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## Home Rule and Local Political Innovation

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***Home Rule and Local Political Innovation***

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## HOME RULE AND LOCAL POLITICAL INNOVATION

RICHARD BRIFFAULT

### I. Introduction

During the fall of 2004, while most of the nation’s political attention was riveted on the presidential election, two intriguing and potentially significant political developments were occurring at the municipal level. In San Francisco on Election Day, voters participating in the election for the city’s Board of Supervisors cast their ballots using an unusual (for Americans) system of instant runoff voting (IRV), which enabled them to indicate their second and third choices in addition to their first preference. If no candidate in a district receives an outright majority of the first-place votes cast, the candidate with the fewest votes is eliminated and the votes for that candidate are reallocated to those voters’ second choices. If that still fails to produce a majority winner, the process is repeated. This enables voters to vote for independent or third party candidates without the fear that they are “wasting” their votes or supporting a “spoiler,” and avoids the cost of a runoff election.

A few weeks later across the country, the members of the New York City Council took a dramatic step when they overrode Mayor Michael Bloomberg’s veto and significantly expanded the reach of the City’s already noteworthy<sup>1</sup> campaign finance law. The old law, which was first enacted in 1988, created a voluntary campaign financing program under which participating candidates for local office are eligible for public matching funds if they agree to spending limitations and to abide by the City’s disclosure requirements and contribution limitations – restrictions much tighter than New York state’s very loose limits on donations to local candidates.<sup>2</sup> The amendments adopted at the end of 2004

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<sup>1</sup> See PAUL RYAN, CENTER FOR GOVERNMENTAL STUD., A STATUTE OF LIBERTY: HOW NEW YORK CITY’S CAMPAIGN FINANCE LAW IS CHANGING THE FACE OF LOCAL ELECTIONS 15 (2003), <http://www.cgs.org/publications/docs/nycreport.pdf> (referring to the New York City law as a “model for the nation”).

<sup>2</sup> See *id.* at 8–13.

extend New York City's disclosure requirements and contribution limitations to all candidates for municipal office – even those not participating in the public funding program.<sup>3</sup> The amendments also address a problem endemic to public campaign financing programs: self-financing candidates who spend well above the voluntary spending limits. Reacting to Bloomberg's expenditure of \$73 million of his personal funds in his successful quest for the mayoralty in 2001, the City Council voted not only to lift the spending limit for a participating candidate facing a self-funded opponent but also to provide the participating candidate with an unprecedented six-to-one public funds match for qualifying private contributions.<sup>4</sup>

These developments in San Francisco and New York are illustrative of a broader phenomenon – political innovation and reform at the local level. Although the scope of local autonomy remains subject to continued academic debate, a number of cities and counties across the country have been actively engaged in examining and revising their local governmental and electoral processes, and in experimenting with new forms of political organization. Many of these – like alternative voting systems,<sup>5</sup> campaign finance reform,<sup>6</sup> term limits,<sup>7</sup> and conflict of interest regulation<sup>8</sup> – can involve

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<sup>3</sup> See N.Y. CITY COUNCIL LOCAL LAW 59–60 (2004), available at <http://www.nycouncil.info>.

<sup>4</sup> See N.Y. CITY COUNCIL LOCAL LAW 58, §6, (2004) (amending Section 3-706(3) of the Administrative Code of the City of New York), available at <http://www.nycouncil.info>. The six-to-one match is capped at \$1500 in public funds per contributor, and the total public funds payment capped at 125% of the expenditure limit for the office the candidate is seeking.

<sup>5</sup> See, e.g., NEW YORK CITY CHARTER REVISION COMM'N, FINAL REPORT, ENHANCING ACCESS, OPPORTUNITY AND COMPETITION: A BLUEPRINT FOR REFORM (2003), [http://www.nyc.gov/html/charter/downloads/pdf/final\\_report2003.pdf](http://www.nyc.gov/html/charter/downloads/pdf/final_report2003.pdf) (proposing that New York City replace its partisan electoral system with a two-step nonpartisan system). The Charter Revision Commission's proposal was rejected by New York City voters in the November 2003 election.

<sup>6</sup> See generally, NAT'L CIVIC LEAGUE, LOCAL CAMPAIGN FIN. REFORM (2002), <http://www.ncl.org/npp/lcfr/inventory.html> (listing cities and counties that have adopted a range of campaign finance reform measures, including contribution limits, expenditure limits, public financing, disclosure, time limits on fundraising, and prohibitions on contributions from certain donors, like government contractors). See also Paul Ryan, *Beyond BCRA: Cutting-Edge Campaign Finance Reform at the Local Government Level*, 92 NAT'L CIV. REV. 3 (2003) (discussing local public funding measures).

fairly dramatic changes in local politics and governance. Other local initiatives, such as revisions of tax,<sup>9</sup> budget,<sup>10</sup> or legislative procedures,<sup>11</sup> or the size of the local legislative body,<sup>12</sup> seem more prosaic, although they, too, can affect the substance of local decisions. But large or small, these developments nicely illustrate both the capacity of local governments to restructure basic features of their political organization, and their interest in doing so.

These developments test the legal as well as the political meaning of home rule. When these measures are adopted without express state authorization, courts may be called upon to decide whether they fall within the scope for local self-government created by state home rule constitutional provisions or statutes. Moreover, because, typically, state laws address many aspects of local government structure and local elections, local political innovations are often subject to the claim that

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<sup>7</sup> See, e.g., *Cawdrey v. City of Redondo Beach*, 19 Cal. Rptr. 2d 179 (Cal. Ct. App. 1993) (upholding city charter's two-term limit provision for mayor and council members); *Roth v. Cuevas*, 624 N.E.2d 689 (N.Y. 1993) (upholding New York City charter amendment imposing term limits on municipal elected officials). *But cf.* *Cottrell v. Santillanes*, 901 P.2d 785 (N.M. Ct. App. 1995) (ruling that locally adopted term limits for municipal officials were preempted by state constitution).

<sup>8</sup> See, e.g., *Golden v. Clark*, 564 N.E.2d 611 (N.Y. 1990) (prohibiting party officials from holding certain municipal elected positions); *Suffolk County Ethics Comm'n. v. Neppell*, 762 N.Y.S. 2d 307 (N.Y. App. Div. 2003) (ruling that county ethics code is not preempted by state financial disclosure requirements). See also NAT'L CIVIC LEAGUE, LOCAL CAMPAIGN FIN. REFORM: CASE STUDIES, INNOVATIVE, AND MODEL LEGIS. (2001), [http://www.ncl.org/npp/lcfr/lcfr\\_addendum.pdf](http://www.ncl.org/npp/lcfr/lcfr_addendum.pdf) (discussing provision of Westminster Colorado city charter precluding city councilor from debating or voting on any issues that directly affect any person who contributed more than \$100 to the councilor's campaign).

<sup>9</sup> See, e.g., *Traders Sports, Inc. v. City of San Leandro*, 112 Cal. Rptr. 2d 677 (Cal. Ct. App. 2001) (upholding city charter provision enabling council to vote by simple majority to put a tax increase on the ballot, rather than the two-thirds council vote required by state law).

<sup>10</sup> See, e.g., *Bd. of Educ. v. Town & Borough of Naugatuck*, 843 A.2d 603 (Conn. 2004) (upholding power of town to provide for separate referenda on education and general town budgets, notwithstanding state law providing for single referendum on combined education and general town budget).

<sup>11</sup> See, e.g., *Windham Taxpayers Ass'n v. Windham*, 662 A.2d 1281 (Conn. 1995) (allowing town charter, not state law, to determine criteria for submitting legislation to a town meeting).

<sup>12</sup> See, e.g., *State ex rel. Haynes v. Bonem*, 845 P.2d 150 (N.M. 1992) (upholding authority of home rule municipality to create a commission larger than provided by state law).

they are preempted by inconsistent state laws or state occupation of the field. Although decisions vary, reflecting differences in both state home rule enactments and state home rule judicial doctrines, local political innovations have done surprisingly well in state courts.

This paper examines local political innovations, their reception in state courts, and the implications for home rule and for political reform more broadly defined. Part II will review some recent local political innovations, with particular attention to instant runoff voting and campaign finance reform.

Part III will analyze the fate of local political innovations in state courts. In most cases, the critical legal issue has been not home rule authority per se but preemption. To a considerable degree, state courts have upheld these local innovations either by determining that the local interest in local elections or the structure of local government outweighs the state interest behind the conflicting state statute or by concluding that the state did not mean to preclude local departures from state-prescribed models.

Part IV will consider some of the implications of these political innovation/preemption decisions for home rule more broadly. The political innovation/preemption cases suggest techniques that may be used to expand local autonomy within the general legal framework of state predominance in state-local relations. This could be particularly relevant for other aspects of local governance, such as the municipal employment relationship or local taxation.

Finally, in Part V, I will conclude with a brief discussion of the external benefits of local political reform. Although the judicial analysis of local innovations in elections or political procedures focuses on the predominant local interest in these matters, there is a significant general public interest in the local freedom to innovate. San Francisco's IRV system, New York City's campaign finance

reforms, and other local political developments have drawn national attention, as they involve basic questions of political participation and governance that are significant throughout the country. Seventy years ago, Justice Brandeis celebrated the role of the states as laboratories of democracy. These local initiatives suggest that a significant benefit of home rule can be the local introduction and testing of political innovations that can have national consequences.

