondingly, leaving municipalities out in the cold, is a worthy state interest.<sup>136</sup> By this logic, state laws which undermine local fiscal authority more broadly and decisively would pass muster more easily under the home rule analysis than less invasive laws. Given the state's obvious incentive in expanding its own fiscal powers and in disabling competing intrastate institutions, the *California Federal Savings & Loan* analysis skews the result squarely in favor of the state and against the locality.

#### IV. ASSESSING THE COURTS' HOME RULE DECISIONMAKING

We have seen in Part III the various ways that the state courts have drawn lines between the state and local spheres of authority. In this Part we consider whether and to what extent that project has been a success. Such an assessment, we believe, has implications not only for state constitutionalism and home rule, but also for the appropriate role of the courts in demarcating and enforcing federal constitutional boundaries of state regulatory immunity.

The long and rich history of state courts crafting doctrines and working through, case by case, the adjudicatory problems posed by home rule provisions in the state constitution stands in stark contrast to the U.S. Supreme Court's holding in *Garcia v. San Antonio Metropolitan Transit Authority*<sup>137</sup> that the courts could not usefully, and should not, play a role in disputes under the Tenth Amendment<sup>138</sup> concerning the boundaries of state immunity from federal regulation. The fact that the U.S. Supreme Court has declared impossible<sup>139</sup> a task that lesser state courts regularly undertake underscores the importance and value of critically evaluating the state courts' work. If the state courts are in fact doing a good job, it would suggest that the task is far from impossible and, indeed, that the U.S. Supreme Court might do well to follow the state courts' lead. If,

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135. See *id.* at 926-27.

136. See Daniel B. Rodriguez, *State Supremacy, Local Sovereignty: Reconstructing State/Local Relations under the California Constitution*, in CONSTITUTIONAL REFORM IN CALIFORNIA 401, 408-09 (Bruce E. Cain & Roger G. Noll eds., 1995).

137. 469 U.S. 528 (1985).

138. U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.").

139. See, e.g., *Garcia*, 469 U.S. at 531 (observing that eight years of experience "persuades us that the attempt to draw the boundaries of state regulatory immunity in terms of 'traditional governmental function' is not only unworkable but is also inconsistent with established principles of federalism . . ."); *id.* at 546-47 (rejecting "as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional'"); *Nat'l League of Cities v. Usery*, 426 U.S. 833, 880 (1976) (Brennan, J., dissenting) (contending that the "essential-function test" is "conceptually unworkable").

instead, a close examination causes one to question the quality or feasibility of the state courts' work, then those courts might do well to adopt the *Garcia* Court's approach and abandon this particular line-drawing project.

In order to evaluate the state courts' home rule doctrines and decisions, one must first agree upon a metric or baseline against which to measure them. This fact is surprisingly often overlooked by commentators and appellate courts when they engage in such critiques.<sup>140</sup> In addition, it is important to note that there are two possible focuses of any evaluation of the work of the courts: the judicially crafted doctrine or test, and the court's application of that doctrine or test to the facts of individual cases.

By what standard should one evaluate the state courts' tests for distinguishing between "local affairs" and "matters of state-wide concern"?<sup>141</sup> Should one ask, for example, whether such a test, in the abstract, is coherent? Draws distinctions that are logical? Treats like cases alike?<sup>142</sup> Is likely to yield predictable results? Or appears to be an efficient means toward a proclaimed policy goal? Similarly, one might ask by what standard one should judge a state court's application of its home rule doctrine to the facts of individual cases: Are like cases treated alike? Are the results predictable? Are plausible justifications given for the distinctions that are drawn?

We do not propose to resolve these important questions involving the baselines that should be used in evaluating either aspect of the courts' work. We raise them largely to underscore the fact that one cannot properly assess the quality or success of a legal doctrine or judicial decision

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140. See, e.g., KRANE, ET AL., *supra* note 7, at 12 (terming the effort of the courts to sort out state and local interests "a quixotic quest," but applying no articulated standard when evaluating the cases). Similarly, George Vaubel has simply concluded, without elaboration, that the cases are "unpredictable" and "arbitrary":

Many observers lament the need for judicial decision as the greatest weakness of home rule. Forced to work with vague constitutional language supported only by an imprecise concept of "local matters," courts rest their decisions upon the facts and circumstances of each case. The results are unpredictable, if not, at times, arbitrary. Courts, involved in this impossible, or at least daunting task, equivocate.

George D. Vaubel, *Toward Principles of State Restraint Upon the Exercise of Municipal Power in Home Rule*, 20 STETSON L. REV. 5, 39 (1990) (footnotes omitted).

Perhaps the best known example of a court contending that a doctrine is "unworkable" or inadequate, without articulating a useful baseline against which to measure the cases is the U.S. Supreme Court in *Garcia*, 469 U.S. at 530 (contending that *Nat'l League of Cities* doctrine is unacceptable because although the Court "supplied some examples of 'traditional governmental functions,' it did not offer a general explanation of how a 'traditional' function is to be distinguished from a 'nontraditional' one"); *id.* at 539 (contending that "this Court has made little headway in defining the scope of the governmental functions deemed protected under *Nat'l League of Cities*").

141. See *supra* Parts III (Introduction) and III.A.

142. For a defense of the intriguing proposition that like cases need not be treated alike and that "[t]he principle 'treat like cases alike' has no independent moral force," see David A. Strauss, *Must Like Cases Be Treated Alike?* 2 (Chicago Pub. Law & Legal Theory Working Paper No. 24, May 2002), available at [http://ssrn.com/abstract\\_id=312180](http://ssrn.com/abstract_id=312180).

in a vacuum or against an unspecified ideal. In the absence of an appropriate, agreed-upon metric, we will nonetheless in the remainder of this Part attempt to evaluate the work of the state courts by closely examining several criticisms that logically might be levied against the *imperio* home rule doctrines that the courts have devised. These criticisms, not surprisingly, echo those discussed by the U.S. Supreme Court in the context of its efforts, pursuant to the Tenth Amendment, to protect traditional state functions,<sup>143</sup> “the functions essential to separate and independent existence” of the states,<sup>144</sup> from federal regulation.

First, one might contend that the doctrines that the courts have crafted pursuant to the *imperio* home rule provisions of their states’ constitutions are unworkable. The claim is that one cannot distinguish between matters of “local” or “municipal” concern versus matters of “statewide” concern with sufficient consistency nor define these terms with sufficient coherence.<sup>145</sup> This claim must be further parsed, however. The project of distinguishing between local/municipal and statewide matters of concern is mandated by the text of many state constitutions’ home rule provisions.<sup>146</sup> The Colorado Constitution, for example, authorizes any home rule city to make the laws governing “all its local and municipal matters,” and further stipulates that such local laws “shall supersede within the territorial limits and other jurisdiction of said city or town any law of the state in conflict therewith.”<sup>147</sup> Thus, any perceived problems with the coherence or “workability” of the larger project, including the defining or identifying of such “local and municipal matters,” are the fault of the drafters and ratifiers of the constitution’s home rule provision rather than of the courts.

If the claim, rather, is that the doctrines that the courts have crafted to explicate the distinction between local and statewide concerns and to guide the ensuing line-drawing are not capable of coherent or consistent

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143. See, e.g., *Nat’l League of Cities*, 426 U.S. at 851 (referring to services “which the States have traditionally afforded their citizens”); *id.* at 849 (“traditional aspects of state sovereignty”); *id.* at 852 (invoking “States’ freedom to structure integral operations in areas of traditional governmental functions”); *id.* at 854 (“activities in which the states have traditionally engaged”) (quoting *Unites States v. California*, 297 U.S. 175, 185 (1936)).

144. *Lane County v. Oregon*, 74 U.S. 71, 76 (1868) quoted in *Nat’l League of Cities*, 426 U.S. at 845; see also *Coyle v. Oklahoma*, 221 U.S. 559, 581 (1911); *Nat’l League of Cities*, 426 U.S. at 851; *id.* at 855 (referring to the states “choices as to how essential decisions regarding the conduct of integral governmental functions are to be made”).

145. Cf. *Garcia*, 469 U.S. at 530 (contending that *Nat’l League of Cities* doctrine is unacceptable because although the Court “supplied some examples of ‘traditional governmental functions,’ it did not offer a general explanation of how a ‘traditional’ function is to be distinguished from a ‘nontraditional’ one”); *id.* at 539 (contending that “this Court has made little headway in defining the scope of the governmental functions deemed protected under *Nat’l League of Cities*”); *id.* at 545 (“A nonhistorical standard for selecting immune governmental functions is likely to be just as unworkable as is a historical standard.”); *id.* at 546-47 (rejecting “as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is ‘integral’ or ‘traditional’”).

146. See state constitutional provisions cited *supra* note 12.

147. COLO. CONST. art. XX, § 6.

application, then several other questions arise: Against what baseline is “coherence” or “consistency” in this context usefully measured? How is a coherent or consistent application of *any* doctrine to be identified? What is an example of a judicial doctrine that *is* capable of the requisite level of coherence and consistency in its application? In this area, as in all others in which courts engage in constitutional interpretation, there is substantial, beneficial doctrinal path dependence that mitigates against large, abrupt, unexpected changes as a doctrine evolves. Can one ask more of a system of case-by-case adjudication than that it produce a roughly consistent and sensible pattern of cases that carry out the larger objectives of a defensible public policy?

In this regard, it should be noted that no less an authority than New York’s Chief Justice Cardozo affirmed some 80 years ago that drawing these lines was surely possible, although he did not answer any of the preceding questions in reaching that conclusion:

[T]he fundamental question to be determined is the line of division between city and state concerns. In every case, “it is necessary to inquire whether a proposed subject of legislation is a matter of State concern or of local concern.” . . . There are some affairs intimately connected with the exercise by the city of its corporate functions, which are city affairs only. Illustrations of these I have given, the laying out of parks, the building of recreations piers, the institution of public concerts. Many more could be enumerated. Most important of all, perhaps is the control of the locality over payments from the local purse. . . . There are other affairs exclusively those of the state, such as the law of domestic relations, of wills, of inheritance, of contracts, of crimes not essentially local (for example, larceny or forgery), the organization of courts, the procedure therein. None of these things can be said to touch the affairs that a city is organized to regulate, whether we have reference to history or to tradition or to the existing forms of charters.

. . . A zone, however, exists where state and city concerns overlap and intermingle. . . .

How great must be the infusion of local interest before fetters are imposed [on the power of the Legislature]? . . .

Considerations of “more or less” will lead us in such a case, and in many others, into a morass of indecision. The test is rather this: That, if the subject be in a substantial degree a matter of state concern, the Legislature may act, though intermingled with it are concerns of the locality. . . . I assume that, if the affair is partly state and partly local, the city is free to act until the state has intervened.<sup>148</sup>

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148. *Adler v. Deegan*, 167 N.E. 705, 713-14 (N.Y. 1929) (Cardozo, C.J., concurring) (citations omitted).

One need not simply defer, however, to Chief Justice Cardozo's implicit assessment that the courts are quite capable of drawing appropriate and principled lines between matters of state and local concern. The claim that the courts' *imperio* home rule doctrines are not capable of coherent or consistent application is problematic in several independent respects. First, in the absence of an agreed baseline against which various doctrines might be measured and compared, there is no reason to think that judicial linedrawing in this area is any less coherent or consistent than in other doctrinal areas. Second, one implication of concerns about the coherence or consistency of these doctrines is that the courts should play no role at all unless they can do so with some (unspecified) level of jurisprudential purity. The further implication is that judicial abstinence in this context is preferable to arguably imperfect judicial review.

Is there support for such a claim? Perhaps judicial review in this context is not in fact necessary or preferable. What if the state legislature were simply left to make its own determinations of what matters are of statewide versus local concern, without judicial oversight or interference? In enacting laws, the legislature in an *imperio* home rule state could be understood to have made a determination, implicitly or explicitly, that the matter at issue is of statewide concern. If the role of the courts under *imperio* home rule provisions is to correct any errors in these determinations by the legislature, such judicial review would arguably be unnecessary if either there were no legislative errors for the courts to correct or if the likelihood of subsequent judicial errors were at least as great as the likelihood of an initial legislative error. We take up each of these possibilities in turn.

Can the state legislature reasonably be expected *not* to encroach into areas of local concern? The argument, analogous to that set out by the *Garcia* majority in the federalism context,<sup>149</sup> would be that to the extent that localities and municipalities are represented in the state legislature, the state lawmaking process will inevitably and naturally protect their interests. In fact, however, representation in state legislatures does not respect the geographic boundaries of municipalities, let alone provide municipalities any analogue to the representation of states in the U.S. Senate. Thus, for example, the city of Austin is represented by two members of the Texas Senate, each of whom represents a portion of the city, and each of whom also represents various neighboring cities.<sup>150</sup> The

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149. See *Garcia*, 469 U.S. at 556-57; see also *Nat'l League of Cities*, 426 U.S. at 876-77 (Brennan, J., dissenting).

150. Texas Senate District 14 includes 84% of the city of Austin, as well as twenty-four other municipalities in Travis County. Texas Senate District 25 includes the remaining 16% of Austin, as well as six other municipalities in Travis County and all of the municipalities in each of three neighboring counties (Guadalupe, Hays, and Kendall). See TEXAS LEGISLATIVE COUNCIL, CITY AND CENSUS DESIGNATED PLACES (CDPS) REPORT BY DISTRICT, SENATE DISTRICT 14, SENATE



city of Austin has six Representatives in the Texas House, each of whom represents a different part of the city, and all but one of whom also represents some or all of several neighboring municipalities.<sup>151</sup> This structure of representation can offer no reassurance to those who contend that municipalities *could* protect themselves adequately within a state's political process, in the absence of any judicial review, *if* each municipality were represented within that process as a whole and separate municipality. That is, if one's concern, as embodied in *imperio* home rule provisions of state constitutions, is to ensure that home rule jurisdictions have a realm of autonomy from state regulation, the existing allocation of representation gives one no reason to think that the members of the state legislature will be especially keen to abstain from regulating in areas of "local concern."

It must be noted, however, that the *absence* of an analogue to the U.S. Senate within state legislatures may nonetheless protect localities from legislative encroachments on their autonomy in a different way. Since at least 1964, when the U.S. Supreme Court held in *Reynolds v. Sims*<sup>152</sup> that "the Equal Protection Clause requires that both houses of a state legislature be apportioned on a population basis,"<sup>153</sup> representation in each house of every state's legislature has been allocated among districts of equal population. This means that small and large municipalities receive equivalent representation, relative to their shares of the state's population. And this further means that the gains from any legislation that the state legislature passes are highly likely to be distributed across municipalities in proportion to their relative shares of the state's population.<sup>154</sup>

This state of affairs differs markedly from that surrounding the U.S. Senate, which affords large and small states equal representation, without regard to population. As one of us has demonstrated in previous work, the disproportionately great representation that the Senate affords small

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DISTRICT 25—PLAN 01188S, <http://www.fyi.legis.state.tx.us/Info.aspx?rpts=reports> (searchable database requiring input of search terms for specific district).

151. Texas House District 46 includes 18% of the city of Austin, part of one neighboring municipality, and all of another. House District 47 includes 13% of the city of Austin and all of ten neighboring municipalities. House District 48 includes 15% of the city of Austin, part of one neighboring municipality, and all of five others. House District 49 includes 21% of the city of Austin. House District 50 includes 13% of the city of Austin, part of five neighboring municipalities, and all of two others. House District 51 includes 19% of the city of Austin, part of one neighboring municipality, and all of two others. See TEXAS LEGISLATIVE COUNCIL, CITY AND CENSUS DESIGNATED PLACES (CDPS) REPORT BY DISTRICT, HOUSE DISTRICT 46, 47, 48, 49, 50, 51—PLAN 01368H, <http://www.fyi.legis.state.tx.us/Info.aspx?rpts=reports> (searchable database requiring input of search terms for specific district).

152. 377 U.S. 533 (1964).

153. *Id.* at 583.

154. See Lynn A. Baker & Samuel H. Dinkin, *The Senate: An Institution Whose Time Has Gone?*, 13 J.L. & POL. 21, 37 (1997); see also Baker, *Spending Power*, *supra* note 49, at 203-04; Lynn A. Baker, *Constitutional Ambiguities and Originalism: Lessons from the Spending Power*, 103 NW. U.L. REV. 495, 525 (2009) [hereinafter Baker, *Constitutional Ambiguities*].

population states, relative to their shares of the nation's population, results in small population states wielding disproportionately great power in Congress as a whole.<sup>155</sup> This in turn can be shown, both theoretically and empirically, to result in small states receiving a disproportionately large slice, and large states a disproportionately small slice, of the federal "pie."<sup>156</sup> This systematic redistribution of wealth from the larger states to the smaller ones cannot be explained by systematically greater poverty in the smaller states, nor can it be justified by any moral or economic theory.<sup>157</sup> In sum, the equal representation afforded states by the Senate systematically encroaches on the autonomy of the larger population states, to the benefit of the smaller states.

