

A PROPORTIONALITY ANALYSIS SHOULD GOVERN HOME RULE DISPUTES

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Despite more than a century of reform, state constitutional law governing the state–local relationship remains unsatisfactory. Current doctrine governing intrastate federalism struggles with the same issues as the more familiar interstate federalism doctrine does: in both contexts courts have failed to choose between categorization and balancing. Two recent trends highlight this unsatisfactory pocket of state constitutional jurisprudence. One is hyperpreemption, where punitive state laws override local regulations and invade traditional zones of local police power. The other pressure point is the nationwide housing crisis, which provokes intrastate conflict when state governments act to preempt local zoning to permit more, denser, and more affordable housing.

In this Article we propose proportionality review as the way forward. Conflicts over home rule represent a clash of foundational principles: between local autonomy and the general welfare of the community. Courts and scholars reach for proportionality in other similar constitutional traditions concerning a clash of principles. Proportionality requires that one principle give way, but only as necessary to accomplish the important interest that justifies giving priority to one of the principles. In the state–local context, a proportionality analysis would minimize hyperpreemption because state interests are typically too slight in most cases and the state actions too sweeping. Yet targeted preemption of local zoning authority to address the housing crisis probably would pass muster. Using California as an example, we examine recent California cases that suggest California law is trending toward proportionality review and argue that this trend should become the rule in every state.

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INTRODUCTION

In this Article we focus on the relationship between states and their local jurisdictions, particularly cities. That is often a fraught relationship because designing a government with different levels of government requires a legal structure for balancing and maintaining the balance

between those governments. At the federal level, the balance of power between the separate federal and state sovereigns is maintained through complicated federalism doctrines that attempt to reconcile various parts of the federal Constitution, such as the Commerce Clause and the Tenth, Eleventh, and Fourteenth Amendments. Compared with the federal Constitution, state constitutions often have more express textual rules governing the state–local relationship. These explicit provisions for local autonomy, particularly for cities, are known as home rule provisions.

Balancing competing governmental powers with legal doctrine is difficult, but crucial. We live in a big, diverse, and intensely divided country, and the same is true for many states. Finding a way for citizens with substantially different values to live together is one of the key goods that federalism is supposed to provide.¹ That is not going well presently between the states or within the states.² For instance, many states seem eager to deprive local governments of their autonomy.³ State preemption sometimes targets only minor issues (e.g., local plastic bag bans), but states also seek sole control over issues of intense public interest such as prohibiting the use of masks or regulating firearms, even aiming punitive measures at the local government officials themselves.⁴

It is therefore tempting to argue (as some leading local government law scholars have) for a more robust home rule doctrine that better

¹ See Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 9 (2010) (“[O]rienting constitutional theory around federalism-all-the-way-down would help us build a more satisfying nationalist account of federalism, one that emphasizes the integrative role that discord and division can play in a well-functioning democracy.”); Erin Ryan, *Secession and Federalism in the United States: Tools for Managing Regional Conflict in a Pluralist Society*, 96 OR. L. REV. 123, 162 (2016) (“Understanding federalism as a project of continual negotiation among all levels of government—preserving both regional preferences and national commitments—is a critical feature of healthy multilevel governance, and one that has helped strengthen the American Union against the forces of fragmentation.”).

² At least one reason for this is that many state and local elections no longer reflect state and local concerns, but have, in effect, been nationalized. See David Schleicher, *Federalism and State Democracy*, 95 TEX. L. REV. 763, 765 (2017).

³ See generally Nestor M. Davidson, *The Dilemma of Localism in an Era of Polarization*, 128 YALE L.J. 954 (2019); Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995 (2018); Erin Adele Scharff, *Hyper Preemption: A Reordering of the State-Local Relationship?*, 106 GEO. L.J. 1469 (2018); Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163 (2018).

⁴ See, e.g., Scharff, *supra* note 3, at 1494–1504; Melina Delkic, *Arkansas’ Governor Says It ‘Was an Error’ to Ban Mask Mandates*, N.Y. TIMES (Aug. 8, 2021), <https://www.nytimes.com/2021/08/08/world/asa-hutchinson-arkansas-mask-mandate.html> (last visited Apr. 4, 2023); Myah Ward, *Abbott Asks Texas Hospitals to Postpone Elective Procedures to Free Beds for Latest Covid Surge*, POLITICO (Aug. 9, 2022, 8:58 PM), <https://www.politico.com/news/2021/08/09/abbott-texas-hospitals-covid-503066> [<https://perma.cc/V3UG-CLUR>].

protects local autonomy.⁵ And a clear and sensible home rule doctrine would be a big step forward, because (despite many waves of thoughtful reforms) the current analyses are inconsistent and unsatisfactory.⁶ Yet a doctrinal rule that systematically favored local governments could be just as problematic as a rule that favored the state.

For example, one dramatic harm exacerbated by local control relates to the local power over zoning.⁷ Surveys show that there are nominally more liberal and conservative views on what kind of community people want to live in, but the prevalence of single-family homes indicates that most local governments with the zoning power are responding to homeowners of all political stripes who oppose denser development.⁸ The scale of the resulting housing shortage is inequitable to vulnerable groups; it is also inefficient at the level of national productivity because it prevents people from working where their talents are most needed.⁹

Thus, the problem is that neither state nor local government should always be preeminent—our community needs both and the law needs a clear means of balancing the legitimate interests of both governments. Any legal reform meant to strengthen local political autonomy from hyperpreemption threatens to further undermine the ability of states to prod localities to zone more efficiently and fairly.¹⁰ Yet reforms aimed at enhancing centralized state control threaten local self-government. These

⁵ See NAT'L LEAGUE OF CITIES, PRINCIPLES OF HOME RULE FOR THE 21ST CENTURY (2020), <https://www.nlc.org/wp-content/uploads/2020/02/Home-Rule-Principles-ReportWEB-2-1.pdf> [<https://perma.cc/A4J2-HQWM>].

⁶ See *id.* at 9–13 (describing reforms and an “often-muddled judicial gloss on [home rule] constitutional provisions”).

⁷ See, e.g., 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, 887, 899–903 (2021).

⁸ Christopher S. Elmendorf & Darien Shanske, *Auctioning the Upzone*, 70 CASE W. RES. L. REV. 513, 514–15 (2020).

⁹ See, e.g., Schleicher, *supra* note 7, at 899–903 (documenting harms). And there are numerous other issues where local governments are hardly on the side of angels. One prominent example involves the use of criminal justice fees. See *id.* at 917. For a thorough discussion of the problem, see Ariel Jurow Kleiman, *Nonmarket Criminal Justice Fees*, 72 HASTINGS L.J. 517 (2021).

¹⁰ To be clear, states, themselves in thrall to suburban voters, have in many cases not acted at all or effectively to counter exclusionary tendencies. See Richard C. Schragger, *The Perils of Land Use Deregulation*, 170 U. PA. L. REV. 125, 150–56 (2021). It is also the case that some localities are coming around on their own. Mara Gay, *In New York, NIMBYism Finally Outstays Its Welcome*, N.Y. TIMES (Sept. 28, 2022), <https://www.nytimes.com/2022/09/28/opinion/new-york-housing-crisis.html> (last visited Apr. 4, 2023) (describing pro-development shifts in New York City politics). This all granted, the question is whether we want a home rule test that stands in the way of state action when a state finally does rouse itself to act productively in the face of local opposition. See, e.g., Maria Cramer & Alan Yuhas, *California Town Says Mountain Lions Don't Stop Housing After All*, N.Y. TIMES (Feb. 7, 2022), <https://www.nytimes.com/2022/02/07/us/woodside-mountain-lion-housing.html> (last visited Apr. 4, 2023). We think the answer is no.

are competing values, and favoring one disfavors the other to an equal extent.

This presents a clash of foundational principles: local autonomy sometimes conflicts with the community's general interests and individual rights. In such a scenario of principled conflict, in most other constitutional traditions legal scholars would reach for the proportionality principle.¹¹ That principle states that in a clash of foundational principles, one must give way—but only so much as is necessary to accomplish the important interest that justifies affirming it. A proportionality analysis would likely find that forbidding a city from imposing a mask mandate in the face of a pandemic is a major infringement on local autonomy (effective disease prevention) for a minor statewide goal (theoretically greater economic activity).¹² On the other hand, given the current housing crisis, state preemption of specific local zoning law seems permissible, but perhaps not preemption of *all* local zoning law.

We first argue that proportionality provides the right test for adjudicating state–local conflicts, as it is for conflict regarding rights generally.¹³ In California, the history and text of home rule provisions show that local autonomy represents a constitutional value of great importance that should not be restricted more than is necessary to advance a different constitutional value. We then show that proportionality review is inherent in many current home rule provisions and doctrines. After a brief survey of several states, we unpack California home rule as a representative example.

California is an illuminating case for several reasons. As we will demonstrate, California home rule doctrine is relatively protective of home rule cities. Yet California home rule doctrine exhibits the stresses from the broad theoretical and practical problems we identify. On the one hand, the California legislature has engaged in hyperpreemption

¹¹ See, e.g., Bernhard Schlink, *Proportionality in Constitutional Law: Why Everywhere but Here?*, 22 DUKE J. COMPAR. & INT'L L. 291 (2012) (explaining and comparing balancing and proportionality).

¹² To be sure, perhaps the mask mandates could be framed as harming a weighty dignity interest and hence it is important that our test involve probing of the facts. For some examples of the weak factual predicates underlying the mask bans, see Delkic, *supra* note 4. Additionally, see Ward, *supra* note 4, for a hard-to-fathom story featuring a governor asking hospitals to prepare for a surge of pandemic patients but still refusing to lift a ban on local mask mandates. Lessons learned from the use of mask mandates would also be relevant for future cases.

¹³ See, e.g., JAMAL GREENE, HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART (2021) (arguing for proportionality review for individual rights); Jamal Greene, *The Supreme Court, 2017 Term—Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28 (2018) (same).

regarding local soda taxes.¹⁴ The state law preempting the soda tax was recently struck down as violating home rule and is currently being appealed by the state.¹⁵ Yet California's legislature has also overridden some local control over land use—and those laws have also been challenged on home rule grounds. Although the state has won three recent appellate decisions,¹⁶ a lower court judge found one piece of the main housing statute unconstitutional because it violated local autonomy.¹⁷ The question is how to reconcile why the state can override local land use decisions—but not local decisions about taxing soda.

Finally, we argue that a primary California home rule analysis (*Cal Fed*) contains a form of the proportionality test.¹⁸ The fact that proportionality is already in California law is a mixed fact for our argument. It benefits us in that it illustrates that we are arguing only for a clarification and proper application of an existing idea, not for some exotic foreign transplant.¹⁹ Yet (as we will explain) the current law on home rule is a mess, and so we will also explain why proportionality is the solution, not part of the problem.

¹⁴ CAL. REV. & TAX. CODE § 7284.12 (West 2022); Anahad O'Connor & Margot Sanger-Katz, *California, of All Places, Has Banned Soda Taxes. How a New Industry Strategy Is Succeeding*, N.Y. TIMES (June 27, 2018), <https://www.nytimes.com/2018/06/27/upshot/california-banning-soda-taxes-a-new-industry-strategy-is-stunning-some-lawmakers.html> (last visited Apr. 4, 2023).

¹⁵ See *Cultiva La Salud v. State*, No. 34-2020-80003458, 2021 Cal. Super. LEXIS 108384 (Super. Ct. Nov. 8, 2021). Note that one of the authors of this Article (Shanske) participated in this appeal as an amicus, citing, in part, the argument of this Article. See Application to File Amicus Curiae Brief & Brief of Amici Law Professors in Support of Plaintiff-Respondent, *Cultiva La Salud*, No. C095486 (Cal. Ct. App. Dec. 2, 2022).

¹⁶ *Cal. Renters Legal Advoc. & Educ. Fund v. City of San Mateo*, 283 Cal. Rptr. 3d 877 (Ct. App. 2021) (upholding state law requiring objective land use rules); *Ruegg v. City of Berkeley*, 277 Cal. Rptr. 3d 649, 673–78 (Ct. App. 2021) (upholding streamlined project approval under certain conditions), *reh'g denied*, No. S269012, 2021 Cal. LEXIS 5333 (July 28, 2021); *Anderson v. City of San Jose*, 255 Cal. Rptr. 3d 654 (Ct. App. 2019) (upholding state law prioritizing sale of surplus municipal land for affordable housing, overruling trial court finding that this law violated home rule autonomy). Note that one of the authors of this Article (Shanske) participated in *Cal. Renters Legal Advoc. & Educ. Fund* as an amicus. For a thorough discussion of California home rule law as it relates to land use, a discussion upon which we drew for this Article, see Kenneth Stahl, *Home Rule and State Preemption of Local Land Use Control*, 50 URB. LAW. 179 (2021).

¹⁷ *Cal. Renters Legal Advoc. & Educ. Fund*, 283 Cal. Rptr. 3d at 883.

¹⁸ *Cal. Fed. Sav. & Loan Ass'n v. City of Los Angeles*, 812 P.2d 916 (Cal. 1991). Some California Court of Appeal decisions treat the *Cal Fed* test as a form of proportionality analysis. See, e.g., *Ruegg*, 277 Cal. Rptr. 3d at 677 (“The relevant question is whether the statute is reasonably related to resolving the statewide interest it addresses and does not unduly interfere with the City’s historical preservation authority.”).

¹⁹ Most other states share California’s problem with internal federalism. NAT’L LEAGUE OF CITIES, *supra* note 5, at 13 (finding that only nine states “have constitutions that do not directly delegate (or direct their legislatures to delegate) police power to local governments”). Many other states currently use tests that (like California’s) have elements of proportionality. See, e.g., *City of New Orleans v. Bd. of Comm’rs*, 93-0690 (La. 7/5/94), 640 So. 2d 237, 252.

I. PROPORTIONALITY IS THE BEST ANALYSIS FOR
HOME RULE CONFLICTS

A. *The Basics of Home Rule*

In 1868 Iowa Judge John F. Dillon expressed a narrow view of a local government's authority, holding that it can exercise only those powers expressly permitted by state law; his rule soon became the prevailing doctrine nationwide.²⁰ California courts applying Dillon's Rule described it as "so familiar as to be trite that a municipal corporation can exercise only such powers as have been conferred upon it in its charter, or by some general law."²¹ But Dillon's Rule generated considerable dissent, causing California and other states to adopt constitutional provisions in the late 1800s that conferred autonomy on local governments.²² This autonomy is called *home rule*.

In California, the state has two local government entities (counties and cities) that have substantial autonomy to act without receiving state authorization.²³ Counties and cities are organized either under general statutory law enacted by the state legislature or under a charter adopted by the local voters that serves as a local mini-constitution.²⁴ Several California constitutional provisions now grant broad home rule powers to cities that have such a charter.²⁵ After a city adopts a charter, its local

²⁰ *Hunter v. City of Pittsburgh*, 207 U.S. 161, 167 (1907). See generally NAT'L LEAGUE OF CITIES, *supra* note 5, at 9–11.

²¹ *Von Schmidt v. Widber*, 38 P. 682, 684 (Cal. 1894); see also *Johnson v. City of San Diego*, 42 P. 249, 250 (Cal. 1895) ("Municipal corporations . . . are . . . creatures of the state . . . [and] the legislature may increase or diminish the powers of such a corporation . . . or may destroy its corporate existence entirely. . . . [because] such corporations have no vested rights in powers conferred upon them" (referencing JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 63 (Little, Brown & Co. eds., 4th ed. 1890))).

²² NAT'L LEAGUE OF CITIES, *supra* note 5, at 9–11.

²³ CAL. CONST. art. XI, § 7 ("A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.").

²⁴ Most California cities are general law cities: of the state's 482 cities, 121 have charters. DAVID A. CARRILLO & DANNY Y. CHOU, CALIFORNIA CONSTITUTIONAL LAW 842 n.3 (1st ed. 2021). California counties can also adopt charters under CAL. CONST. art. XI, § 3(a), but the municipal affairs concept applies only to charter cities and not to charter counties. *Id.* at 842. Accordingly, we focus here on charter cities.

²⁵ CAL. CONST. art. XI, § 3(a) ("For its own government, a county or city may adopt a charter The provisions of a charter are the law of the State and have the force and effect of legislative enactments."); *id.* § 5 ("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 . . . 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

laws concerning “municipal affairs” supersede state law; counties and cities formed under general law lack similar powers. Courts have struggled with balancing home rule provisions against state power, and particularly with how to define a municipal affair.²⁶

All California counties and cities have the police power, and any local police power act is subject to preemption by state laws. Preemption describes a state legislature adopting a state law that overrides a local government ordinance. This is where familiar doctrines such as field preemption get applied. Charter cities in California also have additional protection from preemption for matters that are classified as “municipal affairs.” Thus, the field preemption analysis applies to all exercises of local power, while an additional analysis as to what is a municipal affair is necessary when considering whether the action of a charter city is protected from preemption. That is, both a general law city and a charter city can pass an ordinance under the police power. Assuming that the ordinance is local and not extraterritorial, that ordinance will govern. All local ordinances can be challenged as preempted by state law. Only charter cities can argue that an ordinance found to be preempted is shielded by home rule immunity.

B. *The Current Debate About the Scope of Local Power*

Debates about the merits of home rule have generally moved past the threshold question of whether local governments should have some autonomy and now focus on how much. No local government scholar we know of endorses a model that treats local autonomy as having so little value that any statewide interest is enough to displace it. Instead, the commentary focuses on possible cures to hyperpreemption and whether those cures might be worse than the disease.

