

HOME RULINGS

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Home rule developed through nearly a century and a half of popular reform aimed at devolving legal authority, leaving a legacy of detailed constitutional provisions in many states. State courts, however, can interpret these provisions as a relatively unconstrained instrumental and normative exercise in constitutional common law, reflexively valorizing state authority in the process. Home rule jurisprudence carries an irreducible element of judicial discretion, but this Essay argues that paying insufficient attention to constitutional text—read in the context of the reform movements that help shape the adoption of those home rule provisions—undermines popular sovereignty and risks ossifying the institutional flexibility of state constitutional structure. These concerns are all the more salient at a moment of renewed interest in home rule reform.

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INTRODUCTION

Although the fundamental balance of legal power between states and the federal government has not seen significant change through formal constitutional amendment since the aftermath of the Civil War,¹ the same can hardly be said of the relationship between states and local governments. In 1875, Missouri adopted the nation’s first home rule

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1. Which is not to say that the federal-state balance has not seen significant doctrinal change outside of explicit constitutional amendment. Among other changes, the New Deal Supreme Court’s embrace of expansive federal power and, to a lesser degree, the Rehnquist Court’s “federalism revolution” represented transformations in the constitutional culture of federalism. See generally BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998).

constitutional provision, directly conferring independent legal authority on local governments.² In the nearly 150 years since, home rule reformers in most states have shepherded the adoption of constitutional provisions embodying the substance and mechanics of devolution and decentralization.³ State courts, however, have too often resisted giving life to the results of these movements to empower local governments, interpreting home rule provisions narrowly or even ignoring them altogether.⁴ Reformers have responded with further constitutional change, rejecting judicial understandings of the limits of local authority.⁵

How to explain a vein in the jurisprudence of home rule in which courts struggle with explicit structural change? The answer begins with the recognition that state courts often review home rule provisions through an open-ended instrumental and normative constitutional common law relatively unmoored from text and context. As Lynn Baker and Daniel Rodriguez note: “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 state-wide concern,’” with courts freely “drawing lines between what is properly the domain of state government and those powers which may be exercised by municipalities free of state preemption.”⁶ Much of the scholarly discourse similarly tends to approach the jurisprudence through a lens of indeterminacy.⁷

2. See MO. CONST. of 1875, art. IX, §§ 16, 20 (authorizing cities with populations of more than 100,000 to frame a charter and providing protection from inconsistent state special laws). The year after Missouri adopted its constitutional home rule article, St. Louis became the first city to enact a home rule charter. See *The City Charter of St. Louis*, N.Y. TIMES, Nov. 16, 1876, <https://www.nytimes.com/1876/11/16/archives/the-city-charter-of-st-louis.html>; Henry J. Schmandt, *Municipal Home Rule in Missouri*, 1953 WASH. U. L.Q. 385, 388.

3. See generally David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255 (2003).

4. See *infra* Part II.

5. See *infra* Part II.

6. Lynn A. Baker & Daniel B. Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, 86 DENV. U. L. REV. 1337, 1338 (2009). The view that home rule provisions are fundamentally indeterminant goes back to the earliest days of the doctrine. See, e.g., Schmandt, *supra* note 2, at 388 (“Not only were [courts] forced to deal with a new and untried scheme of municipal government but, what was even more perplexing, they were faced with the necessity of reading some semblance of meaning into the vague and apparently contradictory provisions of the organic law which created the device.”).

7. See, e.g., Darien Shanske & David A. Carrillo, *A Proportionality Analysis Should Govern Home Rule Disputes*, 44 CARDOZO L. REV. 1843 (2023); Terrance Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643 (1964); GORDON L. CLARK, JUDGES AND THE CITIES 174 (1985) (while acknowledging the grounding of text, arguing that in interpreting home rule, “pragmatism is inevitable once we come to implement empirical tests in a changing world”).

I have contributed to the discourse that understands home rule doctrine as an exercise in judicial construction of constitutional norms. See, e.g., Nestor M. Davidson,

Baker, Rodriguez, and others are certainly right that the terms embodied in constitutional home rule provisions can be vague, inviting courts to make broad (and often state-centric) judgments.⁸ But the idea that home rule interpretation mostly involves open-ended judicial discretion elides the fact that many constitutional home rule provisions can be quite prescriptive and detailed about both the substance of local authority and the process through which states may curtail that authority.⁹

Take, for example, New York’s “substantial state interest” doctrine, which this Essay looks to as an apt case study.¹⁰ Frustrated with rural domination of an increasingly urbanized state, reformers began advocating for amending the state’s constitution over a century ago to carve out space for local power, notably moving a 1923 provision that placed procedural limitations on the state’s authority to enact special laws.¹¹ New York’s highest court responded by reading out these constraints “where subjects of state concern are directly and substantially involved.”¹² When New York reformers again moved to have the constitution amended in 1963, adding an expansive and detailed “Bill of Rights for Local Governments” and clarifying the scope of local power, the judiciary simply continued applying the substantial state interest doctrine.¹³ And the durability of New York’s judge-made exception to the text of the state’s home rule article through cycles of reform is hardly unique in the jurisprudence.¹⁴

What would it mean, then, for state courts to take more seriously the results of devolutionary reform movements that fostered the adoption

The Dilemma of Localism in an Era of Polarization, 128 *YALE L.J.* 954 (2019) (arguing that states should interpret the ambiguities of local legal identity in light of broader normative commitments in state constitutions). This Essay does not abandon that argument—which still holds force given that state courts will inherently retain interpretive discretion—but explores arguments for narrowing the range of such discretion.

8. See, e.g., Baker & Rodriguez, *supra* note 6, at 1344–45. To be clear, given the variety of home rule cases, some decisions do read ambiguous constitutional provisions to reinforce local, rather than state, power. One example is *Canton v. State*, where the Ohio Supreme Court read the Ohio Constitution’s requirement that the state preempt through “general” legislation to craft a detailed, multi-factored test that constitutes a material barrier to some forms of state preemption. 766 N.E.2d 963, 968 (Ohio 2002).

9. See *infra* notes 58–62 and accompanying text.

10. See *infra* Part II.

11. See *Home Rule and the New York Constitution*, 66 *COLUM. L. REV.* 1145, 1147–48 (1966).

12. *Adler v. Deegan*, 167 N.E. 705, 713 (N.Y. 1929) (Cardozo, J., concurring). The New York courts have also read a related doctrine about the scope of local initiative authority narrowly. See *infra* notes 71–75 and accompanying text.

13. See *infra* notes 59–69 and accompanying text.

14. For similar examples from other states, see *infra* notes 76–93 and accompanying text.

of those home rule provisions? State supreme courts take a wide range of approaches to constitutional interpretation,¹⁵ but, generally speaking, constitutional text and the context of adoption are commonly relevant touchpoints.¹⁶ The vein of the jurisprudence that reads ambiguity in home rule provisions as an invitation to normative and instrumental constitutional common law thus stands as a methodological anomaly in this regard. Respecting the results of home rule reform movements evinced in constitutional language—rather than reflexively valorizing state authority—would reinforce the popular sovereignty that is foundational to state constitutional law.¹⁷

Another, perhaps more instrumental, argument for giving life to what home rule reformers have embedded in their constitutions is fostering institutional flexibility. It may be rote to foreground the role that states paradigmatically—and usefully—play as metaphorical laboratories to try innovations unfamiliar in the federal constitutional order. That experimentalism is particularly important in the allocation of authority between states and local governments, reflecting as it does tradeoffs inherent in the costs and benefits of calibrating centralization and decentralization.¹⁸ When courts default to the state in questions of the scope and meaning of home rule, they raise interpretive barriers to that important institutional variety.