The thoroughly proportional structure of representation in state legislatures, combined with the absence of municipality-based representation, means that a subset of cities within a state are unlikely to be able systematically to harness the state lawmaking power to infringe on the autonomy of other cities.<sup>158</sup> At the same time, however, the absence of municipality-based representation may give the state legislature no particular reason to respect, and to refrain from legislating in, areas of "local concern." In sum, the structure of representation within the state legislature, taken alone, does not provide a persuasive argument that the state legislature can reasonably be expected *not* to encroach into areas of local concern.

If state legislatures cannot be presumed consistently to "get right" the divide between matters of local versus statewide concern, the question then becomes whether the addition of judicial review will reduce or increase the rate of errors in this area. In essence, the question is one of comparative institutional competence between state courts and state legislatures in the area of ensuring constitutionally mandated local autonomy.

At one level, this inquiry simply returns us to a variant of the questions with which we began: by what baseline or metric should one measure the competence of the court in this area? And what is the purpose of constitutional home rule provisions? If one looks beyond these questions to potentially relevant differences between courts and legislatures, however, it seems likely that judicial review will reduce rather than increase the rate of errors in identifying areas of local concern. Judicial

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155. See Baker & Dinkin, *supra* note 155, at 26-29; Baker, *Constitutional Ambiguities*, *supra* note 165, at 528-29.

156. See Baker & Dinkin, *supra* note 155, at 36-41; Baker, *Constitutional Ambiguities*, *supra* note 165, at 525-36; Baker, *Spending Power*, *supra* note 49, at 203-12.

157. See Baker & Dinkin, *supra* note 155, at 41-42; Baker, *Constitutional Ambiguities*, *supra* note 165, at 535; Baker, *Spending Power*, *supra* note 48, at 211.

158. Other provisions of state constitutions, most notably prohibitions on special legislation, may prevent this as well. See, e.g., BAKER & GILLETTE, *supra* note 14, at 224-43 (discussing and presenting cases involving prohibitions on "special" and "local" legislation).

norms can be expected to cause the courts to strive for continuity over time in deciding what is or is not a matter of local concern. Although this respect for precedent might be construed as resulting in “regressive” or “backward looking” decisions, it means that there is likely to be a predictability to those decisions. Appellate courts, especially, are likely to be attentive to the temporal “big picture” in a particular doctrinal area. The legislature, by contrast, operates under very different norms. The preferences of current interest groups and constituencies are likely to substantially affect legislative outcomes. In sum, as compared to the legislature, the courts seem to have relatively little incentive to be biased in their decisionmaking in favor of any particular interest group or constituency, and to be relatively more likely to be impartially concerned with the larger, theoretical question of what is a matter of local concern.

Finally, without regard to the persuasiveness of the above, some might contend that there is no reason for the courts to review legislation under the state constitution’s home rule provision because the courts are also reviewing legislation under a variety of other constitutional provisions designed to reign in plenary legislative power. Such provisions include prohibitions against special and local legislation, prohibitions on special commissions, and “public purpose” requirements for the issuance of debt and the spending of public funds.<sup>159</sup> Although the effect of some of these provisions in particular instances may be to prevent legislative encroachments on local autonomy, none of these other provisions has that as its focus. Consistent with that fact, at the time of their adoption, *imperio* home rule provisions were quite obviously not considered to be redundant with concurrently adopted or pre-existing constitutional constraints on plenary legislative power.<sup>160</sup>

#### CONCLUSION

In this Article, we have undertaken a preliminary critical examination of the role of the courts under *imperio* home rule provisions of state constitutions. We have set out a framework for understanding what it is

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159. See, e.g., BAKER & GILLETTE, *supra* note 14, at 222-43 (discussing and presenting cases involving prohibitions on special and local legislation); *id.* at 213-22 (discussing and presenting cases involving prohibitions on special commissions); *id.* at 393-448 (discussing and presenting cases involving constitutional requirements for the issuance of debt and the spending of public funds).

160. The first state to adopt *imperio* home rule was Missouri in its 1875 Constitution. The home rule provision granted only the city of St. Louis a power of initiative, which was required to be exercised “in harmony with and subject to the Constitution and laws” of Missouri. MO. CONST. art. IV, §§ 20-22 (1875). Importantly, however, the 1875 Constitution also included a prohibition on special and local laws. *Id.* art. IX, §§ 20-25. See also Libonati, *supra* note 22, at 109-24. In 1851, Indiana was the first state to include in its constitution a provision prohibiting local or special legislation. *Id.* at 122-23. And in 1872, Pennsylvania adopted a “ripper clause” constitutional provision limiting the power of the legislature to delegate municipal functions to a “special commission.” *Id.* at 123. Many states went on to adopt both of these types of provisions, as well as *imperio* home rule. See, e.g., *id.* at 114; KRANE ET AL., *supra* note 7, at 10-12; REYNOLDS, JR., *supra* note 14, at 90-114.

that state courts are doing when they review legislation that is challenged under these provisions, and have discussed in detail the courts' handling of a number of home rule disputes. We have then undertaken to assess the extent to which the attempts of the state courts to draw lines between the state and local spheres of authority has been a success. Our tentative conclusion is that the state courts do have a significant role to play in ensuring the local autonomy mandated by constitutional home rule, and that there is no compelling reason to declare this doctrinal project a failure, let alone one requiring judicial abdication.

In future work, we intend to investigate more elaborately, and with greater attention to political and structural considerations, the relationship between constitutional design, constitutional law, and the respective roles of the federal and state judiciaries. In particular, we hope to compare and contrast more fully the role of the state courts under imperio home rule and the role of the federal courts when considering federalism claims under the Tenth Amendment. Such a thoroughgoing positive analysis, we believe, has important implications for both the federal and state courts.

To the extent that the results of the preliminary analysis in this Article are borne out in future work, it may provide reassurance to the state courts that their attempts to police the boundaries between cities and states in home rule jurisdictions are important and should continue, notwithstanding the contrary jurisprudential claims of the U.S. Supreme Court in *Garcia*.<sup>161</sup> And, to the extent that the Court's decisions in *New York*,<sup>162</sup> *Lopez*,<sup>163</sup> and *Printz*<sup>164</sup> suggest that it has begun a retreat from its declaration of nonjusticiability in *Garcia*,<sup>165</sup> our work may offer reason

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161. See *Garcia*, 469 U.S. at 552.

162. See *New York v. United States*, 505 U.S. 144, 175-77 (1992) (invalidating a federal environmental regulation deemed to "'commandeer' state governments into the service of federal regulatory purposes" and therefore to be "inconsistent with the Constitution's division of authority between federal and state governments"); *id.* at 201-07 (White, J., dissenting) (questioning whether majority's decision in *New York* could be reconciled with *Garcia*).

163. See *United States v. Lopez*, 514 U.S. 549, 564 (1995) (identifying family law, criminal law enforcement, and education as areas "where States historically have been sovereign"); *id.* at 624 (Breyer, J., dissenting) (suggesting that Commerce Clause does not permit the federal government "to regulate 'marriage, divorce, and child custody,' or to regulate any and all aspects of education").

164. See, e.g., *Printz v. United States*, 521 U.S. 898, 933 (1997) (holding Brady Act unconstitutional on grounds that "the Federal Government may not compel the States to enact or administer a federal regulatory program"); *cf.* *Alden v. Maine*, 527 U.S. 706 (1999) (holding under Eleventh Amendment that Congress lacks authority to empower private citizens to sue states for damages in state court without the states' consent).

165. *Cf.* *Alden v. Maine*, 527 U.S. 706 (1999) (holding under Eleventh Amendment that Congress lacks authority to empower private citizens to sue states for damages in state court without the states' consent). Scholars disagree about the extent to which *Garcia* is still good law, though all agree that the Court has retreated from its position in *Garcia* that the courts have no role to play in delimiting or enforcing the federal-state divide. Compare, e.g., John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1311-12 (1997) (contending that *Garcia* is no longer "good law" nor "the controlling theory concerning judicial review of federalism questions"), and *id.* at 1334-35 (acknowledging that "the Court has yet to explicitly override *Garcia*," but contending that both the then-current majority on the Court as well as the dissenters "have acquiesced in the

for optimism that the federal courts can and should play a useful role in policing the federal/state divide.

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overruling of *Garcia*” in cases beginning with *Gregory v. Ashcroft*, 501 U.S. 452 (1991)), with Jay S. Bybee, *The Tenth Amendment Among the Shadows: On Reading the Constitution in Plato’s Cave*, 23 HARV. J.L. & PUB. POL’Y 551, 561 (2000) (describing *New York*, *Printz*, and *Alden* as “cases that chip away at,” rather than overrule, *Garcia*). See also Thomas H. Odom, *Foreword: An Introduction to the Symposium on the Federalism Decisions of the Supreme Court’s 1999 Term*, 25 OKLA. CITY U.L. REV. 783, 810-11 (2000) (observing that *New York* and *Printz* may be understood either “to effectively overrule *Garcia*” or “to create an ‘anti-commandeering’ exception to *Garcia*”).

**APPENDIX:  
HOME RULE PROVISIONS IN THE STATES IN 2009**

| • | State   | Type of Home Rule | Citation                                 | Home Rule Provision   |
|---|---------|-------------------|--|---|
| 1 | Alabama |                   |  |   |
| 2 | Alaska  | Legislative       | Alaska Const. art. X, § 11 (2009)        | <p>Section 11. Home Rule Powers</p> <p>A home rule borough or city may exercise all legislative powers not prohibited by law or by charter.</p>   |
| 3 | Arizona | Legislative       | Ariz. Const. art. XIII, §§ 2 & 3 (2008). | <p>§ 2. Charter; preparation and proposal by board of freeholders; ratification and approval; amendment</p> <p>Section 2. Any city containing, now or hereafter, a population of more than three thousand five hundred may frame a charter for its own government consistent with, and subject to, the Constitution and the laws of the State, in the following manner: A board of freeholders composed of fourteen qualified electors of said city may be elected at large by the qualified electors thereof, at a general or special election, whose duty it shall be, within ninety days after such election, to prepare and propose a charter for such city. Such proposed charter shall be signed in duplicate by the members of such board, or a majority of them, and filed, one copy of said proposed charter with the chief executive officer of such city and the other with the county recorder of the county in which said city shall be situated. Such proposed charter shall then be published in one or more newspapers published, and of general circulation, within said city for at least twenty-one days if in a daily paper, or in three consecutive issues if in a weekly paper, and the first publication shall be made within twenty days after the completion of the proposed charter. Within thirty days, and not earlier than twenty days, after such publication, said proposed charter shall be submitted to the vote of the qualified electors of said city at a general or special election. If a majority of such qualified electors voting thereon shall ratify such proposed charter, it shall thereupon be submitted to the Governor for his approval, and the Governor shall approve it if it shall not be in conflict with this Constitution or with the laws of the State. Upon such approval said charter shall become the organic law of such city and supersede any charter then existing (and all amendments thereto), and all ordinances inconsistent with said new charter. A copy of such charter, certified by the chief executive officer, and authenticated by the seal, of such city, together with a statement similarly certified</p> |

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\* The authors are grateful to George Hinchey, Univ. of Texas School of Law Class of 2009, who did the bulk of the research necessary for preparing this appendix.

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|   |          |         |   | <p>and authenticated setting forth the submission of such charter to the electors and its ratification by them, shall, after the approval of such charter by the Governor, be made in duplicate and filed, one copy in the office of the Secretary of State and the other in the archives of the city after being recorded in the office of said County Recorder. Thereafter all courts shall take judicial notice of said charter.</p> <p>The charter so ratified may be amended by amendments proposed and submitted by the legislative authority of the city to the qualified electors thereof (or by petition as hereinafter provided), at a general or special election, and ratified by a majority of the qualified electors voting thereon and approved by the Governor as herein provided for the approval of the charter.</p> <p>§ 3. Election of board of freeholders</p> <p>Section 3. An election of such board of freeholders may be called at any time by the legislative authority of any such city. Such election shall be called by the chief executive officer of any such city within ten days after there shall have been filed with him a petition demanding such election, signed by a number of qualified electors residing within such city equal to twenty-five per centum of the total number of votes cast at the next preceding general municipal election. Such election shall be held not later than thirty days after the call therefore. At such election a vote shall be taken upon the question whether further proceedings toward adopting a charter shall be had in pursuance to the call, and unless a majority of the qualified electors voting thereon shall vote to proceed further, no further proceedings shall be had, and all proceedings up to the time of said election shall be of no effect.</p> |
| 4 | Arkansas | Imperio | <p>A.C.A. § 14-42-307 (2008)</p> <p>A.C.A. § 14-43-602 (2008)</p> | <p>14-42-307. Powers of municipalities.</p> <p>(a) (1) Each municipality operating under a charter shall have the authority to exercise all powers relating to municipal affairs.</p> <p>(2) This grant of authority shall not be deemed to limit or restrict the powers of the General Assembly in matters of state affairs, nor shall this subchapter be construed as increasing or diminishing the powers of the state to regulate utilities not municipally owned or fix the rates thereof.</p> <p>(b) The following shall be deemed to be a part of the powers conferred upon the municipalities by this subchapter:</p> <p>(1) To levy, assess, and collect taxes within the limits prescribed in the charter adopted by the municipality and the limits prescribed in the Arkansas Constitution;</p> <p>(2) To furnish all local public services; to acquire property therefor by condemnation or otherwise, within or without the corporate limits, subject, however, to the provisions of the general laws of the State of Arkansas, including any law requiring</p>  |

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|   |            |         |   | <p>that the acquisition of a utility plant be approved by a municipal election. However, no property can be acquired under this subchapter by the issuance of bonds, notes, or other evidence of indebtedness unless the bonds, notes, or evidence of indebtedness is secured by the credit of the city and all the property therein;</p> <p>(3) To exercise all powers conferred by the state constitution and the General Assembly generally upon municipalities not contrary to this subchapter.</p> <p>(c) No municipality shall pass any laws contrary to the criminal laws of the State of Arkansas.</p> <p>14-43-602. Authority generally.</p> <p>Any city of the first class is authorized to perform any function and exercise full legislative power in any and all matters of whatsoever nature pertaining to its municipal affairs including, but not limited to, the power to tax.</p>  |
| 5 | California | Imperio | Cal Const, Art. XI §§ 3(a), 4(g), 5 & 6 (2008). | <p>§ 3. County and city charters</p> <p>(a) For its own government, a county or city may adopt a charter by majority vote of its electors voting on the question. The charter is effective when filed with the Secretary of State. A charter may be amended, revised, or repealed in the same manner. A charter, amendment, revision, or repeal thereof shall be published in the official state statutes. County charters adopted pursuant to this section shall supersede any existing charter and all laws inconsistent therewith. The provisions of a charter are the law of the State and have the force and effect of legislative enactments.</p> <p>§ 4. County charter provisions</p> <p>County charters shall provide for:</p> <p>(g) Whenever any county has framed and adopted a charter, and the same shall have been approved by the Legislature as herein provided, the general laws adopted by the Legislature in pursuance of Section 1(b) of this article, shall, as to such county, be superseded by said charter as to matters for which, under this section it is competent to make provision in such charter, and for which provision is made therein, except as herein otherwise expressly provided.</p> <p>§ 5. City charter provisions</p> <p>(a) It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws. City charters adopted pursuant to this Constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent</p> |



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|   |          |         |  | <p>therewith.</p> <p>(b) It shall be competent in all city charters to provide, in addition to those provisions allowable by this Constitution, and by the laws of the State for: (1) the constitution, regulation, and government of the city police force (2) subgovernment in all or part of a city (3) conduct of city elections and (4) plenary authority is hereby granted, subject only to the restrictions of this article, to provide therein or by amendment thereto, the manner in which, the method by which, the times at which, and the terms for which the several municipal officers and employees whose compensation is paid by the city shall be elected or appointed, and for their removal, and for their compensation, and for the number of deputies, clerks and other employees that each shall have, and for the compensation, method of appointment, qualifications, tenure of office and removal of such deputies, clerks and other employees.</p> <p>§ 6. Consolidation as charter city and county<br/>                 (a) A county and all cities within it may consolidate as a charter city and county as provided by statute.<br/>                 (b) A charter city and county is a charter city and a charter county. Its charter city powers supersede conflicting charter county powers.</p>   |
| 6 | Colorado | Imperio | <p>Colo. Const. Art. XX, § 6 (2008).</p> | <p>Section 6. Home rule for cities and towns</p> <p>The people of each city or town of this state, having a population of two thousand inhabitants as determined by the last preceding census taken under the authority of the United States, the state of Colorado or said city or town, are hereby vested with, and they shall always have, power to make, amend, add to or replace the charter of said city or town, which shall be its organic law and extend to all its local and municipal matters.</p> <p>Such charter and the ordinances made pursuant thereto in such matters shall supersede within the territorial limits and other jurisdiction of said city or town any law of the state in conflict therewith.</p> <p>Proposals for charter conventions shall be submitted by the city council or board of trustees, or other body in which the legislative powers of the city or town shall then be vested, at special elections, or at general, state or municipal elections, upon petition filed by qualified electors, all in reasonable conformity with section 5 of this article, and all proceedings thereon or thereafter shall be in reasonable conformity with sections 4 and 5 of this article.</p> <p>From and after the certifying to and filing with the secretary of state of a charter framed and approved in reasonable conformity with the provisions of this article, such city or town, and the citizens thereof, shall have the powers set out in sections 1, 4 and 5 of this article, and all other powers necessary, requisite or proper for the government and administration of its local and municipal matters, including power to legislate upon, provide, regulate,</p> |