Leading local government scholars formulated the principal contender for a new approach to home rule doctrine in *Principles of Home Rule for the 21st Century*.²⁷ The Model has many parts, but we focus on one as relevant here:

affairs shall supersede all laws inconsistent therewith.”). As discussed below, these provisions were gradually adopted by constitutional amendment, and the way they evolved is important to understanding their meaning. See *City of Riverside v. Inland Empire Patients Health & Wellness Ctr., Inc.*, 300 P.3d 494, 496 (Cal. 2013).

²⁶ See, e.g., *Butterworth v. Boyd*, 82 P.2d 434, 438 (Cal. 1938) (“No exact definition of the term ‘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.”).

²⁷ See NAT’L LEAGUE OF CITIES, *supra* note 5, at 35.

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

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

We start with this provision for several reasons. First, it captures the general proposed rule for assessing the boundary between state and local power. And this rule is a proportionality test, our preferred rubric. Even better, the test does not even try to carve out a particular protected zone but leaves that to the proportionality test. But we would characterize this test as putting an extra thumb on the scale for the local government: any proportionality test would be protective of local government autonomy because one only uses this test when there is a substantial right to be protected. The Model test requires not mere tailoring but *narrow* tailoring—not merely a weightier state interest (relative to the local) but a *substantial* interest, and the state must *expressly* override local law.

If applied fairly and with its background context and commentary in mind, this test should bar hyperpreemption. But it may be an overcorrection. In many states it is assumed that cities cannot have their own contract law or family law as a matter of implicit field preemption, and this proposed reform would seem to require explicit preemption. Even then, a state might not succeed if it explicitly preempted local contract law—how can such a blanket preemption be “narrowly tailored”?²⁸

Thus, the Model test threatens to make some existing problems worse. Zoning and land use are quintessential local powers, but in the context of a housing crisis driven in part by local land use decisions local policies on those issues have major statewide (even nationwide) implications. The Model test could well fail to produce sound and just results even when applied fairly. For example, a state law restricting local government power to reject denser development is arguably not *necessary*.

We think the proposed Model went astray in proposing a bespoke proportionality test. Instead, an “ordinary” proportionality test will negate hyperpreemption without making it unduly difficult to address

²⁸ See Schleicher, *supra* note 7, at 891–93 (“The presumption against preemption in the Model Article would be a radical change from the way preemption is analyzed in any state.”). There is no doubt that this test need not lead to these results in the hands of a skillful judiciary. The question is whether it is appropriate to risk absurd results by adopting such a deferential test in this area of law when other important rights seem adequately protected with the regular proportionality test for which we are advocating.

matters of statewide interest. An ordinary proportionality test will tend to presume substantial local control because local autonomy is a foundational principle only to be infringed upon to the extent necessary.

C. *Our Solution: Ordinary Proportionality*

Courts have long struggled with defining the zone of home rule immunity, which in California requires defining “municipal affairs.”²⁹ Much of the difficulty is caused by a tendency to focus on drawing the boundary between matters internal and external to the local government. We solve that state–local boundary drawing problem by dissolving it. Many eminent justices and scholars have tried and failed to define the *municipal affairs* and *statewide concern* concepts over the past century.³⁰ We think these are not fixed concepts to be delineated, but principles to be weighed against one another in an analytically rigorous manner. This is what proportionality review does.

Proportionality review started in the German legal tradition and has now traveled the world.³¹ Versions of it appear throughout U.S. jurisprudence in the form of various balancing tests.³² Proportionality review typically applies when an individual’s right (say to privacy or due process) clashes with a collective right (say to freedom from harm).³³ The proportionality principle permits abridging the individual right, but only if the collective need is sufficiently important and only to the extent necessary to satisfy that need—proportional abridgment.

The transnational jurisprudence concerning proportionality analysis in a structural context is not so well-developed as it is in the individual rights context, and even as to individual rights there is diversity and controversy. Yet the principle of proportionality is found in the

²⁹ *Butterworth*, 82 P.2d at 438 (“No exact definition of the term ‘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.”).

³⁰ *Sunset Tel. & Tel. Co. v. City of Pasadena*, 118 P. 796, 803 (Cal. 1911) (“There has been much discussion in our decisions as to what matters are embraced in this term, and it has been said that it is very difficult, if not impossible, to give a general definition clearly defining the term ‘municipal affairs’ and its scope.”).

³¹ See Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT’L L. 72, 89–91 (2008).

³² See generally Moshe Cohen-Eliya & Iddo Porat, *The Hidden Foreign Law Debate in Heller: The Proportionality Approach in American Constitutional Law*, 46 SAN DIEGO L. REV. 367 (2009).

³³ See, e.g., Sweet & Mathews, *supra* note 31, at 89; Vicki C. Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening up the Conversation on “Proportionality,” Rights and Federalism*, 1 U. PA. J. CONST. L. 583, 626 (1999).

Treaty of the European Union (EU) as it relates to federalism.³⁴ There is thus a command in EU law for the Court of Justice of the European Union (CJEU) to apply the principle of proportionality as to relations between the EU and member states. The CJEU's application of proportionality is controversial, with the primary complaint being that the court has been too quick to find that EU legislation trumps national law.³⁵

We propose adapting the proportionality analysis in the home rule context as follows.³⁶ Reasonable minds might differ on this restatement, but we state our proposed test here to show how it differs from alternatives:

(1) The asserted statewide interest must be evaluated. Courts cannot take the state's word on what its interests are or how strong they are. Thus, for example, we can see a state having *some* uniformity interest in prohibiting local jurisdictions from requiring masks, but should a state proclaim a vital interest, then that claim should be interrogated before it is placed into the balance.³⁷

(2) The local interest must also be evaluated. Even in areas of traditional local control, such as zoning and land use, even that strong general interest may be weaker in a particular case. Proportionality rejects strict categorization.

³⁴ Consolidated Version of the Treaty on European Union, art. 5, Oct. 26, 2012, 2012 O.J. (C326) 13 [hereinafter TEU]. (“Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.”).

³⁵ Armin Steinbach, *The Federalism Dimension of Proportionality*, EUR. L.J. (forthcoming) (on file with Wiley Online Library). The TEU also contains an explicit commitment to “subsidiarity,” which requires that:

[T]he Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

TEU, *supra* note 34, art. 5. As another scholar observed, subsidiarity (at least as applied by a court) is reducible to the proportionality principle: “The principle of subsidiarity will thus ask whether the European legislator has unnecessarily restricted national autonomy. A subsidiarity analysis that will not question the federal proportionality of a European law is bound to remain an empty formalism. Subsidiarity properly understood is federal proportionality.” Robert Schutze, *Subsidiarity After Lisbon: Reinforcing the Safeguards of Federalism*, 68 CAMBRIDGE L.J. 525, 533 (2009). Alternately, the requirement for actions by the center to be justifiable by means of the proportionality principle itself embodies a default preference for subsidiarity.

³⁶ See Sweet & Mathews, *supra* note 31, at 75–76; Matthias Kumm, *Constitutionalising Subsidiarity in Integrated Markets: The Case of Tobacco Regulation in the European Union*, 12 EUR. L.J. 503, 519 (2006); Richard Stacey, *The Magnetism of Moral Reasoning and the Principle of Proportionality in Comparative Constitutional Adjudication*, 67 AM. J. COMPAR. L. 435, 439–40 (2019).

³⁷ Note that this review should not consist of reviewing the work of a legislature like that of an administrative agency. See generally William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. 87 (2001).

(3) There must be reasonable tailoring between the state's means and ends: the state must use among "the least intrusive of all equally effective means."³⁸ That does not require the *least* intrusive means—doing so sets the bar too high and grants courts excessive discretion. State legislators should adopt a reasonableness norm (*tailor your preemption*) in the context of real politics. This is one of the two analytic keys to the test, and it requires that no more local control is displaced than necessary to meet the state's interests. This is why it is necessary to carefully delineate the state interest.

(4) There should be a final balancing between the state's interest and the local interest, and this is the proportionality analysis itself. The state's tailored intervention may still amount to a significant burden on local autonomy. If the benefit to the state is *significantly* out of proportion to the cost to local autonomy, then the state intervention is disallowed. The "significantly" requirement indicates that this is not an exercise in mathematics, and judges are not invited to make overly fine distinctions.

In the next Section, we apply these principles to some practical examples.

D. *Applications*

For this to be the best test it is unnecessary that it gets all cases "right." Instead, we think the way to evaluate our test is to consider whether it picks out the right cases as "easy" and whether it can resolve "hard" cases so as to develop the doctrine to make future hard cases less hard.

Our proportionality test will do well with easy cases. Consider the ban on local mask mandates: it is a sweeping ban, tied neither to individual conditions nor to a significant state benefit, but it imposes substantial local health costs. Or consider a requirement that cities give developers reasonable notice regarding their land use rules. This preemption is not only in response to a major statewide housing crisis, but it impacts local autonomy to just a minor degree. That is, local governments retain significant discretion over designing their community while shouldering only a relatively small notice burden, with the benefit that developers will know the rules in advance and can plan accordingly.

There will still be hard cases because this test is intended to resolve a clash of fundamental principles. If both the state and locality have substantial interests and the state has made some effort at tailoring, there

³⁸ Kumm, *supra* note 36, at 521.

still must be a winner and loser if preemption is litigated. It is not reasonable to ask for a test of constitutional principles that prevents hard cases. Rather, we think that because our proposed test will ask the right question, the answer given by a court ought to provide guidance for the future.

Consider the classic scope of local power disputes concerning living wage ordinances. Such cases will be difficult across at least two related dimensions. One difficulty is that such disputes are fact specific; a leading New Mexico Court of Appeals case about a living wage ordinance is an example. Although it did not formally apply a proportionality analysis, the court emphasized that the living wage ordinance in question only applied to larger employers that were licensed in the city.³⁹ A different ordinance, one that applied to smaller businesses that could have the effect of imposing a large burden on out-of-city businesses, likely would have been invalidated. Of course, how much smaller is unknown, but the uncertainty here is neither problematic nor soluble. It would be more problematic for there to be a categorical rule that any living wage ordinance no matter how poorly designed passed muster (or the reverse, a rule allowing for no possibility of a living wage). As things stand now in New Mexico, policymakers understand that a carefully crafted living wage ordinance is feasible—and in our view that is the right way to move the doctrine and the larger political community forward.

The other difficulty is that these hard cases will turn on close judgment calls, weighing the import of local control and local policy goals against those articulated by the state (or implicit in state law). Thus, a court that placed a higher value on uniformity, and in particular some of the values uniformity advances (such as notice and fairness to smaller businesses), could reasonably have found Santa Fe's ordinance preempted because it applied to businesses that were so small that they would effectively be overburdened. So long as the decision is not categorical or effectively so, we think it beneficial that the proportionality analysis forces courts to make these empirical and normative judgments explicit. The point here is to enhance education and dialogue about those judgments by foregrounding them; this ultimately will improve and enhance the doctrine's predictability. Once reasonable decisions have been reached, such judgments are also useful to educate state legislatures on what they can or cannot do.

³⁹ *New Mexicans for Free Enter. v. City of Santa Fe*, 126 P.3d 1149, 1164 (N.M. Ct. App. 2005) (“Any concerns about inefficiency in terms of high notice and compliance costs are allayed by the limited application of the ordinance—it applies only to employers who are registered or licensed in the City. We presume that those entities with more than twenty-five employees seeking city business licenses are doing so purposefully (and with at least some deliberation), and we doubt that they are unaware of such a high-profile ordinance.”).

We also think that frank development of normative values (e.g., uniformity in this context is more important than a living wage or vice versa) enhances the rule of law because the rule of law is not just about following rules, but about crafting rules that make sense to citizens.⁴⁰ This is because one aspect of the rule of law is mutual reciprocity between the rule and the ruled. For that to happen there must be at least rough congruence between normative commitments and the law.⁴¹ Such congruence will never happen if the commitments are unknown because they are buried in a bright line test or an unstructured multifaceted balancing test.

These abstract points take form through a negative example from U.S. constitutional law. The Affordable Care Act (ACA) sought to regulate health care in part by imposing a mandate-and-penalty structure regarding health insurance purchases.⁴² The initial question in the first ACA case was whether the federal government could impose such an insurance mandate, which under current federal constitutional doctrine required courts to parse the word “commerce.”⁴³ Thus, whether the national government could use its chosen tool to regulate 20% of the national economy turned on a metaphysical discussion of whether a mandate constituted regulating inaction and whether inaction was commerce. Leaving aside whether this debate was necessary, this seems a silly course of discussion in the abstract. What constitutes commerce and a central government’s proper role in a federation are not the same. And by channeling the discussion in this way, the result was opaque at best.⁴⁴

In sum, our proposed proportionality analysis has practical and doctrinal benefits. It offers a principled analysis for resolving easy cases, and it can resolve hard cases in a way that tends toward developing a constitutional discourse that will make future hard cases less hard, or at least make their reasoning transparent.

⁴⁰ Cf. *People ex rel. Deukmejian v. Brown*, 624 P.2d 1206, 1208 (Cal. 1981) (“The rules which underlie our decision have long been written in the books so that he who runs might read.” (quoting *Earl Scheib, Inc. v. Superior Court*, 61 Cal. Rptr. 386, 388 (Ct. App. 1967))).

⁴¹ See Stacey, *supra* note 36, at 473–74.

⁴² *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 539–40, 547–48 (2012).

⁴³ See *generally id.* Thanks to Ash Bhagwat for the example. Cf. GREENE, *supra* note 13, at 93 (“The American rightist approach severs the link between constitutional rights and constitutional justice. It turns rights questions into arid *interpretive* questions . . .”).

⁴⁴ One can see a future U.S. Supreme Court applying a proportionality analysis to federalism questions. The Court has found an implied structural principle of federalism in the Eleventh Amendment. See, e.g., *Alden v. Maine*, 527 U.S. 706, 712–13 (1999). The Court has also found an implied proportionality test in relation to Congress’s enforcement power under the Fourteenth Amendment. See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 512 (1999).

E. Other Home Rule Reform Proposals

This Section explains how our proposal relates to other discussions of these issues. As noted at the outset, others have recognized the problems presented by hyperpreemption and the old pathologies of localism. We canvas some of their thoughtful solutions here. Our approach is broadly consistent with these other solutions, though also subtly different in several overlapping ways. First, some of these other theories highlight certain values or issues in a way that seems to load the dice as to certain outcomes. We think that is neither necessary nor wise. And many of these approaches provide less refined guidance as to how to do a home rule analysis, even though their normative priors are very close to ours. Finally, in some cases these other approaches apply an analytic rubric that is narrower than proportionality analysis. A court applying our test might well properly apply these other analyses as a version of proportionality review.

One proposed test is the new National League of Cities (NLC) proposed test, which is a form of proportionality review that defers more to the local government—formally, at least, as it may not in practice.⁴⁵ For instance, state courts could see the current housing crises as severe enough to permit preempting a great deal of local housing authority. And the NLC model has broader benefits; for example, it explicitly bars the use of coercion through spending. And the model calls for substantial local fiscal autonomy.⁴⁶ If local governments had broader sources of revenue, then perhaps they would be less likely to zone out the less wealthy for fiscal reasons.

Still, on balance, we think that the NLC test goes too far. Proportionality review is the dominant form of analyzing and protecting rights, and there is no reason that a local community's autonomy rights should be protected by a stronger form of proportionality review than any other fundamental right. Not only is this special solicitude unwarranted but doing so seems to invite mischief.⁴⁷ It is foundational to a

⁴⁵ As a reminder, the core of the test we are discussing is:

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

See NAT'L LEAGUE OF CITIES, *supra* note 5, at 35.

⁴⁶ *Id.* at 25 (discussing "The Local Fiscal Authority Principle").

⁴⁷ Two of the authors of the NLC Model have argued that "there are some very good reasons for not allowing exclusionary zoning to be the tail that wags the dog of home rule." Nestor M. Davidson & Richard C. Schragger, *Do Local Governments Really Have Too Much Power?*

straightforward proportionality analysis that the value to be impinged upon (local control generally) be interfered with as little as possible, and so the ordinary test is already quite protective and should sweep away the most problematic hyperpreemption. We think it goes too far to require, for example, that the state use a means that is the least restrictive. This is not just a theoretical quibble; a California trial court invalidated a narrow housing preemption statute in part on the ground that the court found it insufficiently tailored.⁴⁸ That decision was overturned by an appellate court, which scrutinized the state interest (but with some deference) and we believe reached the reasonable decision that the statute was tailored enough.⁴⁹

Nestor Davidson, one of the authors of the NLC model, argues that state courts should look for rights already specified as worthy of protection under state constitutions in deciding how to balance local and state values.⁵⁰ This seems wise. What more appropriate place to start in considering values than those already in the state constitution? And yet many of the state interests that one would think are worthy (such as housing) do not meet that criterion. Davidson recognizes this problem and persuasively argues that such interests should be seen as implicit in the need to advance the general welfare.⁵¹ Again, we agree, but what process is there for courts to consider such implicit rights other than a fact-intensive probing of the state's asserted interests that resembles step one of our proportionality analysis? And how else to get the state to assert appropriate interests if there is no expectation of factual probing followed by proportionality review? The frank development of facts—and structured reasoning from facts—is often seen as an advantage of proportionality review.⁵² Thus, we view proportionality as the structured method that courts (in dialogue with legislatures) can use to articulate new statewide rights, and so our approach supplements Davidson's.