To be clear, the claim that home rule jurisprudence should be more textually and contextually grounded is necessarily contingent, in that the law of home rule varies significantly from state to state, reflecting each state’s constitutional interpretive culture, history, and specific provisions.¹⁹ The claim also risks reductionism, given how complex

15. See generally Robert F. Williams, *The Brennan Lecture: Interpreting State Constitutions as Unique Legal Documents*, 27 OKLA. CITY U. L. REV. 189 (2002) (surveying the breadth of state constitutional interpretive methodology). See also PHILLIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 11–22 (1991) (surveying pluralism in constitutional interpretive methodology).

16. See Williams, *supra* note 15, at 194–207 (describing plain meaning and constitutional history as primary state constitutional interpretive methods). Cf. Jeremy M. Christiansen, *Originalism: The Primary Canon of State Constitutional Interpretation*, 15 GEO. J.L. & PUB. POL’Y 341, 344–56 (2017) (discussing originalism in state constitutional interpretation).

17. ROBERT F. WILLIAMS & LAWRENCE FRIEDMAN, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 44–45 (2d ed. 2023). Cf. Christian G. Fritz, *Alternative Visions of American Constitutionalism: Popular Sovereignty and the Early American Constitutional Debate*, 24 HASTINGS CONST. L.Q. 287 (1997) (exploring the history and legacy of state constitutionalism centering popular sovereignty).

18. See Daniel B. Rodriguez, *State Constitutional Theory and Its Prospects*, 28 N.M. L. REV. 271, 277–82 (1998) (discussing the distinctive nature of state constitutional structure).

19. In this sense, home rule is particularly resistant to “trans-state” constitutionalism. Compare *id.* at 300–01 (insisting upon a coherent state constitutional

home rule and related doctrines are in practice.²⁰ But the argument is still worth exploring for the light it sheds on an area of state constitutional law—and the dynamic interplay of constitutional change and judicial interpretation—newly returning to salience. Home rule reform has re-entered the national discourse, reflecting increasingly pitched and polarized conflicts between local governments and states over the past decade.²¹ Indeed, the National League of Cities recently promulgated a model constitutional home rule article,²² sparking renewed interest in structural reform.²³ Should nascent efforts to strengthen home rule gain traction, reform advocates may soon have to reckon with a body of constitutional jurisprudence that again reflexively favors the state.

This Essay proceeds as follows. Part I provides background on constitutional home rule. Part II turns to a case study—New York’s substantial state interest doctrine—in the stickiness of unanchored constitutional common law on questions of local authority in the face of constitutional reform, with a sampling of examples from other states. Part III then sketches arguments for a jurisprudence of fidelity to text and context in home rule, grounded in a democratic theory of state constitutional change and the importance of institutional experimentalism in state constitutional vertical allocation of authority.

theory), with Goodwin Liu, Brennan Lecture, *State Constitutions and the Protection of Individual Rights: A Reappraisal*, 92 N.Y.U. L. REV. 1307 (2017) (discussing the value of distinctive state constitutional interpretive identity). See also Rachel A. Van Cleave, *State Constitutional Interpretation and Methodology*, 28 N.M. L. REV. 199, 219–23 (surveying state interpretive methods in the rights context that are moving toward independent, state-specific approaches).

20. See *infra* Part I.

21. See, e.g., Joshua S. Sellers & Erin A. Scharff, *Preempting Politics: State Power and Local Democracy*, 72 STAN. L. REV. 1361 (2020); Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163 (2018); Erin Adele Scharff, *Hyper Preemption: A Reordering of the State-Local Relationship?*, 106 GEO. L.J. 1469 (2018); Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995 (2018).

22. NAT’L LEAGUE OF CITIES, PRINCIPLES OF HOME RULE FOR THE 21ST CENTURY 34–37 (2020). In full disclosure, I was part of a group of law professors that assisted in drafting the *Principles*.

23. For an example of the emerging debates on the *Principles*, compare David Schleicher, *Constitutional Law for NIMBYs: A Review of “Principles of Home Rule for the 21st Century” by the National League of Cities*, 81 OHIO ST. L.J. 883 (2020) (arguing that the NLC’s new model constitutional article would reinforce local parochialism and corruption), with Nestor M. Davidson & Richard C. Schragger, *Do Local Governments Really Have Too Much Power? Understanding the National League of Cities’ Principles of Home Rule for the 21st Century*, 100 N.C. L. REV. 1385 (2022) (responding to Schleicher’s arguments and explaining the affirmative case for recalibrating local legal autonomy in the contemporary environment).

I. THE JURISPRUDENTIAL CONTEXT OF HOME RULE, IN BRIEF

To understand the interplay of constitutional reform and judicial discretion in home rule, it may be helpful to start with a brief primer, which state and local government law mavens need no encouragement to skip. This Part accordingly outlines this area of constitutional law and describes some of the primary fault lines that arise in the case law.²⁴

In a slightly reductionist history, for much of the first century of American constitutional history, courts mostly adhered to a view of the nature of local government legal identity known as Dillon's Rule.²⁵ This was a regime of default local legal powerlessness, granting local governments only the authority to act that state legislatures specifically delegated to them.²⁶ As Richard Briffault has noted, Dillon's Rule also provided state legislatures with a substantive standard of delegation when empowering local governments and provided courts with a canon of construction to read such delegations narrowly.²⁷

Home rule advocates sought to overturn these baseline presumptions about local authority in various ways. Beginning, as noted, with Missouri, successive waves of constitutional enactments addressed both local authority to act without legislative delegation (what Terry Sandalow

24. The doctrinal conflicts at issue in this analysis are only a subset of the constitutional-structural determinants of local autonomy. Outside of a state's home rule constitutional article, the nature of local constitution legal identity is shaped by state constitutional fiscal provisions, such as tax and expenditure limitations, limitations on state "special" or "local" laws, the constitutional law that governs the creation of local governments as well as their borders, and state constitutional rights provisions, among other aspects of state constitutional law. Much of the case law that defines the nature of local legal authority, moreover, involves statutory, rather than constitutional, law. That said, this Essay focuses primarily on core constitutional provisions because they distill the scope of constitutional autonomy that home rule reformers intended in the constitution itself.

25. The Dillon of the rule was an Iowa state supreme court justice and later federal circuit judge as well as influential treatise writer. See JOHN F. DILLON, TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS (1872). See also Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980) (recounting the early American development of the conception of local governments in state law); DALE KRANE, PLATON N. RIGOS & MELVIN B. HILL JR., HOME RULE IN AMERICA: A FIFTY-STATE HANDBOOK 10 (2001).

26. Richard Briffault, *Our Localism, Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 7–8 (1990); Paul A. Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1122–23 (2007). See also Sandalow, *supra* note 7, at 646 (discussing the pre-home rule "'common law' of municipal corporations" that derived from general federal and state constitutional norms).