## II. Local Political Innovation

As a preliminary matter, in referring to a local political innovation or electoral reform, I do not mean to praise the development or suggest it constitutes an improvement over the prior political or electoral structure. All I mean is that the measure is a change, often a significant one, adopted at the local level with the intention of affecting local politics or governance. Moreover, this brief survey is neither comprehensive nor the result of a systematic review of the history or current scope of local political innovation. Rather, by chronicling a handful of past and present instances of local political reform, I hope to give some sense of the capacity and willingness of local governments to experiment with local government organization and the design of the local political process

### A. Background: The Form of Local Government and Local Voting Systems

Local governments have long been involved in political innovation and electoral reform. Two of the three principal forms of municipal organization – the city commission plan, and the council-manager system – were products of local innovation. The commission plan was developed by citizens in Galveston, Texas when the old mayor-council government proved unequal to the task of responding to the destruction resulting from a hurricane and tidal wave in September 1900. Although formal

creation of the commission required state legislative action, the impetus was local.<sup>13</sup> So, too, the spread of the commission form, first to other cities in Texas and then throughout the country, was attributable to local demands, confirmed by local charter adoptions.<sup>14</sup> In 1907, Des Moines, Iowa “tempered the antidemocratic and centralizing features of the Texas idea by incorporating such techniques of direct democracy as initiative, referendum, and recall”<sup>15</sup> and a nonpartisan primary<sup>16</sup> into the commission system. As with the commission plan in Texas, the lack of home rule in Iowa meant that adoption of the manager system required state legislative authorization. But the enabling law “had originally been brought forward and urged,” by the citizens of Des Moines and the adoption of the plan was contingent on voter approval.<sup>17</sup>

Shortly after that, Dayton, Ohio – acting, like Galveston, in the aftermath of a flood – became the first large city to adopt the council-manager form of city government.<sup>18</sup> Moreover, in Dayton, the innovation reflected the city’s local legal autonomy. “The real starting point [for the city manager system] was the adoption of a home-rule amendment to the Ohio constitution in the year preceding. This made possible what many of the citizens had long desired – a scheme of local government

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<sup>13</sup> See, e.g., WILLIAM B. MUNRO, *THE GOVERNMENT OF AMERICA’S CITIES* 295–97 (1921).

<sup>14</sup> See *id.* at 298–302; MARTIN J. SCHIESL, *THE POLITICS OF EFFICIENCY: MUNICIPAL ADMINISTRATION AND REFORM IN AMERICA: 1880-1920* 136-39 (1977).

<sup>15</sup> See RAYMOND A. MOHL, *THE NEW CITY: URBAN AMERICA IN THE INDUSTRIAL AGE, 1860-1920* 119 (1985).

<sup>16</sup> See MUNRO, *supra* note 13, at 300. Local governments have played a leading role in the development and spread of nonpartisan elections in the United States. See Carol A. Cassel, *The Nonpartisan Ballot in the U.S.*, in *ELECTORAL LAWS AND THEIR POLITICAL CONSEQUENCES* 226–41 (Bernard Grofman & Arend Lijphart, eds., 1986) [hereinafter *POLITICAL CONSEQUENCES*].

<sup>17</sup> MUNRO, *supra*, note 13, at 298.

<sup>18</sup> *Id.* at 388. Several smaller cities, including Staunton, Virginia, Lockport, New York, and Sumter, South Carolina, had previously adopted city manager systems. *Id.* at n.1.

adapted to local needs.”<sup>19</sup> In the years that followed, the “Dayton plan” spread rapidly to many small and medium-sized cities.<sup>20</sup>

Local governments have also taken the lead in experimenting with so-called alternative voting systems – which are alternatives to the dominant form of winner-take-all, single-member-district, first-past-the-post-elections used to elect all federal and nearly all state and local legislators in the United States.<sup>21</sup> Alternative voting systems provide representation for city-wide or district-level minorities unable to win seats in winner-take-all elections.

In the early and middle decades of the twentieth century, some two dozen cities, including New York City, Cleveland, and Cincinnati, experimented with a variety of proportional representation (“PR”) systems that sought to enable a wider range of interests to obtain seats in municipal legislative bodies.<sup>22</sup> The adoption of proportional representation “came about as part of municipal reform movements in the cities concerned,”<sup>23</sup> was frequently connected to other municipal reforms (like the

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<sup>19</sup> *Id.* at 388-89. *See also*, SCHIESL, *supra* note 14, at 175 (noting that the Dayton charter providing for a council-manager government followed directly on Ohio’s adoption of a home rule constitutional amendment).

<sup>20</sup> *See* MOHL, *supra* note 15, at 120. *See also* *Bareham v. City of Rochester*, 158 N.E. 51 (N.Y. 1927) (upholding Rochester’s authority to depart from the state-prescribed municipal structure of a strong mayor and partisan elections and replace it with a council-manager government with nonpartisan elections).

<sup>21</sup> They are also in contrast with the city-wide, winner-take-all at-large elections characteristic of many local governments.

<sup>22</sup> *See* Leon Weaver, *The Rise, Decline and Resurrection of Proportional Representation in Local Governments in the U.S.*, in *POLITICAL CONSEQUENCES*, *supra* note 16, at 139–53. As Judge Lehman of the New York Court of Appeals explained in the case upholding the 1936 New York City Charter amendment providing for the election of city council members by proportional representation, PR “is intended . . . to give to minority groups a share in government which must be denied them if we adhere to the principle that all officers of government must be elected by a plurality of the voters of the voting district.” *Johnson v. City of New York*, 9 N.E.2d 30, 39 (N.Y. 1937). Under PR, New York voters in 1945 elected two Communists (in addition to fourteen Democrats, three Republicans, two Liberals and two members of the American Labor Party) to the New York City Council, which precipitated a move to repeal PR. In 1947, the electorate, which had approved a Charter amendment adding PR in 1936, approved a Charter amendment abolishing PR, effective 1949.

<sup>23</sup> Weaver, *supra* note 22, at 140.

council-manager system or nonpartisan elections),<sup>24</sup> and was effectuated by local referenda rather than state authorization or imposition.<sup>25</sup> Nearly all these local PR systems were also subsequently repealed, again typically by local referendum.<sup>26</sup>

Local governments have also played an important role in experimenting with so-called semi-proportional electoral systems which rely on districts rather than an-large elections, and provide for the election of multiple representatives from the same district, but bolster the position of electoral minorities. These systems maintain the neighborhood representation than can be lost in proportional representation while providing some of the minority representation that results from PR elections. Under limited voting, for example, an individual voter can cast fewer votes than the number of seats to be filled from the voter's district. This assures that a minority can win at least one seat from the district. Virtually all the experience with limited voting in the United States is at the local level. A large number of city councils in Connecticut, New York and Pennsylvania have used this system. New York City adopted this system for the election of borough-wide representatives to its city council in 1961,<sup>27</sup> and used it for two decades. The intent and effect was to facilitate the election of some non-Democrat council members in the Democratic Party-dominated city.

#### B. Instant Runoff Voting

San Francisco's adoption of instant runoff voting should be seen against this backdrop of

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<sup>24</sup> *Id.* at 142.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 140–42.

<sup>27</sup> *See* *Blaikie v. Power*, 193 N.E.2d 55 (N.Y. 1963). The New York City plan provided each borough with an equal number of borough-wide representatives. Ultimately, that voting arrangement was found to violate the one person, one vote requirement. *Andrews v. Koch*, 528 F. Supp. 246 (E.D.N.Y. 1981), *aff'd* 688 F.2d 815 (2d Cir. 1982), *aff'd mem. sub nom. Giacobbe v. Andrews*, 459 U.S. 801 (1982).

longstanding municipal experimentation with alternative voting systems. To be sure, unlike proportional representation or limited voting, IRV does not directly limit the power of local majorities or increase the ability of political minorities to elect representatives to the local legislature. However, IRV can strengthen the position of minor parties and independents in the polity by enabling voters to cast ballots for third parties and outsider candidates without the fear that their votes will be “wasted” on a candidate who has no chance of winning, or, worse, that by voting for a long-shot they are making it more likely that the candidate they least prefer among the major contenders is more likely to win. By enabling voters to list and rank multiple candidates, IRV permits a voter to vote for both her sincere first choice and, if different, for her preference among the major contenders. If a voter casts a first-place ballot for a third-party candidate then either (i) one of the major contenders will win an outright majority – in which case the voter did not somehow help swing the election to someone she opposes – or, (ii) if no one of the major contenders wins an outright majority, her vote can also be counted in deciding which of the major candidates prevails.

IRV can lead to more voting for minor parties and independents – although only to the extent that those candidates actually enjoy voter support – while also assuring that the ultimate winner is backed by a majority of voters. IRV can reveal the true extent of electoral support for minor parties, such as the Green Party or the Libertarian Party, which would be lost if Green supporters or Libertarians chose to vote for one of the major contenders out of the strategic fear that their preferred candidate will be no more than a spoiler. An IRV election, thus, gives a better sense of the diversity of electoral opinion within the community and of the extent of support for minority political positions.<sup>28</sup>

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<sup>28</sup> See *Votes Would Carry More Weight with Instant Runoff*, DETROIT FREE PRESS, Oct. 21, 2004 (arguing that “the sophisticated system more accurately reflects voter sentiment”).

Moreover, IRV can promote more positive campaigning and less divisive politics. Candidates have an incentive not just to turn out their base but also to take positions that gain them the second- or third-place support of the voters who also back their opponents. Indeed, one news account of the San Francisco IRV election found that the new electoral mechanism “has made campaigning more civilized,” with candidates not only appealing for second- and third-choice votes, but opponents also appearing at each other’s fundraisers, sharing Web sites and making cross-endorsements.<sup>29</sup> This can also sustain minor parties – or at least advance some of their policy goals – even if the minor parties are unable to win a seat.

San Francisco became the first American community in three decades<sup>30</sup> to adopt IRV, when in 2002 the city’s voters approved the voting system for city elections. The system was first implemented in the November 2004 elections for the city’s Board of Supervisors, and used again in 2005 in elections for the city-wide offices of assessor-recorder and city treasurer.<sup>31</sup>

It is too soon to assess the significance of IRV in San Francisco. The early signs, however, are positive. A survey of the 2004 election undertaken by political scientists at San Francisco State University found that most voters felt they understood IRV, preferred it to the old system, and

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<sup>29</sup> Kimberly Edds, *For Voters, Choice is as Easy as 1, 2, 3*, WASH. POST, Oct. 12, 2004, at A3; See also Dean E. Murphy, *New Runoff System in San Francisco Has the Rival Candidates Cooperating*, N.Y. TIMES, Sept. 30, 2004, at A16.