Understanding The National League of Cities' Principles of Home Rule for the 21st Century, 100 N.C. L. REV. 1385, 1402 (2022). In other words, it is not a good idea to excessively weaken local control because of its role in the housing crisis for many reasons, including the advent of the new preemption. Other reasons include that the housing crisis is not the same everywhere, and states have hardly been innocent in creating the crisis where it exists. *See id.* at 1402–05. We agree, but we also think that the current wave of hyperpreemption should also not wag the dog.

⁴⁸ Cal. Renters Legal Advoc. & Educ. Fund v. City of San Mateo, 283 Cal. Rptr. 3d 877, 899 (Ct. App. 2021) (requiring that the state only preempt localities that act in bad faith).

⁴⁹ *Id.* at 899 (“Given the extent and intractability of the housing shortfall, we see nothing improper in the Legislature addressing it on a statewide basis, without limiting the statute to local agencies that act in bad faith. We reject the trial court’s proposed limitation.”).

⁵⁰ Davidson, *supra* note 3, at 987.

⁵¹ *Id.* at 990, 994 (following the reasoning of the New Jersey Supreme Court in *Southern Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713 (N.J. 1975)).

⁵² *See, e.g.*, ANNE CARTER, PROPORTIONALITY AND FACTS IN CONSTITUTIONAL ADJUDICATION 22, 32–39 (1st ed. 2021).

Others also advocate some kind of balancing. Paul Diller, for example, argues that “[g]ood-faith [local] policy experiments should be presumed valid in the face of preemption challenges, but in the rare case where they clearly contravene the purposes of state law, they should nonetheless be invalidated.”⁵³ We broadly agree and see this Article as providing an analytic rubric and doctrinal support for applying Diller’s insight. After all, how is a court to ferret out what is “good faith” and where there is a “clear” conflict with state purpose? And *any* state purpose should not be sufficient to preempt a good faith local experiment, all else equal. For instance, the state interest should fail if it is disproportionately disruptive of local autonomy.

John Infranca has argued that due attention to the principle of subsidiarity *and* the principle of solidarity is an important analytic rubric for courts looking to balance different types of exclusionary tendencies.⁵⁴ For instance, one might consider the efforts by a traditionally less wealthy neighborhood to preserve its character as different from efforts made for character preservation by a wealthy suburban enclave.⁵⁵ Again, we agree with Infranca, but, as with Davidson’s appeal to the “general welfare,” we think that the concept of solidarity as a counter-interest is best developed through a proportionality framework. We do not think it would be a desirable rule for neighborhood stability for the less fortunate to trump all other interests.

Kathleen Morris also embraces balancing in this context, and she also embraces structure but proposes categories rather than proportionality review as her primary analytic mode.⁵⁶ In particular, Morris argues for a kind of tiered review with different types of state actions held to different levels of scrutiny.⁵⁷ For example, punitive preemption would be held to higher scrutiny than regular preemption. Further, regular preemption would be held to a lower standard if a local regulatory law is preempted (e.g., minimum wage), but the review would be stricter if the local law was non-regulatory (e.g., city contractors have to pay a living wage).⁵⁸ On the one hand, our concern about categories also applies to Morris’s proposals; we do not want a home rule test that encourages collateral disputes regarding what constitutes punitive preemption, for example. And yet we have also argued that one benefit of

⁵³ Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1173 (2007).

⁵⁴ See John Infranca, *Differentiating Exclusionary Tendencies*, 72 FLA. L. REV. 1271, 1310–14 (2020).

⁵⁵ *Id.* at 1314.

⁵⁶ See Kathleen Morris, *Rebel Cities, Bully States: A New Preemption Doctrine for an Anti-Racist, Pro-Democracy Localism*, 65 HOW. L.J. 225, 230 (2021).

⁵⁷ *Id.* at 230–31.

⁵⁸ See *id.* at 242–44, 252.

proportionality review is that, if done reasonably, it will eventually articulate additional guidance. We agree with Morris that it seems likely that such a test will tend to strike down punitive preemption while upholding municipal contracting choices. Thus, while we would not go so far as Morris in proposing categories *ex ante* complete with separate tests, we think her categories would likely be among those that emerge from careful application of proportionality review over time.

Clayton Gillette's approach is also similar to ours, albeit framed differently. Gillette "contend[s] that state constitutional principles prohibit legislative majorities from exercising raw political power to entrench their position with respect to an otherwise malleable allocation of governmental authority."⁵⁹ Using our framework, we think this is akin to saying that hyperpreemption tends to fail even the first step of proportionality review because the ends of such statutes—assertion of raw power—are either illegitimate or so weak compared with other justifications that they are bound to fail the subsequent steps.

Gillette's approach is both broader and narrower than ours. It is narrower because his analysis only clearly disqualifies hyperpreemption. His approach does not help develop a better jurisprudence for harder cases and, in fairness, is not meant to address them. Yet Gillette's primary claim is that background state constitutional practice can (and should) accommodate many approaches to the distribution of power, and presumably to tests regarding the limits of this power. Again, we agree. It does not offend background state constitutional principles to use a more *ad hoc* home rule test, for example. Still, we think that proportionality review provides a principled way for courts to proceed given the importance of both diversity and uniformity in particular cases—and the need for change as facts change.⁶⁰

F. *Theoretical Objections*

Though proportionality review is common around the world—and even (quietly) in the United States—it is not uncontroversial. It is beyond our scope to parry all these objections, but we will briefly address some big ones as they apply to our proposal.

⁵⁹ Clayton P. Gillette, *Preemption and Entrenchment of the State/Local Divide* 5 (N.Y.U. L. & Econ. Paper Series, Working Paper No. 20-41, 2020).

⁶⁰ Gillette sees the issue but does not outline a "normal" preemption analysis model. *Id.* at 75 ("The very contestability of the state/local divide in those areas suggests that, while traditional preemptive legislation may represent an effort by state officials to control the level of regulation at a particular point in time, the possibility that temporal and technological changes will alter the calculus indicates that the activities are inappropriate for the entrenching effects of penalty preemption.").

The most basic objection is to the notion of judicial review.⁶¹ Why trust judges to police the state–local line over state legislators?⁶² We offer an easy answer and three more refined responses. The easy answer is that we are not designing a decentralized intrastate system from scratch, but trying to make improvements to the system as is, and the limits of home rule are currently being patrolled by judges—and so our goal is to make the existing system better.

And there is good reason to have the issue of local autonomy taken out of regular politics.⁶³ It is now something of a truism in political science that local governments, particularly major cities, lose at the state level.⁶⁴ It is beyond our scope to survey all the reasons for this (e.g., the structure of state legislatures), but our point is that there are sound reasons to entrench local control out of the reach of ordinary politics as they now stand.⁶⁵

There also are sound arguments that state judges, and especially state high court justices, are better able to protect local autonomy in contrast to state legislatures. State high courts are not wholly removed from the power of the voters; they are responsible to a state electorate, and so there is reason to think that they (like governors) can and will look after broader interests.⁶⁶

Finally, proportionality review does not necessarily empower judges. If legislators absorb the proportionality norm, then this obviates

⁶¹ See generally Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006).

⁶² *Id.* at 1371 (“The legislature takes sides on one or more of the disagreements we imagined in assumption four. The question we face is whether that resolution of the legislature should be dispositive or whether there is reason to have it second-guessed and perhaps overruled by the judiciary.”).

⁶³ Even Waldron acknowledges this is possible in the abstract. *Id.* at 1406 (“Maybe there are circumstances—peculiar pathologies, dysfunctional legislative institutions, corrupt political cultures, legacies of racism and other forms of endemic prejudice—in which these costs of obfuscation and disenfranchisement [caused by judicial review] are worth bearing for the time being.”).

⁶⁴ See generally JONATHAN A. RODDEN, *WHY CITIES LOSE* (2019); Gerald Gamm & Thad Kousser, *No Strength in Numbers: The Failure of Big-City Bills in American State Legislatures, 1880–2000*, 107 AM. POL. SCI. REV. 663 (2013).

⁶⁵ Lynn A. Baker & Daniel B. Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, 86 DENV. U. L. REV. 1337, 1370 (2009).

⁶⁶ See *id.* at 1371; Diller, *supra* note 53, at 1161–62 (“Because state legislators represent individual districts rather than the state as a whole, they can be expected to support local measures adopted by the communities that elect them, even if those measures are parochial and expropriate from other communities around the state. . . . The members of the high courts of forty-two states are either appointed by the governor, who is elected statewide, or run for office themselves on a statewide basis.”).

the need for judicial review.⁶⁷ Legislators cannot absorb a norm that, like much home rule doctrine, is ad hoc. But legislators can learn: Consider the ban on special legislation, a common feature of state constitutions.⁶⁸ These provisions were installed as a response to a real problem: state legislatures intervening in local affairs in unprincipled ways.⁶⁹ Not many state laws are currently struck down as special legislation, and we think this does not merely reflect judicial leniency.⁷⁰ Instead, we think it plausible to argue that courts are forgiving as to what constitutes special legislation because modern cases tend to be closer and less obviously state power grabs. That is, state legislatures do not generally engage in the kind of unprincipled localized power grabs that the bans are concerned with because they understand they would be struck down.⁷¹ Similar institutional learning can happen if legislators understand that their interventions into local affairs must be proportional.

A different objection is that the supposed additional rigor of proportionality review is all a fraud, that it is all just politics. To be sure, the test is not automatic and is not immune to bad faith or poor application.⁷² Still, we think such cynicism is unwarranted. The analytic steps asked of a judge doing a proportionality review are common elements of practical reasoning (e.g., means–end fit) that judges already employ throughout the law.⁷³ As in other such areas, from torts to criminal law to the law of free expression, we can meaningfully talk of

⁶⁷ Diller makes a similar point, arguing that the worst issues of hyperpreemption could be prevented if only state political processes did not result in lopsided legislatures. Paul A. Diller, *Is Enhanced Judicial Review the Correct Antidote to Excessive State Preemption?*, 100 N.C. L. REV. 1469, 1503 (2022). We agree, but even more balanced legislatures need to know the limits of their power.

⁶⁸ Justin R. Long, *State Constitutional Prohibitions on Special Laws*, 60 CLEV. ST. L. REV. 719, 721–22 (2012).

⁶⁹ Robert M. Ireland, *The Problem of Local, Private, and Special Legislation in the Nineteenth-Century United States*, 46 AM. J. LEGAL HIST. 271, 271 (2004).

⁷⁰ Long, *supra* note 68, at 719 (labeling their treatment as a “dead-letter”).

⁷¹ For this structural justification for the ban on special legislation, see Anthony Schutz, *State Constitutional Restrictions on Special Legislation as Structural Restraints*, 40 J. LEGIS. 39 (2014). For some data on the size of the problem before the ban, see generally Ireland, *supra* note 69 (“Before reform the ratio of special to general legislation ranged from three to one to more than ten to one. . . . However gradually, in most of the states these reforms substantially reduced the number of special laws enacted at each legislative session.”). We would concede that the new preemption, by attempting to rip away whole pieces of local autonomy, is inconsistent with the spirit of the ban on special legislation, as it is inconsistent with home rule. But this only goes to show the persistence of state legislative pathologies that call for a broader form of judicial review of the type we are proposing.

⁷² See Timothy Endicott, *Proportionality and Incommensurability*, in PROPORTIONALITY AND THE RULE OF LAW: RIGHTS, JUSTIFICATION, REASONING 327–40 (Grant Huscroft, Bradley W. Miller & Grégoire Webber eds., 2014) (discussing six pathologies of proportionality review).

⁷³ *Id.* at 324.

better or worse decisions, and subsequent decisions that hew more or less faithfully to those decisions.

A more specific objection observes that the history of home rule in America is largely a history of municipal reformers needing to constantly return to constitutional reforms to protect municipal autonomy from narrow interpretation by state judges who refused to give municipalities the autonomy the drafters intended. California's home rule jurisprudence, recounted below, certainly shows this.⁷⁴ And it is true in many other states.⁷⁵ The first NLC reform proposal addressed this issue of judicial backsliding,⁷⁶ as does the new one we address in this Article.⁷⁷ Given this history, it seems appropriate for a reform proposal to establish even higher guardrails, as the new NLC proposal does.

But the limited success of those reforms prompts us to propose a different path. The history of the failure of previous attempts at imposing a strict enough rule suggests that a still stricter rule is not what is needed and is unlikely to succeed.⁷⁸ That is, a new rule is likely to misfire or be misapplied through motivated reasoning, just like previous ones. We think our explicitly balanced and analytically rigorous approach, grounded in a trans-substantive body and practice of constitutional law, is more likely ultimately to move the law in a sensible way and, as the correct rule as a normative matter, is more likely to be adopted by voters, legislators, or judges.

And there is a risk of overcorrection from a rule that is too strict (like that of the NLC's), which is why it is not a good practice to craft tests that assume improper application. A rule that over-corrected for local control could end up being close to right in its application in the hands of a state-oriented judiciary, but such a formal rule would over-correct in the hands of a formalist judiciary and provide too much deference to local governments.

⁷⁴ See *infra* notes 172–75 and accompanying text.

⁷⁵ Consider the example of New York. See *infra* notes 84–86 and accompanying text.

⁷⁶ See, e.g., NAT'L LEAGUE OF CITIES, *supra* note 5, at 11–12.

⁷⁷ See *id.* at 17–18.

⁷⁸ In a related context, Wittgenstein warns not to be bewitched by the image of machine-like reasoning spitting out the right answer. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 77, ¶ 192 (G.E.M. Anscombe trans., 1953) (“You have no model of this superlative fact, but you are seduced into using a super-expression.”). Applied here, we do not have a sound model of judges getting it right—if they are only given the right rules—much less a model of how to give them the wrong rules to get the right answer. And, so, very loosely following Wittgenstein, we are advocating moving from looking to better rules (e.g., applying the following presumption) to crafting a better practice (working through proportionality review). See *id.* at 81 ¶ 202. For some additional context on Wittgenstein, see DARIEN SHANSKE, THUCYDIDES AND THE PHILOSOPHICAL ORIGINS OF HISTORY 178–79 (2007).

Adopting our proportionality approach is not a panacea. Instead, by inviting judges and legislators (and other stakeholders) to engage in a structured discussion of the underlying norms that home rule provisions are designed to achieve, our goal is to move toward a better constitutional practice. Legislators will receive meaningful advice about what their state's home rule doctrine is, and judges cannot hide behind opaque ad hoc "tests." Establishing a common set of tools for balancing the competing principles here is the best way forward for state constitutionalism.

G. *Proportionality and Current State Home Rule Doctrine*

A further practical objection could be that academics do not make law, so no matter how convincing our theoretical argument might be it does not matter unless we plan on amending state constitutions. In response, we note first that amending state constitutions is certainly possible relative to amending the federal constitution, which is why the new NLC model is so important. More immediately, we believe that proportionality review is already implicit in the constitutional text, history, and doctrine of many states. Since we cannot survey all the states, this Section will briefly demonstrate how our approach is already inherent in the law of many states before proceeding with a deeper dive into California law.

At the level of constitutional text, many state constitutions offer fairly broad home rule immunity, at least concerning local actions. Consider the Colorado Constitution:

Home rule for cities and towns. The people of each city or town of this state . . . 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.

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.⁷⁹

At the level of constitutional history, there is often ample evidence in state constitutional history that the people wanted to protect substantial local authority. This was, after all, the whole point of the home

⁷⁹ COLO. CONST. art. XX, § 6.

rule movement.⁸⁰ But the constitutional texts empowering cities typically specify that their powers only extend to the “local” or “municipal.”⁸¹

At the doctrinal level, many courts have recognized the need for some kind of principled balancing between local and statewide interests. Colorado, with the strong provision noted above, considers various factors, all of which would be relevant to proportionality review:

The [] factors include: (1) the need for statewide uniformity of regulation; (2) the extraterritorial impact—i.e., the impact of the municipal regulation or home rule provision on persons living outside the municipal limits; (3) any other state interests; and (4) the asserted local interests in the municipal regulation contemplated by the home rule provision—e.g., does the Colorado Constitution specifically commit a particular matter to state or local regulation.⁸²

Or consider the test in Louisiana, which requires a more structured analysis very similar to our model of proportionality review:

[A] litigant claiming that a home rule municipality’s local law abridges the police power of the state must show that the local law conflicts with an act of the state legislature that is necessary to protect the vital interest of the state as a whole. To establish that the conflict actually exists, the litigant must show that the state statute and the ordinance are incompatible and cannot be effectuated in harmony. Further, to demonstrate that the state statute is “necessary” it must be shown that the protection of such state interest cannot be achieved through alternate means significantly less detrimental to home rule powers and rights.⁸³

New York provides a complicated example as to all three trends. On the one hand, the text of the New York Constitution appears (and was meant) to be extremely protective of city power.⁸⁴ New York’s Municipal Home Rule Clause allows the legislature

⁸⁰ See NAT’L LEAGUE OF CITIES, *supra* note 5, at 11 (“In 1875 . . . Missouri became the first state to enshrine home rule in its constitution, leading to a wave of Progressive Era reforms that empowered growing cities across the country to govern.”).

⁸¹ See, e.g., CAL. CONST. art. XI(a), § 5; ILL. CONST. art. VII, § 6; see also MO. CONST. art. VI, § 19(a).

⁸² Fraternal Ord. of Police, Colo. Lodge No. 27 v. City & County of Denver, 926 P.2d 582, 589 (Colo. 1996).