27. Briffault, *supra* note 26, at 8.

called the “initiative” function of home rule²⁸) and the nature of state oversight (the “immunity” function).²⁹ Home rule provisions also often also explicitly reject the state-centric interpretive edifice of Dillon’s Rule, eliminating judicial presumptions against local power and even nominally adopting the opposite presumption in some states.³⁰

Scholars generally outline two broad models of home rule: “*imperio*” and “legislative,” although many states combine elements of these approaches.³¹ In the earliest versions of home rule, state constitutions sought to imbue local governments with power over some core of local or municipal affairs.³² This model theoretically empowered local governments to initiate policy in that arena without the state delegating authority through legislation and, importantly, gave local governments power to prevail when states sought to interfere with local power. This is often called *imperio* home rule in recognition of early case law that described this form of home rule as an empire within an empire—*imperium in imperio*.³³

In a second approach, state constitutions grant local governments relatively broad default authority to initiate policy but functionally no immunity from state legislative override.³⁴ This model is sometimes called “legislative” home rule because advocates sought to shift the locus of deciding questions about local legal identity and the state-local relationship from courts to legislatures.³⁵ As Paul Diller has noted,

28. See Sandalow, *supra* note 7, at 650–51 (disaggregating local legal autonomy into the initial authority to act and the freedom to prevail over contrary state commands).

29. CLARK, *supra* note 7, at 6–7 (elaborating on the implications of the initiative/immunity framework).

30. See *infra* Part II (discussing the New York state constitution’s explicit rejection of Dillon’s Rule).

31. RICHARD BRIFFAULT, LAURIE REYNOLDS, NESTOR M. DAVIDSON, ERIN ADELE SCHARFF & RICK SU, *CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW* 409–13 (9th ed. 2022).

32. *Id.* at 408–09.

33. *Id.* at 409–10.

34. *Id.* at 409–11.

35. *Id.* at 410–11. “Legislative” home rule provisions tend to derive from a 1953 model constitutional article crafted by former University of Pennsylvania Law School Dean Jefferson B. Fordham and promulgated by the American Municipal Association (AMA), which later became the National League of Cities. See JEFFERSON B. FORDHAM, *AM. MUN. ASS’N, MODEL CONSTITUTIONAL PROVISIONS FOR MUNICIPAL HOME RULE* (1953); Kenneth Vanlandingham, *Constitutional Municipal Home Rule Since the AMA (NLC) Model*, 17 *WM. & MARY L. REV.* 1, 2–5 (1975). The National Municipal League (NML), another civic organization, promulgated a similar Model State Constitution in 1953, which it amended in 1968. See BRIFFAULT, REYNOLDS, DAVIDSON, SCHARFF & SU *supra* note 31, at 410–11. Accordingly, legislative home rule is sometimes described as the “AMA/NML” or “NLC/NML” model.

however, “despite the second-wave home-rule reformers’ intent to remove the responsibility for deciding the scope of local authority from the judiciary, legislative home rule traded the much-criticized judicial role of determining whether a subject matter was properly ‘local’ for the equally controversial task of applying the doctrine of preemption.”³⁶

Commentators often discuss home rule as though it encompasses a few sparse provisions, but state constitutions address in detail a variety of questions related to initiative and immunity and can contain quite specific procedural mandates.³⁷ For example, some home rule provisions, while broadly empowering local governments to act, restrict local authority over specific policy or legal domains, such as felony crimes or “private law” subjects like property, contract, and torts.³⁸ Some home rule provisions, moreover, list specifically delineated areas of local authority.³⁹ Similarly, legislative home rule provisions often require states to preempt only through “general laws,” a variation on long-standing prohibitions on special legislation, and can set forth other procedural barriers to state preemption.⁴⁰

36. Diller, *supra* note 26, at 1126.

37. Dillon’s Rule still pertains as the general regime in a handful of states, although scholars disagree about how to characterize some state regimes. *Id.* at 1126–27 nn.64–65 (recounting methodological and empirical challenges and disagreements in cataloguing state home rule and Dillon’s Rule regimes). Moreover, Dillon’s Rule governs some kinds of local governments even in states that have adopted home rule. Home rule, for example, often requires a given population threshold and, in many states, an affirmative choice by the local government (typically by adopting a home rule charter), and not all eligible local governments choose to do so. *See, e.g., id.* at 1169. And home rule generally pertains to local governments of general jurisdiction (although some states confer home rule on cities but not counties). These types of local government play the central democratic governance role at the local level, but are outnumbered by special districts and similar forms, which tend to have more narrowly focused policy domains and generally lack home rule powers. *See id.* at 1163–64.

38. *See* Paul A. Diller, *The City and the Private Right of Action*, 64 STAN. L. REV. 1109, 1118–21 (2012) (recounting the historical development and interpretation of the “private law” exception to home rule initiative authority); Gary T. Schwartz, *The Logic of Home Rule and the Private Law Exception*, 20 UCLA L. REV. 671 (1973).

39. Constitutional text and state court interpretation often distinguish between domains of local legal autonomy, which the NLC has categorized into structural, personnel, functional, and fiscal home rule. *See* Paul A. Diller, *Reorienting Home Rule: Part 2—Remedying the Urban Disadvantage Through Federalism and Localism*, 77 LA. L. REV. 1045, 1066 (2017) (citing *Local Government Authority*, NAT’L LEAGUE OF CITIES, <https://perma.cc/QSM2-CNEN>). Structural refers to the forms of governance, personnel to employment policies, functional to regulation, and fiscal to revenue and spending policies. *Id.* at 1066–67. *See also id.* at 1105–14 (cataloging the variable protection states provide across these domains). Courts also gesture at times towards a fifth category, when local governments act in their “proprietary,” or private property owning, capacity. *See, e.g., Hunter v. City of Pittsburgh*, 207 U.S. 161, 179–80 (1907).

40. *See generally* Anthony Schutz, *State Constitutional Restrictions on Special Legislation as Structural Restraints*, 40 J. LEGIS. 39, (2013–14); Justin R. Long, *State*

Finally, what kinds of legal issues does constitutional home rule case law tend to address? As we will see below, courts confront questions such as whether local governments are empowered to act in a given area of policy, even when the constitution nominally grants broad authority, as well as when and through what process states can preempt or otherwise override local authority.⁴¹ Litigation at times directly brings states and local governments into conflict, but more often involves private parties invoking the limits of local initiative authority or claiming state preemption to resist local law.⁴²

Home rule jurisprudence addresses a great many doctrinal details beyond the basic framework outlined in this summary and much of the case law involves statutory issues in the shadow of constitutional provisions. But this snapshot should hopefully get anyone new to home rule oriented for the case study to which we now turn.

II. A CASE STUDY: NEW YORK'S SUBSTANTIAL STATE INTEREST DOCTRINE

New York state provides a particularly resonant—and puzzling—example of judicial resistance to applying the clear text of a constitution's home rule provisions adopted to shift the balance of power from the state to local governments. This Part recounts the rise and persistence of New York's substantial state interest doctrine and the reform movements the doctrine rejects, and then briefly notes similar tensions in the jurisprudence of other states, echoing critiques that have attended home rule jurisprudence from the outset.⁴³

Constitutional Prohibitions on Special Laws, 60 CLEV. ST. L. REV. 719 (2012) As to “implied preemption”—the doctrine that displaces local authority not through explicit legislation but as a judicial gloss on the interstices of legislative intent in the face of textual silence—Illinois requires such preemption to be express. *See* ILL. CONST. art. VII, § 6(i). Illinois, along with other states, further imposes procedural hurdles to preemption such as supermajority votes or the requirement that any preemption bill be enacted in successive legislative sessions. *See, e.g.*, ILL. CONST. art. VII, §§ 6(g), (l); N.Y. CONST. art. IX, § 2(a)(1).