<sup>30</sup> Ann Arbor, Michigan adopted IRV by charter amendment in 1974. Ann Arbor, Michigan Charter Amendment (proposed Nov. 5, 1974), <http://www.fairvote.org/?page=385>. After using IRV for the April 1975 mayoral election, Ann Arbor voters repealed IRV in April 1976. See FAIRVOTE, FEBRUARY E-NEWS, <http://www.fairvote.org> (follow “Newsletter” hyperlink; then follow “Mar. 2nd 2005” hyperlink).

<sup>31</sup> See Ilene Lelchuk, *Incumbent S.F. Assessor Ting Wins After Tough Campaign*, S.F. CHRON., Nov. 9, 2005, at B3.

exercised the opportunity to vote for second and third choice candidates.<sup>32</sup> It is less clear whether IRV will change the types of candidates who are elected to office. Of the seven supervisor seats up for election, candidates won outright majorities in three, and the first-place candidates were elected after the redistribution of second-choice votes in the other four. One Green was elected to the Board of Supervisors, but he replaced a Green who had been previously elected to that seat. In the two 2005 races, one candidate won with an outright majority in one race, while in the other race the first-place candidate was not elected until after the redistribution of second-choice votes.<sup>33</sup> In both years, IRV saved the city the cost of mounting run-off elections.<sup>34</sup>

San Francisco's adoption of IRV received considerable national attention and seems to have sparked a new interest in electoral reform in other communities. Earlier in 2004, Berkeley, California adopted IRV,<sup>35</sup> and voters in Ferndale, Michigan approved IRV for future mayor and city council

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<sup>32</sup> FRANCIS NEELY, LISEL BLASH & COREY COOK, AN ASSESSMENT OF RANKED-CHOICE VOTING IN THE SAN FRANCISCO 2004 ELECTION, FINAL REPORT 2–3 (2005), <http://pri.sfsu.edu> (follow "Reports" hyperlink).

<sup>33</sup> See Matthew S. Bajko, *Cisneros, Ting Win First Elections*, BAY AREA REP., Nov. 10, 2005, available at <http://fairvote.org/> (follow "In the News" hyperlink; then follow "Cisneros, Ting Win First Elections" hyperlink).

<sup>34</sup> Although public reaction to IRV was generally positive, see Rachel Gordon & Ilene Lelchuk, *It's a Go; Premiere of Ranked-Choice Voting Method Mostly Gets a Thumbs-Up*, S.F. CHRON., Nov. 3, 2004, at B1, the first IRV election was marred by a software glitch, attributed to unexpectedly high turnout, that delayed the tallying of redistributed second place votes. See Suzanne Herel, *Election Aftermath: Turnout Swamped 'Ranked' Software*, S.F. CHRON., Nov. 5, 2004, at B1, Lee Romney, *San Francisco Officials Repair Voting Glitches: High Turnout Slowed the Tallying of 'Ranked Choice' Selections in a Supervisor's Contest*, L.A. TIMES, Nov. 6, 2004, at B6.

<sup>35</sup> See THE CENTER FOR VOTING AND DEMOCRACY, *Instant Runoff in Berkeley*, (Mar. 13, 2004), <http://www.fairvote.org/irv/berkeley.htm> (reporting that Berkeley voters adopted IRV by a margin of 72% to 28% in the March 2004 election).

elections at a referendum held on Election Day 2004.<sup>36</sup> In March 2005, voters in Burlington, Vermont's largest city, voted to amend their charter to use IRV in mayoral elections<sup>37</sup>, and in November 2005, the voters in Takoma Park, Maryland voted to implement IRV in municipal elections starting in 2007.<sup>38</sup> There may soon be enough municipalities using IRV in local elections to provide a better understanding of how this electoral system can affect electoral outcomes and local governance.

### C. Campaign Finance Reform

Local campaign finance reform legislation has less of a historic pedigree than experimentation with alternative voting systems, but in recent years local governments have emerged as leaders in campaign finance regulation and in testing the limits of the restrictions on campaign finance limitations adopted by the United States Supreme Court in *Buckley v. Valeo*.<sup>39</sup> As at the federal and state levels, local interest in campaign financing mostly began in the aftermath of the Watergate scandal, and there were locally-adopted regulations of the financing of local election campaigns as early as 1974.<sup>40</sup> A recent survey by the National Civic League found that 135 city and county governments in eighteen states and the District of Columbia have adopted their own campaign finance laws. Although these measures vary considerably from community to community, collectively they deal with all the major elements of campaign finance regulation – disclosure, contribution limitations,

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<sup>36</sup> Ferndale for Instant Runoff Voting, “Ferndale MI Voters Overwhelmingly Pass Proposal B to Authorize Instant Runoff Voting (IRV),” (Nov. 2, 2004) (IRV proposal passes by a margin of 69.75% to 30.25%) *available at* <http://www.firv.org/pressreleases/propbpasses110204.html>.

<sup>37</sup> See FAIR VOTE IRV AMERICA, *IRV in Vermont*, at <http://www.fairvote.org/index.php?page=1453&articlemode=showspecific&showarticle=789>.

<sup>38</sup> See FAIR VOTE IRV AMERICA, *IRV in Takoma Park*, at <http://www.fairvote.org/?page=1689>.

<sup>39</sup> 424 U.S. 1 (1976).

<sup>40</sup> See, e.g., *Homans v. City of Albuquerque*, 217 F.Supp. 2d 1197, 1200 (D.N.M. 2002) (noting that Albuquerque had adopted campaign spending limits in 1974).

expenditure limitations, and the provision of public funds to qualifying candidates.<sup>41</sup> Contribution limitations are particularly widespread, and are found in roughly 115 localities.<sup>42</sup>

Local campaign reform measures have been daring, innovative, and wide-ranging. Two local governments challenged head-on the Supreme Court's determination in *Buckley* that expenditure limitations are unconstitutional. Albuquerque, New Mexico enacted spending limits for candidates for local office in 1974 and, amazingly enough, despite *Buckley* those limits remained on the books and were apparently enforced through 1995. The limits were temporarily enjoined in 1997, but were amended and restored in 1999.<sup>43</sup> When a mayoral candidate sought to enjoin their enforcement in the 2001 race, the federal district court initially denied the plaintiff's request for a preliminary injunction, concluding that the plaintiff had shown neither a likelihood of success on the merits nor that the public interest would benefit from an injunction.<sup>44</sup> The court found on the record that for more than two decades the Albuquerque spending limits had promoted competitive elections, increased citizen confidence in government, led to high voter turnout, reduced the role of large donors, created opportunities for lower-income and lower-middle-income candidates, and generally improved the quality of electoral campaigns without limiting the ability of candidates to campaign effectively.<sup>45</sup> Based on that record, the court found the city had demonstrated its spending limits were necessary to

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<sup>41</sup> See NAT'L CIVIC LEAGUE, LOCAL CAMPAIGN FIN. REFORM (Feb. 2002), <http://www.ncl.org/npp/lcf/inventory.html>. Roughly two-thirds of the cities and counties that adopted campaign finance measures are in California. Other states where multiple local governments have been active in campaign finance reform include Colorado, Ohio, Washington, Maryland, Florida, Illinois, North Carolina, and Utah.

<sup>42</sup> See *id.*

<sup>43</sup> *Homans*, 217 F.Supp. 2d at 1200 (D.N.M. 2002).

<sup>44</sup> *Homans v. City of Albuquerque*, 160 F.Supp. 2d 1266 (D.N.M. 2001).

<sup>45</sup> *Id.* at 1268–70.

promote the compelling governmental interest in “preserving the public faith in democracy, and reducing the appearance of corruption.”<sup>46</sup> Less than a week later, however, the Tenth Circuit reversed and held that the compelling government interests identified by the district court were “really no different than the interests deemed insufficient to justify expenditure limitations in *Buckley*”<sup>47</sup> and granted a preliminary injunction against enforcement of the Albuquerque limits.

Subsequently, the district court conducted a full trial on the merits. The court found that unlimited campaign spending interfered with competitive elections by aiding incumbents, noting that in Albuquerque all the mayors seeking reelection since the adoption of spending limits had been defeated, compared with the 88% reelection rate of incumbent mayors in other cities.<sup>48</sup> The court again found that turnout in municipal elections had been higher in Albuquerque under spending limits than in other cities without spending limits, that spending limits encourage electoral competition,<sup>49</sup> and that Albuquerque voters think their spending-limited elections are less influenced by special interest money than un-limited-spending federal elections.<sup>50</sup> Ultimately, however, the court concluded that based on the Tenth Circuit’s earlier decision it was “constrained to find” that the city’s expenditure limits were unconstitutional,<sup>51</sup> and the Tenth Circuit affirmed.<sup>52</sup>

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<sup>46</sup> *Id.* at 1272.

<sup>47</sup> *Homans v. City of Albuquerque*, 264 F.3d 1240, 1244 (10th Cir. 2001).

<sup>48</sup> *Homans*, 217 F.Supp. 2d at 1200.

<sup>49</sup> *Id.* at 1206. In the un-limited 2001 mayoral election, the second- and third-place finishers – who each received more votes than the incumbent mayor who unsuccessfully sought reelection, and who together received more votes than the winner – each spent less money than the enjoined spending limit would have allowed. See *id.* at 1203. The winning candidate, however, spent more than the double the spending limit. *Id.*

<sup>50</sup> *Id.* at 1201.

<sup>51</sup> *Id.* at 1206.

Like Albuquerque, the City of Cincinnati also adopted spending limits on city council candidates notwithstanding *Buckley*. That 1995 action appears to have been motivated in part by a desire to challenge *Buckley*.<sup>53</sup> In the constitutional litigation that followed, the city presented evidence that wealthy donors dominated the financing of city elections, and that the overwhelming majority of local residents believed that large contributors wield undue influence over the local political system.<sup>54</sup> The Sixth Circuit, however, held that *Buckley* “foreclose[d] . . . as a matter of law”<sup>55</sup> most of the city’s arguments and invalidated the ordinance.