⁸³ City of New Orleans v. Bd. of Comm’rs, 93-0690 (La. 7/5/94), 640 So. 2d 237, 252.

⁸⁴ See Note, *Home Rule and the New York Constitution*, 66 COLUM. L. REV. 1145, 1148–49 (1966) (exploring New York’s attempt to ensure greater local autonomy, which was stymied by narrow judicial construction of New York’s constitutional home rule provisions and application of Dillon’s Rule to narrowly construe all grants of local authority against the locality).

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.⁸⁵

This provision is so strong that it does not seem to contain the usual requirement that home rule power is limited to local affairs; the legislature must be invited to act locally for a special law. But that limit has been provided by judicial gloss. The current test is that there is no need for such a local invitation “where the State possesses a ‘substantial interest’ in the subject matter and ‘the enactment . . . bear[s] a reasonable relationship to the legitimate, accompanying substantial State concern.’”⁸⁶ As with the Colorado and Louisiana tests, we think the New York courts are approaching use of proportionality review. That is one way the New York approach resembles California’s; the other is the similarity in the application of a judicial gloss to dilute an apparent voter intent to establish powerful home rule immunity.

We chose a few examples out of many. We think that many states have constitutional text or discourse that manifest one or more of the features we canvassed above and will develop below as to California. For the states that currently lack proportionality review features, adopting a proportionality approach would preserve the value of local autonomy tempered by the need to look after the broader good. States that have limited or no home rule immunity likely will be unmoved by our analysis. Yet we think the better way to move the law towards adopting more robust protections for local autonomy is to demonstrate that home rule can be both meaningful *and* limited in a principled manner.

II. THE CALIFORNIA HOME RULE DOCTRINE’S EVOLUTION

As we explained in the Introduction, several reasons underlie our choice to focus on California’s home rule doctrine, including that elements of California’s current doctrine already resemble proportionality review. Because California’s doctrine and history are typical, this Part should be read as broadly outlining how and why a form of proportionality review should be applied to home rule in every state.

⁸⁵ N.Y. CONST. art. IX, § 2(b)(2).

⁸⁶ Greater N.Y. Taxi Ass’n v. State, 993 N.E.2d 393, 400 (N.Y. 2013) (alterations in original) (quoting City of New York v. Patrolmen’s Benevolent Ass’n of N.Y., Inc., 676 N.E.2d 847, 851 (N.Y. 1996)).

As this Part shows, California's electorate shifted the state–local power balance in a series of constitutional changes.⁸⁷ And there is credible evidence that California voters intended the new concept of municipal affairs to vest local governments with maximal autonomy. That intent is relevant because the California electorate can set constitutional policy.⁸⁸ And yet the voters could not have intended to create city-states—that would produce absurd results, given the state's power to regulate statewide interests. This dissonance is why the courts found it so difficult to apply the municipal affairs concept and is the reason California courts have been left to parse the meaning of “municipal affairs” either categorically or with ad hoc balancing on a case-by-case basis, which even the California Supreme Court concedes is confusing.⁸⁹

We argue that both approaches are unsatisfactory. As discussed above, we would instead use proportionality to resolve conflicts between municipal affairs and statewide interests. And the cases we describe below show that California courts are moving in that direction. Categorically defining local and state matters is the wrong frame because home rule provisions are constitutional policy decisions about power-sharing between competing interests. And categorically dividing state and local interests is impossible because everything in a local government has some external effects.⁹⁰ Thus, the better frame is that the state–local power balance is a constitutional policy decision.⁹¹

⁸⁷ The 1879 constitution's provision on city charters was “amended on six different occasions since its adoption in 1879.” HOWARD LEE MCBAIN, *THE LAW AND THE PRACTICE OF MUNICIPAL HOME RULE* 223 (1916). Only the 1896 and 1914 amendments have substantive changes relevant to our subject, so we do not discuss the other amendments here. See Sho Sato, “*Municipal Affairs*” in *California*, 60 CALIF. L. REV. 1055, 1057–58 (1972) (noting that the 1968 amendment was non-substantive).

⁸⁸ *Pro. Eng'rs in Cal. Gov't v. Kempton*, 155 P.3d 226, 244 (Cal. 2007) (noting that the electorate, acting through its initiative power, makes policy determinations as a constitutionally empowered legislative entity).

⁸⁹ *Butterworth v. Boyd*, 82 P.2d 434, 438 (Cal. 1938) (“No exact definition of the term ‘municipal affairs’ can be formulated and the courts have made no attempt to do so”); *Pac. Tel. & Tel. Co. v. City & County of San Francisco*, 336 P.2d 514, 517 (Cal. 1959) (“[T]he constitutional concept of municipal affairs is not a fixed or static quantity.”); *In re Hubbard*, 396 P.2d 809, 814 (Cal. 1964) (“[These issues] must be answered in the light of the facts and circumstances surrounding each case.”); *Cal. Fed. Sav. & Loan Ass'n v. City of Los Angeles*, 812 P.2d 916, 924 (Cal. 1991) (“We have said that the task of determining whether a given activity is a ‘municipal affair’ or one of statewide concern is an ad hoc inquiry”).

⁹⁰ MCBAIN, *supra* note 87, at 290.

⁹¹ *Cal. Fed.*, 812 P.2d at 925 (noting that courts have “the difficult but inescapable duty” to allocate the governmental powers between local and state legislative bodies); *State Bldg. & Constr. Trades Council of Cal. v. City of Vista*, 279 P.3d 1022, 1034 (Cal. 2012) (“[T]he resolution of constitutional challenges to state laws falls within the *judicial* power, not the *legislative* power.”); see also Leon Thomas David, *California Cities and the Constitution of 1879: General Laws and Municipal Affairs*, 7 HASTINGS CONST. L.Q. 643, 645, 693 (1980).

A. *The Current California Constitutional Context*

The California Constitution is the sole authority for how the state distributes power between its state and local governments.⁹² The California constitutional provisions regulating state and local relations evolved in four steps, showing a consistent trend of devolving more power to local governments. Beginning with the 1849 state constitution the California legislature had unfettered discretion over every corner of the state. The voters abolished that exclusive legislative control with several state constitutional changes in 1879, 1896, and 1914—each granting cities ever-greater autonomy.

California's first constitution in 1849 gave the state legislature plenary authority over both statewide and local affairs.⁹³ Local dissatisfaction with legislative interference soon led to diluting that legislative power.⁹⁴ That process began with the 1879 California Constitution, which weakened the legislature's otherwise-plenary police power by giving cities their own local police powers, abolishing special laws, and instead requiring all laws to apply statewide.⁹⁵ But those changes proved inadequate to secure the desired degree of local autonomy because general laws passed by the state legislature continued to preempt all conflicting local laws regardless of how local a problem was. The voters next adopted constitutional amendments in 1896 and 1914, each further diluting legislative power and expanding charter city powers to include exclusive control over municipal affairs.

⁹² *City of Trenton v. State of New Jersey*, 262 U.S. 182, 185–87 (1923) (noting that a city is a political subdivision of the state); *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178–79 (1907) (noting that states have “absolute discretion” and “absolute power” over their municipal corporations as political subdivisions of the state); *Atkin v. Kansas*, 191 U.S. 207, 220–21 (1903) (noting that municipal corporations are the “mere political subdivisions” of the state). That leaves states “wide leeway when experimenting with the appropriate allocation of state legislative power.” *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978); see David A. Carrillo & Stephen M. Duvernay, *California Constitutional Law: The Guarantee Clause and California's Republican Form of Government*, 62 UCLA L. REV. DISCOURSE 104, 110–11 (2014).

⁹³ CAL. CONST. of 1849, art. IV, § 1 (“The Legislative power of this State shall be vested in . . . the Legislature of the State of California . . .”); *id.* art. IV, §§ 31, 37 (permitting the legislature to form and organize municipal governments by special acts); *id.* art. XI, § 4 (“The Legislature shall establish a system of county and town governments . . .”); *Pattison v. Bd. of Supervisors*, 13 Cal. 175, 184 (1859) (holding that cities were political subdivisions of the state without powers of their own).

⁹⁴ David, *supra* note 91, at 645.

⁹⁵ CAL. CONST. of 1879, art. XI, § 11 (“Any county, city, town, or township, may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws.”). This section was renumbered with non-substantive changes to current CAL. CONST. art. XI, § 7 (“A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.”).

Presently the California Constitution divides power between the state government, counties, and cities.⁹⁶ It provides that cities and counties have some constitutionally guaranteed powers and gives local governments the option to be organized either under the general state laws or by charter.⁹⁷ A city that adopts a charter assumes power to override conflicting state laws concerning its municipal affairs:

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.*⁹⁸

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 therewith.*⁹⁹

Defining municipal affairs proved impossible, and California courts struggled to apply these constitutional provisions in cases that required parsing state and local powers. The courts experimented with various methods: either categorically defining things as internal to a city versus external things, or applying various balancing tests. No single method proved functional, resulting in a fractured doctrine. In the following Sections we show why the municipal affairs concept is so opaque.

B. *The Text Is Unclear*

Unlike more modern constitutions, California's Constitution lacks an express warrant for using proportionality analysis. And so courts have struggled to define the municipal affairs concept in Article XI, Section 5. Just six years after the 1896 amendment installed that concept, Justice McFarland wrote that the state constitution "uses the loose, undefinable,

⁹⁶ CAL. CONST. art. XI, §§ 1–2.

⁹⁷ *Id.* § 7. A general law county or city is structured and operates under legislative statutes.

⁹⁸ *Id.* § 3(a) (emphasis added).

⁹⁹ *Id.* § 5(a) (emphasis added).

wild words, ‘municipal affairs,’ and imposes upon the courts the almost impossible duty of saying what they mean.”¹⁰⁰

As the courts found, the standard California interpretation analysis does not produce a clear definition of municipal affairs.¹⁰¹ In that analysis a court first considers the language, giving the words their ordinary meaning and construing the language in the context of the statute and initiative as a whole.¹⁰² If the language is not ambiguous, courts presume the voters intended the meaning apparent from that language.¹⁰³ If the language is ambiguous, courts consider ballot summaries and arguments in determining the voters’ intent and understanding of a ballot measure.¹⁰⁴ Courts adopt a construction that will effectuate the voters’ intent (giving meaning to each word and phrase) and avoid absurd results.¹⁰⁵ Reviewing its own decisions, the California Supreme Court concluded that this standard analysis produced no consistent definition of municipal affairs.¹⁰⁶ Scholars similarly conclude that it is impossible to find consistency in judicial decisions on municipal affairs.¹⁰⁷

We of course agree that the text has no plain meaning. The key is that the constitution’s text makes delegation of control over municipal affairs a constitutional policy, out of the range of ordinary state politics. Yet at the same time, all that is delegated is control over *municipal* affairs; local power is inherently circumscribed. The proportionality principle is a way to give effect to both commitments: to home rule, and to its limitations.

Having concluded that the text is ambiguous we turn to extrinsic aids.¹⁰⁸ In the next Section we review the voter intent evidence on the four

¹⁰⁰ *Ex parte Braun*, 74 P. 780, 784 (Cal. 1903) (McFarland, J., concurring).

¹⁰¹ *Cal. Cannabis Coal. V. City of Upland*, 401 P.3d 49, 55 (Cal. 2017) (“We apply similar principles when construing constitutional provisions and statutes, including those enacted through voter initiative.”); David A. Carrillo, Stephen M. Duvernay & Brandon V. Stracener, *California Constitutional Law: Popular Sovereignty*, 68 HASTINGS L.J. 731, 747 (2017).

¹⁰² *People v. Superior Court*, 227 P.3d 858, 862 (Cal. 2010).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *People v. Stringham*, 253 Cal. Rptr. 484, 491 (Ct. App. 1988).

¹⁰⁶ *Cal. Fed. Sav. & Loan Ass’n v. City of Los Angeles*, 812 P.2d 916, 917, 924–25, 931 (Cal. 1991) (no pattern is discernible from the California Supreme Court’s many municipal affairs decisions).

¹⁰⁷ See, e.g., FRANK J. GOODNOW, MUNICIPAL HOME RULE: A STUDY IN ADMINISTRATION 78 (1903) (“The decisions do not reveal any very definite conclusion as to what are corporate or municipal or internal, as distinguished from governmental affairs, and the judges have been wont to apply the prohibition of special legislation, without discrimination, to all matters actually attended to by the territorial divisions or their officers.”).

¹⁰⁸ *People v. Superior Court*, 171 Cal. Rptr. 3d 86, 91 (Ct. App. 2014) (“[E]xtrinsic aids[] I[es] the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, . . . the statutory scheme[,] . . .’ [and] ‘other

key developments of California home rule doctrine: the 1849 and 1879 constitutions, and the 1896 and 1914 amendments. That evidence demonstrates a consistent intent to prefer local control “municipal affairs.” Although the policy preference is clear, the text’s ambiguity and lack of definitions led the courts in circles, which suggests the need for turning to a dynamic test that actualizes the voter intent.

C. *Historical Evidence of the Intended Meaning of
“Municipal Affairs”*

The historical development of the state–local power balance in California demonstrates an intent to increase local control. Yet reading the voter intent evidence to require complete local autonomy would lead to absurd practical results, and courts have struggled to balance the potent statements of voter intent with the imperative to prevent the complete loss of state control over statewide affairs.

1. The 1849 California Constitution Granted Complete
Legislative Control

California’s first constitution granted the legislature plenary authority over the state’s political subdivisions.¹⁰⁹ Municipal governments could only be formed by special act and the legislature controlled their organization.¹¹⁰ The legislature had power to provide “for the organization of cities and incorporated villages” but also to “restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent abuses.”¹¹¹ Under that constitutional structure, the California Supreme Court held that cities were mere political subdivisions of the state with no independent powers.¹¹²

indicia of the voters’ intent, particularly the analyses and arguments contained in the official ballot pamphlet.’ . . . [A court then] ‘select[s] the construction that comports most closely with the apparent intent of the [electorate], . . . [attempting] to promot[e] . . . the general purpose of the statute, and avoid[s] . . . absurd consequences.’” (eleventh alteration in original) (citations omitted) (first quoting *People v. Woodhead*, 741 P.2d 154, 156 (Cal. 1987); then quoting *People v. Rizo*, 996 P.2d 27, 30 (Cal. 2000); and then quoting *People v. Sinohui*, 47 P.3d 629, 633 (Cal. 2002))). Finally, “courts are required to try to harmonize constitutional language with that of existing statutes if possible.” *Citizens Ass’n of Sunset Beach v. Orange Cnty. Loc. Agency Formation Comm’n*, 147 Cal. Rptr. 3d 696, 703 (Ct. App. 2012).

¹⁰⁹ CAL. CONST. of 1849, art. IV, § 1; *see supra* note 93 and accompanying text.

¹¹⁰ CAL. CONST. of 1849, art. IV, §§ 31, 37; *id.* art. XI, § 4.

¹¹¹ *Id.* art. IV, § 37.

¹¹² *Pattison v. Bd. of Supervisors*, 13 Cal. 175, 184 (1859).

Because city powers only existed by legislative grace under the 1849 constitution, the legislature could intrude into local affairs as it pleased. From 1850 through 1879, the legislature regulated city governments' organization, elections, finances, and public works.¹¹³ Legislative supervision ranged from petty micromanagement (e.g., making it "unlawful for hogs or goats to run at large in the Town of Woodbridge") to substantial interference (such as by forcing a city to use city funds to pay the claim of a private citizen).¹¹⁴ When the legislature by statute directed "the City of Stockton to donate three hundred thousand dollars to a company who propose to build a certain railroad," the California Supreme Court dismissed the city's challenge because the legislature's power to enact such a tax was "so obvious that no one will controvert it."¹¹⁵ Indeed, the legislature's role as sole lawgiver practically required special laws.¹¹⁶ The legislature did grant some broad local powers, but they were not exclusive of the legislature's authority, and the legislature frequently preempted local ordinances with general laws and overrode them with charter amendments and special laws.¹¹⁷

Local attempts to contest legislative rule proved futile. Starting with *People ex rel. O'Donnell v. Board of Supervisors*, the California Supreme Court ruled that local government was conducted under legislative authorization and direction.¹¹⁸ In *O'Donnell* the court upheld a statute that appropriated local money for debt repayment because the powers in city charters were legislative "*provisions, not concessions*" of power, and because cities "are but parts of the general State government; the creatures

¹¹³ John C. Peppin, *Municipal Home Rule in California: I*, 30 CALIF. L. REV. 1, 12–25, 14 nn.36–37 (1941) (noting that the legislature is appointed by statute city boards and commissions). The legislature frequently called elections in certain cities, most often to approve bond or tax measures to fund projects approved by the legislature. *Id.* at 12 n.29, 14 n.35 (noting that the legislature defined the duties of city officials). The legislature also passed laws creating and regulating local police and fire departments, including regulations on the number of officers and their salaries. *Id.* at 16 n.42, 17 n.44 (noting that the legislature granted individuals the power to construct and operate railroads and gas lines in cities); *id.* at 11–12 n.26 (noting that the legislature ordered San Francisco to pay claims due on contracts made by the city government and appropriated city money to pay a claim from the city's general fund). The legislature also would require local governments to issue bonds and segregate funds into particular accounts. *Id.* at 12 n.27 (noting that the legislature zoned cities for slaughterhouses and schools, regulated local railcar rates, and declared streets to be public highways); *id.* at 16 n.43 (noting that the legislature criminalized activities only in certain cities, making it unlawful to allow cattle to run at large in streets in Napa); *id.* at 16 nn.40–41 (noting that there are special laws requiring individual cities to construct or improve streets, bridges, and sewer systems).