41. *See infra* Part II.

42. Commentators have raised a fair question about whether the substance of home rule actually matters to policy outcomes. *See, e.g.*, Jesse J. Richardson, Jr., Meghan Zimmerman Gough & Robert Puentes, *Is Home Rule the Answer? Clarifying the Influence of Dillon's Rule on Growth Management* (Brookings Inst. Ctr. on Urb. & Metro. Pol'y, Discussion Paper, 2003). Given the level of contestation over home rule, however, it is safe to say that people most directly impacted by its judicial interpretation understand the difference the legal dimensions of local autonomy make.

43. *See, e.g.*, Wallace Mendelson, *Paths to Constitutional Home Rule for Municipalities*, 6 VAND. L. REV. 66, 66–67 (1952); KRANE, RIGOS & HILL, *supra* note 25, at 13 (“Crabbed judicial interpretations have continued to construe local government

Understanding how New York's "substantial state interest" doctrine functionally eliminates several important aspects of the state's constitutional home rule system requires a detour into the history of home rule in the state. Advocacy for empowering cities in New York grew out of frustration in the post-Civil War era with a rural-dominated state legislature that arbitrarily interfered in city governance.⁴⁴ Although reform efforts began to gain traction in the 1870s, it was not until the 1894 constitution that the state recognized some home rule,⁴⁵ albeit quite limited. The weakness of the 1894 provision, particularly as the courts interpreted it, brought repeated attempts to strengthen home rule over more than two decades.⁴⁶ Reform efforts finally reached fruition in the 1924 Home Rule Amendment.⁴⁷

Advocates for the amendment sought to achieve two core goals. First, they sought to empower local governments in New York to act with respect to a list of enumerated areas of policy, including a catch-all "government and regulation of the conduct of its inhabitants and the protection of their property, safety and health."⁴⁸ And advocates sought to give teeth to the special laws provision, adding language to prohibit

power very narrowly, even when the legislature has indicated that it has a contrary intent.").

44. See W. Bernard Richland, *Constitutional City Home Rule in New York*, 54 COLUM. L. REV. 311, 315–20 (1954); PETER J. GALIE, *ORDERED LIBERTY: A CONSTITUTIONAL HISTORY OF NEW YORK* 148 (1996). Much of the nineteenth-century impetus for home rule in New York reflected the state's early constitutional history that structurally favored rural over urban interests. See Richland, *supra* at 317–18. One provision in the New York Constitution of 1777, for example, limited votes for state senate to freeholders, of which there were relatively few in New York City. *Id.* at 317. That provision was removed following the constitutional convention of 1821, over strong anti-urban objections, such as from a histrionic Chancellor James Kent, who argued that limitations on the franchise should be preserved as "security against the caprice of the motley assemblage of paupers, emigrants, journeymen manufacturers, and those indefinable classes of inhabitants which a state and a city like ours is calculated to invite." *Id.* (quoting L. H. CLARKE, *A REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION OF THE STATE OF NEW YORK* 115 (1821)).

45. Article XII of the 1894 New York Constitution created a classification system for local governments and procedural hurdles for the state to enact "special laws" relating to less than all cities in a given class, requiring the consent of the relevant city or successive enactment. N.Y. CONST. art. XII, § 2. This was generally understood as a weak form of home rule, which the New York Court of Appeals promptly ignored. See Richland, *supra* note 44, at 321–23 (reviewing cases rejecting "special law" claims under the 1894 provision). The New York state legislature in this era, however, did at times follow the constitutional requirements for local consent. See *id.* at 325.

46. See Richland, *supra* note 44, at 323 ("Between 1907 and 1920 repeated attempts were made to amend the home rule provisions of the Constitution, but all except one, effected in 1907, died in the Legislature.").

47. *Id.*

48. N.Y. CONST. art. XII, § 3.

statutes that “in [their] terms or in [their] effect” targeted individual cities with respect to the “property, affairs or government” of those cities.⁴⁹

The first significant test of this framework came before the New York Court of Appeals, the state’s highest court, in *Browne v. City of New York*.⁵⁰ In a hint of judicial skepticism to come, Judge Cardozo ruled that New York City could not acquire and operate a local bus system, interpreting the amendment’s grant of authority extremely narrowly.⁵¹ Judge Cardozo went a step further in his concurrence in the famous 1929 case *Adler v. Deegan*,⁵² which involved the state’s regulation of tenements in New York City.⁵³ On its face, the relevant law—the Multiple Dwelling Act—clearly had the “effect” of being a special law, which the New York Constitution under the Home Rule Amendment required a supermajority vote to enact.⁵⁴ The *Adler* majority read the terms “property, affairs or government” not to have their plain meaning but instead to reflect *pre*-amendment high-court interpretations of the narrow confines of local power.⁵⁵

Judge Cardozo’s concurrence in *Adler*, however, proved particularly enduring. As Judge Cardozo framed the central question: “Has the State surrendered the power to enact local laws by the usual forms of legislation where subjects of state concern are directly and

49. N.Y. CONST. art. VII, § 2. The amendment was not self-executing, and the New York legislature created a Home Rule Commission to effectuate the amendment’s goals. See JAMES J. HOEY & CLARENCE M. LEWIS, PRELIMINARY RECOMMENDATION OF THE HOME RULE COMMISSION 1, 4 (1924). The fifteen-member commission drafted a proposed Home Rule Enabling Act, paralleling the 1923 amendment, seeking to vest “the broadest measure of home rule compatible with reserving to the State its sovereign right.” *Id.* at 4. The commission, in a subsequent report, foresaw issues with judicial interpretation, noting that courts were likely to have difficulty interpreting the clause “property, affairs or government” as no other states’ home rule article included the same provision and courts would likewise be challenged to define “general laws” given the difficulty in enacting legislation that can be applied to all cities of a state in the same fashion. JAMES J. HOEY & CLARENCE M. LEWIS, SECOND REPORT OF THE HOME RULE COMMISSION 35–38 (1925).

50. 149 N.E. 211 (N.Y. 1925).

51. *Id.* at 218 (holding that nine enumerated categories of local initiative authority in the new home rule provision did not grant general powers over local property, affairs, or government, hence acquiring a bus system was excluded). The state later statutorily authorized New York City to operate buses. See, e.g., N.Y. COMP. CODES. R. & REGS. tit. 21, § 1044.1.

52. 167 N.E. 705 (N.Y. 1929).

53. *Id.*

54. N.Y. CONST. art. IX, § 2(a)(2).

55. *Adler*, 167 N.E. at 707 (“When the people put these words in article 12 of the Constitution, they put them there with a *Court of Appeals’ definition*, not that of Webster’s Dictionary.”). Methodologically, then, *Adler* explicitly rejected plain meaning in approaching home rule. See Comment, *Municipal Home Rule in New York*, 39 YALE L.J. 92 (1929).

substantially involved, though intermingled with these, and perhaps identical with them, are concerns proper to the [local government]?”⁵⁶ His answer was, “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.”⁵⁷ As a result, where courts could find that substantial state concern, the legislature need not pass legislation by supermajority, literally reading out of the state constitution the 1923 Home Rule Amendment’s procedural limitations on state power to enact special laws—many of which, not surprisingly given the state’s political economy, directly targeted New York City.