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|  |  |  | <p>conduct and control:</p> <p>a. 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;</p> <p>b. The creation of police courts; the definition and regulation of the jurisdiction, powers and duties thereof, and the election or appointment of police magistrates therefor;</p> <p>c. The creation of municipal courts; the definition and regulation of the jurisdiction, powers and duties thereof, and the election or appointment of the officers thereof;</p> <p>d. All matters pertaining to municipal elections in such city or town, and to electoral votes therein on measures submitted under the charter or ordinances thereof, 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 form of ballots, balloting, challenging, canvassing, certifying the result, securing the purity of elections, guarding against abuses of the elective franchise, and tending to make such elections or electoral votes non-partisan in character;</p> <p>e. The issuance, refunding and liquidation of all kinds of municipal obligations, including bonds and other obligations of park, water and local improvement districts;</p> <p>f. The consolidation and management of park or water districts in such cities or towns or within the jurisdiction thereof; but no such consolidation shall be effective until approved by the vote of a majority, in each district to be consolidated, of the qualified electors voting therein upon the question;</p> <p>g. The assessment of property in such city or town for municipal taxation and the levy and collection of taxes thereon for municipal purposes and special assessments for local improvements; such assessments, levy and collection of taxes and special assessments to be made by municipal officials or by the county or state officials as may be provided by the charter;</p> <p>h. The imposition, enforcement and collection of fines and penalties for the violation of any of the provisions of the charter, or of any ordinance adopted in pursuance of the charter.</p> <p>It is the intention of this article to grant and confirm to the people of all municipalities coming within its provisions the full right of self-government in both local and municipal matters and the enumeration herein of certain powers shall not be construed to deny such cities and towns, and to the people thereof, any right or power essential or proper to</p> |
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|   |                    |         |                                  | <p>the full exercise of such right.</p> <p>The statutes of the state of Colorado, so far as applicable, shall continue to apply to such cities and towns, except insofar as superseded by the charters of such cities and towns or by ordinance passed pursuant to such charters.</p> <p>All provisions of the charters of the city and county of Denver and the cities of Pueblo, Colorado Springs and Grand Junction, as heretofore certified to and filed with the secretary of state, and of the charter of any other city heretofore approved by a majority of those voting thereon and certified to and filed with the secretary of state, which provisions are not in conflict with this article, and all elections and electoral votes heretofore had under and pursuant thereto, are hereby ratified, affirmed and validated as of their date.</p> <p>Any act in violation of the provisions of such charter or of any ordinance thereunder shall be criminal and punishable as such when so provided by any statute now or hereafter in force.</p> <p>The provisions of this section 6 shall apply to the city and county of Denver.</p> <p>This article shall be in all respects self-executing.</p>   |
| 7 | <b>Connecticut</b> | Imperio | Conn. Gen. Stat. § 7-148 (2008). | <p>Sec. 7-148. Scope of municipal powers</p> <p>(a) Definitions. Whenever used in this section, "municipality" means any town, city or borough, consolidated town and city or consolidated town and borough.</p> <p>(b) Ordinances. Powers granted to any municipality under the general statutes or by any charter or special act, unless the charter or special act provides to the contrary, shall be exercised by ordinance when the exercise of such powers has the effect of:</p> <p>(1) Establishing rules or regulations of general municipal application, the violation of which may result in the imposition of a fine or other penalty including community service for not more than twenty hours; or</p> <p>(2) Creating a permanent local law of general applicability.</p> <p>(c) Powers. Any municipality shall have the power to do any of the following, in addition to all powers granted to municipalities under the Constitution and general statutes:</p> <p>(1) Corporate powers. (A) Contract and be contracted with, sue and be sued, and institute, prosecute, maintain and defend any action or proceeding in any court of competent jurisdiction;</p> <p>(B) Provide for the authentication, execution and delivery of deeds, contracts, grants, and releases of</p> |

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|  |  |  | <p>municipal property and for the issuance of evidences of indebtedness of the municipality;</p> <p>(2) Finances and appropriations. (A) Establish and maintain a budget system;</p> <p>(B) Assess, levy and collect taxes for general or special purposes on all property, subjects or objects which may be lawfully taxed, and regulate the mode of assessment and collection of taxes and assessments not otherwise provided for, including establishment of a procedure for the withholding of approval of building application when taxes or water or sewer rates, charges or assessments imposed by the municipality are delinquent for the property for which an application was made;</p> <p>(C) Make appropriations for the support of the municipality and pay its debts;</p> <p>(D) Make appropriations for the purpose of meeting a public emergency threatening the lives, health or property of citizens, provided such appropriations shall require a favorable vote of at least two-thirds of the entire membership of the legislative body or, when the legislative body is the town meeting, at least two-thirds of those present and voting;</p> <p>(E) Make appropriations to military organizations, hospitals, health care facilities, public health nursing organizations, nonprofit museums and libraries, organizations providing drug abuse and dependency programs and any other private organization performing a public function;</p> <p>(F) Provide for the manner in which contracts involving unusual expenditures shall be made;</p> <p>(G) When not specifically prescribed by general statute or by charter, prescribe the form of proceedings and mode of assessing benefits and appraising damages in taking land for public use, or in making public improvements to be paid for, in whole or in part, by special assessments, and prescribe the manner in which all benefits assessed shall be collected;</p> <p>(H) Provide for the bonding of municipal officials or employees by requiring the furnishing of such bond, conditioned upon honesty or faithful performance of duty and determine the amount, form, and sufficiency of the sureties thereof;</p> <p>(I) Regulate the method of borrowing money for any purpose for which taxes may be levied and borrow on the faith and credit of the municipality for such general or special purposes and to such extent as is authorized by general statute;</p> <p>(J) Provide for the temporary borrowing of money;</p> <p>(K) Create a sinking fund or funds or a trust fund or funds or other special funds, including funds which do not lapse at the end of the municipal fiscal year;</p> |
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|  |  |  | <p>(L) Provide for the assignment of municipal tax liens on real property to the extent authorized by general statute;</p> <p>(3) Property. (A) Take or acquire by gift, purchase, grant, including any grant from the United States or the state, bequest or devise and hold, condemn, lease, sell, manage, transfer, release and convey such real and personal property or interest therein absolutely or in trust as the purposes of the municipality or any public use or purpose, including that of education, art, ornament, health, charity or amusement, cemeteries, parks or gardens, or the erection or maintenance of statues, monuments, buildings or other structures, require. Any lease of real or personal property or any interest therein, either as lessee or lessor, may be for such term or any extensions thereof and upon such other terms and conditions as have been approved by the municipality, including without limitation the power to bind itself to appropriate funds as necessary to meet rent and other obligations as provided in any such lease;</p> <p>(B) Provide for the proper administration of gifts, grants, bequests and devises and meet such terms or conditions as are prescribed by the grantor or donor and accepted by the municipality;</p> <p>(4) Public services. (A) Provide for police protection, regulate and prescribe the duties of the persons providing police protection with respect to criminal matters within the limits of the municipality and maintain and regulate a suitable place of detention within the limits of the municipality for the safekeeping of all persons arrested and awaiting trial and do all other things necessary or desirable for the policing of the municipality;</p> <p>(B) Provide for fire protection, organize, maintain and regulate the persons providing fire protection, provide the necessary apparatus for extinguishing fires and do all other things necessary or desirable for the protection of the municipality from fire;</p> <p>(C) Provide for entertainment, amusements, concerts, celebrations and cultural activities, including the direct or indirect purchase, ownership and operation of the assets of one or more sports franchises;</p> <p>(D) Provide for ambulance service by the municipality or any person, firm or corporation;</p> <p>(E) Provide for the employment of nurses;</p> <p>(F) Provide for lighting the streets, highways and other public places of the municipality and for the care and preservation of public lamps, lamp posts and fixtures;</p> <p>(G) Provide for the furnishing of water, by contract or otherwise;</p> <p>(H) Provide for or regulate the collection and</p> |
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|  |  |  | <p>disposal of garbage, trash, rubbish, waste material and ashes by contract or otherwise, including prohibiting the throwing or placing of such materials on the highways;</p> <p>(I) Provide for the financing, construction, rehabilitation, repair, improvement or subsidization of housing for low and moderate income persons and families;</p> <p>(5) Personnel. (A) Provide for and establish pension systems for the officers and employees of the municipality and for the active members of any volunteer fire department or any volunteer ambulance association of the municipality, and establish a system of qualification for the tenure in office of such officers and employees, provided the rights or benefits granted to any individual under any municipal retirement or pension system shall not be diminished or eliminated;</p> <p>(B) Establish a merit system or civil service system for the selection and promotion of public officials and employees. Nothing in this subparagraph shall be construed to validate any merit system or civil service system established prior to May 24, 1972;</p> <p>(C) Provide for the employment of and prescribe the salaries, compensation and hours of employment of all officers and employees of the municipality and the duties of such officers and employees not expressly defined by the Constitution of the state, the general statutes, charter or special act;</p> <p>(D) Provide for the appointment of a municipal historian;</p> <p>(6) Public works, sewers, highways. (A) Public facilities. (i) Establish, lay out, construct, reconstruct, alter, maintain, repair, control and operate cemeteries, public burial grounds, hospitals, clinics, institutions for children and aged, infirm and chronically ill persons, bus terminals and airports and their accessories, docks, wharves, school houses, libraries, parks, playgrounds, playfields, fieldhouses, baths, bathhouses, swimming pools, gymnasiums, comfort stations, recreation places, public beaches, beach facilities, public gardens, markets, garbage and refuse disposal facilities, parking lots and other off-street parking facilities, and any and all buildings or facilities necessary or convenient for carrying on the government of the municipality;</p> <p>(ii) Create, provide for, construct, regulate and maintain all things in the nature of public works and improvements;</p> <p>(iii) Enter into or upon any land for the purpose of making necessary surveys or mapping in connection with any public improvement, and take by eminent domain any lands, rights, easements, privileges, franchises or structures which are necessary for the purpose of establishing, constructing or maintaining any public work, or for any</p> |
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|  |  |  | <p>municipal purpose, in the manner prescribed by the general statutes;</p> <p>(iv) Regulate and protect from injury or defacement all public buildings, public monuments, trees and ornaments in public places and other public property in the municipality;</p> <p>(v) Provide for the planting, rearing and preserving of shade and ornamental trees on the streets and public grounds;</p> <p>(vi) Provide for improvement of waterfronts by a board, commission or otherwise;</p> <p>(B) Sewers, drainage and public utilities. (i) Lay out, construct, reconstruct, repair, maintain, operate, alter, extend and discontinue sewer and drainage systems and sewage disposal plants;</p> <p>(ii) Enter into or upon any land for the purpose of correcting the flow of surface water through water-courses which prevent, or may tend to prevent, the free discharge of municipal highway surface water through said courses;</p> <p>(iii) Regulate the laying, location and maintenance of gas pipes, water pipes, drains, sewers, poles, wires, conduits and other structures in the streets and public places of the municipality;</p> <p>(iv) Prohibit and regulate the discharge of drains from roofs of buildings over or upon the sidewalks, streets or other public places of the municipality or into sanitary sewers;</p> <p>(C) Highways and sidewalks. (i) Lay out, construct, reconstruct, alter, maintain, repair, control, operate, and assign numbers to streets, alleys, highways, boulevards, bridges, underpasses, sidewalks, curbs, gutters, public walks and parkways;</p> <p>(ii) Keep open and safe for public use and travel and free from encroachment or obstruction the streets, sidewalks and public places in the municipality;</p> <p>(iii) Control the excavation of highways and streets;</p> <p>(iv) Regulate and prohibit the excavation, altering or opening of sidewalks, public places and grounds for public and private purposes and the location of any work or things thereon, whether temporary or permanent, upon or under the surface thereof;</p> <p>(v) Require owners or occupants of land adjacent to any sidewalk or public work to remove snow, ice, sleet, debris or any other obstruction therefrom, provide penalties upon their failure to do so, and cause such snow, ice, sleet, debris or other obstruction to be removed and make the cost of such removal a lien on such property;</p> <p>(vi) Grant to abutting property owners a limited</p> |
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|  |  |  | <p>property or leasehold interest in abutting streets and sidewalks for the purpose of encouraging and supporting private commercial development;</p> <p>(7) Regulatory and police powers. (A) Buildings.</p> <p>(i) Make rules relating to the maintenance of safe and sanitary housing;</p> <p>(ii) Regulate the mode of using any buildings when such regulations seem expedient for the purpose of promoting the safety, health, morals and general welfare of the inhabitants of the municipality;</p> <p>(iii) Regulate and prohibit the moving of buildings upon or through the streets or other public places of the municipality, and cause the removal and demolition of unsafe buildings and structures;</p> <p>(iv) Regulate and provide for the licensing of parked trailers when located off the public highways, and trailer parks or mobile manufactured home parks, except as otherwise provided by special act and except where there exists a local zoning commission so empowered;</p> <p>(v) Establish lines beyond which no buildings, steps, stoop, veranda, billboard, advertising sign or device or other structure or obstruction may be erected;</p> <p>(vi) Regulate and prohibit the placing, erecting or keeping of signs, awnings or other things upon or over the sidewalks, streets and other public places of the municipality;</p> <p>(vii) Regulate plumbing and house drainage;</p> <p>(viii) Prohibit or regulate the construction of dwellings, apartments, boarding houses, hotels, commercial buildings, youth camps or commercial camps and commercial camping facilities in such municipality unless the sewerage facilities have been approved by the authorized officials of the municipality;</p> <p>(B) Traffic. (i) Regulate and prohibit, in a manner not inconsistent with the general statutes, traffic, the operation of vehicles on streets and highways, off-street parking and on-street residential neighborhood parking areas in which on-street parking is limited to residents of a given neighborhood, as determined by the municipality;</p> <p>(ii) Regulate the speed of vehicles, subject to the provisions of the general statutes relating to the regulation of the speed of motor vehicles and of animals, and the driving or leading of animals through the streets;</p> <p>(C) Building adjuncts. Regulate and prohibit the construction or use, and require the removal of sinks, cesspools, drains, sewers, privies, barns, outhouses and poultry pens and houses;</p> <p>(D) Animals. (i) Regulate and prohibit the going at</p> |
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|  |  |  | <p>large of dogs and other animals in the streets and public places of the municipality and prevent cruelty to animals and all inhuman sports;</p> <p>(ii) Regulate and prohibit the keeping of wild or domestic animals, including reptiles, within the municipal limits or portions thereof;</p> <p>(E) Nuisance. Define, prohibit and abate within the municipality all nuisances and causes thereof, and all things detrimental to the health, morals, safety, convenience and welfare of its inhabitants and cause the abatement of any nuisance at the expense of the owner or owners of the premises on which such nuisance exists;</p> <p>(F) Loitering and trespassing. (i) Keep streets, sidewalks and public places free from undue noise and nuisances, and prohibit loitering thereon;</p> <p>(ii) Regulate loitering on private property with the permission of the owner thereof;</p> <p>(iii) Prohibit the loitering in the nighttime of minors on the streets, alleys or public places within its limits;</p> <p>(iv) Prevent trespassing on public and private lands and in buildings in the municipality;</p> <p>(G) Vice. Prevent vice and suppress gambling houses, houses of ill-fame and disorderly houses;</p> <p>(H) Public health and safety. (i) Secure the safety of persons in or passing through the municipality by regulation of shows, processions, parades and music;</p> <p>(ii) Regulate and prohibit the carrying on within the municipality of any trade, manufacture, business or profession which is, or may be, so carried on as to become prejudicial to public health, conducive to fraud and cheating, or dangerous to, or constituting an unreasonable annoyance to, those living or owning property in the vicinity;</p> <p>(iii) Regulate auctions and garage and tag sales;</p> <p>(iv) Prohibit, restrain, license and regulate the business of peddlers, auctioneers and junk dealers in a manner not inconsistent with the general statutes;</p> <p>(v) Regulate and prohibit swimming or bathing in the public or exposed places within the municipality;</p> <p>(vi) Regulate and license the operation of amusement parks and amusement arcades including, but not limited to, the regulation of mechanical rides and the establishment of the hours of operation;</p> <p>(vii) Prohibit, restrain, license and regulate all sports, exhibitions, public amusements and per-</p> |
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|  |  |  |  | <p>formances and all places where games may be played;</p> <p>(viii) Preserve the public peace and good order, prevent and quell riots and disorderly assemblages and prevent disturbing noises;</p> <p>(ix) Establish a system to obtain a more accurate registration of births, marriages and deaths than the system provided by the general statutes in a manner not inconsistent with the general statutes;</p> <p>(x) Control insect pests or plant diseases in any manner deemed appropriate;</p> <p>(xi) Provide for the health of the inhabitants of the municipality and do all things necessary or desirable to secure and promote the public health;</p> <p>(xii) Regulate the use of streets, sidewalks, highways, public places and grounds for public and private purposes;</p> <p>(xiii) Make and enforce police, sanitary or other similar regulations and protect or promote the peace, safety, good government and welfare of the municipality and its inhabitants;</p> <p>(xiv) Regulate, in addition to the requirements under section 7-282b, the installation, maintenance and operation of any device or equipment in a residence or place of business which is capable of automatically calling and relaying recorded emergency messages to any state police or municipal police or fire department telephone number or which is capable of automatically calling and relaying recorded emergency messages or other forms of emergency signals to an intermediate third party which shall thereafter call and relay such emergency messages to a state police or municipal police or fire department telephone number. Such regulations may provide for penalties for the transmittal of false alarms by such devices or equipment;</p> <p>(xv) Make and enforce regulations preventing housing blight, including regulations reducing assessments, provided such regulations define housing blight, and including regulations establishing a duty to maintain property and specifying standards to determine if there is neglect; prescribe fines for the violation of such regulations of not less than ten or more than one hundred dollars for each day that a violation continues and, if such fines are prescribed, such municipality shall adopt a citation hearing procedure in accordance with section 7-152c;</p> <p>(8) The environment. (A) Provide for the protection and improvement of the environment including, but not limited to, coastal areas, wetlands and areas adjacent to waterways in a manner not inconsistent with the general statutes;</p> |
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|   |                 |             |                          | <p>(B) Regulate the location and removal of any offensive manure or other substance or dead animals through the streets of the municipality and provide for the disposal of same;</p> <p>(C) Except where there exists a local zoning commission, regulate the filling of, or removal of, soil, loam, sand or gravel from land not in public use in the whole, or in specified districts of, the municipality, and provide for the reestablishment of ground level and protection of the area by suitable cover;</p> <p>(D) Regulate the emission of smoke from any chimney, smokestack or other source within the limits of the municipality, and provide for proper heating of buildings within the municipality;</p> <p>(9) Human rights. (A) Provide for fair housing;</p> <p>(B) Adopt a code of prohibited discriminatory practices;</p> <p>(10) Miscellaneous. (A) Make all lawful regulations and ordinances in furtherance of any general powers as enumerated in this section, and prescribe penalties for the violation of the same not to exceed two hundred fifty dollars, unless otherwise specifically provided by the general statutes. Such regulations and ordinances may be enforced by citations issued by designated municipal officers or employees, provided the regulations and ordinances have been designated specifically by the municipality for enforcement by citation in the same manner in which they were adopted and the designated municipal officers or employees issue a written warning providing notice of the specific violation before issuing the citation;</p> <p>(B) Adopt a code of ethical conduct;</p> <p>(C) Establish and maintain free legal aid bureaus;</p> <p>(D) Perform data processing and related administrative computer services for a fee for another municipality;</p> <p>(E) Adopt the model ordinance concerning a municipal freedom of information advisory board created under subsection (f) of section 1-205 and establish a municipal freedom of information advisory board as provided by said ordinance and said section.</p> |
| 8 | <b>Delaware</b> | Legislative | 22 Del. C. § 802 (2008). | <p>§ 802. Applicability of chapter; grant of power</p> <p>Every municipal corporation in this State containing a population of at least 1,000 persons as shown by the last official federal decennial census may proceed as set forth in this chapter to amend its municipal charter and may, subject to the conditions and limitations imposed by this chapter, amend its charter so as to have and assume all powers which, under the Constitution of this State,</p>   |