¹¹⁴ See Brett A. Stroud, *Preserving Home Rule: The Text, Purpose, and Political Theory of California's Municipal Affairs Clause*, 41 PEPP. L. REV. 587, 594 nn.40–41 (2014).

¹¹⁵ *Stockton & Visalia R.R. Co. v. Common Council*, 41 Cal. 147, 157 (1871).

¹¹⁶ Peppin, *supra* note 113, at 7–8.

¹¹⁷ *Id.*

¹¹⁸ *People ex rel. O'Donnell v. Bd. of Supervisors*, 11 Cal. 206 (1858).

of legislation, and as in their organized constitution subject, even to the extent of absolute repeal, so by the stronger reason subject in all matters of administration.”¹¹⁹ That view persisted up to the 1879 constitution.¹²⁰

2. The 1879 Constitution Recognized Local Self-Governing Power

The home rule movement grew from the events described above, as “a festering reaction to legislative domination of the most minute details of municipal affairs and the common law rule of absolute legislative supremacy.”¹²¹ That reaction led to the 1879 constitution making major changes to the state–local power balance, empowering local governments and limiting legislative intrusion into local affairs. The 1879 delegates incorporated the home rule provisions from the Missouri Constitution, the first state constitution to authorize home rule for cities.¹²² The new constitution gave cities local police power;¹²³ abolished special laws¹²⁴ and special incorporation;¹²⁵ barred the legislature from appointing special commissions to “control, appropriate, supervise, or in any way interfere with” local affairs;¹²⁶ and provided that cities of 100,000 people or more

¹¹⁹ *Id.* at 208.

¹²⁰ *See, e.g.,* *Pattison v. Bd. of Supervisors*, 13 Cal. 175, 182 (1859) (rejecting argument that special law requiring county board of supervisors to initiate vote on stock purchase was prohibited “by the spirit, meaning, and true intent of the Constitution”); *People ex rel. Blanding v. Burr*, 13 Cal. 343, 351 (1859) (upholding special law requiring cities to issue bonds to pay debt, reasoning that cities’ “powers are subject to be increased, restricted, or repealed, at the will of the Legislature”), *abrogated by* *People v. Lynch*, 51 Cal. 15 (1875); *Creighton v. Bd. of Supervisors*, 42 Cal. 446, 449–50 (1871) (rejecting challenge to law requiring San Francisco to pay for services rendered under a contract with a street contractor). *See generally* Peppin, *supra* note 113, at 24 n.71.

¹²¹ Coleman Blease, *Civil Liberties and the California Law of Preemption*, 17 HASTINGS L.J. 517, 560 (1966).

¹²² MCBAIN, *supra* note 87, at 113, 200; GOODNOW, *supra* note 107, at 96.

¹²³ CAL. CONST. of 1879, art. XI, § 11; *id.* § 7. *See generally* John C. Peppin, *Municipal Home Rule in California III: Section 11 of Article XI of the California Constitution*, 32 CALIF. L. REV. 341 (1944); ARVO VAN ALSTYNE, CAL. CONST. REVISION COMM’N, BACKGROUND STUDY, ARTICLE XI: LOCAL GOVERNMENT 298–315 (1966).

¹²⁴ CAL. CONST. of 1879, art. IV, § 25; *see id.* § 16.

¹²⁵ *Id.* art. XI, § 6.

¹²⁶ *Id.* § 13 (“The Legislature shall not delegate to any special commission, private corporation, company, association, or individual, any power to make, control, appropriate, supervise, or in any way interfere with, any county, city, town, or municipal improvement, money, property, or effects.”). The current version of this provision (CAL. CONST. art. XI, § 11(a)) forbids the legislature to delegate to a private person or body power to perform municipal functions. Courts have applied this provision to, for example, strike down binding arbitration when a public agency and its peace officers were at impasse. *See County of Riverside v. Superior Court*, 66 P.3d 718 (Cal. 2003) (holding a statute requiring binding arbitration invalid because it deprives the county of its constitutional authority to provide for the compensation of its employees and delegates to a private body the power to interfere with county financial affairs and to perform a municipal function).

(at the time only San Francisco) could frame freeholders charters for their own self-government.¹²⁷

The local police power provision was original to the 1879 constitution.¹²⁸ One contemporary commentator called the new local police power particularly significant as a broad grant, “unusual in the generality of its terms, to cities and counties,” which “approaches in magnitude those general grants of power which are so often the theme of the admirers of European city governments. It is the capstone of our system of municipal independence.”¹²⁹

These novel constitutional provisions created a new local right to self-government to prevent the legislative interference the 1849 constitution permitted. The charter provision in Article XI, Section 5 involved substantial debate about whether allowing cities to form their own charters gave them too much power.¹³⁰ According to one 1879 convention delegate, the convention’s operating theory when drafting the new local control provisions was “that local legislation ought to be left to the localities which it is intended to affect.”¹³¹

Upon first reviewing this provision the California Supreme Court held that it was “manifestly the intention” of the new provisions to “emancipate municipal governments from the authority and control formerly exercised over them by the Legislature.”¹³² Yet that intent did not manifest in practice. Despite the increased local autonomy from the new provisions, the prevailing judicial view under the 1879 constitution was that city charters were “intended to be subordinate to general laws.”¹³³ That view was consistent with contemporary local government law, dominated as it was by Dillon’s Rule and its narrow view of a local

¹²⁷ CAL. CONST. of 1879, art. XI, § 8; see John C. Peppin, *Municipal Home Rule in California: II: Prohibition of Special Legislation and Provision for Incorporation Under General Laws*, 30 CALIF. L. REV. 272, 272–73 (1942).

¹²⁸ CAL. CONST. art. XI, § 7; CAL. CONST. of 1879, art. XI, § 11.

¹²⁹ Thomas H. Reed, *Municipal Home Rule in California*, 1 NAT’L CIVIC REV., Jan. 1913, at 569, 576.

¹³⁰ See 2 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA 1060–64 (1881) [hereinafter CONSTITUTIONAL CONVENTION].

¹³¹ Joseph W. Winans, Remarks at the Sacramento Convention of 1878–79 (Jan. 17, 1879), in 2 CONSTITUTIONAL CONVENTION, *supra* note 130, at 1063.

¹³² *People v. Hoge*, 55 Cal. 612, 618 (1880).

¹³³ ALSTYNE, *supra* note 123, at 185 (quoting John S. Hager, Remarks at the Sacramento Convention of 1878–79 (Feb. 27, 1879), in 3 CONSTITUTIONAL CONVENTION, *supra* note 130, at 1483); see also James S. Reynolds, Speech at the Sacramento Convention of 1878–79 (Jan. 17, 1879), in 2 CONSTITUTIONAL CONVENTION, *supra* note 130, at 1060 (advocating municipal home rule for San Francisco but emphasizing that “[o]f course this charter must be subservient to the Constitution and laws of the State”).

government's authority. And so California courts regularly applied Dillon's Rule between 1879 and 1896.¹³⁴

The judicial reaction left cities subject to being overridden by the legislature's general laws, and from 1880 to 1890 the California Supreme Court continued to reject local challenges to state authority.¹³⁵ The court invited constitutional action if anyone disagreed, writing in 1890 that if the legislature's power "to interfere by general laws with the local affairs of a city . . . is an evil affecting the rights of city governments, the remedy is by amendment of the constitution."¹³⁶ In 1896, the legislature and the voters took the court's advice.

3. The 1896 Amendment Gave Cities Exclusive Control over Local Matters

To "terminate this controversy" over charter city powers, in 1896 the legislature and the electorate amended the California Constitution to provide that charter cities would only be subject to those general laws that did not interfere with local matters.¹³⁷ The act amended Article XI, Section 6 to add the italicized phrase:

¹³⁴ Von Schmidt v. Widber, 38 P. 682, 684 (Cal. 1894); *see also* Johnson v. City of San Diego, 42 P. 249, 250 (Cal. 1895) ("Municipal corporations . . . are . . . creatures of the state . . . [and] the legislature may increase or diminish the powers of such a corporation . . . or may destroy its corporate existence entirely. . . . [because] such corporations have no vested rights in powers conferred upon them . . .").

¹³⁵ *See* MCBAIN, *supra* note 87, at 240–50; *see, e.g.*, Staude v. Bd. of Election Comm'rs, 61 Cal. 313 (1882) (rejecting city's challenges to general laws regulating election of local officials); Thomason v. Ashworth, 14 P. 615 (Cal. 1887) (rejecting city's challenge to state law regulating street conditions); *People ex rel. Daniels v. Henshaw*, 18 P. 413 (Cal. 1888) (rejecting challenge to establishment of local police courts).

¹³⁶ *Davies v. City of Los Angeles*, 24 P. 771, 773 (Cal. 1890).

¹³⁷ Comment, *Municipal Corporations: Municipal Home Rule: Municipal Market as a Public Purpose*, 11 CALIF. L. REV. 446, 446 (1923). We ordered the legislative history file on Senate Constitutional Amendment 25 (Fay 1895) from the Legislative Intent Service. An abbreviated version of the LIS report with page references added for convenience is available at ABRIDGED LEGISLATIVE INTENT SERVICE REPORT RE: SENATE CONSTITUTIONAL AMENDMENT NO. 25 (2018) [hereinafter ABRIDGED LIS REPORT], <https://drive.google.com/file/d/1V3BGURhMGi--zEHurghKy2MJLn6kyDo/view> [https://perma.cc/6UZD-2DBW].

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 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, *except in municipal affairs*, shall be subject to and controlled by general laws.¹³⁸

Adding that phrase was the second major step away from central control and toward local autonomy. That amendment revoked the assurances during the 1879 debates that charter cities would remain subject to general laws in every context.¹³⁹ We next examine the evidence of the drafters' intent for the 1896 amendment to determine their purpose.

The 1896 amendment is framed by the history that led to its adoption, which resulted from the experience of living under the 1879 constitution. That experience was similar to and produced the same local frustrations as the period between 1849 and 1878. Between the 1879 constitution's adoption and the 1896 amendment, the legislature employed general and special laws to control cities and frustrate local power.¹⁴⁰ The 1896 amendment addressed that problem and was "intended to give municipalities the sole right to regulate, control, and govern their internal conduct independent of general laws" and "prevent existing provisions of charters from being frittered away by general laws."¹⁴¹ It was enacted on the principle that "the municipality itself knew better what it wanted and needed than did the state at large, and to give that municipality the exclusive privilege and right to enact direct legislation which would carry out and satisfy its wants and needs."¹⁴² The amendment's purpose was to give charter cities autonomy in local

¹³⁸ CAL. CONST. art. XI, § 6, *amended by* CAL CONST. amend. 4 (repealed 1970) (emphasis added); *see* S.C.A. 25, 1895 Leg., 31st Sess. (Cal. 1895) [hereinafter S.C.A. 25], *reprinted in* ABRIDGED LIS REPORT, *supra* note 137, at LIS0009, LIS0011. This act originated as Senate Constitutional Amendment 25 (Fay), introduced February 15, 1895, to committee February 19, 1895, adopted March 16, 1895. The Assembly version was Assembly Constitutional Amendment 48 (Dodge), introduced February 16, 1895, to committee February 19, 1896, adopted February 26, 1895, withdrawn and substituted by S.C.A. 25.

¹³⁹ *See* Reynolds, *supra* note 133, at 1060; Winans, *supra* note 131, at 1063.

¹⁴⁰ Reed, *supra* note 129, at 574; MCBAIN, *supra* note 87, at 252; Lloyd E. Graybiel, *Review of Recent California Decisions on Municipal Law*, 11 CALIF. L. REV. 73, 91 (1923); Comment, *supra* note 137, at 446.

¹⁴¹ *Fragley v. Phelan*, 58 P. 923, 925 (Cal. 1899).

¹⁴² *Id.*

matters and to overrule *Davies v. City of Los Angeles* and a series of similar decisions that showed that the charter power was useless “if such charters could at once be superseded by any general legislative enactment.”¹⁴³

The 1896 amendment has scant legislative history, consisting mainly of procedure with no reported debates about the intended meaning of the “except in municipal affairs” addition. The measure began as Senate Constitutional Amendment 25, introduced by Senator John Fay on February 15, 1895.¹⁴⁴ It went to the committee on constitutional amendments on February 19, 1895, which examined the proposal and reported on it without recommendation on February 28, 1895.¹⁴⁵ The committee report was adopted without debate.¹⁴⁶ The motion on the resolution was adopted unanimously, again without reported debate.¹⁴⁷ No author, committee, or floor documents still exist.¹⁴⁸ The legislature made no amendments, and adopted it in its original form as Chapter 23, Statutes of 1895 on March 16, 1895.¹⁴⁹ The voters adopted it as Amendment No. 4 in the general election on November 3, 1896.¹⁵⁰ The

¹⁴³ ALSTYNE, *supra* note 123, at 186 (quoting *Ex parte Braun*, 74 P. 780, 782 (Cal. 1903)); *see also* *Morton v. Broderick*, 50 P. 644, 648 (Cal. 1897) (“[I]t had been believed by the legislature and by the people that it would be wiser to relieve the charters of cities from the operation of general legislative laws affecting municipal affairs, lest otherwise there would be danger of the charter provisions being entirely ‘frittered away.’”); *Braun*, 74 P. at 782 (“[T]he object of the amendment was to secure to the municipality . . . the maintenance of its charter provisions in municipal matters, and to deprive the Legislature of the power . . . to interfere in the government and management of the municipality.”); *see, e.g.*, *Thomason v. Ashworth*, 14 P. 615 (Cal. 1887); *Kennedy v. Miller*, 32 P. 558 (Cal. 1893).

¹⁴⁴ S.C.A. 25, *supra* note 138, at LIS0009, LIS0011; FINAL HISTORY OF SENATE AND ASSEMBLY BILLS, CONSTITUTIONAL AMENDMENTS, AND JOINT RESOLUTIONS: INTRODUCED IN THE SENATE AND ASSEMBLY DURING THE THIRTY-FIRST SESSION—CALIFORNIA LEGISLATURE (1895) [hereinafter FINAL HISTORY OF THE THIRTY-FIRST SESSION SENATE AND ASSEMBLY BILLS], *reprinted in* ABRIDGED LIS REPORT, *supra* note 137, at LIS0015; THE JOURNAL OF THE SENATE DURING THE THIRTY-FIRST SESSION OF THE LEGISLATURE OF THE STATE OF CALIFORNIA (1895) [hereinafter JOURNAL OF THE THIRTY-FIRST SESSION SENATE], *reprinted in* ABRIDGED LIS REPORT, *supra* note 137, at LIS0018; ALSTYNE, *supra* note 123, at 186; *see also* *Morton*, 50 P. at 648; *Braun*, 74 P. at 782; *Thomason*, 14 P. 615; *Kennedy*, 32 P. 558.

¹⁴⁵ S.C.A. 25, *supra* note 138, at LIS0011; FINAL HISTORY OF THE THIRTY-FIRST SESSION SENATE AND ASSEMBLY BILLS, *supra* note 144, at LIS0015; JOURNAL OF THE THIRTY-FIRST SESSION SENATE, *supra* note 144, at LIS0040, LIS0042.

¹⁴⁶ JOURNAL OF THE THIRTY-FIRST SESSION SENATE, *supra* note 144, at LIS0042.

¹⁴⁷ *Id.* at LIS0047.

¹⁴⁸ Lillge, *supra* note 137, at LIS0003.

¹⁴⁹ *Id.* at LIS0002–LIS0003; S.C.A. 25, *supra* note 138, at LIS0014; JOURNAL OF THE THIRTY-FIRST SESSION SENATE, *supra* note 144, at LIS0050. The only procedural wrinkle is that a mirror image Assembly bill (Assembly Constitutional Amendment 48, Dodge 1895) was withdrawn in favor of S.C.A. 25, which was substituted in its place, on the author’s own motion and by unanimous vote in the Assembly without debate. FINAL HISTORY OF THE THIRTY-FIRST SESSION SENATE AND ASSEMBLY BILLS, *supra* note 144, at LIS0027; JOURNAL OF THE THIRTY-FIRST SESSION SENATE, *supra* note 144, at LIS0048, LIS0053–LIS0054.

¹⁵⁰ Lillge, *supra* note 137, at LIS0002.

vote was 101,587 for and 74,353 against, with 42,414 “yes” votes from Los Angeles and San Francisco alone—42% of the total votes in favor.¹⁵¹

Only one variation of this measure was proposed (also by Senator Fay), Senate Constitutional Amendment 14, which read:

Section 6. 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 shall so determine and shall organize in conformity therewith; *but no charter framed or adopted by authority of section eight of article eleven of this Constitution shall ever be subject to, or deemed to be subject to, or controlled by, or deemed to be controlled by, any general law*; and none of such charters shall ever be amended, or deemed to be amended, except in the manner provided by said section eight, of said article eleven, of this Constitution.¹⁵²

It was introduced on January 21, 1895, and returned by the committee on amendments on January 23 with a “be not adopted” recommendation.¹⁵³ It was re-referred to committee on February 9.¹⁵⁴ The last time it appears in the Senate journal is March 4, 1895, when it was passed on file.¹⁵⁵

At the time, elections were announced by proclamation, without any arguments for and against by proponents and opponents.¹⁵⁶ The text of the proposed measures was printed in newspapers.¹⁵⁷ The dearth of legislative debate contrasts with the wealth of popular press coverage, which generally supported Amendment No. 4. The editorial coverage argued for a common understanding of the amendment that would guarantee maximum autonomy to charter cities:

¹⁵¹ STATEMENT OF THE VOTE OF CALIFORNIA AT THE GENERAL ELECTION, HELD NOVEMBER 3, 1896, *reprinted in* ABRIDGED LIS REPORT, *supra* note 137, at LIS0065, LIS0067.