Continued dissatisfaction with rural state legislative domination in New York, the early stirrings of liberal localist ferment, and the rise of suburban power in an era of white flight were all in the background during the development of a 1963 amendment that sought to bolster the domains of local autonomy under a revised Article IX.⁵⁸ Ambitiously including what the drafters called a “Bill of Rights for Local Governments,”⁵⁹ the amendment declared “effective local self-government and intergovernmental cooperation . . . purposes of the people of the state.”⁶⁰ The new Article IX consolidated and restated existing provisions, but clarified the scope of local initiative power over a range of specified topics, including a general “local laws” authorization provision as well as ten specified categories,⁶¹ such as a second residual general-welfare-style authority over the “government, protection, order, conduct, safety, health and well-being of persons or property therein.”⁶²

The new Article IX reaffirmed the state legislature’s power to act in relation to the “property, affairs, or government” of local governments by general law.⁶³ But it specified that when the legislature acts by special

56. *Adler*, 167 N.E. at 713.

57. *Id.* at 714. Versions of this sentiment began appearing in New York case law after the 1894 amendment, where courts avoided the special law restriction by finding that statutes dealt with matters within the scope of the state’s police power, and thus not constrained. *See, e.g., People ex rel. Einsfield v. Murray*, 44 N.E. 146 (N.Y. 1896).

58. *See* Rosalind Tough & Gordon D. Mac Donald, *The New York Metropolitan Region: Social Forces and the Flight to Suburbia*, 37 *LAND ECON.* 327, 328–32 (1961). *See also* ROBERT B. WARD, *NEW YORK STATE GOVERNMENT* 102–04 (2d ed. 2006).

59. N.Y. CONST. art. IX, § 1. *See also* Michael A. Cardozo & Zachary W. Klinger, *Home Rule in New York: The Need for a Change*, 38 *PACE L. REV.* 90, 91 (2017) (quoting then-Governor Rockefeller’s statement that the purpose of the amendment was to “strengthen[] the governments closest to the people so that they may help meet the present and emerging needs of [the] time”) (second alteration in original).

60. N.Y. CONST. art. IX, § 1.

61. N.Y. CONST. art. IX, § 2(c).

62. N.Y. CONST. art. IX, § 2(c)(10).

63. N.Y. CONST. art. IX, § 2(b)(2).

law, it must obtain the request of two-thirds of the members of the local legislative body or the request of its chief executive officer concurred in by a majority of such members.⁶⁴ The amendment alternatively allowed special laws (except for those singling out New York City) on a “certificate of necessity” from the Governor citing an emergency, but even then, only with a supermajority vote of the legislature.⁶⁵

Maurice Fleischman, at the time the Deputy Comptroller for the state Department of Audit and Control, and a member of the Advisory Committee on Home Rule that helped draft the amendment, noted in a contemporaneous municipal law seminar that Section 2, in part,

represent[ed] an attempt to escape from some of the judicial implications which have attended the phrase “matters of state concern.” It grants to every local government the power to adopt and amend local laws whether or not they relate to the property, affairs and government of such local government in ten particular categories.⁶⁶

Recounting the enumerated powers in Section 2(c), Fleischman continued that these represented “many areas in which the court has from time to time held special laws valid on the ground that the particular function was one of State concern.”⁶⁷

After the state adopted the 1963 Bill of Rights for Local Governments, however, New York’s Court of Appeals picked right back

64. *Id.*

65. *Id.* The revised home rule article also allows the legislature to delegate other areas of authority then limits the state’s ability to withdraw that additional authority by requiring such withdrawals to be enacted twice. N.Y. CONST. art. IX, § 2(b)(1). There are other provisions of the New York Constitution designed to protect local autonomy, including Article III, Section 15 (prohibiting “local” bills with more than one subject and requiring clear titles) and Article III, Section 17 (barring state legislation on thirteen specific categories of “local” laws), but these provisions generally “have had no effect whatever upon legislative interference with localities.” Richland, *supra* note 44, at 311 n.1.

66. Maurice J. Fleischman, Deputy Comptroller, Dep’t of Audit & Control, Grants of Local Powers (June 4, 1963), in MUNICIPAL LAW SEMINAR: PROCEEDINGS 23, 26 (1963).

67. *Id.* at 27. This is not to argue that the drafters rejected the substantial-state-interest test in clear terms, but that others involved in the drafting of Article IX pointed to its rejection of Dillon’s Rule as an element that would temper judicial hostility. *See infra* notes 71–75 and accompanying text. The drafters also pointed to Article IX’s preamble. *See* W. Bernard Richland, Member, Home Rule Advisory Comm., Property, Affairs and Government (June 4, 1963), in MUNICIPAL LAW SEMINAR: PROCEEDINGS 35, 44 (1963).

up reading the constitution's grant of local authority narrowly.⁶⁸ And, notably, the Court of Appeals has continued to regularly invoke the substantial-state-interest doctrine laid out in Chief Judge Cardozo's *Adler* concurrence to validate special laws without any of the constitution's procedural requirements, upending the careful calibration of local and state power in New York's Article IX.⁶⁹

The New York Court of Appeals has similarly read Article IX's clear directive for localist interpretation almost entirely out of the New York Constitution. Enacted in parallel to the Local Government Bill of Rights,⁷⁰ Section 3(c) provides that "[r]ights, powers, privileges and immunities granted to local governments by this article shall be liberally construed."⁷¹ As Professor Hills has chronicled, New York courts regularly invoked Dillon's Rule through the early twentieth century to construe local authority with "stringent narrowness,"⁷² and New York's "liberally construe" language was designed as an explicit rejection of Dillon's Rule in the state.⁷³

In all the close questions the New York Court of Appeals has addressed on the scope of local authority and state preemption over the past nearly sixty years, it has only *once* invoked Section 3(c) to give it that intended effect, which is to say reinforcing local authority in the case of ambiguity. The Court of Appeals did so in a 1978 case over whether

68. See James D. Cole, *Constitutional Home Rule in New York: "The Ghost of Home Rule,"* 59 ST. JOHN'S L. REV. 713, 715 n.7 (1985) (arguing that while the 1963 Article IX's delegation of authority to local governments was "very expansive, . . . subsequent judicial interpretations . . . virtually emasculated the home rule amendment").

69. See, e.g., *Greater N.Y. Taxi Ass'n v. State*, 993 N.E.2d 393, 404–05 (N.Y. 2013) (finding the state's interest in New York City taxicabs sufficient); *Patrolmen's Benevolent Ass'n of New York v. City of New York*, 767 N.E.2d 116, 117 (N.Y. 2001). As the doctrine has crystalized, it holds that when the state possesses a substantial interest in the subject matter, and the enactment bears a reasonable relationship to that legitimate substantial state concern, the state may legislate on what would otherwise be a local matter without the procedural requirements of the New York Constitution. See Roberta A. Kaplan & Jacob H. Hupart, *Can New York City Govern Itself? The Incongruity of the Court of Appeals' Recent Cases Regarding Regulation of New York City by New York City*, 78 ALB. L. REV. 105, 107–09 (2014–15).