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|   |                |         |                              | it would be competent for the General Assembly to grant by specific enumeration and which are not denied by statute. This grant of power does not include the power to enact private or civil law governing civil relationships except as an incident to an exercise of an independent municipal power, nor does it include power to define and provide for the punishment of a felony.  |
| 9 | <b>Florida</b> | Imperio | Fla. Stat. § 166.021 (2009). | <p>§ 166.02. Powers</p> <p>(1) As provided in s. 2(b), Art. VIII of the State Constitution, municipalities shall have the governmental, corporate, and proprietary powers to enable them to conduct municipal government, perform municipal functions, and render municipal services, and may exercise any power for municipal purposes, except when expressly prohibited by law.</p> <p>(2) "Municipal purpose" means any activity or power which may be exercised by the state or its political subdivisions.</p> <p>(3) The Legislature recognizes that pursuant to the grant of power set forth in s. 2(b), Art. VIII of the State Constitution, the legislative body of each municipality has the power to enact legislation concerning any subject matter upon which the state Legislature may act, except:</p> <p>(a) The subjects of annexation, merger, and exercise of extraterritorial power, which require general or special law pursuant to s. 2(c), Art. VIII of the State Constitution;</p> <p>(b) Any subject expressly prohibited by the constitution;</p> <p>(c) Any subject expressly preempted to state or county government by the constitution or by general law; and</p> <p>(d) Any subject preempted to a county pursuant to a county charter adopted under the authority of ss. 1(g), 3, and 6(e), Art. VIII of the State Constitution.</p> <p>(4) The provisions of this section shall be so construed as to secure for municipalities the broad exercise of home rule powers granted by the constitution. It is the further intent of the Legislature to extend to municipalities the exercise of powers for municipal governmental, corporate, or proprietary purposes not expressly prohibited by the constitution, general or special law, or county charter and to remove any limitations, judicially imposed or otherwise, on the exercise of home rule powers other than those so expressly prohibited. However, nothing in this act shall be construed to permit any changes in a special law or municipal charter which affect the exercise of extraterritorial powers or which affect an area which includes lands within and without a municipality or any changes in a special law or municipal charter which affect the creation or existence of a municipality,</p> |

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|  |  |  | <p>the terms of elected officers and the manner of their election except for the selection of election dates and qualifying periods for candidates and for changes in terms of office necessitated by such changes in election dates, the distribution of powers among elected officers, matters prescribed by the charter relating to appointive boards, any change in the form of government, or any rights of municipal employees, without approval by referendum of the electors as provided in s. 166.031. Any other limitation of power upon any municipality contained in any municipal charter enacted or adopted prior to July 1, 1973, is hereby nullified and repealed.</p> <p>(5) All existing special acts pertaining exclusively to the power or jurisdiction of a particular municipality except as otherwise provided in subsection (4) shall become an ordinance of that municipality on the effective date of this act, subject to modification or repeal as other ordinances.</p> <p>(6) The governing body of a municipality may require that any person within the municipality demonstrate the existence of some arrangement or contract by which such person will dispose of solid waste in a manner consistent with the ordinances of the county or municipality or state or federal law. For any person who will produce special wastes or biomedical waste, as the same may be defined by state or federal law or county or city ordinance, the municipality may require satisfactory proof of a contract or similar arrangement by which special or biomedical wastes will be collected by a qualified and duly licensed collector and disposed of in accordance with the laws of Florida or the Federal Government.</p> <p>(7) Notwithstanding the prohibition against extra compensation set forth in s. 215.425, the governing body of a municipality may provide for an extra compensation program, including a lump-sum bonus payment program, to reward outstanding employees whose performance exceeds standards, if the program provides that a bonus payment may not be included in an employee's regular base rate of pay and may not be carried forward in subsequent years.</p> <p>(8) Entities that are funded wholly or in part by the municipality, at the discretion of the municipality, may be required by the municipality to conduct a performance audit paid for by the municipality. An entity shall not be considered as funded by the municipality by virtue of the fact that such entity utilizes the municipality to collect taxes, assessments, fees, or other revenue. If an independent special district receives municipal funds pursuant to a contract or interlocal agreement for the purposes of funding, in whole or in part, a discrete program of the district, only that program may be required by the municipality to undergo a performance audit.</p> <p>(9) (a) The Legislature finds and declares that this</p> |
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|  |  |  | <p>state faces increasing competition from other states and other countries for the location and retention of private enterprises within its borders. Furthermore, the Legislature finds that there is a need to enhance and expand economic activity in the municipalities of this state by attracting and retaining manufacturing development, business enterprise management, and other activities conducive to economic promotion, in order to provide a stronger, more balanced, and stable economy in the state, to enhance and preserve purchasing power and employment opportunities for the residents of this state, and to improve the welfare and competitive position of the state. The Legislature declares that it is necessary and in the public interest to facilitate the growth and creation of business enterprises in the municipalities of the state.</p> <p>(b) The governing body of a municipality may expend public funds to attract and retain business enterprises, and the use of public funds toward the achievement of such economic development goals constitutes a public purpose. The provisions of this chapter which confer powers and duties on the governing body of a municipality, including any powers not specifically prohibited by law which can be exercised by the governing body of a municipality, shall be liberally construed in order to effectively carry out the purposes of this subsection.</p> <p>(c) For the purposes of this subsection, it constitutes a public purpose to expend public funds for economic development activities, including, but not limited to, developing or improving local infrastructure, issuing bonds to finance or refinance the cost of capital projects for industrial or manufacturing plants, leasing or conveying real property, and making grants to private enterprises for the expansion of businesses existing in the community or the attraction of new businesses to the community.</p> <p>(d) Nothing contained in this subsection shall be construed as a limitation on the home rule powers granted by the State Constitution for municipalities.</p> <p>(10) (a) As used in this subsection, the term:</p> <ol style="list-style-type: none"> <li>1. "Authorized person" means a person: <ol style="list-style-type: none"> <li>a. Other than an officer or employee, as defined in this paragraph, whether elected or commissioned or not, who is authorized by a municipality or agency thereof to incur travel expenses in the performance of official duties;</li> <li>b. Who is called upon by a municipality or agency thereof to contribute time and services as consultant or advisor; or</li> <li>c. Who is a candidate for an executive or professional position with a municipality or agency thereof.</li> </ol> </li> </ol> |
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|  |  |  | <p>2. "Employee" means an individual, whether commissioned or not, other than an officer or authorized person as defined in this paragraph, who is filling a regular or full-time authorized position and is responsible to a municipality or agency thereof.</p> <p>3. "Officer" means an individual who, in the performance of his or her official duties, is vested by law with sovereign powers of government and who is either elected by the people, or commissioned by the Governor and who has jurisdiction extending throughout the municipality, or any person lawfully serving instead of either of the foregoing two classes of individuals as initial designee or successor.</p> <p>4. "Traveler" means an officer, employee, or authorized person, when performing travel authorized by a municipality or agency thereof.</p> <p>(b) Notwithstanding s. 112.061, the governing body of a municipality or an agency thereof may provide for a per diem and travel expense policy for its travelers which varies from the provisions of s. 112.061. Any such policy provided by a municipality or an agency thereof on January 1, 2003, shall be valid and in effect for that municipality or agency thereof until otherwise amended. A municipality or agency thereof that provides any per diem and travel expense policy pursuant to this subsection shall be deemed to be exempt from all provisions of s. 112.061. A municipality or agency thereof that does not provide a per diem and travel expense policy pursuant to this subsection remains subject to all provisions of s. 112.061.</p> <p>(c) Travel claims submitted by a traveler in a municipality or agency thereof which is exempted from the provisions of s. 112.061, pursuant to paragraph (b), shall not be required to be sworn to before a notary public or other officer authorized to administer oaths, but any claim authorized or required to be made under any per diem and travel expense policy of a municipality or agency thereof must contain a statement that the expenses were actually incurred by the traveler as necessary travel expenses in the performance of official duties and shall be verified by a written declaration that it is true and correct as to every material matter; and any person who willfully makes and subscribes any such claim that he or she does not believe to be true and correct as to every material matter, or who willfully aids or assists in, or procures, counsels, or advises the preparation or presentation of such a claim that is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such claim, commits a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083. Whoever receives an allowance or reimbursement by means of a false claim is civilly liable in the amount of the overpayment for the reimbursement of the public</p> |
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| 10 | <b>Georgia</b>  | Imperio   | Ga. Const. Art. IX, § II, Para. II (2008)        | <p>PARAGRAPH II. Home rule for municipalities</p> <p>The General Assembly may provide by law for the self-government of municipalities and to that end is expressly given the authority to delegate its power so that matters pertaining to municipalities may be dealt with without the necessity of action by the General Assembly.</p>   |
| 11 | <b>Hawaii</b>   | Imperio – no municipalities – Home Rule only for counties | HRS Const. Art. VIII, § 2 (2008).                | <p>Section 2. LOCAL SELF-GOVERNMENT; CHARTER.</p> <p>Each political subdivision shall have the power to frame and adopt a charter for its own self-government within such limits and under such procedures as may be provided by general law. Such procedures, however, shall not require the approval of a charter by a legislative body. Charter provisions with respect to a political subdivision's executive, legislative and administrative structure and organization shall be superior to statutory provisions, subject to the authority of the legislature to enact general laws allocating and reallocating powers and functions.</p> <p>A law may qualify as a general law even though it is inapplicable to one or more counties by reason of the provisions of this section.</p>   |
| 12 | <b>Idaho</b>    | Imperio   | Idaho Const. Art. XII, § 2 (2008)                | <p>§ 2. Local police regulations authorized</p> <p>Any county or incorporated city or town may make and enforce, within its limits, all such local police, sanitary and other regulations as are not in conflict with its charter or with the general laws.</p>   |
| 13 | <b>Illinois</b> | Legislative   | 65 ILCS 5/1-1-5 (2009)<br>65 ILCS 5/1-1-7 (2009) | <p>Sec. 1-1-5. The corporate authorities of each municipality may exercise jointly, with one or more other municipal corporations or governmental subdivisions or districts, all of the powers set forth in this Code unless expressly provided otherwise. In this section "municipal corporations or governmental subdivisions or districts" includes, but is not limited to, municipalities, townships, counties, school districts, park districts, sanitary districts, and fire protection districts.</p> <p>§ 65 ILCS 5/1-1-7. Power of municipality to contract with school boards, hospitals, commercial and industrial facilities, and owners of shopping centers or apartment complexes. The corporate authorities of any municipality shall have the power to contract with school boards, hospitals, commercial and industrial facilities, and owners of shopping centers or apartment complexes within and without the municipal limits in such manner as is provided by Section 11-209 of "The Illinois Vehicle Code", approved September 29, 1969, as amended [625 ILCS 5/11-209], and as provided under Section 2 of "An Act in relation to the regulation of motor vehicle traffic and the promotion of safety on public highways in counties", approved August 9, 1951, as amended.</p> |
| 14 | <b>Indiana</b>  | Legislative   | Burns Ind. Code Ann. §                           | 36-1-3-4. Presumption that unit has powers necessary to conduct affairs. (a) The rule of law that a   |



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|    |               |         | <p>36-1-3-4 (2009)</p> <p>Burns Ind. Code Ann. § 36-1-3-5 (2009)</p> | <p>unit has only:</p> <p>(1) Powers expressly granted by statute;</p> <p>(2) Powers necessarily or fairly implied in or incident to powers expressly granted; and</p> <p>(3) Powers indispensable to the declared purposes of the unit;</p> <p>is abrogated.</p> <p>(b) A unit has:</p> <p>(1) All powers granted it by statute; and</p> <p>(2) All other powers necessary or desirable in the conduct of its affairs, even though not granted by statute.</p> <p>(c) The powers that units have under subsection (b)(1) are listed in various statutes. However, these statutes do not list the powers that units have under subsection (b)(2); therefore, the omission of a power from such a list does not imply that units lack that power.</p> <p>36-1-3-5. Limitations on exercise of powers by statute or constitution.</p> <p>(a) Except as provided in subsection (b), a unit may exercise any power it has to the extent that the power:</p> <p>(1) Is not expressly denied by the Indiana Constitution or by statute; and</p> <p>(2) Is not expressly granted to another entity.</p> <p>(b) A township may not exercise power the township has if another unit in which all or part of the township is located exercises that same power.</p> |
| 15 | <b>Iowa</b>   | Imperio | <p>Iowa Const., Art. III § 38A (2008)</p>                            | <p>Sec. 38A. Municipal home rule.</p> <p>Municipal corporations are granted home rule power and authority, not inconsistent with the laws of the general assembly, to determine their local affairs and government, except that they shall not have power to levy any tax unless expressly authorized by the general assembly.</p> <p>The rule or proposition of law that a municipal corporation possesses and can exercise only those powers granted in express words is not a part of the law of this state.</p>  |
| 16 | <b>Kansas</b> | Imperio | <p>Kan. Const. Art. 12, § 5 (2007)</p> <p>K.S.A. § 12-101 (2007)</p> | <p>5. Cities' powers of home rule.</p> <p>(a) The legislature shall provide by general law, applicable to all cities, for the incorporation of cities and the methods by which city boundaries may be altered, cities may be merged or consolidated and cities may be dissolved: Provided, That existing laws on such subjects not applicable to all</p>   |