¹⁵² S.C.A. 14, 1895 Leg., 31st Sess. (Cal. 1895), *reprinted in* ABRIDGED LIS REPORT, *supra* note 137, at LIS0009, LIS0011, at LIS0781.

¹⁵³ FINAL HISTORY OF THE THIRTY-FIRST SESSION SENATE AND ASSEMBLY BILLS, *supra* note 144, at LIS0786; JOURNAL OF THE THIRTY-FIRST SESSION SENATE, *supra* note 144, at LIS0789, LIS00791.

¹⁵⁴ JOURNAL OF THE THIRTY-FIRST SESSION SENATE, *supra* note 144, at LIS0794.

¹⁵⁵ *Id.* at LIS0823.

¹⁵⁶ L.H. BROWN, PROCLAMATION REGARDING AMENDMENT NUMBER FOUR, ARTICLE XI, SECTION 6 (1896), *reprinted in* ABRIDGED LIS REPORT, *supra* note 137, at LIS0060; L.H. BROWN, ELECTION PROCLAMATION (1896), *reprinted in* ABRIDGED LIS REPORT, *supra* note 137, at LIS0061–LIS0064.

¹⁵⁷ *Amendment Number Four (Senate Constitutional Amendment No. 25)*, PETALUMA DAILY COURIER, Sept. 17, 1896, *reprinted in* ABRIDGED LIS REPORT, *supra* note 137, at LIS0070.

- “The effect of this amendment, if it be adopted, would be to give municipal corporations more complete control of purely local affairs.”¹⁵⁸
- “Chartering was supposed to give autonomy—freedom from State legislative interference—but that was early found to be a hollow delusion. Municipal self-government has been proven to be an absolute impossibility under the State Constitution as it is. Experimental remedies have been applied without reaching the marrow of the trouble, and large gaps have been opened by the State legislation in every charter adopted with the view of securing local autonomy”¹⁵⁹
- Regarding a legislatively-imposed local debt limit: “So long as that law remains on the statute books and municipal autonomy is not granted in the fullest sense under the State Constitution to chartered cities, the acquisition of necessary public works by cities which have as heavy a bonded indebtedness as Oakland and Los Angeles will be impossible”¹⁶⁰
- “The intention and effect of these four words, ‘except in municipal affairs,’ . . . is to enlarge the powers of cities and towns to the uttermost limit in all affairs that are strictly their own, and to release such communities hereafter from the control of the state legislature in all matters essentially municipal.”¹⁶¹
- “This amendment aims to enable each city and town to have a system of its own relative to its own municipal affairs, without being subject to or controlled by general laws, and, as this would be a long step in the direction of local self-government, this amendment should be adopted.”¹⁶²
- “The effect of this amendment, if it be adopted, would be to give municipal corporations more complete control of purely local affairs.”¹⁶³
- “The amendment would insert in this sentence, the words, ‘except in municipal affairs.’ In other words, the amendment would make city charters, in purely city affairs, free from interference by State laws.”¹⁶⁴
- “By these words a city is made almost independent of state law, and indeed this is the sole objection that has been urged against the adoption of the amendment. It has been urged that a Board of City Trustees could

¹⁵⁸ *The Constitutional Amendments*, L.A. TIMES, Oct. 31, 1896, reprinted in ABRIDGED LIS REPORT, *supra* note 137, at LIS0072.

¹⁵⁹ *Municipal Experiments*, S.F. CHRON., May 17, 1896, reprinted in ABRIDGED LIS REPORT, *supra* note 137, at LIS0095.

¹⁶⁰ *Id.*

¹⁶¹ *Amendment Number Four*, L.A. HERALD, Oct. 15, 1896.

¹⁶² *The Constitutional Amendments*, L.A. HERALD, Oct. 25, 1896.

¹⁶³ *The Constitutional Amendments*, L.A. TIMES, Oct. 31, 1896.

¹⁶⁴ *Proposed Amendments*, MORNING UNION, July 29, 1896, reprinted in SAUSALITO NEWS, Aug. 8, 1896.

nullify an act of the Legislature, and if carried to the ultimate, it would be true, although it is improbable that it would ever be done. . . . The amendment would permit the City Trustees to legislate concerning all questions of municipal interest, even to criminal matters, and the enlargement of the power of the city would certainly be beneficial, while it is only a reasonable view to say that no undue advantage of such increased powers would be taken.”¹⁶⁵

• “Amendment No. 4 secures home rule for [cities] by preventing the amendment of city charters by general laws. Cities are to be subject to general laws ‘except in municipal affairs.’ The intent of this section is to keep the hands of the Legislature off the local regulations without weakening the power of the State in regard to legislation that concerns the whole State.”¹⁶⁶

The consistency in the editorial commentary shows that the contemporary popular opinion and understanding of the 1896 amendment was that it was intended to secure “local autonomy,” enlarge charter city powers “to the uttermost limit,” and make them “almost independent of state law.”

In *Fragley v. Phelan*, the first California Supreme Court decision to interpret the 1896 amendment, the court explained why it was adopted:

It was to prevent existing provisions of charters from being frittered away by general laws It was to enable municipalities to conduct their own business and control their own affairs, to the fullest possible extent, in their own way. It was enacted upon the principle that the municipality itself knew better what it wanted and needed than did the state at large, and to give that municipality the exclusive privilege and right to enact direct legislation which would carry out and satisfy its wants and needs. . . . This amendment, then, was intended to give municipalities the sole right to regulate, control, and govern their internal conduct independent of general laws¹⁶⁷

The court held that the amendment “corrected the evil and legislative interference was declared to be ended when a purely municipal affair was involved.”¹⁶⁸

Even the modern court recognized that the 1896 amendment was in “apparent response” to its decisions limiting municipal home rule:

¹⁶⁵ *Amendment Number Four*, SAN BERNARDINO DAILY SUN, Oct. 30, 1896, reprinted in WEEKLY SUN, Oct. 31, 1896.

¹⁶⁶ *Constitutional Amendments*, SAUSALITO NEWS, Oct. 24, 1896.

¹⁶⁷ *Fragley v. Phelan*, 58 P. 923, 925 (Cal. 1899); see also *Popper v. Broderick*, 56 P. 53, 55 (Cal. 1899) (recognizing that the purpose of the amendment “was to prevent the constant tampering with matters which concern only or chiefly the municipality, under the guise of laws general in form”).

¹⁶⁸ Comment, *supra* note 137, at 446.

[T]he historical impetus for adoption of the municipal home rule provision in 1896 was in part a series of decisions by this court holding that the power to adopt charters (and thus to adopt self-government) given cities . . . could in effect be overridden It was to ensure that city charters could no longer ‘at once be superseded by . . . general legislative enactment’ that the ‘municipal affairs’ clause was proposed to and adopted by the voters.¹⁶⁹

The contemporary academic reviews show that the 1896 amendment was a purposeful response to unwanted legislative acts and restrictive judicial interpretation. One commentator called it “a somewhat heroic attempt to put a stop to legislative interference with the local affairs of cities through the medium of ‘general laws’ by giving to that term the restricted definition which the courts had refused to give.”¹⁷⁰ Other commentary urged an interpretation that secured greater local autonomy.¹⁷¹

Yet after the 1896 amendment judicial decisions again limited municipal autonomy, just as they did after the 1879 constitution.¹⁷² California decisions after *Fragley v. Phelan* continued to apply a form of Dillon’s Rule in connection with city charters.¹⁷³ The cities wanted

¹⁶⁹ Cal. Fed. Sav. & Loan Ass’n v. City of Los Angeles, 812 P.2d 916, 922 n.10 (Cal. 1991) (fourth alteration in original) (quoting *Ex parte Braun*, 74 P. 780, 782 (Cal. 1903)); see also *Johnson v. Bradley*, 841 P.2d 990, 993 (Cal. 1992).

¹⁷⁰ MCBAIN, *supra* note 87, at 252.

¹⁷¹ See, e.g., GOODNOW, *supra* note 107, at 90–91, 95–96, 229–32, 262–63; William Carey Jones, “Municipal Affairs” in the California Constitution, 1 CALIF. L. REV. 132, 133–34 (1913); Reed, *supra* note 129, at 573–74.

¹⁷² See, e.g., *Nicholl v. Koster*, 108 P. 302, 304 (Cal. 1910) (explaining that charter city laws regulating municipal elections and compensation of municipal officers could be given no effect if the city charter was silent on that subject). “As a result, municipalities that wished to exercise their constitutionally granted exclusive control over municipal affairs were forced to adopt ‘bulky charters’ that attempted to enumerate specifically and extensively their municipal powers.” *Johnson*, 841 P.2d at 994.

¹⁷³ See, e.g., *Wichman v. City of Placerville*, 81 P. 537, 538 (Cal. 1905) (“The proposition that charters of municipal corporations are special grants of power from the sovereign authority, and are to be strictly construed, and that whatever power is not given expressly, or as a necessary means to the execution of expressly given powers, is withheld, is a proposition too well settled to call for discussion.”); *Hyatt v. Williams*, 84 P. 41, 42 (Cal. 1906) (introducing Dillon’s Rule as the “rule whereby to determine what powers are vested in a city”). Dillon’s Rule continued to appear in California Supreme Court decisions long after the 1914 amendment. See, e.g., *Ex parte Daniels*, 192 P. 442, 444 (1920) (“Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation, and the power is denied.” (quoting *Hyatt*, 84 P. at 42)); *City & County of San Francisco v. Boyle*, 233 P. 965, 968 (Cal. 1925) (“[T]he elementary rule still obtains that ‘municipal corporations have only the powers expressly conferred, [sic] and such as are necessarily incident to those expressly granted, or essential to the declared objects and purposes of the corporation.’” (quoting *Egan v. City & County of San Francisco*, 133 P. 294, 296 (Cal. 1913))).

“absolute” municipal home rule, and so the voters acted again and changed the constitution a third time in 1914.¹⁷⁴

4. The 1914 Amendment Freed City Charters from Legislative Control

Like the 1896 amendment, the 1914 amendment was a response to legislative interference in local affairs and restrictive judicial interpretation of local autonomy. As with the post-1879 period, in the post-1896 period charter cities “felt particularly aggrieved” because the requirement that charters specify each municipal power permitted courts to override ordinances with general state laws.¹⁷⁵ And the 1914 amendment was similarly intended to increase charter city independence.

Recall that after the 1896 amendment, Article XI, Section 6 provided that for charter cities: “All charters thereof framed or adopted by authority of this Constitution, except in municipal affairs, shall be subject to and controlled by general laws.” That provision made local law supreme only if a matter was in a charter.¹⁷⁶ This quickly became burdensome because it required cities seeking greater independence to submit lengthy charters and amendments for legislative approval. And it was undesirable because it embodied the concept of a charter as a document of delegation (rather than a document of limitation)—a view grounded on Dillon’s rule—and abandoning that rule was the whole point of the home rule effort.

So in 1914 the voters again amended the state constitution. Two measures—Assembly Constitutional Amendment 25 (amending Article XI, Section 8; on the ballot as Proposition 25) and Assembly Constitutional Amendment 81 (amending Article XI, Section 6; on the ballot as Proposition 29)—made three key changes to charter city powers:

- Proposition 25 revised Article XI, Section 8 (current Article XI, Section 3(a)) to read: “[I]f approved by a majority of the members elected to each house [a charter] shall become the organic law of such city or city

¹⁷⁴ Comment, *supra* note 137, at 446; see also Johnson, 841 P.2d at 994 (citing Jones, *supra* note 171). After 1914, the “municipal affairs” provisions remained in place until 1968, when the California Constitution Revision Commission recommended they be non-substantively rewritten and renumbered as new Article XI, Section 5, which the voters approved in the June 1970 special election. *Id.* at 994–95 (citation omitted).

¹⁷⁵ Comment, *supra* note 137, at 446; see also Graybiel, *supra* note 140, at 91.

¹⁷⁶ See, e.g., *City of Long Beach v. Lisenby*, 166 P. 333, 337 (Cal. 1917); *Clouse v. City of San Diego*, 114 P. 573, 574 (Cal. 1911).

and county, and supersede any existing charter and all laws inconsistent therewith.”¹⁷⁷

- Proposition 25 revised Article XI, Section 8 (current Article XI, Section 5(a)) to add this provision: “It shall be competent in any charter framed under the authority of this section to provide that the municipality governed thereunder may make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws.”¹⁷⁸

- Proposition 29 revised Article XI, Section 6 (current Article XI, Section 5(a)) to read: “Cities and towns hereafter organized under charters framed and adopted by authority of this constitution are hereby empowered, and cities and towns heretofore organized by authority of this constitution may amend their charters in the manner authorized by this constitution so as to become likewise empowered hereunder, to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters, and in respect to other matters they shall be subject to and controlled by general laws.”¹⁷⁹

The ballot argument for Proposition 25 noted that it “authorizes charter to confer on municipality all powers over municipal affairs,” and it made two significant changes to the state constitution’s provisions on city charters. It made clear that once adopted by a city and approved by the legislature, a charter was supreme within that city.¹⁸⁰ And it broadly defined municipal affairs as anything properly covered by a city charter.¹⁸¹

The argument in favor of Proposition 25 described the first of its two main purposes in terms of a plenary grant of local sovereignty rather than a limited set of enumerated powers: “*First*—It permits a general grant of power, as to municipal affairs, to be made to a city government by charter instead of necessitating the enumeration of a long list of powers to be exercised, as has been done heretofore.”¹⁸²

The proponent’s argument in favor of Proposition 81 described it as partly intended to enable cities to adopt all municipal affairs powers at once:

¹⁷⁷ CAL. SEC’Y OF STATE, AMENDMENTS TO CONSTITUTION AND PROPOSED STATUTES WITH ARGUMENTS RESPECTING THE SAME 14 (1914).

¹⁷⁸ *Id.* at 15.

¹⁷⁹ *Id.* at 25.

¹⁸⁰ *Id.* at 14.

¹⁸¹ *Id.* at 15; *see supra* text accompanying note 179.

¹⁸² *Id.* at 16.

The purpose of this amendment is to make effective section 6 of article XI of the constitution as amended in 1896. . . . The supreme court pointed out that local government was being constantly “frittered away” by laws enacted by the legislature, so that freeholders’ charters were giving only the semblance and not the substance of self-government. Accordingly, the words “except in municipal affairs,” were inserted by amendment in 1896, with the intent and purpose to exempt municipalities from the operation of general legislation in strictly municipal matters. But the revision was so ill-phrased that the supreme court was compelled to hold that the only way for a city to gain the advantage intended by the amendment of 1896 was to incorporate each and every possible municipal affair in its charter.¹⁸³

Thus, the drafters intended the 1914 amendment to abolish the provision of Dillon’s Rule that charter cities had only those powers specifically delegated to them. A contemporary California Supreme Court decision similarly described these changes in broad terms: Once a city adopted a charter under the new provisions,

its powers over municipal affairs became all-embracing, restricted, and limited by the charter “only,” and free from any interference by the state through general laws The result is that the city has become independent of general laws upon municipal affairs. Upon such affairs a general law is of no force with respect to [that city].¹⁸⁴

Yet the ballot argument also confirms that the state must remain supreme over areas of “general concern” and that patrolling this line will be a task for the courts:

The amendment now submitted proposes to relieve this situation and to apply a just and logical remedy. While reserving to the state legislature exclusive control over matters of general concern, it grants to cities and towns jurisdiction in all municipal affairs without need of specifying them in the charter. Of course, if a city should attempt to transcend the limits of a “municipal affair,” its act will be declared void, for the determination of what are “municipal affairs” and what are “state affairs” will remain, as now, a matter for judicial construction.¹⁸⁵

We found almost no commentary in contemporary newspapers. Many newspapers provided a similar capsule summary of Proposition 25:

Adoption and Amendment of Municipal Charters. Assembly Constitutional Amendment 25 amending section 8 of article XI of constitution. Authorizes cities of more than thirty-five hundred

¹⁸³ *Id.* at 25.

¹⁸⁴ *Civic Ctr. Ass’n of L.A. v. R.R. Comm’n of Cal.*, 166 P. 351, 354 (Cal. 1917).

¹⁸⁵ CAL. SEC’Y OF STATE, *supra* note 177, at 25.

population to adopt charters; prescribes method therefor and time for preparation thereof by freeholders; requires but one publication thereof, copies furnished upon application; provides for approval by legislature, method and time for amendment, and that of several conflicting concurrent amendments one receiving highest vote shall prevail; authorizes charter to confer on municipality all powers over municipal affairs, to establish boroughs and confer thereupon general and special municipal powers.¹⁸⁶

One newspaper appended a comment, calling it “[a] proposition too complicated for the general public to pass upon. No recommendation.”¹⁸⁷ That same publication appended this comment to Assembly Constitutional Amendment 81:

The object of this Amendment is stated to be “to give cities and towns jurisdiction in all municipal affairs without need of specifying them in the charter.” At present all charters are by the constitution subject to and controlled by general State laws—a provision which often has proved very troublesome in municipal affairs. The “YES” vote recommended.¹⁸⁸

The academic commentary following the 1914 amendment continued the theme of documenting popular demand for greater home rule powers, and judicial resistance. The seminal early twentieth century treatise on municipal law argued in 1916 that the 1896 amendment’s purpose was specifically aimed at overturning the “laws of general application” doctrine.¹⁸⁹ The author concluded that “just as before 1896 the confusing use of the term ‘general laws’ in the original provision was resolved by the courts in favor of the power of the legislature and against the rights of cities, so after 1896 was the conflict of provisions that resulted from” the new municipal affairs clause resolved against local autonomy.¹⁹⁰

Commentators also viewed this constitutional history as showing that the electorate acted repeatedly to achieve greater home rule powers in face of judicial resistance.¹⁹¹ A 1923 *California Law Review* article argued that the 1896 and 1914 amendments were intended to abolish the

¹⁸⁶ *Forty-Eight Questions for November Voters*, L.A. HERALD, Oct. 21, 1914.