70. N.Y. CONST. art. IX, § 1 (enumerating eight specific rights to be held by local governments in New York, including local democratic elections, intergovernmental agreement authority, and protection against unilateral annexation).

71. N.Y. CONST. art. IX, § 3(c).

72. Roderick M. Hills, Jr., *Hydrofracking and Home Rule: Defending and Defining an Anti-Preemption Canon of Statutory Construction in New York*, 77 ALB. L. REV. 647, 653–54 (2014).

73. See Carmin R. Putrino, Comment, *Home Rule: A Fresh Start*, 14 BUFF. L. REV. 484, 490–91, 491 n.45 (1965) (citing statements made by members of the New York State Office for Local Government involved in drafting the 1963 amendment).

home rule county legislatures could fill unexpired vacancies from within their own membership, rather than by the governor.⁷⁴ Other than that, the only other (two) times the Court of Appeals has cited the New York's liberal construction provision has been to reject explicitly any force that the language might carry, effectively reading yet another reform provision out of the constitution.⁷⁵

The state-centricism of Judge Cardozo's *Adler* legacy is hardly unique in home rule jurisprudence. Like New York, California has a long and checkered history of struggle between its Supreme Court and the people of the state over the extent and meaning of the state's constitutional home rule.⁷⁶ California's original 1849 constitution vested plenary authority in the state legislature, and the legislature micromanaged local governance for the next thirty years.⁷⁷ Growing out of frustration with this legislative domination, a California home rule reform movement emerged that reached fruition in the 1879 constitution's adoption of elements of the Missouri approach, becoming the second state in the country to recognize home rule.⁷⁸ That provision gave cities police power and allowed larger cities to adopt charters for self-government, while barring state special laws, special incorporation, and special commissions from displacing local affairs.⁷⁹ These provisions for significant local authority were hotly debated in the 1879 convention and the drafters made deliberate choices about how to calibrate state authority and local power. For more than a decade after adoption, the California Supreme Court took the view that local constitutional authority remained subject to the state's "general laws," and applied Dillon's Rule to read local authority narrowly.⁸⁰

Frustrated with the California Supreme Court's flouting of the 1879 constitution, the state legislature, spurred by urban caucuses, felt it necessary to step in and amend the constitution again to reject the court's

74. *Resnick v. County of Ulster*, 376 N.E.2d 1271, 1274 (N.Y. 1978).

75. *See Town of Islip v. Cuomo*, 473 N.E.2d 756, 759 (N.Y. 1984) (invoking Article IX, Section 3(a)(3)'s provision that "[e]xcept as expressly provided, nothing in this article shall restrict or impair any power of the legislature in relation to . . . [m]atters other than the property, affairs or government of a local government" to read Article IX, Section 3(c) out of the constitution with respect to preemption conflicts) (alteration in original) (quoting N.Y. CONST. art. IX, § 3(a)(3)); *Holt v. County of Tioga*, 437 N.E.2d 1140, 1141 (N.Y. 1982) (oddly reading Article IX, Section 3(c) to be irrelevant in light of the restricting language in Article IX, Section 2 empowering the legislature to preempt by general law—as though Section 2 had anything to say about interpreting ambiguity).

76. Shanske & Carrillo, *supra* note 7, at 1866, 1871–87. *See also* Sho Sato, "Municipal Affairs" in *California*, 60 CALIF. L. REV. 1055 (1972).

77. Shanske & Carrillo, *supra* note 7, at 1871–72.

78. *Id.* at 1873.

79. *Id.* at 1873–74.

80. *Id.* at 1874–75.

approach.⁸¹ In 1896, the legislature referred to the state’s electorate an amendment to confirm that the legislature could not override the authority of charter cities over “municipal affairs,”⁸² and the popular press at the time clearly reflected an understanding that the amendment “would guarantee maximum autonomy to charter cities.”⁸³ The California Supreme Court could not help itself, interpreting the 1896 amendment by applying Dillon’s Rule to privilege state legislative supremacy and fundamentally limit the autonomy of charter cities.⁸⁴ For a *third* time, the people of California stepped in and responded by amending the California Constitution in 1914.⁸⁵ That amendment had several provisions,⁸⁶ all designed to make clear that local authority over municipal affairs should be read broadly, rejecting Dillon’s Rule.⁸⁷ Thus, over the space of thirty-five years, the people and the courts in California volleyed back and forth, reaching an unstable reconciliation that continued—and arguably continues—to leave much room for interpretation.⁸⁸

To cite a narrower but still telling example, a 2004 constitutional ballot amendment in Florida, which passed by more than seventy percent, set a statewide minimum wage but also included a broad non-preemption clause in response to prior state preemption of local authority over the regulation of wages.⁸⁹ Advocates for the ballot amendment were aware

81. *Id.* at 1876–77 (noting that the triggering event leading to the 1896 amendment was the California Supreme Court’s decision in *Davies v. City of Los Angeles*, 24 P. 771 (Cal. 1890), and a series of similar decisions that followed).

82. *Id.* at 1875–76 (quoting CAL. CONST. art. XI, § 6, *amended by* CAL. CONST. amend. 4 (repealed 1970), available at ABRIDGED LEGISLATIVE INTENT SERVICE REPORT RE: SENATE CONSTITUTIONAL AMENDMENT NO. 25 (2018), <https://drive.google.com/file/d/1V3BGURhMGi--zEHur-ghKy2MJLn6kyDo/view> [<https://perma.cc/UP2M-BS8L>]).

83. *Id.* at 1878–80 (citing an array of press and editorial responses to the proposed amendment).

84. *Id.* at 1881.

85. *Id.* at 1882.

86. The amendment revised three sections of what was then Article XI, Sections 6 and 8. *Id.* at 1882–83.

87. *Id.* at 1884.

88. Turning from history to prescription, Shanske and Carrillo argue that courts in the face of the state’s ambiguous text should adopt a proportionality approach to home rule, balancing local and statewide interests. *See id.* at 1852–54. This proposal is not entirely dissimilar to the recent National League of Cities *Principles* approach, seen in Section C(2) of the *Principles*’s Model Constitutional Home Rule Article. NAT’L LEAGUE OF CITIES, *supra* note 22, at 35. However, the NLC’s Model would place a greater burden on the state as a baseline matter to justify interference with local authority.

89. The language of the amendment read that the statewide minimum wage “shall not be construed to preempt or otherwise limit the authority of the state legislature or any other public body to adopt or enforce any other law, regulation, requirement, policy or standard that provides for payment of higher or supplemental wages or benefits,

of the prior state preemption regime and intended to provide constitutional protection for local governments seeking to raise the local minimum wage to a level above the state floor.⁹⁰ In 2016, Miami Beach passed an ordinance that would have done just that,⁹¹ seemingly in reliance on this constitutional non-preemption language. A coalition of trade associations challenged the ordinance, asserting preemption, and the Florida courts agreed,⁹² reading hard-fought non-preemption language out of the Florida Constitution.⁹³

Glancing through these small windows gives a necessarily incomplete sense of a complex jurisprudence, and it is certainly true that

or that extends such protections to employers or employees not covered by this amendment.” FLA. CONST. art. X, § 24(f).

90. See *Amicus Curiae* Brief of Talbot “Sandy” D’Alemberte & Other Legal Scholars in Support of Petitioner City of Miami Beach, at 13, *City of Miami Beach v. Fla. Retail Fed’n, Inc.*, No. SC17-2284, (Fla. Feb. 5, 2019) (discussing the historical context of the Florida minimum wage amendment).