Some localities, while acting clearly within the contours of *Buckley*, have sought to develop innovative approaches to the problems posed by campaign money.<sup>56</sup> Several communities – including Richland, Washington, and Alta, Utah – have adopted voluntary spending limits with teeth. In Richland, a local ordinance asks candidates to abide by maximum expenditure limitations, and directs the city clerk to monitor spending levels, and publish in the local newspaper an advertisement indicating who is in compliance and who is not.<sup>57</sup> Alta, similarly, directs the city clerk to publicize which candidates have agreed to comply with voluntary limits and which have not. Westminster,

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<sup>52</sup> *Homans v. City of Albuquerque*, 366 F.3d 900 (10th Cir. 2004).

<sup>53</sup> *Kruse v. City of Cincinnati*, 142 F.3d 907, 910 (6th Cir. 1998).

<sup>54</sup> *Id.* at 911.

<sup>55</sup> *Id.* at 915. One member of the *Kruse* panel, however, took issue with the panel’s reasoning and raised the suggestion that spending limitations could also be justified by “the interest in preserving faith in democracy.” *Id.* at 919 (Cohn, D.J., concurring).

<sup>56</sup> Pitkin County, Colorado also challenged *Buckley* when, in 1996, a voter initiative amended its charter to impose a spending limit in local elections. When the constitutionality of the provision was challenged on the eve of the 2000 elections, the county attorney, concerned about the measure’s constitutionality, declined to enforce it. *See* NAT’L CIVIC LEAGUE, ADDENDUM TO LOCAL CAMPAIGN FIN. REFORM: ADDITIONAL CASE STUDIES 14–15 (2001), [http://www.ncl.org/npp/lcfr/lcfr\\_addendum.pdf](http://www.ncl.org/npp/lcfr/lcfr_addendum.pdf).

<sup>57</sup> NAT’L CIVIC LEAGUE, LOCAL CAMPAIGN FIN. REFORM: CASE STUDIES, INNOVATIVE AND MODEL LEGISLATION, (2005), [http://www.ncl.org/npp/lcfr/lcfr\\_first\\_ed\\_summary.html](http://www.ncl.org/npp/lcfr/lcfr_first_ed_summary.html).

Colorado amended its city charter to include a stringent conflict of interests rule that precludes any city councillor from both voting and participating in debate on any issue or matter coming before the Council “involving a benefit” to any person who donated \$100 or more to the councillor’s campaign.<sup>58</sup> Contributions above the conflict-of-interest threshold fell by fifty percent from the election before the adoption of the charter amendment to the election after.<sup>59</sup>

More important, perhaps, than either the direct challenge to *Buckley* posed by municipal spending limits or the alternative forms of regulation promoted by these smaller cities, local governments have taken the lead in implementing, experimenting with, and demonstrating the efficacy of the potentially most significant campaign finance reform – public funding of campaigns. Unlike contribution limits, expenditure limits, or disclosure, only public funding can effectively reduce the dependence of candidates on large private donations, limit the impact of large donors on the electoral process, provide newcomers and challengers with the funds they need to be competitive, and ameliorate the burdens of fundraising that discourage many potential candidates from running while forcing others to spend more of their time with potential large donors than with the general public.<sup>60</sup>

At the national level, there is public funding only in the presidential election, but the low level of funding provided and other technical features of the system have increasingly discouraged candidates from participating, particularly in the primary phase of the presidential election.<sup>61</sup> Several

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<sup>58</sup> *See id.* The recusal requirement does not apply where the benefit to the donor is “merely incidental to an issue or question involving the common public good.” The Westminster charter amendment, which was adopted in 1996, bears a close resemblance to the “recusal alternative” to contribution limits proposed by Professor John Copeland Nagle a few years later. *See* John Copeland Nagel, *The Recusal Alternative to Campaign Finance Legislation*, 37 HARV. J. LEGIS. 69 (2000).

<sup>59</sup> *See* ADDENDUM, *supra* note 57, at 45–47.

<sup>60</sup> *See generally* Richard Briffault, *Public Funding and Democratic Elections*, 148 U. PA. L. REV. 563 (1999).

<sup>61</sup> *See id.* at 586–89.

states have also adopted partial public funding programs, although until recently most states that provided for some form of public funding offered candidates only modest grants, and most limited public funding to candidates for governor.<sup>62</sup> It is local government that has really taken the lead in exploring public funding. Sixteen cities or counties have adopted public funding programs, and twelve of those programs are currently operating.<sup>63</sup>

Public funding programs have been adopted in cities large – New York City, Los Angeles, San Francisco – midsize – Austin, Texas, Portland, Oregon,<sup>64</sup> Tucson, Arizona – and small, Cary, North Carolina, and Petaluma, California. The New York, Los Angeles, and Tucson programs have been considered particularly successful.<sup>65</sup> Tucson’s system has been in operation the longest – since 1985 –

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<sup>62</sup> See MICHAEL L. MALBIN & THOMAS GAIS, *THE DAY AFTER REFORM: SOBERING CAMPAIGN FIN. LESSONS FROM THE STATES 51–75* (1998). Hawaii, Minnesota, and Wisconsin have for some time provided some public funds to legislative candidates, but only Minnesota provides sufficiently public money to make the program attractive to candidates. See *id.* at 58, 71. The more recently adopted “clean money” reforms in Arizona and Maine have been far more ambitious and more comprehensive in providing support for state legislative candidates. See UNITED STATES GENERAL ACCOUNTING OFFICE, *CAMPAIGN FIN. REFORM: EARLY EXPERIENCES OF TWO STATES THAT OFFER FULL PUBLIC FUNDING FOR POLITICAL CANDIDATES* (May 2003), available at <http://www.gao.gov/new.items/d03453.pdf> (analyzing Arizona and Maine public funding programs).

<sup>63</sup> See Ryan, *supra* note 6, at 4. Of the four programs no longer in operation, three were terminated as the result of state-level voter initiatives, two in Washington state and one in California. As I will discuss below, there is a good argument that the California measure was terminated erroneously by a state court. Sacramento County had adopted public funding in 1986. In 1988, California voters passed Proposition 73, which banned the payment of public funds to candidates. In 1990, an intermediate California appellate court held that this preempted the Sacramento public funding system. *County of Sacramento v. Fair Political Practices Comm’n.*, 271 Cal. Rptr. 802 (Cal. Ct. App. 1990). However, two years later, in a case in which Proposition 73 was used to challenge Los Angeles’ public funding system, the California Supreme Court upheld the Los Angeles public funding program and labeled the *Sacramento* decision – which was possibly distinguishable because it involved a county and not a home rule city – “highly questionable.” *Johnson v. Bradley*, 841 P.2d 990, 1001 (Cal. 1992). The fourth defunct public funding program, in Cincinnati Ohio, was terminated by a local ballot measure. See CENTER FOR GOVERNMENTAL STUD., *PUBLIC FINANCING LAWS IN LOCAL JURISDICTIONS 5 n.1* (2005) available at <http://www.cgs.org/publications/docs/PublicFinancingLaws2005.pdf>.

<sup>64</sup> As of this writing, Portland is the most recent major city to have adopted public funding. In May 2005, the city council passed an ordinance creating a voluntary public funding system for city auditor, city commissioner, and mayor. The first election to be held with public funding is the May 2006 primary. See PUBLICLY FINANCED CAMPAIGNS IN PORTLAND – ORDINANCE AND REPORT, available at <http://www.portlandonline.com/auditor/index.cfm?c=37740>.

<sup>65</sup> See RYAN, *supra* note 1. See also PAUL RYAN, CENTER FOR GOVERNMENTAL STUD., *ELEVEN YEARS OF REFORM: MANY SUCCESSES-MORE TO BE DONE, CAMPAIGN FINANCING IN THE CITY OF LOS ANGELES* (2001), available at

while the New York and Los Angeles systems date back to 1988 and 1990 respectively. In all three systems, public matching funds are provided to qualifying candidates who agree to comply with spending limits and abide by various administrative requirements. In Tucson, New York, and Los Angeles, public funds are available for candidates for all municipal offices, and both the public match and the spending limit have been sufficiently attractive to candidates that in recent years most serious candidates have chosen to participate.<sup>66</sup> These programs have reduced candidates' dependence on large private donations and increased the role of small donors;<sup>67</sup> expanded the ability of women, people of color, and grass-roots candidates to run for office;<sup>68</sup> and have generally contributed to more competitive municipal elections.<sup>69</sup>

These cities and the other communities using public funding have experimented in interesting ways with how to determine which candidates qualify for public funds, how much to give candidates, how to distribute the funds, and how to finance and administer their programs.<sup>70</sup> Thus, Los Angeles has demonstrated the benefits of a public financing trust fund – adopted as a charter amendment – in

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[http://www.cgs.org/publications/docs/lacamp\\_fin.pdf](http://www.cgs.org/publications/docs/lacamp_fin.pdf) [hereinafter RYAN, ELEVEN YEARS]; PAUL RYAN, CENTER FOR GOVERNMENTAL STUD., POLITICAL REFORM THAT WORKS: PUBLIC CAMPAIGN FINANCING BLOOMS IN TUCSON (2003), available at [http://www.cgs.org/publications/docs/Political\\_Reform\\_That\\_Works.pdf](http://www.cgs.org/publications/docs/Political_Reform_That_Works.pdf) [hereinafter RYAN, PUBLIC FINANCING BLOOMS].

<sup>66</sup> See RYAN, *supra* note 1, at 21–23 (candidate participation rate was 79% in New York City in 2001 elections); RYAN, ELEVEN YEARS, *supra* note 66, at 18–19 (serious candidate participation in Los Angeles was 70% in 2001); RYAN, PUBLIC FINANCING BLOOMS, *supra* note 66, at 9–11 (100% participation rate in Tucson program in 2001 and 2003 elections).