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|  |  |  | <p>cities on the effective date of this amendment shall remain in effect until superseded by general law and such existing laws shall not be subject to charter ordinance.</p> <p>(b) Cities are hereby empowered to determine their local affairs and government including the levying of taxes, excises, fees, charges and other exactions except when and as the levying of any tax, excise, fee, charge or other exaction is limited or prohibited by enactment of the legislature applicable uniformly to all cities of the same class: Provided, That the legislature may establish not to exceed four classes of cities for the purpose of imposing all such limitations or prohibitions. Cities shall exercise such determination by ordinance passed by the governing body with referendums only in such cases as prescribed by the legislature, subject only to enactments of the legislature of statewide concern applicable uniformly to all cities, to other enactments of the legislature applicable uniformly to all cities, to enactments of the legislature applicable uniformly to all cities of the same class limiting or prohibiting the levying of any tax, excise, fee, charge or other exaction and to enactments of the legislature prescribing limits of indebtedness. All enactments relating to cities now in effect or hereafter enacted and as later amended and until repealed shall govern cities except as cities shall exempt themselves by charter ordinances as herein provided for in subsection (c).</p> <p>(c) (1) Any city may by charter ordinance elect in the manner prescribed in this section that the whole or any part of any enactment of the legislature applying to such city, other than enactments of statewide concern applicable uniformly to all cities, other enactments applicable uniformly to all cities, and enactments prescribing limits of indebtedness, shall not apply to such city.</p> <p>(2) A charter ordinance is an ordinance which exempts a city from the whole or any part of any enactment of the legislature as referred to in this section and which may provide substitute and additional provisions on the same subject. Such charter ordinance shall be so titled, shall designate specifically the enactment of the legislature or part thereof made inapplicable to such city by the adoption of such ordinance and contain the substitute and additional provisions, if any, and shall require a two-thirds vote of the members-elect of the governing body of such city. Every charter ordinance shall be published once each week for two consecutive weeks in the official city newspaper or, if there is none, in a newspaper of general circulation in the city.</p> <p>(3) No charter ordinance shall take effect until sixty days after its final publication. If within sixty days of its final publication a petition signed by a number of electors of the city equal to not less than ten percent of the number of electors who voted at the last preceding regular city election shall be filed in</p> |
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|  |  |  | <p>the office of the clerk of such city demanding that such ordinance be submitted to a vote of the electors, it shall not take effect until submitted to a referendum and approved by a majority of the electors voting thereon. An election, if called, shall be called within thirty days and held within ninety days after the filing of the petition. The governing body shall pass an ordinance calling the election and fixing the date, which ordinance shall be published once each week for three consecutive weeks in the official city newspaper or, if there be none, in a newspaper of general circulation in the city, and the election shall be conducted as elections for officers and by the officers handling such elections. The proposition shall be: "Shall charter ordinance No., entitled (title of ordinance) take effect" The governing body may submit any charter ordinance to a referendum without petition by the same publication of the charter ordinance and the same publication of the ordinance calling the election as for ordinances upon petition and such charter ordinance shall then become effective when approved by a majority of the electors voting thereon. Each charter ordinance becoming effective shall be recorded by the clerk in a book maintained for that purpose with a statement of the manner of adoption and a certified copy shall be filed with the secretary of state, who shall keep an index of the same.</p> <p>(4) Each charter ordinance enacted shall control and prevail over any prior or subsequent act of the governing body of the city and may be repealed or amended only by charter ordinance or by enactments of the legislature applicable to all cities.</p> <p>(d) Powers and authority granted cities pursuant to this section shall be liberally construed for the purpose of giving to cities the largest measure of self-government.</p> <p>(e) This amendment shall be effective on and after July 1, 1961.</p> <p>12-101. Corporate powers; home rule of local affairs and government.</p> <p>Article 12, section 5 of the constitution of Kansas empowers cities to determine their local affairs and government by ordinance and enables the legislature to enact laws governing cities. Each city being a body corporate and politic, may among other powers --</p> <p><i>First.</i> Sue and be sued.</p> <p><i>Second.</i> Purchase or receive, by bequest or gift, and hold, real and personal property for the use of the city.</p> <p><i>Third.</i> Sell and convey any real or personal estate owned by the city, and make such order respecting the same as may be deemed conducive to the interests of the city, and to provide for the im-</p> |
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|    |                  |             |                                 | <p>provement, regulation and government of the same.</p> <p><i>Fourth.</i> Make all contracts and do all other acts in relation to the property and concerns of the city necessary to the exercise of its corporate or administrative powers.</p> <p><i>Fifth.</i> Have and use a corporate seal, and alter the same at pleasure.</p> <p><i>Sixth.</i> Exercise such other and further powers as may be conferred by the constitution or statutes of this state.</p>  |
| 17 | <b>Kentucky</b>  | Legislative | KRS § 82.082 (2009)             | <p>82.082. Power for public purpose only and not in conflict with Constitution or statutes.</p> <p>(1) A city may exercise any power and perform any function within its boundaries, including the power of eminent domain in accordance with the provisions of the Eminent Domain Act of Kentucky, that is in furtherance of a public purpose of the city and not in conflict with a constitutional provision or statute.</p> <p>(2) A power or function is in conflict with a statute if it is expressly prohibited by a statute or there is a comprehensive scheme of legislation on the same general subject embodied in the Kentucky Revised Statutes including, but not limited to, the provisions of KRS Chapters 95 and 96.</p>   |
| 18 | <b>Louisiana</b> | Imperio     | La. Const. Art. VI, § 5 (2008). | <p>§ 5. Home rule charter</p> <p><i>A. Authority to Adopt; Commission.</i> Subject to and not inconsistent with this constitution, any local governmental subdivision may draft, adopt, or amend a home rule charter in accordance with this Section. The governing authority of a local governmental subdivision may appoint a commission to prepare and propose a charter or an alternate charter, or it may call an election to elect such a commission.</p> <p><i>B. Petition to Elect Commission.</i> The governing authority shall call an election to elect such a commission when presented with a petition signed by not less than ten percent of the electors or ten thousand electors, whichever is fewer, who live within the boundaries of the affected subdivision, as certified by the registrar of voters.</p> <p><i>C. Adoption; Amendment; Repeal.</i> A home rule charter shall be adopted, amended, or repealed when approved by a majority of the electors voting thereon at an election held for that purpose.</p> <p><i>D. Adoption by Two or More Local Governmental Subdivisions.</i> Two or more local governmental subdivisions within the boundaries of one parish may adopt a home rule charter under this Section if approved by a majority of the electors in each affected local governmental subdivision voting thereon in an election held for that purpose. The legislature shall provide by law the method of</p> |

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|    |                      |             |   | <p>appointment or election of a commission to prepare and propose a charter consistent with Paragraph (A) of this Section and the method by which the electors may petition for an election consistent with Paragraph (B) of this Section. However, at least one member of the commission shall be elected or appointed from each affected local governmental subdivision.</p> <p><i>E. Structure and Organization; Powers; Functions.</i> A home rule charter adopted under this Section shall provide the structure and organization, powers, and functions of the government of the local governmental 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.</p> <p><i>F. Additional Powers and Functions.</i> Except as prohibited by its charter, a local governmental subdivision adopting a home rule charter under this Section shall have the additional powers and functions granted to local governmental subdivisions by other provisions of this constitution.</p> <p><i>G. Parish Officials and School Boards Not Affected.</i> No home rule charter or plan of government shall contain any provision affecting a school board or the offices of district attorney, sheriff, assessor, clerk of a district court, or coroner, which is inconsistent with this constitution or law.</p> |
| 19 | <b>Maine</b>         | Imperio     | Me. Const. Art. VIII, Pt. 2, § 1 (2008) | <p>§ 1. Power of municipalities to amend their charters</p> <p>Section 1. The inhabitants of any municipality shall have the power to alter and amend their charters on all matters, not prohibited by Constitution or general law, which are local and municipal in character. The Legislature shall prescribe the procedure by which the municipality may so act.</p>   |
| 20 | <b>Maryland</b>      | Imperio     | Md. Const. art. XI-E, § 3 (2008)        | <p>Section 3. Home rule</p> <p>Any such municipal corporation, now existing or hereafter created, shall have the power and authority, (a) to amend or repeal an existing charter or local laws relating to the incorporation, organization, government, or affairs of said municipal corporation heretofore enacted by the General Assembly of Maryland, and (b) to adopt a new charter, and to amend or repeal any charter adopted under the provisions of this Article.</p>   |
| 21 | <b>Massachusetts</b> | Legislative | ALM GL ch. 43B, § 13 (2009)             | <p>§ 13. Powers Exercisable by Cities and Towns; Limitations and Exceptions.</p> <p>Any city or town may, by the adoption, amendment or repeal of local ordinances or by-laws, exercise any power or function which the general court has power to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court in conformity with powers reserved to the general court by Section 8 of Article LXXXIX of the Amendments to the Constitution and which is not denied, either expressly or by clear implication, to the city or town by its charter. Whenever appro-</p>   |

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|    |                  |             |                                    | <p>priations, appointments, orders, regulations or other legislative or executive actions within the scope of any such ordinance or by-law are necessary in the exercise of any power or function authorized by such ordinance or by-law, any such actions which are to be taken by a city council or town meeting may be taken by ordinance, by-law, resolution, order or vote, and any such actions which are to be taken by executive officers may be taken in any appropriate manner, subject, however, as to both such categories, to all provisions of the ordinance or by-law in question, the city or town charter, and other applicable law. Any requirement that an ordinance or by-law be entitled as such, or that it contain the word "ordained," "enacted" or words of similar import shall not affect the validity of any action which is required to be taken by ordinance or by-law. Nothing in this section shall be construed to permit any city or town, by ordinance or by-law, to exercise any power or function which is inconsistent with any general law enacted by the general court before November eighth, nineteen hundred and sixty-six which applies alike to all cities, or to all towns, or to all cities and towns, or to a class of not fewer than two. No exercise of a power or function denied to the city or town, expressly or by clear implication, by special laws having the force of a charter under section nine of said Article, and no change in the composition, mode of election or appointment, or terms of office of the legislative body, the mayor or city manager or the board of selectmen or town manager, may be accomplished by by-law or ordinance. Such special laws may be made inapplicable, and such changes may be accomplished, only under procedures for the adoption, revision or amendment of a charter under this chapter.</p> |
| 22 | <b>Michigan</b>  | Imperio     | MCLS Const. Art. VII, § 22 (2009)  | <p>§ 22. Charters, resolutions, ordinances; enumeration of powers.</p> <p>Sec. 22. Under general laws the electors of each city and village shall have the power and authority to frame, adopt and amend its charter, and to amend an existing charter of the city or village heretofore granted or enacted by the legislature for the government of the city or village. Each such city and village shall have power to adopt resolutions and ordinances relating to its municipal concerns, property and government, subject to the constitution and law. No enumeration of powers granted to cities and villages in this constitution shall limit or restrict the general grant of authority conferred by this section.</p>  |
| 23 | <b>Minnesota</b> | Legislative | Minn. Const., Art. XII, § 4 (2008) | <p>Sec. 4. Home rule charter</p> <p>Any local government unit when authorized by law may adopt a home rule charter for its government. A charter shall become effective if approved by such majority of the voters of the local government unit as the legislature prescribes by general law. If a charter provides for the consolidation or separation of a city and a county, in whole or in part, it shall not be effective without approval of the voters both</p>  |

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|    |             |         |                                  | in the city and in the remainder of the county by the majority required by law.  |
| 24 | Mississippi | Imperio | Miss. Code Ann. § 21-17-1 (2008) | <p>§ 21-17-1. General grant of powers</p> <p>(1) Every municipality of this state shall be a municipal corporation and shall have power to sue and be sued; to purchase and hold real estate, either within or without the corporate limits, for all proper municipal purposes, including parks, cemeteries, hospitals, schoolhouses, houses of correction, waterworks, electric lights, sewers and other proper municipal purposes; to purchase and hold personal property for all proper municipal purposes; to acquire equipment and machinery by lease-purchase agreement and to pay interest thereon, if contracted, when needed for proper municipal purposes; to sell and convey any real and personal property owned by it, and make such order respecting the same as may be deemed conducive to the best interest of the municipality, and exercise jurisdiction over the same.</p> <p>(2) (a) In case any of the real property belonging to a municipality shall cease to be used for municipal purposes, the governing authority of the municipality may sell, convey or lease the same on such terms as the municipal authority may elect. In case of a sale on a credit, the municipality shall charge appropriate interest as contracted and shall have a lien on the same for the purchase money, as against all persons, until paid and may enforce the lien as in such cases provided by law. The deed of conveyance in such cases shall be executed in the name of the municipality by the governing authority of the municipality pursuant to an order entered on the minutes. In any sale or conveyance of real property, the municipality shall retain all mineral rights that it owns, together with the right of ingress and egress to remove same. Except as otherwise provided in this section, before any such lease, deed or conveyance is executed, the governing authority of the municipality shall publish at least once each week for three (3) consecutive weeks, in a public newspaper of the municipality in which the real property is located, or if no newspaper be published as such, then in a newspaper having general circulation therein, the intention to lease or sell, as the case may be, the municipally owned real property and to accept sealed competitive bids for the leasing or sale. The governing authority of the municipality shall thereafter accept bids for the lease or sale and shall award the lease or sale to the highest bidder in the manner provided by law. However, whenever the governing authority of the municipality shall find and determine, by resolution duly and lawfully adopted and spread upon its minutes (i) that any municipally owned real property is no longer needed for municipal or related purposes and is not to be used in the operation of the municipality, (ii) that the sale of such property in the manner otherwise provided by law is not necessary or desirable for the financial welfare of the municipality, and (iii) that the use of such property for the purpose for which it is to be sold, conveyed or leased will</p> |