91. See *City of Miami Beach v. Fla. Retail Fed’n, Inc.*, 233 So. 3d 1236, 1238 (Fla. Dist. Ct. App. 2017).

92. *Id.* at 1239.

93. *Id.* Colorado is another state that has seen judicial development of constitutional common law in the face of traditional “*imperio*” style language about localism. Colorado first adopted home rule in 1902 but amended its constitution in 1912 to add Article XX, Section 6 to its home rule provisions, enshrining what scholars understand to be one of the nominally stronger *imperio* immunity approaches. See Howard C. Klemme, *The Powers of Home Rule Cities in Colorado*, 36 U. COLO. L. REV. 321, 321 (1964). The Colorado Supreme Court, however, has interpreted that provision through a balancing framework that asks whether a given policy question is of local, statewide, or “mixed” local/statewide concern, arguably rewriting the specific provisions of Article XX. See *City & County of Denver v. State*, 788 P.2d 764, 767–68 (Colo. 1990) (en banc) (establishing the framework for resolving preemption conflicts through the lens of “local” versus “statewide” concerns and adopting a four-part test focused on the need for statewide uniformity, the external effects of local lawmaking, the history of regulation in the field, and any specific constitutional provisions allocating authority). See also Richard B. Collins, *The Colorado Constitution in the New Century*, 78 U. COLO. L. REV. 1265, 1328–32 (2007) (tracing the shift in Colorado from recognizing strong local legal authority to the contemporary mixed state/local affairs doctrine with greater deference to the state); John E. Hayes & Kristi M. Hartl, *Home Rule in Colorado: Evolution or Devolution*, COLO. LAW., Jan. 2004, at 36, 61.

Oregon developed a similar approach, even if the details vary. Supreme Court Justice Hans Linde was one of the most influential authorities on state constitutional law and had strong views on how to understand home rule. During his tenure as chief justice, the Oregon Supreme Court developed an explicitly normative framework that valorized state authority except in a very narrow category of local interests. See, e.g., *City of La Grande v. Pub. Emps. Ret. Bd.*, 576 P.2d 1204, 1213–14 (Or. 1978) (en banc), *aff’d on reh’g*, 586 P.2d 765 (Or. 1978) (en banc) (“Nor is it generally useful to define a ‘subject’ of legislation and assign it to one or the other level of government. . . . A search for a predominant state or local interest in the ‘subject matter’ of legislation can only substitute for the political process . . . the court’s own political judgment whether the state or the local policy should prevail.”).

many home rule provisions invite open-ended judicial discretion.⁹⁴ But state courts do at times ignore constitutional text and context, arrogating the power to allocate legal authority with a decidedly state-centric bent.⁹⁵

III. FIDELITY AND JUDICIAL DISCRETION IN HOME RULINGS

Deciphering why state supreme courts can have difficulty crediting the express terms of constitutional home rule provisions seems to invite a certain amount of judicial psychologizing. Perhaps it is a failure of imagination to take seriously a legal structure that meaningfully constrains state power in a legal system nominally predicated on state legislative supremacy, however misunderstood that concept might be?⁹⁶ Or perhaps it is an identification by state supreme court justices with state-level institutions that makes it hard for them to imagine crediting devolution as a constitutional choice? Or perhaps an over-emphasis on the centralizing weight of the federal model, again inappropriately? As tempting as this kind of speculation might be, it would be difficult to know for certain, and the case law provides little explicit grounds on which to rest that speculation. It may be more fruitful, then, to examine arguments for internal jurisprudential coherence within home rule constitutional interpretation.

One place to start would be with how anomalous, methodologically, it is for state supreme courts to ignore text and constitutional history.⁹⁷ Hans Linde, in a slightly different context, argued that state constitutions are not “common law,”⁹⁸ and home rule—when its provisions are not simply open-ended—should not be treated as common law.⁹⁹

It is frequently noted that state constitutionalism is particularly sensitive to popular sovereignty, even if federal constitutional law

94. See Baker & Rodriguez, *supra* note 6, at 1340–42.

95. See Joan C. Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law*, 1986 WIS. L. REV. 83, 86 n.23 (noting that “commentators generally agree that courts have read home rule provisions much more narrowly than their drafters intended”).

96. Properly understood, it is not that states or even state legislatures are sovereign or possess plenary authority; rather, it is that the people of each state have delegated their sovereignty to state institutions and, through their constitutions, can choose to redelegate to political institutions at the sub-state level, which is what home rule does.

97. See generally Williams, *supra* note 15.

98. Hans A. Linde, *State Constitutions Are Not Common Law: Comments on Gardner’s Failed Discourse*, 24 RUTGERS L.J. 927 (1993).

99. *Id.* at 930 n.10 (noting that “[s]uch distinctive state institutions as . . . local home rule . . . are ‘constitutional’ by anyone’s definition”).

ultimately rests on a similar theoretical basis.¹⁰⁰ Grounding the interpretation of constitutional home rule would center the historically active nature of the dialogue between courts and reformers. In some sense, all constitutional interpretation reflects the popular sovereignty embodied in constitutional law. But an area of constitutional law that has seen particularly significant popular movements over time to devolve basic governance authority and the reshaping of constitutional text in ways that specifically respond to the limits of judicial reception to reallocating power is a particularly strong candidate for a popular sovereignty argument for fidelity to text read in historical context.¹⁰¹

There is, of course, the perennial epistemic challenge of discerning meaning over time in any heterogenous community.¹⁰² That said, the history of home rule reform reflects a concerted—and at times, relatively recent—constitutional dialogue where reformers in many states have been able to move the adoption of text that evinces very specific choices about how to allocate power vertically between political institutions, at times intentionally in response to judicial limitations.¹⁰³ Perhaps not surprisingly, the relevant constitutional provisions adopted by states over time can be quite detailed and *not* simply a collection of vague phrases on which courts inscribe their own views.¹⁰⁴ At least some of the most

100. See, e.g., Williams, *supra* note 15, at 194 (“State constitutions owe their legal validity and political legitimacy to the state electorate, not to ‘Framers’ or state ratifying conventions as is the case with the Federal Constitution.”).

101. Cf. David M. Walsh, Note, *Toward a Democratic Theory of Home Rule*, 60 HARV. J. ON LEGIS. 383, 401–04 (2023) (arguing for understanding home rule as primarily a question of democratic theory). The history of popular reform can also ground arguments for interpreting ambiguity in home rule doctrine in light of other expressed state constitutional values in the process of state constitutional amendment. For example, when the people of a state pass an environmental rights amendment, doing so recalibrates the state’s normative commitments. New Yorkers did this in 2021. See N.Y. CONST. art. I, § 19 (providing “a right to clean air and water, and a healthful environment”).

102. See Jane S. Schacter, *The Pursuit of “Popular Intent”: Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107, 123–46 (1995) (analyzing characteristic problems of popular intentionalism). Cf. Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 793 (1983) (arguing against “the naive presumption that past attitudes and intentions are directly accessible to present understanding”).