<sup>67</sup> See RYAN, *supra* note 1, at 15–18; RYAN, ELEVEN YEARS, *supra* note 66, at 21–23, 26–28.

<sup>68</sup> See RYAN, *supra* note 1, at 18–21; RYAN, ELEVEN YEARS, *supra* note 66, at 23–24.

<sup>69</sup> See RYAN, PUBLIC FINANCING BLOOMS, *supra* note 66, at 19–21.

<sup>70</sup> See RYAN, *supra* note 6, at 7–11.

assuring a “consistent and reliable” source of funding.”<sup>71</sup> Tucson has shown that administration of the program by the city clerk, rather than a separate ethics commission or campaign finance board, can be an effective and professional way of implementing public funding.<sup>72</sup> And New York has indicated that public grants plus spending limits need not be a pro-incumbent device, as some critics of public funding have suggested.<sup>73</sup> By amending its law in 1998 to provide an unprecedented \$4-to-\$1 match for individual donations of \$250 or less from New York City residents, the city council not only democratized campaign funding but also contributed to the increased competitiveness of city council elections.<sup>74</sup> And several of the cities that provide public funding— including Austin and San Francisco as well as Los Angeles and New York – have sought to use public funds to improve the quality of municipal election campaigns by requiring candidates who participate in the public funding program to participate in public debates.<sup>75</sup>

The various city and county public funding programs have also had to address a central challenge to all public funding programs – the ability of nonparticipating candidates, including wealthy, self-funded office seekers, and independent committees to engage in unlimited spending. Certainly, Michael Bloomberg’s expenditure of \$73 million of his personal fortune in his quest for the

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<sup>71</sup> New York’s law provides another model for a program funding mechanism “equally well insulated from political pressures.” See RYAN, *supra* note 1, at 28; RYAN, *Eleven Years*, *supra* note 66, at 25.

<sup>72</sup> See RYAN, *PUBLIC FINANCING BLOOMS*, *supra* note 66, at 16. On the other hand, New York’s Campaign Finance Board suggests that an independent administrative body can also do a very successful job. See RYAN, *supra* note 1, at 31–34.

<sup>73</sup> See BRADLEY A. SMITH, *UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM* 98–102 (2001).

<sup>74</sup> See RYAN, *supra* note 1, at 15–18.

<sup>75</sup> See Ryan, *supra* note 6, at 11–12.

New York mayoralty in 2001 indicates the limits of any voluntary funding and limits system.<sup>76</sup> To deal with the challenge posed by high-spending non-participants, Austin, Los Angeles, Oakland, and San Francisco eliminate the spending limit in any electoral contest when independent expenditures designed to influence that race exceed a specified amount.<sup>77</sup> New York eliminates the spending limit when a participating candidate faces a nonparticipating opponent who receives contributions or makes expenditures in excess of 50% of the spending limit, and it also increases the public match. As a result of the amendments enacted in 2004 the match rate was raised from 5-to-1 to 6-to-1. Potentially more significantly, the law now permits a participating candidate facing a high-spending non-participating opponent to receive a public grant of up to 125% of the spending limit.<sup>78</sup>

As with IRV, it would be a mistake to treat these local campaign finance reforms, including the local public funding initiatives, as panaceas. Campaign finance rules are only a small piece of a political system, and will have a limited, even if real, effect on local politics. But these initiatives do demonstrate the willingness and capacity of localities across the country to undertake significant reform in a highly contested area and provide important evidence of the wide range of possible innovations and different approaches to common problems.

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<sup>76</sup> To be sure, Bloomberg's opponent, Mark Green, spent \$16.2 million (including \$4.5 million in public funds) in the same election, which was more money than any successful candidate for New York mayor had ever spent, other than Bloomberg. **NEED CITE**

<sup>77</sup> Ryan, *supra* note 6, at 11.

<sup>78</sup> The law appears to have had little impact on Mayor Bloomberg's campaign spending. In 2005, he spent \$84 million – or \$10 million more than in 2001 – on his successful reelection campaign. *See* Jim Rutenberg, *Bloomberg Spent \$84 Million To Remain Mayor, a Record*, N.Y. TIMES, Jan. 14, 2006, at B2. Even with the City's generous matching program, Bloomberg's 2005 general election opponent, Fernando Ferrer, raised only \$5.3 million in private contributions and received just \$3.9 million in public financing. Ferrer's total spending was just \$9.1 million. Public funding accounted for approximately 42% of Ferrer's total funding. *See* Sam Roberts, *Offers of Coal for the Mayor's Newcastle*, N.Y. TIMES, Dec. 16, 2005, at B4.

#### D. Other Local Innovations in the Local Governance Structure

This subsection is even more unsystematic than the previous ones, since it relies to a significant degree on recent judicial decisions in which locally initiated changes in the organization or procedures of local government have been subject to legal challenge. As a result, it does not consider local structural revisions that have avoided legal attack. Still, even this brief survey indicates some local willingness and capacity to depart from the state-prescribed rules and procedures for local government operations.

One important example of this is the local adoption of term limits for local officials, even in the absence of any state provision for term limits.<sup>79</sup> Local governments have also changed the size of the local legislature,<sup>80</sup> altered the rules for filling vacancies in local office,<sup>81</sup> and subjected state-created local offices – like the coroner and register of wills – to local accountability, hiring, conduct, and ethics codes and local reporting requirements.<sup>82</sup> Other local measures have imposed distinctive local conflict of interest rules,<sup>83</sup> changed election procedures,<sup>84</sup> and adopted specific local procedures for

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<sup>79</sup> See, e.g., *Roth v. Cuevas*, 624 N.E.2d 689 (N.Y. 1993) (discussing term limits adopted by voter initiative in New York City); *Cawdrey v. City of Redondo Beach*, 19 Cal. Rptr. 2d 179 (Cal. Ct. App. 1993) (describing a charter provision that imposed a two-term limit on mayor and council members). *But cf.* *Cottrell v. Santillanes*, 901 P.2d 785 (N.M. Ct. App. 1995) (invalidating Albuquerque charter amendment imposing term limit on city councilors).

<sup>80</sup> See e.g., *State ex rel. Haynes v. Bonem*, 845 P.2d 150 (N.M. 1992) (upholding decision by City of Clovis to expand city commission to eight members, notwithstanding state law setting city commission size at five).

<sup>81</sup> See, e.g., *Westchester County Civ. Serv. Employees Ass'n v. Del Bello*, 393 N.E.2d 488 (N.Y. 1979); *Resnick v. County of Ulster*, 376 N.E.2d 1271 (N.Y. 1978).

<sup>82</sup> See, e.g., *Wecht v. Roddey*, 815 A.2d 1146 (Pa. Commw. Ct. 2002); *accord*, *Lennox v. Clark*, 93 A.2d 834 (Pa. 1953) (holding that the consolidation of the city and county of Philadelphia made county register of wills, coroner, and recorder of deeds into city officers who could be subject to the city's civil service and reporting requirements and the city's prohibition on partisan political activities).

<sup>83</sup> See, e.g., *Golden v. Clark*, 564 N.E.2d 611 (N.Y. 1990) (sustaining city charter provision prohibiting city officials from holding party office); *Suffolk County Ethics Comm'n. v. Neppell*, 762 N.Y.S.2d 915 (N.Y. App. Div. 2003) (upholding county law that imposed more stringent financial disclosure rules than state law).

local legislation,<sup>85</sup> local budget review,<sup>86</sup> approval of franchises,<sup>87</sup> and consideration of tax increases.<sup>88</sup>

There is no consistent thread in the local measures, and no consistent theme in the difference between local and state approaches to these questions. Some local measures might provide for more direct popular involvement in local decision-making,<sup>89</sup> while others provide less.<sup>90</sup> More substantively, a handful of California cases reveal local government efforts to make it easier to impose new local taxes than the state of California, directed by Proposition 13 and its progeny, would allow.<sup>91</sup> Perhaps the dominant impression is simply one of local tinkering with the rules and procedures of local governance, particularly with regard to elections, ethics, employees, budget and taxation, in light of particular local needs, preferences, and circumstances.

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<sup>84</sup> See, e.g., *In re Sanchez*, 81 S.W.3d 794 (Tex. 2002) (finding that City of San Juan's home rule charter allowed candidates for the city commission to file up to thirty days before election day, although state law set the filing deadline at forty-five days before election day).

<sup>85</sup> See, e.g., *Windham Taxpayers Ass'n v. Windham*, 662 A.2d 1281 (Conn. 1995) (finding that town charter permissibly made it more difficult to bring a matter to the town meeting, and thereby override an action of the board of selectmen, than under state law).

<sup>86</sup> See, e.g., *Bd. of Educ. v. Town & Borough of Naugatuck*, 843 A.2d 603 (Conn. 2004) (upholding town charter that provided for separate referendum votes on education and general town budget, despite state law providing for referendum on combined education and general budget); *School Comm. v. Town of York*, 626 A.2d 935 (Me. 1993) (holding that town charter governs procedure for adopting school budget).

<sup>87</sup> See *City of Houston v. Todd*, 41 S.W.3d 289 (Tex. App. 2001) (finding that municipal procedure for approving light rail franchise, not state law setting procedure for street franchises, governs).

<sup>88</sup> See, e.g., *Traders Sports, Inc. v. City of San Leandro*, 112 Cal. Rptr. 2d 677 (Cal. Ct. App. 2001) (permitting city to submit tax increase proposal to voters on approval of simple majority of council, not the two-thirds that state law requires).

<sup>89</sup> See, e.g., *Naugatuck*, 843 A.2d at 606 (upholding town provision providing for direct referendum review of the school budget).

<sup>90</sup> See, e.g., *Todd*, 41 S.W.3d 289 (upholding city provision for approving franchise that eliminated voter approval); *Windham Taxpayers Ass'n*, 662 A.2d 1281 (upholding town charter that made it more difficult for residents to force a town meeting review of an appropriation approved by the board of selectmen).

