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and classification, in proportion to population, of cities and towns, which laws may be altered, amended, or repealed.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:

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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 laws . . . .[167]

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:

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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 narrowly[222] 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]

Unclarity 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-weighing 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).