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|  |  |  |  | <p>promote and foster the development and improvement of the community in which it is located and the civic, social, educational, cultural, moral, economic or industrial welfare thereof, the governing authority of the municipality shall be authorized and empowered, in its discretion, to sell, convey or lease same for any of the purposes set forth herein without having to advertise for and accept competitive bids.</p> <p>(b) In any case in which a municipality proposes to sell, convey or lease real property under the provisions of this subsection (2) without advertising for and accepting competitive bids, the governing authority may sell, convey or lease the property as follows:</p> <p>(i) Consideration for the purchase, conveyance or lease of the property shall be not less than the average of the fair market price for such property as determined by three (3) professional property appraisers selected by the municipality and approved by the purchaser or lessee. Appraisal fees shall be shared equally by the municipality and the purchaser or lessee; or</p> <p>(ii) The governing authority of a municipality may contract for the professional services of a Mississippi licensed real estate broker to assist the municipality in the marketing and sale or lease of the property, and may provide the broker reasonable compensation for services rendered to be paid from the sale or lease proceeds. The reasonable compensation shall not exceed the usual and customary compensation for similar services within the municipality.</p> <p>(3) Whenever the governing authority of the municipality shall find and determine by resolution duly and lawfully adopted and spread upon the minutes that municipally owned real property is not used for municipal purposes and therefore surplus as set forth in subsection (2) of this section:</p> <p>(a) The governing authority may donate such lands to a bona fide not-for-profit civic or eleemosynary corporation organized and existing under the laws of the State of Mississippi and granted tax exempt status by the Internal Revenue Service and may donate such lands and necessary funds related thereto to the public school district in which the land is situated for the purposes set forth herein. Any deed or conveyance executed pursuant hereto shall contain a clause of reverter providing that the bona fide not-for-profit corporation or public school district may hold title to such lands only so long as they are continued to be used for the civic, social, educational, cultural, moral, economic or industrial welfare of the community, and that title shall revert to the municipality in the event of the cessation of such use for a period of two (2) years. In any such deed or conveyance, the municipality shall retain all mineral rights that it owns, together with the right of ingress and egress to remove</p> |
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|  |  |  | <p>same;</p> <p>(b) (i) The governing authority may donate such lands to a bona fide not-for-profit corporation (such as Habitat for Humanity) which is primarily engaged in the construction of housing for persons who otherwise can afford to live only in substandard housing. In any such deed or conveyance, the municipality shall retain all mineral rights that it owns, together with the right of ingress and egress to remove same;</p> <p>(ii) In the event the governing authority does not wish to donate title to such lands to the bona fide not-for-profit civic or eleemosynary corporation, but wishes to retain title to the lands, the governing authority may lease the lands to a bona fide not-for-profit corporation described in paragraph (a) or (b) for less than fair market value;</p> <p>(c) The governing authority may donate any municipally owned lot measuring twenty-five (25) feet or less along the frontage line as follows: the governing authority may cause the lot to be divided in half along a line running generally perpendicular to the frontage line and may convey each one-half (1/2) of that lot to the owners of the parcels laterally adjoining the municipally owned lot. All costs associated with a conveyance under this paragraph (c) shall be paid by the person or entity to whom the conveyance is made. In any such deed or instrument of conveyance, the municipality shall retain all mineral rights that it owns, together with the right of ingress and egress to remove same.</p> <p>(d) Nothing contained in this subsection (3) shall be construed to prohibit, restrict or to prescribe conditions with regard to the authority granted under Section 17-25-3.</p> <p>(4) Every municipality shall also be authorized and empowered to loan to private persons or entities, whether organized for profit or nonprofit, funds received from the United States Department of Housing and Urban Development (HUD) under an urban development action grant or a community development block grant under the Housing and Community Development Act of 1974 (Public Law 93-383), as amended, and to charge interest thereon if contracted, provided that no such loan shall include any funds from any revenues other than the funds from the United States Department of Housing and Urban Development; to make all contracts and do all other acts in relation to the property and affairs of the municipality necessary to the exercise of its governmental, corporate and administrative powers; and to exercise such other or further powers as are otherwise conferred by law.</p> <p>(5) (a) The governing authority of any municipality may establish an employer-assisted housing program to provide funds to eligible employees to be used toward the purchase of a home. This assistance may be applied toward the down payment, closing costs or any other fees or costs associated</p> |
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|  |  |  |  | <p>with the purchase of a home. The housing assistance may be in the form of a grant, forgivable loan or repayable loan. The governing authority of a municipality may contract with one or more public or private entities to provide assistance in implementing and administering the program and shall adopt rules and regulations regarding the eligibility of a municipality for the program and for the implementation and administration of the program. However, no general funds of a municipality may be used for a grant or loan under the program.</p> <p>(b) Participation in the program established under this subsection (5) shall be available to any eligible municipal employee as determined by the governing authority of the municipality. Any person who receives financial assistance under the program must purchase a house and reside within certain geographic boundaries as determined by the governing authority of the municipality.</p> <p>(c) If the assistance authorized under this subsection (5) is structured as a forgivable loan, the participating employee must remain as an employee of the municipality for an agreed upon period of time, as determined by the rules and regulations adopted by the governing authority of the municipality, in order to have the loan forgiven. The forgiveness structure, amount of assistance and repayment terms shall be determined by the governing authority of the municipality.</p> <p>(6) The governing authority of any municipality may contract with a private attorney or private collection agent or agency to collect any type of delinquent payment owed to the municipality, including, but not limited to, past due fees and fines. Any such contract debt may provide for payment contingent upon successful collection efforts or payment based upon a percentage of the delinquent amount collected; however, the entire amount of all delinquent payments collected shall be remitted to the municipality and shall not be reduced by any collection costs or fees. Any private attorney or private collection agent or agency contracting with the municipality under the provisions of this subsection shall give bond or other surety payable to the municipality in such amount as the governing authority of the municipality deems sufficient. Any private attorney with whom the municipality contracts under the provisions of this subsection must be a member in good standing of The Mississippi Bar. Any private collection agent or agency with whom the municipality contracts under the provisions of this subsection must meet all licensing requirements for doing business in the State of Mississippi. Neither the municipality nor any officer or employee of the municipality shall be liable, civilly or criminally, for any wrongful or unlawful act or omission of any person or business with whom the municipality has contracted under the provisions of this subsection. The Mississippi Department of Audit shall establish rules and regulations for use by municipalities in</p> |
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|  |  |  | <p>contracting with persons or businesses under the provisions of this subsection. If a municipality uses its own employees to collect any type of delinquent payment owed to the municipality, then from and after July 1, 2000, the municipality may charge an additional fee for collection of the delinquent payment provided the payment has been delinquent for ninety (90) days. The collection fee may not exceed fifteen percent (15%) of the delinquent payment if the collection is made within this state and may not exceed twenty-five percent (25%) of the delinquent payment if the collection is made outside this state. In conducting collection of delinquent payments, the municipality may utilize credit cards or electronic fund transfers. The municipality may pay any service fees for the use of such methods of collection from the collection fee, but not from the delinquent payment. There shall be due to the municipality from any person whose delinquent payment is collected under a contract executed as provided in this subsection an amount, in addition to the delinquent payment, of not to exceed twenty-five percent (25%) of the delinquent payment for collections made within this state, and not to exceed fifty percent (50%) of the delinquent payment for collections made outside of this state.</p> <p>(7) In addition to such authority as is otherwise granted under this section, the governing authority of any municipality may expend funds necessary to maintain and repair, and to purchase liability insurance, tags and decals for, any personal property acquired under the Federal Excess Personal Property Program that is used by the local volunteer fire department.</p> <p>(8) The governing authority of any municipality may, in its discretion, donate personal property or funds to the public school district or districts located in the municipality for the promotion of educational programs of the district or districts within the municipality.</p> <p>(9) In addition to the authority to expend matching funds under Section 21-19-65, the governing authority of any municipality, in its discretion, may expend municipal funds to match any state, federal or private funding for any program administered by the State of Mississippi, the United States government or any nonprofit organization that is exempt under 26 USCS Section 501(c) (3) from paying federal income tax.</p> <p>(10) The governing authority of any municipality that owns and operates a gas distribution system, as defined in Section 21-27-11(b), and the governing authority of any public natural gas district are authorized to contract for the purchase of the supply of natural gas for a term of up to ten (10) years with any public nonprofit corporation which is organized under the laws of this state or any other state.</p> |
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|  |  |  | <p>(11) The governing authority of any municipality may perform and exercise any duty, responsibility or function, may enter into agreements and contracts, may provide and deliver any services or assistance, and may receive, expend and administer any grants, gifts, matching funds, loans or other monies, in accordance with and as may be authorized by any federal law, rule or regulation creating, establishing or providing for any program, activity or service. The provisions of this subsection shall not be construed as authorizing any municipality or the governing authority of such municipality to perform any function or activity that is specifically prohibited under the laws of this state or as granting any authority in addition to or in conflict with the provisions of any federal law, rule or regulation.</p> <p>(12) (a) In addition to such authority as is otherwise granted under this section, the governing authority of a municipality, in its discretion, may sell, lease, donate or otherwise convey property to any person or legal entity without public notice, without having to advertise for and accept competitive bids and without appraisal, with or without consideration, and on such terms and conditions as the parties may agree if the governing authority finds and determines, by resolution duly and lawfully adopted and spread upon its official minutes:</p> <p>(i) The subject property is real property acquired by the municipality:</p> <ol style="list-style-type: none"> <li>1. By reason of a tax sale;</li> <li>2. Because the property was abandoned or blighted; or</li> <li>3. In a proceeding to satisfy a municipal lien against the property;</li> </ol> <p>(ii) The subject property is blighted and is located in a blighted area;</p> <p>(iii) The subject property is not needed for governmental or related purposes and is not to be used in the operation of the municipality;</p> <p>(iv) That the sale of the property in the manner otherwise provided by law is not necessary or desirable for the financial welfare of the municipality; and</p> <p>(v) That the use of the property for the purpose for which it is to be conveyed will promote and foster the development and improvement of the community in which it is located or the civic, social, educational, cultural, moral, economic or industrial welfare thereof; the purpose for which the property is conveyed shall be stated.</p> <p>(b) All costs associated with a conveyance under this subsection shall be paid by the person or entity to whom the conveyance is made.</p> |
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|    |                 |             |                                       | <p>(c) Any deed or instrument of conveyance executed pursuant to the authority granted under this subsection shall contain a clause of reverter providing that title to the property will revert to the municipality if the person or entity to whom the property is conveyed does not fulfill the purpose for which the property was conveyed and satisfy all conditions imposed on the conveyance within two (2) years of the date of the conveyance.</p> <p>(d) In any such deed or instrument of conveyance, the municipality shall retain all mineral rights that it owns, together with the right of ingress and egress to remove same.</p> <p>(13) The powers conferred by this section shall be in addition and supplemental to the powers conferred by any other law, and nothing contained in this section shall be construed to prohibit, or to prescribe conditions concerning, any practice or practices authorized under any other law.</p>   |
| 25 | <b>Missouri</b> | Legislative | Mo. Const. Art. VI, § 19(a) (2009)    | <p>§ 19(a). Power of charter cities, how limited</p> <p>Any city which adopts or has adopted a charter for its own government, shall have all powers which the general assembly of the state of Missouri has authority to confer upon any city, provided such powers are consistent with the constitution of this state and are not limited or denied either by the charter so adopted or by statute. Such a city shall, in addition to its home rule powers, have all powers conferred by law.</p>   |
| 26 | <b>Montana</b>  | Legislative | Mont. Const., Art. XI §§ 5, 6 (2007). | <p>Section 5. Self-government charters.</p> <p>(1) The legislature shall provide procedures permitting a local government unit or combination of units to frame, adopt, amend, revise, or abandon a self-government charter with the approval of a majority of those voting on the question. The procedures shall not require approval of a charter by a legislative body.</p> <p>(2) If the legislature does not provide such procedures by July 1, 1975, they may be established by election either:</p> <p>(a) Initiated by petition in the local government unit or combination of units; or</p> <p>(b) Called by the governing body of the local government unit or combination of units.</p> <p>(3) Charter provisions establishing executive, legislative, and administrative structure and organization are superior to statutory provisions.</p> <p>Section 6. Self-government powers.</p> <p>A local government unit adopting a self-government charter may exercise any power not prohibited by this constitution, law, or charter. This grant of self-government powers may be extended to other local government units through optional forms of government provided for in section 3.</p> |

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| 27 | <b>Nebraska</b>      | Legislative | Ne. Const. Art. XI, §§ 2, 5 (2009).                             | <p>§ 2. City of 5,000 may frame charter; procedure.</p> <p>Any city having a population of more than five thousand (5000) inhabitants may frame a charter for its own government, consistent with and subject to the constitution and laws of this state, by causing a convention of fifteen freeholders, who shall have been for at least five years qualified electors thereof, to be elected by the qualified voters of said city at any general or special election, whose duty it shall be within four months after such election, to prepare and propose a charter for such city, which charter, when completed, with a prefatory synopsis, shall be signed by the officers and members of the convention, or a majority thereof, and delivered to the clerk of said city, who shall publish the same in full, with his official certification, in the official paper of said city, if there be one, and if there be no official paper, then in at least one newspaper published and in general circulation in said city, three times, and a week apart, and within not less than thirty days after such publication it shall be submitted to the qualified electors of said city at a general or special election, and if a majority of such qualified voters, voting thereon, shall ratify the same, it shall at the end of sixty days thereafter, become the charter of said city, and supersede any existing charter and all amendments thereof. A duplicate certificate shall be made, setting forth the charter proposed and its ratification (together with the vote for and against) and duly certified by the City Clerk, and authenticated by the corporate seal of said city and one copy thereof shall be filed with the Secretary of State and the other deposited among the archives of the city, and shall thereupon become and be the charter of said city, and all amendments of such charter, shall be authenticated in the same manner, and filed with the secretary of state and deposited in the archives of the city.</p> <p>§ 5. Charter of city of 100,000; home rule charter authorized.</p> <p>The charter of any city having a population of more than one hundred thousand inhabitants may be adopted as the home rule charter of such city by a majority vote of the qualified electors of such city voting upon the question, and when so adopted may thereafter be changed or amended as provided in Section 4 of this article, subject to the Constitution and laws of the state.</p> |
| 28 | <b>Nevada</b>        |             |   |   |
| 29 | <b>New Hampshire</b> | Legislative | RSA 49-B:1 (2009)<br><br>N.H. Const. Pt. FIRST, Art. 39. (2009) | <p>49-B:1 Purpose and Intent.</p> <p>It is the purpose of this chapter to implement the home rule powers recognized by article 39, part first, of the constitution of the state of New Hampshire. To that end, the general court hereby provides a vehicle whereby a municipality may adopt a form of government that best addresses local needs. At the same time, however, the general court recognizes a need to require uniform procedures and practices when there is a corresponding state</p>  |

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|    |                   |             |                                | <p>interest. Therefore, this chapter is intended only to provide a procedural framework by which a city or town may amend its actual form of government. Nothing in this chapter shall be construed to create any power in, or confer any power upon, any city or town beyond that necessary to carry out the amendment of a charter or form of government as set forth in this chapter. The general laws of this state shall remain in full force and effect, and they shall be construed to be consistent with this chapter to the greatest extent possible in the effectuation of this chapter's stated purpose. Accordingly, this chapter shall be strictly interpreted to allow towns and cities to adopt, amend, or revise a municipal charter relative to their form of government so long as the resulting charter is neither in conflict with nor inconsistent with the general laws or the constitution of this state.</p> <p>Art. 39. [Changes in Town and City Charters, Referendum Required.]</p> <p>No law changing the charter or form of government of a particular city or town shall be enacted by the legislature except to become effective upon the approval of the voters of such city or town upon a referendum to be provided for in said law.</p> <p>The legislature may by general law authorize cities and towns to adopt or amend their charters or forms of government in any way which is not in conflict with general law, provided that such charters or amendments shall become effective only upon the approval of the voters of each such city or town on a referendum.</p> |
| 30 | <b>New Jersey</b> | Legislative | N.J. Stat. § 40:20-1.2 (2009)  | <p>§ 40:20-1.2. Grant of powers</p> <p>The grant of powers under this amendatory and supplementary act is intended to be as broad as is consistent with the Constitution of the State of New Jersey and with general law relating to local government. The grant of powers shall be construed as liberally as possible in regard to the county's right to reorganize its structure and to alter or abolish its agencies, subject to the general mandate of performing services, whether they be performed by the agency previously established or by a new agency or another department of county government. All county offices, boards, commissions, and authorities authorized or established by statute, other than those boards and offices which are subject to the provisions of subsection b. of section 4 of this amendatory and supplementary act, and other than educational institutions authorized or established pursuant to Title 18A of the New Jersey Statutes, shall be considered to be county agencies for the purposes of this section.</p>   |
| 31 | <b>New Mexico</b> | Legislative | N.M. Const. art. X, § 6 (2008) | <p>§ 6. Municipal elections; charters; legislative powers and taxation</p> <p>D. A municipality which adopts a charter may exercise all legislative powers and perform all functions not expressly denied by general law or charter. This grant of powers shall not include the</p>  |

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|    |          |         |                                 | <p>power to enact private or civil laws governing civil relationships except as incident to the exercise of an independent municipal power, nor shall it include the power to provide for a penalty greater than the penalty provided for a petty misdemeanor. No tax imposed by the governing body of a charter municipality, except a tax authorized by general law, shall become effective until approved by a majority vote in the charter municipality.</p> <p>E. The purpose of this section is to provide for maximum local self-government. A liberal construction shall be given to the powers of municipalities. (As added November 3, 1970.)</p>  |
| 32 | New York | Imperio | NY CLS Const Art IX, § 2 (2009) | <p>§ 2. Powers and duties of legislature; home rule powers of local governments; statute of local governments</p> <p>(a) The legislature shall provide for the creation and organization of local governments in such manner as shall secure to them the rights, powers, privileges and immunities granted to them by this constitution.</p> <p>(b) Subject to the bill of rights of local governments and other applicable provisions of this constitution, the legislature:</p> <p>(1) Shall enact, and may from time to time amend, a statute of local governments granting to local governments powers including but not limited to those of local legislation and administration in addition to the powers vested in them by this article. A power granted in such statute may be repealed, diminished, impaired or suspended only by enactment of a statute by the legislature with the approval of the governor at its regular session in one calendar year and the re-enactment and approval of such statute in the following calendar year.</p> <p>(2) Shall have the power to act in relation to the property, affairs or government of any local government only by general law, or by special law only (a) on request of two-thirds of the total membership of its legislative body or on request of its chief executive officer concurred in by a majority of such membership, or (b), except in the case of the city of New York, on certificate of necessity from the governor reciting facts which in [fig 1] the judgment of the governor constitute an emergency requiring enactment of such law and, in such latter case, with the concurrence of two-thirds of the members elected to each house of the legislature.</p> <p>(3) Shall have the power to confer on local governments powers not relating to their property, affairs or government including but not limited to those of local legislation and administration, in addition to those otherwise granted by or pursuant to this article, and to withdraw or restrict such additional powers.</p> <p>(c) In addition to powers granted in the statute of</p> |