<sup>91</sup> See, e.g., *Traders Sports, Inc.*, 112 Cal. Rptr. 2d 677; see also *Fisher v. County of Alameda*, 24 Cal. Rptr. 2d 384 (Cal. Ct. App. 1993) (permitting local adoption of real estate transfer tax despite state prohibition).

### III. Local Political Reform in the Courts: Home Rule and Preemption

Not all local efforts at political innovation provoke legal challenge. Thus, I am not aware of any court decisions concerning San Francisco's adoption of IRV, Tucson's longstanding public funding system, or New York City's campaign finance law – although New York City's most recent effort to extend its contribution restrictions and disclosure requirements to candidates who do not participate in the voluntary public funding system opens it to legal attack. Moreover, some challenges to local political innovations concern not the scope of local autonomy but other state constitutional constraints. Thus, the principal argument against Seattle's program to provide public funds to candidates in municipal elections was premised on the state constitution's public purpose requirement for spending public dollars.<sup>92</sup> Similarly, Albuquerque's term limits provision was asserted to be inconsistent with the rules for holding office spelled out in the New Mexico Constitution's Qualifications Clause.<sup>93</sup>

Still, local political reform measures have frequently implicated the scope of local autonomy. As is typically the case with local legislation, these questions concern both the power of the locality to adopt the measure in the first place in the absence of express state authorization and whether other state laws addressing the same subject matter preempt local action. State courts have consistently found that the local political innovations have fallen within the local power to initiate. Indeed, the courts have on occasion waxed lyrical on the almost tautological connection between home rule and

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<sup>92</sup> See *City of Seattle v. State*, 668 P.2d 1266 (Wash. 1983).

<sup>93</sup> See *Cottrell v. Santillanes*, 901 P.2d 785 (N.M. Ct. App. 1995).

local control over governance procedures.<sup>94</sup> Even courts least interested in immunizing local initiatives from state displacement have been willing to assume that the power “to organize the local political entity, to establish its governing organs, their selection, their powers, and their limits” is at the heart of the local autonomy provided by home rule.<sup>95</sup>

The real question has been preemption. Sometimes the preemption problem is posed by a specific state law clearly targeting the type of local ordinance in question. Los Angeles, for example, adopted its public funding system shortly after the state’s voters had passed a ban on public funding of candidates. More frequently, the arguably conflicting state law is part of a general state code concerning the rules and procedures for local elections, or prescribing budget practices or governance procedures. Most states have adopted such local government or local election codes. Functionally, these codes can provide a useful framework or model for local governments. Particularly for the many small local governments that may lack the legal and financial resources to engage in extensive research and develop their own forms, they constitute a ready-made “off the shelf” governmental and electoral structure. These localities need not reinvent the wheel but can simply use the rules and procedures the state has provided. More formally, it would be difficult to deny that the state has an interest in assuring fair procedures and workable local government structures for its residents who live within municipalities or counties and depend upon those localities for government services. Although these laws address core local matters, they are, by the same token, also matters of state concern. In the many localities where there is no conflict between the general state code and a special local ordinance, there would be no question that the state has the legal authority to address these matters.

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<sup>94</sup> See, e.g., *Bd. of Educ. v. Town & Borough of Naugatuck*, 843 A.2d 603, 611–12 (Conn. 2004).

<sup>95</sup> *City of La Grande v. Public Employees Ret. Bd.*, 586 P.2d 765, 767–68 (Or. 1978).

Thus, these local political innovation cases have forced state courts to grapple with the problem of local legislation dealing with a matter of core local concern that conflicts with a legitimate state concern with local matters. Based on our usual assumptions about the limited scope of local autonomy, that would appear to be a recipe for state preemption and local defeat. Instead, to a surprising degree, state courts have enabled the local interest in determining the structures and procedures of local politics and governance to prevail. Either the courts have engaged in balancing and concluded that the local interest outweighs the state's, or they have strained to read the relevant state laws as implicitly permitting local departures from the state-prescribed norm.

Strikingly, two of the classic distinctions in home rule thinking – whether home rule is based on a state constitutional provision<sup>96</sup> or only a state statute,<sup>97</sup> or whether the home rule is of the *imperio* form vesting localities with both initiative and immunity from inconsistent laws on the same subject or merely of the *legislative* form, granting broad initiative powers but making them subject to state legislative preemption<sup>98</sup> – appear not to matter much. Local governments have prevailed even when their home rule is statutory, or of the *legislative* constitutional form. What really seems to matter is the judicial recognition that local control of local governance or politics is both of central importance to the local self-determination that is home rule while simultaneously posing little or no threat or cost to

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<sup>96</sup> See, e.g., *Johnson v. Bradley*, 841 P.2d 990, 993 (Cal. 1992).

<sup>97</sup> See, e.g., *Naugatuck*, 843 A.2d 603 (discussing a Connecticut town's home rule based on a statute); *School Comm. v. Town of York*, 626 A.2d 935 (Me. 1993) (discussing a Maine town's home rule based on statutory authority).

<sup>98</sup> Compare *Johnson*, 841 P.2d at 993 (finding no preemption under California's constitution, which provides for local power with respect to municipal affairs) with *State ex rel. Haynes v. Bonem*, 845 P.2d 150, 154 (N.M. 1992) (finding no preemption under New Mexico constitution, which provides that home rule does not apply to "legislative powers . . . denied by general law"). On imperio and legislative home rule generally, see Kenneth Vanlandingham, *Constitutional Home Rule Since the AMA (NLC) Model*, 17 WM. & MARY L. REV. 1 (1975); Kenneth Vanlandingham, *Municipal Home Rule in the United States*, 10 WM. & MARY L. REV. 269 (1968).

the localities or the state beyond local borders. In other words, if it is a question of local political structure and there are no external effects and no state harm from intrastate variations, local innovations can prevail notwithstanding the conflict with state law.

#### A. Balancing of State and Local Interests

The most striking case involving the express balancing of state and local interests in local election regulation is *Johnson v. Bradley*, in which the California Supreme Court upheld Los Angeles’s municipal candidate public funding program in the teeth of the voter-initiated Proposition 73, a state-wide measure that flatly banned the public funding of any election campaign.<sup>99</sup> The court found that the Los Angeles measure easily fell within the state constitution’s grant to charter cities – such as Los Angeles – of plenary authority to “make and enforce all ordinances and regulations in respect to municipal affairs.”<sup>100</sup> The court, however, also acknowledged that the “the integrity of the electoral process, at both the state and local level, is undoubtedly a statewide concern.”<sup>101</sup> As the court noted, without such an understanding it would be difficult to sustain the application of statewide campaign finance disclosure provisions or conflict of interest rules to charter cities that have not adopted their own disclosure or ethics laws.<sup>102</sup> The court, however, declined to defer to the state’s mere assertion of a theoretical interest in local electoral integrity. In light of the local self-governance interest at stake, the court required the state to demonstrate both that the state law is “reasonably calculated to resolve such statewide concerns,” and “narrowly tailored to intrude as little as possible

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<sup>99</sup> 841 P.2d at 991.

<sup>100</sup> *Id.* at 994.

<sup>101</sup> *Id.* at 1003.

<sup>102</sup> *Id.* at 1001 n.18, 1003.

on legitimate local interests.”<sup>103</sup> Because the petitioners failed to cite any evidence that the ban on public funding in political campaigns “advances in any way the goal of enhancing the integrity of the local electoral process,”<sup>104</sup> the court concluded that the municipal interest in structuring local elections outweighs the asserted state interest in local integrity.<sup>105</sup>

In the course of its analysis, the court also gave considerable weight to the local scope of the Los Angeles measure – that is, that it affected only Los Angeles and not other localities or the state itself. The challengers to local public funding asserted that the state’s ban on public funding would serve the statewide concern of “the protection of the public fisc.”<sup>106</sup> The court acknowledged that the “conservation of the *state’s* limited funds is a statewide concern,” but it emphasized that the public funds in question were entirely municipal: There is “nothing that is of greater municipal concern than how a city’s tax dollars will be spent; nor anything which could be of less interest to taxpayers of other jurisdictions.”<sup>107</sup> The lack of external effects offset the finding of a state concern and supported the conclusion that local funding of local candidates is primarily a local matter.

*Johnson’s* balancing of state and local interests affected other cases involving political innovation in California. In *Cawdrey v. City of Redondo Beach*, the court of appeal, relying on

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<sup>103</sup> *Id.* at 1001, n.18.

<sup>104</sup> *Id.* at 1003.

<sup>105</sup> The lack of evidence that a public funding ban promotes the integrity of elections suggests that Proposition 73 is of questionable value for state elections, too. However, as the court considered the benefits of the public funding ban only against the countervailing interest in municipal home rule, *Johnson* did not affect Proposition 73’s applicability to state elections.

<sup>106</sup> *Id.* at 1001.

<sup>107</sup> *Id.* at 1002.

*Johnson*, upheld a charter city’s adoption of term limits for its mayor and council members.<sup>108</sup> The court explained that the “manner of election” of municipal officers is a core municipal affair,<sup>109</sup> so that the adoption of term limits easily fell within the home rule grant. By the same token, the court also found that the extensive state specification of the qualifications for holding local office – which did not include term limits – was intended by the state to occupy the field of municipal office eligibility.<sup>110</sup> Despite the head-on conflict, the local term limit prevailed because the predominant interest was local. As the court noted, the “persons primarily affected . . . are City council members and residents. Council members can only exercise the City’s police powers within the City, and [the term limits provision] has at most a minimal extraterritorial effect.”<sup>111</sup> There was no need for a uniform state law on local term limits – and no harm from local variation – because “term limits for City officials have to do solely with local concerns.”<sup>112</sup> To be sure, there was some state interest in the terms of municipal officeholders, given that municipal decisions inevitably affect nonresidents “who enter a city, or work or own property in it.”<sup>113</sup> Those concerns underscored the state’s general interest in the quality of local government – concerns which support the legitimacy of the many state laws dealing with eligibility to

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<sup>108</sup> 19 Cal. Rptr. 2d 179, 182 (Cal. Ct. App. 1993). Art. XI, §5 of the California Constitution is the source of the home rule power for charter cities. Cal. Const. art. XI, §5. Subsection (a) provides such cities with plenary power over “municipal affairs.” *Id.* Subsection (b)(4) specifically empowers charter cities to regulate the “manner” by which city officials are elected. *Id.* *Cawdrey* rooted Redondo Beach’s term limits authority in the “manner” subsection. Interestingly, the California Supreme Court in *Johnson*, after considerable consideration of the “manner” subsection, relied instead on the more general “municipal affairs” power. *Johnson*, 841 P.2d at 998–99.