¹⁸⁷ *Forty-Eight Propositions Await Attention of Voters November 3rd*, MORNING UNION, Oct. 22, 1914.

¹⁸⁸ *Forty-Eight Propositions Await Attention of Voters November 3rd*, MORNING UNION, Oct. 25, 1914.

¹⁸⁹ MCBAIN, *supra* note 87, at 252.

¹⁹⁰ *Id.* at 253.

¹⁹¹ See, e.g., *id.* at 252, 320–21; Comment, *supra* note 137, at 446–47; Howard H. Desky, *Municipal Corporations: Home Rule Charters: Application of the Workmen’s Compensation Act to Charter Cities*, 15 CALIF. L. REV. 60, 60–63 (1926).

presumption under prior law that state law always prevailed and instead create a new choice-of-law presumption that always favored the municipal ordinance whenever state and local conflicted, but only as to “municipal affairs.”¹⁹² And a 1926 *California Law Review* article described the “present emancipation of California cities from the authority of the legislature” as resulting from a series of constitutional changes in 1879, 1896, and 1914 that responded to restrictive judicial rulings with increasingly broad grants of municipal autonomy.¹⁹³

To summarize, local autonomy in California evolved in a series of expansions. At first, cities had no autonomy under the 1849 constitution. Dissatisfied, delegates to the 1879 constitutional convention granted cities sweeping new powers, which the legislature largely ignored and overrode with special laws. The voters responded by amending the state constitution in 1896 to abolish special laws and specify that in local affairs, cities should be supreme. Still ignored by the legislature and the courts, the voters again amended the California Constitution in 1914, expanding local powers a third time and reiterating that charter cities should have maximum local autonomy and that municipal affairs ordinances overruled general laws.

Since 1914 the California Constitution has added other textual commitments to local autonomy outside the municipal affairs context. City charters and amendments are no longer approved by the legislature, as they once were.¹⁹⁴ Article XI, Section 19 (now Section 9) was added to grant broad authority to any city to “establish, purchase, and operate public works to furnish its inhabitants with light, water, power, heat, transportation, or means of communication.”¹⁹⁵ In 1970, the voters amended this section to permit cities to issue franchises, carving out some of the otherwise broad authority over such activities held by the

¹⁹² Graybiel, *supra* note 140, at 91–92. To end controversy over legislative power to regulate local affairs, “the constitution was amended in 1896 and it was then provided that general laws were to control cities and towns except in ‘municipal affairs.’” Still, “the municipalities were not yet satisfied” and charter “[c]ities felt particularly aggrieved. . . [and] desired absolute ‘municipal home rule.’” So the 1914 amendment “was adopted to meet this situation.” Comment, *supra* note 137, at 446.

¹⁹³ Desky, *supra* note 191, at 60–61. After reviewing nine subjects of state importance and nineteen subjects of municipal concern, the author concluded that municipal affairs “is not a fixed quantity, but fluctuates with every change in the conditions upon which it is to operate.” *Id.* at 63.

¹⁹⁴ *Voter Information Guide for 1974, General Election*, U.C. HASTINGS SCHOLARSHIP REPOSITORY (1974), https://repository.uchastings.edu/ca_ballot_props/804 [https://perma.cc/Y47T-ESU7] (amending CAL. CONST. art. XI, § 3, to permit a city or county to adopt, amend, revise, or repeal a charter by a majority of its electors voting, and without approval from the legislature).

¹⁹⁵ See *Cal. Apartment Ass’n v. City of Stockton*, 95 Cal. Rptr. 2d 605, 610 n.9 (Ct. App. 2000) (quoting CAL. CONST. art. XI, § 9(a)).

legislature and the Public Utilities Commission under Article XII.¹⁹⁶ Finally, general law and charter cities alike are protected by Article XI, Section 11(a), which prohibits the abuses of special commissions to control local property and funds that partly led to the 1879 convention.¹⁹⁷

But the constitutional provisions on municipal affairs have remained substantially the same since 1914.¹⁹⁸ Consequently, judicial decisions are the chief source of modern authority for municipal affairs law. The key takeaway from this historical review is that California policymakers have elevated local autonomy to a fundamental constitutional principle. Yet neither the constitutional text nor its contexts suggest that this principle is unlimited, and courts have failed to define a standard for implementing this local autonomy principle. This leaves the current judicial analysis of municipal affairs in need of reform. Our proposal is to accelerate the trend towards proportionality that we identify.

III. THE CURRENT CALIFORNIA TEST IS PROBLEMATIC

The vision of maximal local autonomy described above proved difficult for courts to apply. Over time, judicial application of the constitutional provisions described above coalesced into two competing modern analyses: a balancing test and a categorical approach. Neither of the modern analyses is the clear default test, reflecting the historical judicial indecision between a standard versus a rule-based approach in this doctrinal area. In this Part, we describe how the two competing modern analyses arose and propose to reconcile them by shifting to proportionality.

¹⁹⁶ CAL. CONST. art. XII, § 8 (“A city, county, or other public body may not regulate matters over which the Legislature grants regulatory power to the [Public Utilities] Commission.”).

¹⁹⁷ *County of Riverside v. Superior Court*, 66 P.3d 718, 721–22 (Cal. 2003) (relying on this and one other constitutional limitation on the legislature’s power over cities and counties to invalidate a state law that delegated final decisions in public safety labor negotiations to a private arbitration panel).

¹⁹⁸ After the amendments of 1914, the “municipal affairs” aspects of these provisions remained essentially unaltered for over half a century. In 1968, as part of the general overhaul of the state Constitution, the California Constitution Revision Commission recommended to the Legislature that the above sections be retained in substance but rewritten and renumbered as new article XI, section 5 (See Cal. Const. Revision Com. (Feb.1968) Proposed Revision of the Cal. Const., pp. 59–60.) Eventually, the voters approved revised article XI, section 5, at the June 1970 Special Election.

Johnson v. Bradley, 841 P.2d 990, 994–95 (Cal. 1992).

A. *California's Home Rule Doctrine Before and After Cal Fed*

The seminal modern California home rule doctrine is known as *Cal Fed*.¹⁹⁹ In the lead article on home rule doctrine before *Cal Fed*, Professor Sho Sato observed that “in 1896 the voters made a fundamental reallocation of political powers between the legislature and a chartered city”—yet he lamented that “[u]fortunately the body of law that has developed does not provide reliable criteria for application of the municipal affairs standard.”²⁰⁰ After reviewing seventy-five years of cases, Sato expected to find “criteria giving predictable meaning” to the municipal affairs concept; instead, he found “confusion, uncertainty, and unpredictability.”²⁰¹ Sato concluded that the judicial approach had been “ad hoc” and had “resulted in somewhat inconsistent resolutions,” and he doubted “whether a single rational principle of allocation of governmental powers satisfying to everyone can be formulated in an area so fraught with value judgments.”²⁰² He concluded that standards were needed even though they would not provide easy answers.²⁰³

The California Supreme Court attempted to craft such standards in its 1991 *Cal Fed* decision.

1. *Cal Fed*

The *Cal Fed* decision conceded that home rule doctrine was unclear.²⁰⁴ The court applied a four-part test for determining whether a statute supersedes a charter city ordinance:

• Does the city ordinance regulate activity that is a “municipal affair”? If not, then the ordinance is invalid unless the legislature has otherwise authorized it.

¹⁹⁹ See *Cal. Fed. Sav. & Loan Ass'n v. City of Los Angeles*, 812 P.2d 916 (Cal. 1991).

²⁰⁰ Sato, *supra* note 87, at 1058; see also David, *supra* note 91, at 644 (finding “baffling and sometimes amazing” case development that featured an ad hoc and ex post facto approach to home rule cases and that courts “effectively relied upon the doctrine of state legislative supremacy. . . . by redefining” the concepts of general laws and municipal affairs that left an open question “[w]hether ‘home rule’ has been brought to extinction”).

²⁰¹ Sato, *supra* note 87, at 1060.

²⁰² *Id.* at 1075.

²⁰³ *Id.* at 1109.

²⁰⁴ *Cal. Fed.*, 812 P.2d at 925 (“But our decisions have also strived to confine the element of judicial interpretation by hedging it with a decisional procedure intended to bring a measure of certainty to the process, narrowing the scope within which a sometimes mercurial discretion operates.”).

- If yes, then does the ordinance conflict with a state law? If not, then the ordinance is valid.
- If yes, then does the state law address a matter of “statewide concern” or does it have a “sufficiently extramunicipal dimension”? If not, then the ordinance is valid.
- If yes, then is the state law reasonably related to that statewide concern and narrowly tailored to avoid unnecessary interference in local governance? If yes, then the ordinance is invalid.²⁰⁵

The *Cal Fed* test approximates proportionality review, though leaving out the final proportionality step of the analysis. The *Cal Fed* test arguably favors state laws over charter city ordinances because it makes the state’s interests paramount: “the question of statewide concern is the bedrock inquiry through which the conflict between state and local interests is adjusted.”²⁰⁶ The key inquiry is thus whether “the subject of the state statute is one of statewide concern” and then seems to set too low a bar for giving the state law preemptive effect: if the statute is reasonably related to its resolution, then the conflicting charter city measure ceases to be a municipal affair.²⁰⁷ The decision frames the question as whether “under the historical circumstances presented, the *state* has a more substantial interest in the subject than the charter city,” and explains that “the hinge of decision is the identification of a convincing basis for *legislative* action originating in *extramunicipal* concerns, one justifying *legislative supersession* based on sensible, pragmatic considerations.”²⁰⁸ The decision adopted a presumption favoring legislative declarations that an issue concerns state interests,²⁰⁹ and held that any doubt “must be resolved in favor of the *legislative* authority of the state.”²¹⁰ That analysis focuses on the state’s concerns, not the municipality’s. This is an inverse of the proposed NLC test: it puts a thumb on the scale for the state.

Yet the *Cal Fed* approach is broadly consistent with our proportionality proposal. The decision rejects categorization, as does proportionality.²¹¹ Some issues (such as land use) might seem categorically “local” in one context (say the early 1900s) and yet are very

²⁰⁵ See *id.* at 925; *Johnson v. Bradley*, 841 P.2d 990, 996–97 (Cal. 1992); *City & County of San Francisco v. Regents of Univ. of Cal.*, 442 P.3d 671, 678 (Cal. 2019).

²⁰⁶ *Cal. Fed.*, 812 P.2d at 925.

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 926 (emphasis added).

²⁰⁹ *Id.* at 930 (“[W]e defer to legislative estimates regarding the significance of a given problem and the responsive measures that should be taken toward its resolution.”).

²¹⁰ *Id.* (emphasis added) (quoting *Baggett v. Gates*, 649 P.2d 874, 881 (Cal. 1982)).

²¹¹ *Id.* at 924–25; see also *Johnson v. Bradley*, 841 P.2d 990, 999 (Cal. 1992).

much not so in another (say the early 2000s). The test contains a tailoring requirement, although we would omit the requirement that the state employ the least restrictive means. Indeed, *Cal Fed* itself did not require a showing of the least restrictive means.²¹² And the *Cal Fed* test does not take the asserted interest of either the state or municipality at face value.

But *Cal Fed* left several key questions unanswered: What exactly is a statewide concern and why is that easier to define than a municipal affair? Why is statewide concern the primary question, and not whether the regulated activity is a municipal affair? What is the rationale for reversing the inquiry, so that finding a statewide concern is fatal to the ordinance, rather than finding a municipal affair is fatal to the state law? The next Section shows that the California Supreme Court's attempts to address those questions produced inconsistent results.

2. After *Cal Fed*

Explaining the current state of the municipal affairs doctrine requires comparing *Cal Fed* with *Johnson v. Bradley*²¹³ and *State Building & Construction Trades Council of California v. City of Vista*.²¹⁴ Those are the only California Supreme Court decisions that have applied *Cal Fed*, and they are difficult to reconcile.

In *Johnson v. Bradley* the court found that Los Angeles could continue to provide public elections financing despite a state statute to the contrary. This was a reasonable result with an unreasonable analysis: the court found that the state did have an interest in election integrity, but that interest was not “reasonably related” to a ban on public campaign financing.²¹⁵ That makes little sense—there is a reasonable concern that public financing can lead to a system that favors incumbents. The court's decision could have been justified because the state's ban was not sufficiently tailored, or because the burden on local autonomy was greater than the state interest. Either way, it is hard to understand how Los Angeles is free to engage in public financing of local elections under home rule doctrine—but not to impose a generally applicable business tax (the city action preempted in *Cal Fed*). One can imagine an analysis that reconciles the two, but *Johnson v. Bradley* made no attempt at reconciling with *Cal Fed*.

²¹² *Cal. Fed.*, 812 P.2d at 929–30.

²¹³ *Johnson*, 841 P.2d at 995.

²¹⁴ *State Bldg. & Constr. Trades Council of Cal. v. City of Vista*, 279 P.3d 1022, 1024, 1027 (Cal. 2012).

²¹⁵ *Johnson*, 841 P.2d at 1004.

The same lack of consistency appears in *Vista*, where the court permitted charter cities to avoid paying prevailing wage for public building construction because there was no statewide interest.²¹⁶ This was both a hard case and a justifiable decision, but again the court's analysis is perplexing.²¹⁷ For example, the court could have said that the state law was insufficiently tailored or applied an explicit balancing test. That test might reasonably have concluded that in light of other effects on municipal finances imposed by state constitutional law, the additional burden created by these laws resulted in too great a loss of municipal autonomy. Instead, *Vista* applied a categorical approach and held that contract worker wages on public works projects was a municipal affair, rejecting claimed statewide concerns about the impact on regional labor standards and worker training.²¹⁸

As with *Johnson v. Bradley* versus *Cal Fed*, *Vista* and *Cal Fed* are difficult to reconcile: the two decisions did not apply the same test, and *Vista* did not explain the discrepancy. As Justice Werdegar noted in dissent, *Vista* arguably shifts the focus from the purpose to the effect of the state law and seems to establish a new principle that state laws that interfere with local fiscal policies are presumptively invalid.²¹⁹ That is the reverse of the *Cal Fed* presumption favoring the state. This left courts with uncertainty about which analysis to apply.

3. Current State of California Home Rule Doctrine

The upshot of the cases discussed above is that California currently lacks a coherent home rule doctrine.²²⁰ No one knows what the test is because the most recent California Supreme Court decisions on this subject applied distinct analyses without explaining the distinctions. Courts have no guidance regarding how (and when) to weigh the interests. The *Cal Fed* test appears to favor the state, yet the court reached

²¹⁶ *Vista*, 279 P.3d at 1029–30.

²¹⁷ *Cf. Stahl*, *supra* note 16, at 209 (“In sum, *Vista* is an analytically weak case, so weak that lower courts are already declining to follow it.”).

²¹⁸ *Vista*, 279 P.3d at 1031.

²¹⁹ *Id.* at 1031, 1034–35 (“No one would doubt that the state could use its own resources to support wages and vocational training in the state’s construction industry, but can the state achieve these ends by interfering in the fiscal policies of charter cities? Autonomy with regard to the expenditure of public funds lies at the heart of what it means to be an independent governmental entity.” (emphasis omitted)).

²²⁰ We think this lack of clarity establishes a baseline against which to find this area of law wanting. *Cf. Baker & Rodriguez*, *supra* note 65, at 1368 (challenging critics of home rule jurisprudence to identify a baseline).

pro-city results in *Johnson v. Bradley* and *Vista*. *Cal Fed* applied a balancing test, but *Vista* used a categorical approach.

Nor are the cases preceding *Cal Fed* any clearer.²²¹ That body of case law can be read to favor either cities or the state. Some commentators see a tendency to read charter city powers narrowly²²² and argue that charter cities lose more often than not.²²³ Yet some decisions are solicitous of local autonomy: For example, in *Ex parte Braun* the principal opinion described municipal affairs as “words of wide import—broad enough to include all powers appropriate for a municipality to possess.”²²⁴ And in *Bishop v. City of San Jose* the court described the municipal affairs clause as creating an “exemption, with respect to its municipal affairs, from the ‘conflict with general laws’ restrictions of section 11.”²²⁵

But decisions such as *Ex parte Braun* and *Bishop* arguably do not describe the doctrine today.²²⁶ Instead, the California Supreme Court at times openly stated a state-favoring premise.²²⁷ For example, in *Professional Fire Fighters, Inc. v. City of Los Angeles* the court reviewed twenty-three municipal affairs disputes and concluded that “general law prevails over local enactments of a chartered city, even in regard to matters which would otherwise be deemed to be strictly municipal affairs, where the subject matter of the general law is of statewide concern.”²²⁸ No balancing is required between state and local interests—the question was whether the legislature intended to deal with a statewide concern, and if so that settled the matter: courts decide, “under the facts of each case,

²²¹ Cal. Fed. Sav. & Loan Ass’n v. City of Los Angeles, 812 P.2d 916, 918, 924–25, 930 (Cal. 1991) (demonstrating that no pattern is discernible from the California Supreme Court’s many municipal affairs decisions).