103. See *supra* Part II. States have adopted home rule variably through limited or unlimited constitutional conventions or through referenda or initiatives. See Vanlandingham, *supra* note 35, at 22 n.83 (surveying the adoption history of home rule constitutional provisions in a range of states). The latter path increasingly utilized as states have functionally stopped having conventions. See J. H. Snider, *Does the World Really Belong to the Living? The Decline of the Constitutional Convention in New York and Other US States, 1776–2015*, 6 AM. POL. THOUGHT 256 (2017) (discussing structural forces that have led to the decline in states calling constitutional conventions).

104. New York’s home rule provision, for one example, is nearly 2,000 words. See N.Y. CONST. art. IX.

salient home rule reforms were enacted after highly public campaigns with a breadth of relatively recent public commentary to shed light on what was understood about such reforms at the time.¹⁰⁵ And the materials available to understand the intent of home rule reform are relatively more contemporary and accessible compared to most federal constitutional questions.¹⁰⁶

The alternative interpretive path invites courts to independently weigh normative and instrumental dimensions of home rule that remain deeply contested. Proponents of devolution and decentralization can cite the Tocquevillian values of democratic participation and community engagement that small scale can bring, the Brandeisian benefits of distributed policy experimentation responsive to local preferences and mobile constituencies, and the potential for counterbalancing centrally concentrated power in our federal system.¹⁰⁷ Skeptics can just as forcefully respond with concerns around low rates of local voting, political process failures flowing from externalities not considered within small boundaries, as well as the parochialism embodied in policies such as exclusionary zoning, among others.¹⁰⁸ These debates are lively—and ongoing¹⁰⁹—but are very difficult for courts to engage in as an unanchored exercise. When state supreme courts take it upon themselves to underscore the importance of central authority or (less commonly) extol the values of localism, they risk straying from structural choices embodied in the relevant state constitution itself.

In many ways, the tradition of state courts treating the constitutional structure of state-local relations as an open-ended normative exercise has been foundational for the jurisprudence since the days of John Dillon. After all, what is Dillon's Rule, in essence, but a judicial gloss on the nature of local authority?¹¹⁰ In other words, reflexive state-centricism—

105. See, e.g., Shanske & Carrillo, *supra* note 7, at 1871–87 (drawing on public debates about various home rule reform efforts).

106. See Maureen E. Brady, *Uses of Convention History in State Constitutional Law*, 2022 WIS. L. REV. 1169 (discussing the distinctive interpretive materials available for state constitutional law).

107. Davidson, *supra* note 7, at 975–76.

108. *Id.* at 976–77.

109. Compare, e.g., Schleicher, *supra* note 23 (arguing that stronger home rule underwrites local exclusionary zoning, police misconduct, pension abuse, and other local policy failures), with Davidson & Schragger, *supra* note 23 (highlighting dysfunctional state political process and the resulting abuse of state preemption, as well as a counterlitany of policies failures at the state level).

110. One case that embodies this insight is *State v. Hutchinson*, 624 P.2d 1116 (Utah 1980). In *Hutchinson*, the Utah Supreme Court chose to reverse the Dillon's Rule presumption of local powerlessness, penning a paean to the modern importance of local authority compared to the suspicion inherent in the rule. *Id.* at 1120 (“If there were once valid policy reasons supporting the rule, we think they have largely lost their force and

the “common law” of local government legal identity that pertains outside of home rule—is just that: common law. And even within home rule, scholars have long highlighted the seeming indeterminacy of constitutional language seeking to identify the realm of local legal autonomy. As Terry Sandalow memorably put it, the use of phrases such as “municipal affairs” and “matter[s] of local self-government . . . constitutes a clear invitation to policy making by judges before whom, in our system of government, all questions as to whether a municipality has exceeded its power must inevitably come.”¹¹¹ In short, the fundamental nature of local powerlessness—against which so much state constitutional doctrine is understood—is a contingent judicial choice, and one that courts should be cautious about replicating when a state has rejected its assumptions in constitutional text, even in relatively open-ended text.¹¹²

A second argument for constitutional fidelity in home rule bears mentioning: the larger experimentalist values of variation when it comes to state constitutional structure. Local government structure has been a particularly fruitful source of innovation,¹¹³ but states have also provided meaningful variations from the familiar federal structure. Perhaps concerns about the concentration of executive power can be mitigated by splitting the executive power into multiple, statewide-elected, relatively independent offices?¹¹⁴ Perhaps the counter-majoritarian difficulty reflected in Article III can be mitigated by the accountability that attends the election and removal of judges? There is much to be learned when states explore different pathways for structuring government.

The flexibility underlying that experimentalist value is particularly important in the vertical allocation of authority between states and local

that effective local self-government, as an important constituent part of our system of government, must have sufficient power to deal effectively with the problems with which it must deal.”). This underscored the extent to which the courts in Utah had created Dillon’s Rule and could just as easily reverse it as a matter of constitutional common law. Cf. BRIFFAULT, REYNOLDS, DAVIDSON, SCHARFF & SU, *supra* note 31, at 408 (asking whether, “given that Dillon’s Rule is a judicially-adopted common-law-like rule reflecting late nineteenth century views of local governments, why shouldn’t twenty-first century courts feel free to adopt a rule of construction of local government power that reflects contemporary concerns?”).

111. Sandalow, *supra* note 7, at 660.

112. Cf. Note, *To Save a City: A Localist Canon of Construction*, 136 HARV. L. REV. 1200, 1210–11 (2023) (arguing for a localist canon of construction on the grounds of popular sovereignty).

113. See Paul A. Diller, *Why Do Cities Innovate in Public Health? Implications of Scale and Structure*, 91 WASH. U. L. REV. 1219, 1265–66 (2014).

114. See, e.g., William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2467–68 (2006).

governments. Again, given the inherent, and contingent, tradeoffs in calibrating centralization and decentralization, it is important to allow the people of the states to try different approaches, especially as conditions change.¹¹⁵ Courts raise interpretive barriers to that institutional variety when they default to the state in questions of the scope and meaning of home rule.

CONCLUSION

Longtime observers of home rule jurisprudence would still find much to agree with in Wallace Mendelson's argument in 1953 that to "come at once to the heart of the matter—in those states where home rule has failed, failure has resulted primarily from the attitude of the state courts."¹¹⁶ In the face of persistent judicial resistance to giving effect to the results of home rule reform, Mendelson concluded fatalistically that "[n]o form of constitutional language can be devised to give what a hostile court sees fit to withhold."¹¹⁷

That may be the case, but as home rule returns once again to salience in the ebb and flow of the politics of localism, it is important to consider ways in which home rule jurisprudence might better reflect explicit constitutional efforts to calibrate the balance between state authority and local legal autonomy. The task of interpreting constitutional home rule will always involve some measure of judicial discretion in the face of textual ambiguity. Moreover, there are good arguments for grounding the interpretation of home rule provisions that *are* more open-ended in a broader understanding of the commitments of a state's constitutional culture.¹¹⁸ But given the dynamic dialogue between popular reform and judicial interpretation of one of the most important aspects of state constitutional structure, fidelity to the commands of constitutional text understood in context has an important role to play as well.

115. The NLC's *Principles of Home Rule for the Twenty-First Century* highlights the increasing centrality of local governance as well as the growing imbalance between urban and urban legal power as among the justifications for rebalancing state and local authority in the current environment. See NAT'L LEAGUE OF CITIES, *supra* note 22, at 14–19.

116. Mendelson, *supra* note 43, at 66–67.

117. *Id.* at 67.

118. See generally Davidson, *supra* note 7.

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