<sup>109</sup> *Cawdrey*, 19 Cal. Rptr. 2d at 179, 188.

<sup>110</sup> *Id.* at 186; *see also* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995) (holding that the United States Constitution’s eligibility requirements to serve in Congress bar state imposition of term limits on its congressional representatives).

<sup>111</sup> *Cawdrey*, 19 Cal. Rptr. 2d at 188.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 187.

serve in local government. But if these concerns are treated as controlling then “virtually all aspects of modern city government are of statewide concern” and that would “nullify” the state constitution’s grant of home rule.<sup>114</sup> Protecting home rule required the court to treat the greater local interest as determinative.

The lack of significant extralocal concern also proved dispositive in another recent California case, *Traders Sports, Inc. v. City of San Leandro*,<sup>115</sup> in which the court upheld a local three percent gross receipts tax on businesses that sell concealable firearms and ammunition for concealable firearms. The city council had adopted the measure by a simple majority vote and then submitted it to the city’s voters, who approved it.<sup>116</sup> However, as a result of Proposition 62, a voter-initiated statewide statute, state law requires a two-thirds council vote, as well as voter approval, in order to adopt or increase local taxes.<sup>117</sup> The court found that the local measure and the state law were in direct conflict.<sup>118</sup> Following *Johnson v. Bradley*, the court emphasized both the predominant local concern in the procedures for adopting local taxation and the state statute’s lack of narrow tailoring to advance the state’s asserted concern with promoting voter control over taxation.<sup>119</sup> First, the court noted that

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<sup>114</sup> *Id.*

<sup>115</sup> 112 Cal. Rptr. 2d 677 (Cal. Ct. App. 2001).

<sup>116</sup> *Id.* at 680.

<sup>117</sup> *Id.* at 681.

<sup>118</sup> *Id.* at 680.

<sup>119</sup> *Id.* at 686.

the question of the percentage of council votes needed to put a measure on the ballot “is precisely the sort of matter to fall within the decision-making power of a home rule municipality. It is a subject that is predominantly, if not entirely, of interest to the citizens of San Leandro.”<sup>120</sup> Indeed, in a classic statement of the theory of home rule, the court rhetorically asked:

After all, who else can best determine the proper balance between the powers delegated to the elected representatives of San Leandro to propose a local tax measure, and the powers reserved to the residents of San Leandro to enact such a tax measure? Certainly, it is the people of San Leandro, who are familiar with local conditions, who are best able to regulate such matters by means of charter provisions and municipal codes.<sup>121</sup>

On the other hand, the court assumed that the statute did address an area of legitimate state concern – increasing voters’ control over taxation. However, as the San Leandro procedure still gave the ultimate power to approve or reject a new tax to the voters, the state statute’s requirement of a two-thirds council vote before the measure could even be considered by the voters was “not narrowly calculated” to advance the state’s interest “while at the same time it invades the right of a charter city to conduct local elections – an area that is historically a municipal affair.”<sup>122</sup> As a result “San Leandro is constitutionally empowered to require a voting majority different from that set out in [state law].”<sup>123</sup>

The balancing technique – with the local interest in local self-governance dominating over state concerns – is not unique to California. In Connecticut, the state supreme court has repeatedly upheld local measures that apparently conflict with general state laws setting out rules for local

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<sup>120</sup> *Id.* at 685.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 686.

<sup>123</sup> *Id.* at 687.

governance on the theory that these are matters of predominant local concern. Thus, the court ruled that the town of Windham could by charter provision make it more difficult for local residents to force a local referendum vote on a budget matter than state law would have allowed. The court acknowledged the conflict between the state and local measures, and did not doubt the authority of either the state or the locality to legislate concerning the issue. It concluded that because the question of referral to the voters is a “matter of local concern,” state law did not preempt the conflicting charter provision.<sup>124</sup> The court noted that the rationale for home rule is that “issues of local concern are most logically answered locally, pursuant to a home rule charter, exclusive of the provisions of the General Statutes.”<sup>125</sup> The court continued:

[W]hether Windham’s primary legislative body – the board of selectmen – can be compelled to hold a referendum on the petition of the town’s voters . . . is of purely local interest . . . in that it relates to concerns that are of particular importance to the town itself. It is of no import to the rest of Connecticut whether the town of Windham . . . holds a second referendum.<sup>126</sup>

More recently, the Connecticut Supreme Court upheld the authority of the town of Naugatuck to provide for separate referenda on the education budget and the rest of the town budget rather than hold a referendum on an integrated general spending-plus-education budget, as provided by state law. The court found that the state and local measures conflicted but determined that the town provision prevailed as “matters concerning a town budget are of local rather than statewide concern.”<sup>127</sup> While both education and education spending are matters of statewide concern, to protect local autonomy the

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<sup>124</sup> Windham Taxpayers Ass’n v. Windham, 662 A.2d 1281, 1292 (Conn. 1995).

<sup>125</sup> *Id.* at 1293.

<sup>126</sup> *Id.* at 1293–94.

<sup>127</sup> Bd. of Educ. v. Town & Borough of Naugatuck, 843 A.2d 603, 613 (Conn. 2004).

court defined the area of conflict not as the broad field of education finance but, more narrowly, as “the particular *procedure* pursuant to which a municipality adopts its budget, including the procedure it employs in adopting the education component of the budget.”<sup>128</sup> Although the state could impose substantive educational mandates, the local education budget procedure, which has no effect outside the municipality, “is not *itself* a matter of statewide concern.”<sup>129</sup>

In *State ex rel. Haynes v. Bonem*,<sup>130</sup> the New Mexico Supreme Court took a particularly creative approach to balancing a state-local conflict over the size of the Clovis city commission. New Mexico law provided that commissions should have five members; Clovis wanted an eight-member body.<sup>131</sup> The court asked whether the state law was a “general” one, which, under the New Mexico constitution, would displace an inconsistent local measure. Although the state law was certainly general in form – it provided simply that a municipality having a commissioner-manager form of government is to have five commissioners, it applied generally throughout the state, and it did not make exceptions for any municipality or category of municipalities – the court determined “[e]ven if a statute applies to all municipalities throughout the state, it is not necessarily a general law if it does not relate to a matter of statewide concern.”<sup>132</sup> Although “[d]etermining whether a matter is of statewide or local concern is not always an easy task,”<sup>133</sup> the court “easily conclude[d] that the subject is of local concern.” As the court noted, the size of the governing body of Clovis has little significance outside

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<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *State ex rel. Haynes v. Bonem*, 845 P.2d 150 (N.M. 1992).

<sup>131</sup> *Id.* at 151.

<sup>132</sup> *Id.* at 155.

<sup>133</sup> *Id.* at 156.

the city limits. “It is a subject that is predominately, if not entirely, of interest to the citizens of the City of Clovis.”<sup>134</sup> As a result, the city could have eight commissioners, notwithstanding the inconsistency with state law.

In these balancing cases, the courts upheld local efforts to change basic aspects of local government structure or procedure or local elections, despite a conflict with state law, on a finding that the matter was both part of the core of local self-determination and had little or no effect on the state concerns underlying the inconsistent state legislation. As a result, the local measures could prevail for those localities choosing to break with the state’s approach, while the state laws remained in effect for all the other localities which had not attempted to depart from them.

#### B. Finding No State Intent to Preclude Local Variation

The other principal technique state courts have used to sustain local political innovations that are arguably inconsistent with state laws has been to find that the state did not intend to preclude local variation from the state-prescribed norm. One version of this, nicely articulated by the Supreme Judicial Court of Maine, has been to treat the state’s laws governing local government organization as a model, but not a mandate for local compliance.

Thus, the Town of York, Maine adopted a number of charter provisions – dealing with such issues as the budget committee, secret ballot voting, recall elections, and the election of the moderator for town referenda – which departed from general state laws. The court noted that many of these legislative provisions pre-dated the statutory expansion of home rule and found a statement in the legislative history to the home rule expansion act that observed that state law “[p]rovisions which do not limit home rule power, but may serve as a useful guide to municipalities are retained, but with an

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<sup>134</sup> *Id.* at 157.

express recognition of municipal home rule authority to act otherwise.”<sup>135</sup> Relying on the legislative history, the court found that not all state laws concerning local governance are binding commands. Instead, some are mere “models” from which a locality is free to depart. Moreover, “not all ‘model’ provisions were so labeled.”<sup>136</sup> Indeed, none of the arguably conflicting state law provisions in the York case had been explicitly designated as a model. However, because the charter provisions at issue advanced local autonomy without conflicting with the state purposes underlying the state law, the court found that the state laws could be treated as “models” rather than binding commands that would displace inconsistent local laws. In other words, not only did the court find that the legislature intended to create two types of laws dealing with home rule localities – models and preemptive directives, but it concluded that these state rules and procedures dealing with local governance would be treated as models unless the state expressly articulated an intent to preempt.

Other state courts have reached a similar result by adopting a kind of state constitutional or state legislative “clear statement” doctrine as a precondition for preemption of local actions concerning local government structure. Thus, the New York court of appeals concluded that under the state’s revised and expanded home rule constitutional amendment of 1964, county governments enjoy the power to fill vacancies in county legislative offices, notwithstanding conflicting state laws that gave that power to the state legislature.<sup>137</sup> The court found there was no “clearly articulated decision

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<sup>135</sup> *School Comm. v. Town of York*, 626 A.2d 935, 944 (Me. 1993).