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|  |  |  | <p>local governments or any other law, (i) every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to its property, affairs or government and, (ii) every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to the following subjects, whether or not they relate to the property, affairs or government of such local government, except to the extent that the legislature shall restrict the adoption of such a local law relating to other than the property, affairs or government of such local government:</p> <p>(1) The powers, duties, qualifications, number, mode of selection and removal, terms of office, compensation, hours of work, protection, welfare and safety of its officers and employees, except that cities and towns shall not have such power with respect to members of the legislative body of the county in their capacities as county officers.</p> <p>(2) In the case of a city, town or village, the membership and composition of its legislative body.</p> <p>(3) The transaction of its business.</p> <p>(4) The incurring of its obligations, except that local laws relating to financing by the issuance of evidences of indebtedness by such local government shall be consistent with laws enacted by the legislature.</p> <p>(5) The presentation, ascertainment and discharge of claims against it.</p> <p>(6) The acquisition, care, management and use of its highways, roads, streets, avenues and property.</p> <p>(7) The acquisition of its transit facilities and the ownership and operation thereof.</p> <p>(8) The levy, collection and administration of local taxes authorized by the legislature and of assessments for local improvements, consistent with laws enacted by the legislature.</p> <p>(9) The wages or salaries, the hours of work or labor, and the protection, welfare and safety of persons employed by any contractor or sub-contractor performing work, labor or services for it.</p> <p>(10) The government, protection, order, conduct, safety, health and well-being of persons or property therein.</p> <p>(d) Except in the case of a transfer of functions under an alternative form of county government, a local government shall not have power to adopt local laws which impair the powers of any other local government.</p> |
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|    |                       |         |                                      | (e) The rights and powers of local governments specified in this section insofar as applicable to any county within the city of New York shall be vested in such city.   |
| 33 | <b>North Carolina</b> |         |                                      |  |
| 34 | <b>North Dakota</b>   | Imperio | N.D. Cent. Code, § 40-05.1-06 (2009) | <p>40-05.1-06. Powers.</p> <p>From and after the filing with the secretary of state of a charter framed and approved in reasonable conformity with the provisions of this chapter, such city, and the citizens thereof, shall, if included in the charter and implemented through ordinances, have the following powers set out in this chapter:</p> <ol style="list-style-type: none"> <li>1. To acquire, hold, operate, and dispose of property within or without the corporate limits, and, subject to chapter 32-15, exercise the right of eminent domain for such purposes.</li> <li>2. To control its finances and fiscal affairs; to appropriate money for its purposes, and make payment of its debts and expenses; to levy and collect taxes, excises, fees, charges, and special assessments for benefits conferred, for its public and proprietary functions, activities, operations, undertakings, and improvements; to contract debts, borrow money, issue bonds, warrants, and other evidences of indebtedness; to establish charges for any city or other services, and to establish debt and mill levy limitations, provided that all real and personal property in order to be subject to the assessment provisions of this subsection shall be assessed in a uniform manner as prescribed by the state board of equalization and the state supervisor of assessments. The authority to levy taxes under this subsection does not include authority to impose income taxes.</li> <li>3. To fix the fees, number, terms, conditions, duration, and manner of issuing and revoking licenses in the exercise of its governmental police powers.</li> <li>4. To provide for city officers, agencies, and employees, their selection, terms, powers, duties, qualifications, and compensation. To provide for change, selection, or creation of its form and structure of government, including its governing body, executive officer, and city officers.</li> <li>5. To provide for city courts, their jurisdiction and powers over ordinance violations, duties, administration, and the selection, qualifications, and compensation of their officers; however, the right of appeal from judgment of such courts shall not be in any way affected.</li> <li>6. To provide for all matters pertaining to city elections, except as to qualifications of electors.</li> <li>7. To provide for the adoption, amendment, and repeal of ordinances, resolutions, and regulations to</li> </ol> |

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|  |  |  | <p>carry out its governmental and proprietary powers and to provide for public health, safety, morals, and welfare, and penalties for a violation thereof.</p> <p>8. To lay out or vacate streets, alleys, and public grounds, and to provide for the use, operation, and regulation thereof.</p> <p>9. To define offenses against private persons and property and the public health, safety, morals, and welfare, and provide penalties for violations thereof.</p> <p>10. To engage in any utility, business, or enterprise permitted by the constitution or not prohibited by statute or to grant and regulate franchises therefor to a private person, firm, corporation, or limited liability company.</p> <p>11. To provide for zoning, planning, and subdivision of public or private property within the city limits. To provide for such zoning, planning, and subdivision of public or private property outside the city limits as may be permitted by state law.</p> <p>12. To levy and collect franchise and license taxes for revenue purposes.</p> <p>13. To exercise in the conduct of its affairs all powers usually exercised by a corporation.</p> <p>14. To fix the boundary limits of said city and the annexation and deannexation of territory adjacent to said city except that such power shall be subject to, and shall conform with the state law made and provided.</p> <p>15. To contract with and receive grants from any other governmental entity or agency, with respect to any local, state, or federal program, project, or works.</p> <p>16. To impose registration fees on motor vehicles, farm machinery gross receipts taxes, alcoholic beverage gross receipts taxes, or sales and use taxes in addition to any other taxes imposed by law. After December 31, 2005, sales and use taxes and gross receipts taxes levied under this chapter:</p> <p>a. Must conform in all respects with regard to the taxable or exempt status of items under chapters 57-39.2, 57-39.5, 57-39.6, and 57-40.2 and may not be imposed at multiple rates with the exception of sales of electricity, piped natural or artificial gas, or other heating fuels delivered by the seller or the retail sale or transfer of motor vehicles, aircraft, watercraft, modular homes, manufactured homes, or mobile homes.</p> <p>b. May not be newly imposed or changed except to be effective on the first day of a calendar quarterly period after a minimum of ninety days' notice to the tax commissioner or, for purchases from printed catalogs, on the first day of a calendar</p> |
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|    |                 |             |                                       | <p>quarter after a minimum of one hundred twenty days' notice to the seller.</p> <p>c. May not be limited to apply to less than the full value of the transaction or item as determined for state sales and use tax purposes, except for farm machinery gross receipts tax.</p> <p>d. Must be subject to collection by the tax commissioner under an agreement under section 57-01-02.1 and must be administered by the tax commissioner in accordance with the relevant provisions of chapter 57-39.2, including reporting and paying requirements, correction of errors, payment of refunds, and application of penalty and interest.</p> <p>It is the intention of this chapter to grant and confirm to the people of all cities coming within its provisions the full right of self-government in both local and city matters within the powers enumerated herein. The statutes of the state of North Dakota, so far as applicable, shall continue to apply to home rule cities, except insofar as superseded by the charters of such cities or by ordinance passed pursuant to such charters.</p> <p>After December 31, 2005, any portion of a charter or any portion of an ordinance passed pursuant to a charter which does not conform to the requirements of subsection 16 is invalid to the extent that it does not conform.</p> <p>The invalidity of a portion of a charter or ordinance because it does not conform to subsection 16 does not affect the validity of any other portion of the charter or ordinance or the eligibility for a refund under section 57-01-02.1. Any taxes imposed under this chapter on farm machinery, farm irrigation equipment, and farm machinery repair parts used exclusively for agricultural purposes, or on alcoholic beverages, which were in effect on December 31, 2005, become gross receipts taxes after December 31, 2005.</p> |
| 35 | <b>Ohio</b>     | Imperio     | Oh. Const. Art. XVIII, § 7 (2009)     | <p>§ 7. Municipal charter</p> <p>Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government.</p>  |
| 36 | <b>Oklahoma</b> | Legislative | Okl. Const. Art. XVIII, § 3(a) (2008) | <p>§ 3(a). Framing and adoption of charter--Approval by Governor--Effect--Record--Amendment</p> <p>Any city containing a population of more than two thousand inhabitants may frame a charter for its own government, consistent with and subject to the Constitution and laws of this State, by causing a board of freeholders, composed of two from each ward, who shall be qualified electors of said city, to be elected by the qualified electors of said city, at any general or special election, whose duty it shall be, within ninety days after such election, to prepare and propose a charter for such city, which shall be signed in duplicate by the members of such</p>   |

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|    |               |             |  | <p>board or a majority of them, and returned, one copy of said charter to the chief executive officer of such city, and the other to the Register of Deeds of the county in which said city shall be situated. Such proposed charter shall then be published in one or more newspapers published and of general circulation within said city, for at least twenty-one days, if in a daily paper, or in three consecutive issues, if in a weekly paper, and the first publication shall be made within twenty days after the completion of the charter; and within thirty days, and not earlier than twenty days after such publication, it shall be submitted to the qualified electors of said city at a general or special election, and if a majority of such qualified electors voting thereon shall ratify the same, it shall thereafter be submitted to the Governor for his approval, and the Governor shall approve the same if it shall not be in conflict with the Constitution and laws of this State. Upon such approval it shall become the organic law of such city and supersede any existing charter and all amendments thereof and all ordinances inconsistent with it. A copy of such charter, certified by the chief executive officer, and authenticated by the seal of such city, setting forth the submission of such charter to the electors and its ratification by them shall, after the approval of such charter by the Governor, be made in duplicate and deposited, one in the office of the Secretary of State, and the other, after being recorded in the office of said Register of Deeds, shall be deposited in the archives of the city; and thereafter all courts shall take judicial notice of said charter. The charter so ratified may be amended by proposals therefor, submitted by the legislative authority of the city to the qualified electors thereof (or by petition as hereinafter provided) at a general or special election, and ratified by a majority of the qualified electors voting thereon, and approved by the Governor as herein provided for the approval of the charter.</p> |
| 37 | <b>Oregon</b> | Legislative | <p>Ore. Const. Art. XI, §§ 2, 2a (2007).</p> | <p>Section 2. Formation of corporations; municipal charters; intoxicating liquor regulation.</p> <p>Corporations may be formed under general laws, but shall not be created by the Legislative Assembly by special laws. The Legislative Assembly shall not enact, amend or repeal any charter or act of incorporation for any municipality, city or town. 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, and the exclusive power to license, regulate, control, or to suppress or prohibit, the sale of intoxicating liquors therein is vested in such municipality; but such municipality shall within its limits be subject to the provisions of the local option law of the State of Oregon.</p> <p>Section 2a. Merger of adjoining municipalities; county-city consolidation.</p> <p>(1) The Legislative Assembly, or the people by the Initiative, may enact a general law providing a method whereby an incorporated city or town or</p>   |

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|    |                       |             |                                   | <p>municipal corporation may surrender its charter and be merged into an adjoining city or town, provided a majority of the electors of each of the incorporated cities or towns or municipal corporations affected authorize the surrender or merger, as the case may be.</p> <p>(2) In all counties having a city therein containing over 300,000 inhabitants, the county and city government thereof may be consolidated in such manner as may be provided by law with one set of officers. The consolidated county and city may be incorporated under general laws providing for incorporation for municipal purposes. The provisions of this Constitution applicable to cities, and also those applicable to counties, so far as not inconsistent or prohibited to cities, shall be applicable to such consolidated government.</p>                     |
| 38 | <b>Pennsylvania</b>   | Legislative | Pa. Const. Art. 9, § 2 (2008)     | <p>§ 2. Home rule</p> <p>Municipalities shall have the right and power to frame and adopt home rule charters. Adoption, amendment or repeal of a home rule charter shall be by referendum. The General Assembly shall provide the procedure by which a home rule charter may be framed and its adoption, amendment or repeal presented to the electors. If the General Assembly does not so provide, a home rule charter or a procedure for framing and presenting a home rule charter may be presented to the electors by initiative or by the governing body of the municipality. A municipality which has a home rule charter may exercise any power or perform any function not denied by this Constitution, by its home rule charter or by the General Assembly at any time.</p>  |
| 39 | <b>Rhode Island</b>   | Imperio     | R.I. Const. Art. XIII, § 2 (2009) | <p>§ 2. Local legislative powers</p> <p>Every city and town shall have the power at any time to adopt a charter, amend its charter, enact and amend local laws relating to its property, affairs and government not inconsistent with this Constitution and laws enacted by the general assembly in conformity with the powers reserved to the general assembly.</p>   |
| 40 | <b>South Carolina</b> | Imperio     | S.C. Code Ann. § 5-7-30 (2007)    | <p>§ 5-7-30. Powers conferred upon municipalities; surtax for parking spaces.</p> <p>Each municipality of the State, in addition to the powers conferred to its specific form of government, may enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State, including the exercise of powers in relation to roads, streets, markets, law enforcement, health, and order in the municipality or respecting any subject which appears to it necessary and proper for the security, general welfare, and convenience of the municipality or for preserving health, peace, order, and good government in it, including the authority to levy and collect taxes on real and personal property and as otherwise authorized in this section, make assessments, and establish uniform service charges</p> |

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|    |              |             |                                    | <p>relating to them; the authority to abate nuisances; the authority to provide police protection in contiguous municipalities and in unincorporated areas located not more than three miles from the municipal limits upon the request and agreement of the governing body of such contiguous municipality or the county, including agreement as to the boundaries of such police jurisdictional areas, in which case the municipal law enforcement officers shall have the full jurisdiction, authority, rights, privileges, and immunities, including coverage under the workers' compensation law, which they have in the municipality, including the authority to make arrests, and to execute criminal process within the extended jurisdictional area; provided, however, that this shall not extend the effect of the laws of the municipality beyond its corporate boundaries; grant franchises for the use of public streets and make charges for them; grant franchises and make charges for the use of public beaches; engage in the recreation function; levy a business license tax on gross income, but a wholesaler delivering goods to retailers in a municipality is not subject to the business license tax unless he maintains within the corporate limits of the municipality a warehouse or mercantile establishment for the distribution of wholesale goods; and a business engaged in making loans secured by real estate is not subject to the business license tax unless it has premises located within the corporate limits of the municipality and no entity which is exempt from the license tax under another law nor a subsidiary or affiliate of an exempt entity is subject to the business license tax; borrow in anticipation of taxes; and pledge revenues to be collected and the full faith and credit of the municipality against its note and conduct advisory referenda. The municipal governing body may fix fines and penalties for the violation of municipal ordinances and regulations not exceeding five hundred dollars or imprisonment not exceeding thirty days, or both.</p> <p>For the purpose of providing and maintaining parking for the benefit of a downtown commercial area, a municipality may levy a surtax upon the business license of a person doing business in a designated area in an amount not to exceed fifty percent of the current yearly business license tax upon terms and conditions fixed by ordinance of the municipal council. The area must be designated by council only after a petition is submitted by not less than two-thirds of the persons paying a business license tax in the area and who paid not less than one-half of the total business license tax collected for the preceding calendar year requesting the designation of the area. The business within the designated area which is providing twenty-five or more parking spaces for customer use is required to pay not more than twenty-five percent of a surtax levied pursuant to the provisions of this paragraph.</p> |
| 41 | South Dakota | Legislative | S.D. Const. Article IX, § 2 (2008) | <p>§ 2.</p> <p>Any county or city or combinations thereof may provide for the adoption or amendment of a charter.</p>   |

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|    |           |             |                                  | <p>Such charter shall be adopted or amended if approved at an election by a majority of the votes cast thereon. Not less than ten per cent of those voting in the last preceding gubernatorial election in the affected jurisdiction may by petition initiate the question of whether to adopt or amend a charter.</p> <p>A chartered governmental unit may exercise any legislative power or perform any function not denied by its charter, the Constitution or the general laws of the state. The charter may provide for any form of executive, legislative and administrative structure which shall be of superior authority to statute, provided that the legislative body so established be chosen by popular election and that the administrative proceedings be subject to judicial review.</p> <p>Powers and functions of home rule units shall be construed liberally.</p>  |
| 42 | Tennessee | Legislative | Tenn. Const. Art. XI, § 9 (2009) | <p>Sec. 9. Power over local affairs -- Home rule for cities and counties -- Consolidation of functions.</p> <p>The Legislature shall have the right to vest such powers in the Courts of Justice, with regard to private and local affairs, as may be expedient.</p> <p>The General Assembly shall have no power to pass a special, local or private act having the effect of removing the incumbent from any municipal or county office or abridging the term or altering the salary prior to the end of the term for which such public officer was selected, and any act of the General Assembly private or local in form or effect applicable to a particular county or municipality either in its governmental or its proprietary capacity shall be void and of no effect unless the act by its terms either requires the approval by a two-thirds vote of the local legislative body of the municipality or county, or requires approval in an election by a majority of those voting in said election in the municipality or county affected.</p> <p>Any municipality may by ordinance submit to its qualified voters in a general or special election the question: "Shall this municipality adopt home rule?"</p> <p>In the event of an affirmative vote by a majority of the qualified voters voting thereon, and until the repeal thereof by the same procedure, such municipality shall be a home rule municipality, and the General Assembly shall act with respect to such home rule municipality only by laws which are general in terms and effect.</p> <p>Any municipality after adopting home rule may continue to operate under its existing charter, or amend the same, or adopt and thereafter amend a new charter to provide for its governmental and proprietary powers, duties and functions, and for the form, structure, personnel and organization of its government, provided that no charter provision</p> |