²²² Constitutional protections for charter cities “have not fulfilled the expectations of those who advocated their passage” because of unfriendly judicial decisions, which have “certainly render[ed] the constitutional provisions almost futile, from the point of view of securing to municipal corporations immunity from special legislative action.” GOODNOW, *supra* note 107, at 91. “[T]he courts have . . . almost nullified the constitutional provisions which they were called upon to interpret, and have left the municipality, almost as much as before the adoption of these provisions, at the mercy of the legislature.” *Id.* at 95–96; *see also id.* at 80, 231–32, 263.

²²³ Empirical evidence suggests that the state prevails more often than not. *See* Nicholas Cotter, CAL. CONST. CTR., *Municipal Taxes Are (Almost) Always Municipal Affairs*, SCOCABLOG (Apr. 6, 2020), <http://scocablog.com/municipal-taxes-are-almost-always-municipal-affairs/?print=pdf> [<https://perma.cc/RDS9-Y266>].

²²⁴ *Ex parte Braun*, 74 P. 780, 782 (Cal. 1903).

²²⁵ *Bishop v. City of San Jose*, 460 P.2d 137, 140 (Cal. 1969).

²²⁶ *See, e.g.*, Cal. Cannabis Coal. v. City of Upland, 401 P.3d 49, 58 (Cal. 2017) (“[T]he concurring and dissenting opinion relies on *In re Pfahler* . . . , a 111-year-old case cited by none of the briefs.”).

²²⁷ *See, e.g.*, *Weekes v. City of Oakland*, 579 P.2d 449, 463 (Cal. 1978) (Mosk, J., dissenting) (“It is elementary that if home rule rights of chartered cities conflict with constitutionally bestowed authority of the State of California and its Legislature, the latter will prevail.”).

²²⁸ *Pro. Fire Fighters, Inc. v. City of Los Angeles*, 384 P.2d 158, 168 (Cal. 1963).

whether the subject matter under discussion is of municipal or statewide concern. This question must be determined from the legislative purpose in each individual instance.”²²⁹

Uncertainty also results from a century of the judiciary trying and discarding various approaches.²³⁰ Experiments with a definitional approach failed because defining “municipal affairs” has proved impossible.²³¹ And the dichotomy between municipal affairs (in which cities are supreme) and statewide concerns (in which the legislature is supreme) proved equally impossible to resolve.²³²

Categorical approaches proved equally problematic. For example, in one case the court held that regulating railroads was not a municipal affair because it was a statewide concern.²³³ That reasoning makes all activities the state decides to regulate a statewide concern. This circular approach became a mainstay of municipal affairs analysis.²³⁴ And courts have struggled to explain just how statewide an activity must be to qualify as a

²²⁹ *Id.* at 169.

²³⁰ David, *supra* note 91, at 644 (noting that courts have “effectively relied upon the doctrine of state legislative supremacy” by over-applying the statewide concerns principle); Graybiel, *supra* note 140, at 93 (“The writer cannot see the line of logic running through these cases.”); Sato, *supra* note 87, at 1075–76 (“[T]he approach has been ad hoc and has resulted in somewhat inconsistent resolutions.”).

²³¹ See *Fragley v. Phelan*, 58 P. 923, 924–35 (Cal. 1899) (rejecting a broad reading of “municipal affairs”). Justice Harrison concurred and attempted to define “municipal affairs,” explaining that the term “affair” is “a word of wide import, and has been held to be more comprehensive than the word ‘business,’” and concluded that municipal affairs include all activities that are municipal businesses. *Id.* at 928. Justice Temple concurred; he would have held that conducting local elections is a municipal affair because “[m]unicipal’ means simply pertaining to a municipality” and local elections pertain to a municipality. *Id.* at 931 (Temple, J., concurring).

²³² *Civic Ctr. Ass’n of L.A. v. R.R. Comm’n of Cal.*, 166 P. 351, 355 (Cal. 1917). The concept of “statewide concern” has its roots in *Fragley*, where the court found that because the constitution grants the state legislature the power to create cities, the constitution deems the “creation of a municipal corporation a state affair of the greatest import.” *Fragley*, 58 P. at 926. It was also employed by the dissenting justice in *Ex parte Braun*, who explained that “‘municipal affairs.’ . . . stand in contradistinction to ‘state affairs.’” *Ex parte Braun*, 74 P. 780, 785 (Cal. 1903) (Beatty, C.J., dissenting).

²³³ See *Civic Ctr. Ass’n of L.A.*, 166 P. at 355.

²³⁴ See, e.g., *Young v. Superior Court*, 15 P.2d 163, 164–65 (Cal. 1932) (cross-city public improvements); *Wilson v. City of San Bernardino*, 9 Cal. Rptr. 431, 432–33, 435–36 (Ct. App. 1961) (forming a water district); *County of San Mateo v. City Council of Palo Alto*, 335 P.2d 1013, 1014–15 (Cal. Ct. App. 1959) (procedures for annexation of territory outside city boundaries); *In re Shaw*, 89 P.2d 161, 162–23 (Cal. Ct. App. 1939) (judicial system and jurisdiction over crimes); *Pipoly v. Benson*, 125 P.2d 482, 483–85 (Cal. 1942) (traffic passing through city streets); *Cralle v. City of Eureka*, 289 P.2d 509, 510–11 (Cal. Ct. App. 1955) (recording of documents); *Bay Cities Transit Co. v. City of Los Angeles*, 108 P.2d 435, 436–38 (Cal. 1940) (control of transit systems between cities).

statewide concern.²³⁵ Some issues are sometimes categorically municipal affairs.²³⁶ At other times the courts reject such compartmentalization.²³⁷

The interest-weighting approach also produced conflicting decisions.²³⁸ For example, in the labor standards context the state cannot mandate a prevailing wage for contractors hired by the city,²³⁹ but the state can require cities to provide a meet-and-confer process before terminating a city employee,²⁴⁰ and the state can guarantee firefighters the right to join a union.²⁴¹ Yet all three regulations increased city costs and raised city employee wages—matters that are typically well within a municipality's discretion.²⁴² Indeed, the court once held that the same improvement project could be a municipal affair for minimum wage law purposes, but it was a statewide concern for an alien labor prohibition.²⁴³

Home rule doctrine should be refined into a proportionality test. The *Vista* court did make a nod to proportionality review, as did *Cal Fed* and *Johnson v. Bradley*. *Vista* cited *Cal Fed* to explain that “the hinge of the decision is the identification of a convincing basis for legislative action

²³⁵ See generally Sato, *supra* note 87, at 1068–69 (“A test based on whether a general law has application within and without the municipal boundaries does not resolve the difficult problems of power allocation between the state and local entities.”). Then-Judge Cardozo encountered this problem when attempting to clarify the scope of “statewide concerns” under New York’s home rule law. *Adler v. Deegan*, 167 N.E. 705, 713–14 (N.Y. 1929). He was writing to critique a test defining statewide concerns as those predominantly related to the state: “[P]redominance is not the test [to determine whether an issue is a statewide concern]. The introduction of such a test involves comparisons too vague and too variable, too much a matter of mere opinion, to serve as an objective standard.” *Id.* at 713. “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.” *Id.* at 714. Cardozo’s test merely replaces the word “predominance” with “substantial.” Neither term explains why the occurrence of an activity occurring predominantly or substantially throughout the state is the primary consideration.

²³⁶ *State Bldg. & Constr. Trades Council of Cal. v. City of Vista*, 279 P.3d 1022, 1029 (Cal. 2012) (“The wage levels of contract workers constructing locally funded public works are certainly a ‘municipal affair.’ We said so explicitly in our 1932 decision in *Charleville* We there held that the issue of wage levels of contract workers improving a city-owned reservoir was, as a matter of law, a ‘municipal affair.’”).

²³⁷ *Cal. Fed. Sav. & Loan Ass’n v. City of Los Angeles*, 812 P.2d 916, 925–26 (Cal. 1991).

²³⁸ Some older cases also frame the issue this way. See, e.g., *In re Hubbard*, 396 P.2d 809, 814–15 (Cal. 1964) (reasoning that the determination between municipal affairs and statewide concerns “must be answered in the light of the facts and circumstances surrounding each case”).

²³⁹ *Vista*, 279 P.3d at 1033–34.

²⁴⁰ *People ex rel. Seal Beach Police Officers Ass’n v. City of Seal Beach*, 685 P.2d 1145, 1148–52 (Cal. 1984).

²⁴¹ *Pro. Fire Fighters, Inc. v. City of Los Angeles*, 384 P.2d 158, 165–67, 169 (Cal. 1963).

²⁴² Such conflicting results have led one commentator to suggest that “municipal affairs” receives a liberal construction when the only issue is whether the city is authorized to exercise a given power and a limited construction when the issue is whether a chartered city or the legislature prevails in the event of a conflict in the assertion of their powers.” Sato, *supra* note 87, at 1062.

²⁴³ *City of Pasadena v. Charleville*, 10 P.2d 745, 746–51 (Cal. 1932), *overruled by Purdy & Fitzpatrick v. State*, 456 P.2d 645 (Cal. 1969); ALSTYNE, *supra* note 123, at 241.

originating in extramunicipal concerns, one justifying legislative supersession based on sensible, pragmatic considerations.”²⁴⁴ The court in *Vista* may have meant that the state law in question was not sufficiently tailored, or that any state interest was not proportional to the local interest in spending its own tax dollars—perhaps in light of the severe fiscal constraints local governments operate under in California due to other constitutional provisions. Our point as to proportionality review here is not that it would have provided the right answer, but that it would have forced a more thoughtful and transparent analysis for the benefit of all stakeholders.

B. *New Challenges*

The city prevailed in two of the three modern California Supreme Court decisions discussed above, consistent with the view of California as a strong home rule jurisdiction. Yet the reasoning of these cases was unsatisfactory. And as noted above, in many older cases the state prevailed—so much so that one commentator suggests a presumption favoring preemption.²⁴⁵

This current fractured state of the doctrine renders what should be easy cases hard and makes the resolution of hard cases seem arbitrary. Take the state preemption of soda taxes: given that the state could preempt taxes on banks in *Cal Fed*, why not taxes on soda? And why can't the state withhold collection of sales taxes if a city does not follow the state's lead on taxes? The potential problem with the hyperpreemption of soda taxes is that the law is not tailored to any great state problem, and the burden it places on local public health, finance, and autonomy is disproportionate to the state benefit, especially if one takes into account the draconian costs to cities that flaunt the rule.²⁴⁶ But judicial decisions have not developed this kind of analysis, leaving the bare assertion of a state interest in uniformity possibly winning the day—or not, if the statewide interest will be exposed to *Vista*-like skepticism.

²⁴⁴ *Vista*, 279 P.3d at 1030 (quoting *Cal. Fed. Sav. & Loan Ass'n v. City of Los Angeles*, 812 P.2d 916, 926 (Cal. 1991)).

²⁴⁵ Cotter, *supra* note 223 (“[T]he state won 46, and the city won 37 [of all municipal affairs cases reviewed]. This shows the state winning 55.42% and the city winning 44.58%. . . . [T]his larger sample confirmed our previous hypothesis that the state wins more Article XI, section 5 municipal affairs cases in the California Supreme Court.”).

²⁴⁶ *Cultiva La Salud v. State*, No. 34-2020-80003458, 2021 Cal. Super. LEXIS 68581, at *18–21 (Super. Ct. Nov. 8, 2021).

And consider whether the state can force local governments to provide clear information to developers.²⁴⁷ The state will benefit from uniformity cases like *Cal Fed*, but cases like *Vista* (with its argument that certain state interests can be abstracted into nothingness) will favor local governments. Such seemingly arbitrary results can be prevented with a proportionality approach.

C. *Back to Proportionality*

Although the current *Cal Fed* test resembles proportionality review, the California Supreme Court has applied it in an ad hoc way, and so its decisions are not a fair test of our proposal. On the contrary, if *Cal Fed* employed a proper proportionality analysis with the components we outlined above, the decision would have produced more consistent and better results. For example, assume that in *Cal Fed* the court had explained that a relatively weak case for statewide uniformity regarding taxes on financial institutions prevailed because the city also had a weak interest in taxing them. The court could then have explained in *Johnson v. Bradley* that the city won on public financing because there the city had a much stronger interest in organizing its elections as compared to the state's interest, especially given the sweep of the state law banning public financing. A similar analysis could have been applied in *Vista*: given the fragility of local finances, the sweep of the prevailing wage law was too broad.

If these were the analyses, courts would be better positioned to consider future home rule issues. Consider soda tax preemption: the state would argue this is a minor and narrow preemption like *Cal Fed*, and cities would argue its sweep and effect are disproportionate, as in *Johnson v. Bradley*. So too with the housing cases: the courts would consider the scope of the dislocation as compared to the scope of the need. And this increased clarity would also benefit legislators: when the state preempts local law it should consider the extent of the problem and worry that its solution is not sufficiently tailored. This focuses the discussion on the right issues rather than having the legislature and the cities look to the unpredictable black box of existing home rule doctrine.

²⁴⁷ This was the issue in *California Renters Legal Advocacy and Education Fund v. City of San Mateo*, 283 Cal. Rptr. 3d 877, 883, 885 (Ct. App. 2021).

D. *Proof of Concept in the Lower Courts*

The lower courts have not waited for the California Supreme Court to clarify its doctrine and have recently issued a series of decisions interpreting the *Cal Fed* test in a manner broadly consistent with the proportionality gloss we would apply. Yet those lower courts have naturally encountered problems with the unclarity in *Cal Fed* about how much tailoring is sufficient. And cities have argued that *Cal Fed* requires state housing preemption laws to employ the least intrusive means. The cities convinced at least one lower court, but the California Court of Appeal in *California Renters Legal Advocacy and Education Fund v. City of San Mateo* rejected that extreme gloss on tailoring and properly upheld the state law.²⁴⁸ Based on the case law and the underlying structure of proportionality review, we agree that the requirement should be *reasonably tailored*, not the *least intrusive*.

Another important characteristic of these cases (and one harder to summarize) is their careful attention to the facts. This is important because it demonstrates that state courts are capable of evaluating facts for the purpose of proportionality review. And as part of this factual review, the courts engage in the final step of proportionality review where the interrogated state interest is weighed against the dislocation of local power.²⁴⁹

In a recent example of this, a trial court found that California's hyperpreemption of local soda taxes violates home rule, implicitly applying a proportionality analysis.²⁵⁰ The court explained that the penalty provision in question (the state ceasing to collect the sales tax on behalf of a city with a soda tax) was a "severe" penalty imposed on charter cities for exercising their power over municipal affairs. But why did the state law not simply preempt this power, as in *Cal Fed*? The court agreed with the cities that the penalty provision violates a charter city's home rule because of "financial coercion."²⁵¹ This suggests that the state crafted the penalty provision because it assumed its interest was too weak to

²⁴⁸ *Id.* at 898–99 (“Given the extent and intractability of the housing shortfall, we see nothing improper in the Legislature addressing it on a statewide basis, without limiting the statute to local agencies that act in bad faith. We reject the trial court’s proposed limitation.”).

²⁴⁹ *See, e.g.,* *Ruegg v. City of Berkeley*, 277 Cal. Rptr. 3d 649, 678 (Ct. App. 2021) (“[I]n light of the Legislature’s long history of attempting to address the state’s housing crisis and frustration with local governments’ interference with that goal, and the highly subjective nature of historical preservation, the intrusion of section 65913.4 into local authority over such preservation is not broader than necessary to achieve the purpose of the legislation.”).

²⁵⁰ *Cultiva La Salud*, 2021 Cal. Super. LEXIS 68581, at *18–21.

²⁵¹ *Id.* at *21–22.

justify overriding an otherwise-valid tax imposed by a charter city.²⁵² If this is so (and it seems a reasonable conclusion), then the court concluded that a sweeping penalty provision cannot achieve what direct preemption could not do.

In sum, lower California courts are already deploying an improved version of the *Cal Fed* test along the lines we propose—and are doing so successfully. This suggests both that our proportionality test is the trend and that it improves on the current fractured doctrine.

CONCLUSION

By itself, improving the home rule analysis will not allow intrastate federalism to flourish, but it is a crucial first step. The right test enables the right discourse, and with time one hopes the right discourse enables the right constitutional culture. One reason the hyperpreemption phenomenon is so disruptive is that it assigns no value to localism and subsidiarity, norms that we thought were widely shared. Perhaps not, at least in certain states, and if so no judicial doctrine will change matters. But we suggest that the commitment to subsidiarity remains strong, just confused. The solution is a test that clarifies the stakes without loading the dice. We think proportionality review provides that test.

*As this Article was going to print, the California Court of Appeal issued its decision in *Cultiva La Salud v. State*. The court affirmed the lower court's ruling that a very substantial penalty that would apply to charter cities only if they properly exercised their home rule power to impose a soda tax was unconstitutional.*²⁵³

²⁵² And local taxes have proved to be a particularly favorable ground for charter cities to win on municipal affairs arguments. Cotter, *supra* note 223.

²⁵³ *Cultiva La Salud v. State*, No. C095486 (Cal. Ct. App. Mar. 27, 2023).