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|    |       |             |                                 | <p>except with respect to compensation of municipal personnel shall be effective if inconsistent with any general act of the General Assembly and provided further that the power of taxation of such municipality shall not be enlarged or increased except by general act of the General Assembly. The General Assembly shall by general law provide the exclusive methods by which municipalities may be created, merged, consolidated and dissolved and by which municipal boundaries may be altered.</p> <p>A charter or amendment may be proposed by ordinance of any home rule municipality, by a charter commission provided for by act of the General Assembly and elected by the qualified voters of a home rule municipality voting thereon or, in the absence of such act of the General Assembly, by a charter commission of seven (7) members, chosen at large not more often than once in two (2) years, in a municipal election pursuant to petition for such election signed by qualified voters of a home rule municipality not less in number than ten (10%) percent of those voting in the then most recent general municipal election.</p> <p>It shall be the duty of the legislative body of such municipality to publish any proposal so made and to submit the same to its qualified voters at the first general state election which shall be held at least sixty (60) days after such publication and such proposal shall become effective sixty (60) days after approval by a majority of the qualified voters voting thereon.</p> <p>The General Assembly shall not authorize any municipality to tax incomes, estates, or inheritances, or to impose any other tax not authorized by Sections 28 or 29 of Article II of this Constitution. Nothing herein shall be construed as invalidating the provisions of any municipal charter in existence at the time of the adoption of this amendment.</p> <p>The General Assembly may provide for the consolidation of any or all of the governmental and corporate functions now or hereafter vested in municipal corporations with the governmental and corporate functions now or hereafter vested in the counties in which such municipal corporations are located; provided, such consolidations shall not become effective until submitted to the qualified voters residing within the municipal corporation and in the county outside thereof, and approved by a majority of those voting within the municipal corporation and by a majority of those voting in the county outside the municipal corporation.</p> |
| 43 | Texas | Legislative | Tex. Const. Art. XI, § 5 (2009) | <p>§ 5. Cities of More Than 5,000 Population; Adoption or Amendment of Charters; Taxes; Debt Restrictions</p> <p>Cities having more than five thousand (5000) inhabitants may, by a majority vote of the qualified voters of said city, at an election held for that purpose, adopt or amend their charters. If the number of inhabitants of cities that have adopted or</p>   |

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|    |             |         |                                 | <p>amended their charters under this section is reduced to five thousand (5000) or fewer, the cities still may amend their charters by a majority vote of the qualified voters of said city at an election held for that purpose. The adoption or amendment of charters is subject to such limitations as may be prescribed by the Legislature, and no charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State. Said cities may levy, assess and collect such taxes as may be authorized by law or by their charters; but no tax for any purpose shall ever be lawful for any one year, which shall exceed two and one-half per cent of the taxable property of such city, and no debt shall ever be created by any city, unless at the same time provision be made to assess and collect annually a sufficient sum to pay the interest thereon and creating a sinking fund of at least two per cent thereon. Furthermore, no city charter shall be altered, amended or repealed oftener than every two years.</p>   |
| 44 | <b>Utah</b> | Imperio | Utah Const. Art. XI, § 5 (2008) | <p>§ 5. [Cities and towns not to be created by special laws -- Legislature to provide for the incorporation, organization, dissolution, and classification of cities and towns -- Charter cities.]</p> <p>The Legislature may not create cities or towns by special laws.</p> <p>The Legislature by statute shall provide for the incorporation, organization and dissolution of cities and towns and for their classification in proportion to population. Any incorporated city or town may frame and adopt a charter for its own government in the following manner:</p> <p>The legislative authority of the city may, by two-thirds vote of its members, and upon petition of qualified electors to the number of fifteen per cent of all votes cast at the next preceding election for the office of the mayor, shall forthwith provide by ordinance for the submission to the electors of the question: "Shall a commission be chosen to frame a charter?" The ordinance shall require that the question be submitted to the electors at the next regular municipal election. The ballot containing such question shall also contain the names of candidates for members of the proposed commission, but without party designation. Such candidates shall be nominated in the same manner as required by law for nomination of city officers. If a majority of the electors voting on the question of choosing a commission shall vote in the affirmative, then the fifteen candidates receiving a majority of the votes cast at such election, shall constitute the charter commission, and shall proceed to frame a charter.</p> <p>Any charter so framed shall be submitted to the qualified electors of the city at an election to be held at a time to be determined by the charter commission, which shall be not less than sixty days subsequent to its completion and distribution</p> |

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|  |  |  | <p>among the electors and not more than one year from such date. Alternative provisions may also be submitted to be voted upon separately. The commission shall make provisions for the distribution of copies of the proposed charter and of any alternative provisions to the qualified electors of the city, not less than sixty days before the election at which it is voted upon. Such proposed charter and such alternative provisions as are approved by a majority of the electors voting thereon, shall become an organic law of such city at such time as may be fixed therein, and shall supersede any existing charter and all laws affecting the organization and government of such city which are now in conflict therewith. Within thirty days after its approval a copy of such charter as adopted, certified by the mayor and city recorder and authenticated by the seal of such city, shall be made in duplicate and deposited, one in the office of the secretary of State and the other in the office of the city recorder, and thereafter all courts shall take judicial notice of such charter.</p> <p>Amendments to any such charter may be framed and submitted by a charter commission in the same manner as provided for making of charters, or may be proposed by the legislative authority of the city upon a two-thirds vote thereof, or by petition of qualified electors to a number equal to fifteen per cent of the total votes cast for mayor on the next preceding election, and any such amendment may be submitted at the next regular municipal election, and having been approved by the majority of the electors voting thereon, shall become part of the charter at the time fixed in such amendment and shall be certified and filed as provided in case of charters.</p> <p>Each city forming its charter under this section shall have, and is hereby granted, the authority to exercise all powers relating to municipal affairs, and to adopt and enforce within its limits, local police, sanitary and similar regulations not in conflict with the general law, and no enumeration of powers in this constitution or any law shall be deemed to limit or restrict the general grant of authority hereby conferred; but this grant of authority shall not include the power to regulate public utilities, not municipally owned, if any such regulation of public utilities is provided for by general law, nor be deemed to limit or restrict the power of the legislature in matters relating to State affairs, to enact general laws applicable alike to all cities of the State.</p> <p>The power to be conferred upon the cities by this section shall include the following:</p> <p>(a) To levy, assess and collect taxes and borrow money, within the limits prescribed by general law, and to levy and collect special assessments for benefits conferred.</p> <p>(b) To furnish all local public services, to pur-</p> |
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|    |                   |             |                                   | <p>chase, hire, construct, own, maintain and operate, or lease, public utilities local in extent and use; to acquire by condemnation, or otherwise, within or without the corporate limits, property necessary for any such purposes, subject to restrictions imposed by general law for the protection of other communities; and to grant local public utility franchises and within its powers regulate the exercise thereof.</p> <p>(c) To make local public improvements and to acquire by condemnation, or otherwise, property within its corporate limits necessary for such improvements; and also to acquire an excess over than [that] needed for any such improvement and to sell or lease such excess property with restrictions, in order to protect and preserve the improvement.</p> <p>(d) To issue and sell bonds on the security of any such excess property, or of any public utility owned by the city, or of the revenues thereof, or both, including, in the case of public utility, a franchise stating the terms upon which, in case of foreclosure, the purchaser may operate such utility.</p>  |
| 45 | <b>Vermont</b>    |             |                                   |  |
| 46 | <b>Virginia</b>   | Imperio     | Va. Code Ann. § 15.2-1102 (2009)  | <p>§ 15.2-1102. General grant of power; enumeration of powers not exclusive; limitations on exercise of power</p> <p>A municipal corporation shall have and may exercise all powers which it now has or which may hereafter be conferred upon or delegated to it under the Constitution and laws of the Commonwealth and all other powers pertinent to the conduct of the affairs and functions of the municipal government, the exercise of which is not expressly prohibited by the Constitution and the general laws of the Commonwealth, and which are necessary or desirable to secure and promote the general welfare of the inhabitants of the municipality and the safety, health, peace, good order, comfort, convenience, morals, trade, commerce and industry of the municipality and the inhabitants thereof, and the enumeration of specific powers shall not be construed or held to be exclusive or as a limitation upon any general grant of power, but shall be construed and held to be in addition to any general grant of power. The exercise of the powers conferred under this section is specifically limited to the area within the corporate limits of the municipality, unless otherwise conferred in the applicable sections of the Constitution and general laws, as amended, of the Commonwealth.</p> |
| 47 | <b>Washington</b> | Legislative | Wash. Const. Art. XI, § 10 (2009) | <p>§ 10. Incorporation of municipalities</p> <p>Corporations for municipal purposes shall not be created by special laws; but the legislature, by general laws, shall provide for the incorporation, organization and classification in proportion to population, of cities and towns, which laws may be altered, amended or repealed. Cities and towns heretofore organized, or incorporated may become organized under such general laws whenever a majority of the electors voting at a general election,</p>   |

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|    |                      |         |                                     | <p>shall so determine, and shall organize in conformity therewith; and cities or towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this Constitution shall be subject to and controlled by general laws. Any city containing a population of ten thousand inhabitants, or more, shall be permitted to frame a charter for its own government, consistent with and subject to the Constitution and laws of this state, and for such purpose the legislative authority of such city may cause an election to be had at which election there shall be chosen by the qualified electors of said city, fifteen freeholders thereof, who shall have been residents of said city for a period of at least two years preceding their election and qualified electors, whose duty it shall be to convene within ten days after their election, and prepare and propose a charter for such city. Such proposed charter shall be submitted to the qualified electors of said city, and if a majority of such qualified electors voting thereon ratify the same, it shall become the charter of said city, and shall become the organic law thereof, and supersede any existing charter including amendments thereto, and all special laws inconsistent with such charter. Said proposed charter shall be published in the daily newspaper of largest general circulation published in the area to be incorporated as a first class city under the charter or, if no daily newspaper is published therein, then in the newspaper having the largest general circulation within such area at least once each week for four weeks next preceding the day of submitting the same to the electors for their approval, as above provided. All elections in this section authorized shall only be had upon notice, which notice shall specify the object of calling such election, and shall be given as required by law. Said elections may be general or special elections, and except as herein provided shall be governed by the law regulating and controlling general or special elections in said city. Such charter may be amended by proposals therefor submitted by the legislative authority of such city to the electors thereof at any general election after notice of said submission published as above specified, and ratified by a majority of the qualified electors voting thereon. In submitting any such charter, or amendment thereto, any alternate article or proposition may be presented for the choice of the voters, and may be voted on separately without prejudice to others.</p> |
| 48 | <b>West Virginia</b> | Imperio | W. Va. Const. Art. VI, § 39a (2008) | <p>§ 39(a). Home Rule for Municipalities</p> <p>No local or special law shall hereafter be passed incorporating cities, towns or villages, or amending their charters. The legislature shall provide by general laws for the incorporation and government of cities, towns and villages and shall classify such municipal corporations, upon the basis of population, into not less than two nor more than five classes. Such general laws shall restrict the powers of such cities, towns and villages to borrow money and contract debts, and shall limit the rate of taxes for municipal purposes, in accordance with section one, article ten of the Constitution of the State of</p>   |

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|    |                  |         |   | <p>West Virginia. Under such general laws, the electors of each municipal corporation, wherein the population exceeds two thousand, shall have power and authority to frame, adopt and amend the charter of such corporation, or to amend an existing charter thereof, and through its legally constituted authority, may pass all laws and ordinances relating to its municipal affairs: Provided, that any such charter or amendment thereto, and any such law or ordinance so adopted, shall be invalid and void if inconsistent or in conflict with this Constitution or the general laws of the State then in effect, or thereafter, from time to time enacted.</p>   |
| 49 | <b>Wisconsin</b> | Imperio | <p>Wis. Const. Art. XI, § 3 (2008)</p> <p><i>See Bleck v. Monona Village</i>, 148 N.W.2d 708 (1967) (determining that home rule applies to local governments only when they have first been validly organized pursuant to state law).</p> | <p>Section 3. Municipal home rule; debt limit; tax to pay debt.</p> <p>[As amended Nov. 1874, Nov. 1912, Nov. 1924, Nov. 1932, April 1951, April 1955, Nov. 1960, April 1961, April 1963, April 1966 and April 1981]</p> <p>(1) Cities and villages organized pursuant to state law may determine their local affairs and government, subject only to this constitution and to such enactments of the legislature of statewide concern as with uniformity shall affect every city or every village. The method of such determination shall be prescribed by the legislature.</p> <p>(2) No county, city, town, village, school district, sewerage district or other municipal corporation may become indebted in an amount that exceeds an allowable percentage of the taxable property located therein equalized for state purposes as provided by the legislature. In all cases the allowable percentage shall be 5 percent except as specified in pars. (a) and (b):</p> <p>(a) For any city authorized to issue bonds for school purposes, an additional 10 percent shall be permitted for school purposes only, and in such cases the territory attached to the city for school purposes shall be included in the total taxable property supporting the bonds issued for school purposes.</p> <p>(b) For any school district which offers no less than grades one to 12 and which at the time of incurring such debt is eligible for the highest level of school aids, 10 percent shall be permitted.</p> <p>(3) Any county, city, town, village, school district, sewerage district or other municipal corporation incurring any indebtedness under sub. (2) shall, before or at the time of doing so, provide for the collection of a direct annual tax sufficient to pay the interest on such debt as it falls due, and also to pay and discharge the principal thereof within 20 years from the time of contracting the same.</p> <p>(4) When indebtedness under sub. (2) is incurred in the acquisition of lands by cities, or by counties or sewerage districts having a population of 150,000 or over, for public, municipal purposes, or for the permanent improvement thereof, or to purchase, acquire, construct, extend, add to or improve a</p> |

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|    |                |         |                                 | <p>sewage collection or treatment system which services all or a part of such city or county, the city, county or sewerage district incurring the indebtedness shall, before or at the time of so doing, provide for the collection of a direct annual tax sufficient to pay the interest on such debt as it falls due, and also to pay and discharge the principal thereof within a period not exceeding 50 years from the time of contracting the same.</p> <p>(5) An indebtedness created for the purpose of purchasing, acquiring, leasing, constructing, extending, adding to, improving, conducting, controlling, operating or managing a public utility of a town, village, city or special district, and secured solely by the property or income of such public utility, and whereby no municipal liability is created, shall not be considered an indebtedness of such town, village, city or special district, and shall not be included in arriving at the debt limitation under sub. (2).</p>   |
| 50 | <b>Wyoming</b> | Imperio | Wyo. Const. Art. 13, § 1 (2008) | <p>§ 1. Incorporation; alteration of boundaries; merger; consolidation; dissolution; determination of local affairs; classification; referendum; liberal construction</p> <p>(a) The legislature shall provide by general law, applicable to all cities and towns,</p> <p>(i) For the incorporation of cities,</p> <p>(ii) For the methods by which city and town boundaries may be altered, and</p> <p>(iii) For the procedures by which cities and towns may be merged, consolidated or dissolved; provided that existing laws on such subjects and laws pertaining to civil service, retirement, collective bargaining, the levying of taxes, excises, fees, or any other charges, whether or not applicable to all cities and towns on the effective date of this amendment, shall remain in effect until superseded by general law and such existing laws shall not be subject to charter ordinance.</p> <p>(b) All cities and towns are hereby empowered to determine their local affairs and government as established by ordinance passed by the governing body, subject to referendum when prescribed by the legislature, and further subject only to statutes uniformly applicable to all cities and towns, and to statutes prescribing limits of indebtedness. The levying of taxes, excises, fees, or any other charges shall be prescribed by the legislature. The legislature may not establish more than four (4) classes of cities and towns. Each city and town shall be governed by all other statutes, except as it may exempt itself by charter ordinance as hereinafter provided.</p> <p>(c) Each city or town may elect that the whole or any part of any statute, other than statutes uniformly applicable to all cities and towns and statutes prescribing limits of indebtedness, may not apply to such city or town. This exemption shall be by charter ordinance passed by a two-thirds (2/3)</p> |

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|  |  |  |  | <p>vote of all members elected to the governing body of the city or town. Each such charter ordinance shall be titled and may provide that the whole or any part of any statute, which would otherwise apply to such city or town as specifically designated in the ordinance shall not apply to such city or town. Such ordinance may provide other provisions on the same subject. Every charter ordinance shall be published once each week for two consecutive weeks in the official city or town newspaper, if any, otherwise in a newspaper of general circulation in the city or town. No charter ordinance shall take effect until the sixtieth (60th) day after its final publication. If prior thereto, a petition, signed by a number of qualified electors of the city or town, equaling at least ten per cent (10%) of the number of votes cast at the last general municipal election, shall be filed in the office of the clerk of such city or town, demanding that such ordinance be submitted to referendum, then the ordinance shall not take effect unless approved by a majority of the electors voting thereon. Such referendum election shall be called within thirty (30) days and held within ninety (90) days after the petition is filed. An ordinance establishing procedures, and fixing the date of such election shall be passed by the governing body and published once each week for three (3) consecutive weeks in the official city or town newspaper, if any, otherwise in a newspaper of general circulation in the city or town. The question on the ballot shall be: "Shall Charter Ordinance No. ... Entitled (stating the title of the ordinance) take effect?". The governing body may submit, without a petition, any charter ordinance to referendum election under the procedures as previously set out. The charter ordinance shall take effect if approved by a majority of the electors voting thereon. An approved charter ordinance, after becoming effective, shall be recorded by the clerk in a book maintained for that purpose with a certificate of the procedures of adoption. A certified copy of the ordinance shall be filed with the secretary of state, who shall keep an index of such ordinances. Each charter ordinance enacted shall prevail over any prior act of the governing body of the city or town, and may be repealed or amended only by subsequent charter ordinance, or by enactments of the legislature applicable to all cities and towns.</p> <p>(d) The powers and authority granted to cities and towns, pursuant to this section, shall be liberally construed for the purpose of giving the largest measure of self-government to cities and towns.</p> |
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