<sup>136</sup> *Id.* at 944–945.

<sup>137</sup> *Resnick v. County of Ulster*, 376 N.E.2d 1271 (N.Y. 1978).

by the State legislature to intrude upon a domain which county legislatures presumptively control.”<sup>138</sup> As the court suggested, “the spirit of home rule” envisioned that localities would enjoy “great autonomy in experimenting with the manner in which their local officers, including legislative officers, were to be chosen.”<sup>139</sup> Such local control would allow the counties to “choose that structure of local government which is best tailored to serve particular community needs.”<sup>140</sup> In the absence of convincing evidence that the general constitutional provision authorizing the legislature to provide for filling vacancies in office meant to limit the presumptive local control over local officer selection, the court concluded that the state constitution permitted counties to opt out of the standard vacancy-filling procedure provided by the legislature.

Similarly, in *In re Sanchez*,<sup>141</sup> the Supreme Court of Texas held that a local election procedure, which gave candidates for mayor and city commissioner more time to file to run for office than the state’s Election Code allowed, was not preempted. The court found that the local filing deadline was well within home rule’s provision for local self-government, but also did not doubt the legitimacy of state regulation of the procedures for local elections. Assuming the state could preempt an inconsistent local rule dealing with local election procedure, the court ruled the state “must do so with ‘unmistakable clarity.’”<sup>142</sup> The court concluded, through a rather impressive double incorporation by reference, that a phrase in the state statutory filing deadline that permitted another filing “as otherwise

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<sup>138</sup> *Id.* at 1274.

<sup>139</sup> *Id.* at 1273.

<sup>140</sup> *Id.* at 1274.

<sup>141</sup> 81 S.W.3d 794 (Tex. 2002).

<sup>142</sup> *Id.* at 796 (quoting *Dallas Merchant’s & Concessionaire’s Ass’n, v. City of Dallas*, 852 S.W.2d 489, 491 (Tex. 1993)).

provided by [the state Election Code]” picked up another provision of the Code enabling home rule cities to prescribe application requirements in municipal elections; as a result, state law did not preempt the local ordinance with the requisite unmistakable clarity.<sup>143</sup> Moreover, the court subsequently specifically rejected the argument of the Texas Secretary of State in an amicus brief filed in support of rehearing, that “allowing home rule cities to set any filing deadline they want” would have an adverse effect on the state.<sup>144</sup>

In *Caulfield v. Noble*,<sup>145</sup> the Connecticut Supreme Court similarly focused on the absence of an explicit statement of preemptive intent from the Connecticut legislature. In *Caulfield*, the town of New Canaan, pursuant to its charter, decided to put a year-end surplus into a special account, rather than use it to reduce the next year’s tax rate, as apparently required by state law. The court noted the tension between local home rule and lack of local control over taxation. On the one hand, home rule requires “that issues of local concern are most logically answered locally” so that to prevail over a conflicting home rule charter provision a state law “must pertain to those things of general concern to the people of the state, and it cannot deprive cities of the right to legislate on purely local affairs germane to city purposes.”<sup>146</sup> On the other hand, home rule notwithstanding, under Connecticut law “a municipality has no inherent powers of taxation except those expressly granted by the legislature” which “can be lawfully exercised only in strict conformity to the terms by which they are given.”<sup>147</sup>

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<sup>143</sup> *Id.* at 797. *See also* *City of Houston v. Todd*, 41 S.W.3d 289 (Tex. App. 2001) (reading narrowly a state statute permitting referenda on grant of street franchises in order to avoid preemption of Houston charter provision and council action giving franchise to a light rail authority without a referendum).

<sup>144</sup> *Sanchez*, 81 S.W.3d at 800.

<sup>145</sup> 420 A.2d 1160 (Conn. 1979).

<sup>146</sup> *Id.* at 1163.

<sup>147</sup> *Id.* at 1164.

The court resolved that tension by noting, first, that however limited the powers of municipalities concerning taxation generally, “the imposition of real property taxes, a matter concerning the ordinary town corporate budget, incidental to the existence of the organized municipal corporation, is a local matter.”<sup>148</sup> With that background, the court then considered the arguably preemptive state legislation and found “there is no indication that the legislature intended the statute to prevail in the face of the specific provisions of the local charter.”<sup>149</sup>

Finally, the New Mexico Supreme Court expressed support for this preemption clear statement doctrine in the *Haynes* decision previously discussed. In a portion of its opinion it labeled unnecessary to the case at hand but “helpful in resolving future cases,”<sup>150</sup> the court underscored the need for a clear legislative statement of intent to preempt. The legislature’s flat provision for five city commissioners did not indicate a clear intent to fix the number of commissioners or prevent home rule municipalities from adopting a different number. There was no “limitation that the number of commissioners be set at *only* a stated number.”<sup>151</sup> As with the Maine Supreme Judicial Court’s decision in *York*, a state law concerning local structure was to be treated as a model, not a mandate.<sup>152</sup>

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<sup>148</sup> *Id.* at 1165.

<sup>149</sup> *Id.* at 1166.

<sup>150</sup> *New Mexico ex rel. Haynes v. Bonem*, 845 P.2d 150, 157 (N.M. 1992).

<sup>151</sup> *Id.* at 158.

<sup>152</sup> The “clear statement” requirement can protect local autonomy in substantive areas as well as with respect to local control of the structure of local government. In *New Mexicans for Free Enterprise v. City of Santa Fe*, No. 25073, 2005 WL 3704678, at \*6 (N.M. App. Nov. 29, 2005), the court of appeals upheld the city of Santa Fe’s “living wage” ordinance, which requires certain large local employers to pay an hourly minimum wage well above the minimum wage set by the state. The New Mexico court rejected the argument that the state minimum wage law preempted the local ordinance, finding that the state law did not expressly deny to the city the power to set a higher local minimum wage.

#### IV. Implications for Home Rule

The significance of this modest jurisprudence of state political innovation should not be overstated. The case sample is small, and the selection of states limited. Some of the harder local innovations – like New York City’s extension of its contribution limits and disclosure requirements to all candidates, not just those opting into the voluntary public funding system – have not been tested. Nevertheless, the cases do have two significant implications for the future of home rule.

First, as a matter of legal analysis, the cases suggest several arguments or legal techniques that may successfully advance the positions of localities in state-local conflicts. The significance of balancing – and of the fact that localities have prevailed in a fair number of balancing cases – may be surprising. The canned history of home rule has been that localities have done poorly when courts engage in state-local balancing. The usual assumption is that such balancing generally leads to the balancing away of local rights and powers in favor of vague and open-ended, but preemptive, state concerns. The rise of the *legislative* home rule model – which trades away all immunity in order to assure greater scope to local initiative – is surely at least in part attributable to the sense that local governments usually lose when balancing is the rule. Yet, local governments sometimes prevail when courts are willing to balance competing state and local concerns. The key to local success in the balancing cases appears to be the combination of the intense local interest in the structures and procedures of local governance, with the absence of external effects or state-wide costs from local variations.

This was perhaps suggested by Justice Hans Linde’s often-cited opinion in *City of La Grande v. Public Employees Retirement Board* distinguishing between state laws addressed to “substantive social, economic, or other regulatory objectives of the state” and those “addressed to . . . the structures

and procedures of local agencies.”<sup>153</sup> In the former case, there would be no balancing and state law would automatically prevail. But because the latter type of state law burdens the “central object” of home rule – allowing the people of the locality “to decide upon the organization of their government and the scope of its powers” -- the state’s law would have to be balanced and justified against the local law. To Justice Linde’s focus on the close connection between local measures dealing with local self-government and home rule, the more recent cases add an almost economic concern with externalities and the lack thereof. The judicial recognition that people outside Los Angeles don’t care whether Angelenos spend their tax dollars on paying for candidates’ campaigns or that New Mexicans outside Clovis have no interest in the size of the Clovis governing board – tied to the importance of these matters to the localities that have acted on these measures – were critical to the vindication of home rule in those cases.

The “models, not mandates” and the clear statement cases also make an important analytical point – that state and local interests may be reconciled by treating general state laws dealing with local government structure, procedure, and elections as templates, or off-the-shelf models, for local governments which may be superseded by local governments that prefer to do things their own way.<sup>154</sup> There is nothing inherently wrong about state governments legislating about local matters. Such legislation may be useful to local governments, and assure a basic level of local government efficacy and integrity. But the purpose and ultimate effect of such measures should be to assure that some rules and procedures are in place to deal with basic governance questions, not to preclude local variation by

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<sup>153</sup> 576 P.2d 1204, 1215 (Ore. 1978).

<sup>154</sup> Another version of this would be for the state to invite local departures from general structural rules, as New York does in the “supersession” provisions of its town and village laws. *See, e.g., Kamhi v. Town of Yorktown*, 547 N.E.2d 346, 348–349 (N.Y. 1989).

those localities that want alternatives— at least not until the state has clearly ruled out local variation (and, ideally, the state’s concerns are sufficiently weighty and narrowly tailored to the specific state interest to justify preempting a local alternative).

Second, these cases suggest that the core focus of home rule on local government structure can be pushed out to reach closely related areas of critical significance to local autonomy. These areas could include, for example, the municipal employment relationship and municipal taxation.

The municipal employment relationship goes to the heart of a local government’s ability to choose the services and service levels it will provide, and to its ability to pay for them. State requirements in this area often function as unfunded mandates, impairing governing capacity. A number of courts have extended the core local concern with the structure of local self-government to include local regulation of the municipal employment relationship. Thus, the Pennsylvania Supreme Court recently held that Philadelphia’s extension of health and other employment benefits to the same-sex “Life Partners” of the city’s employees fell within the city’s “explicit authority to legislate regarding matters of local concern.”<sup>155</sup> In words similar to the analysis engaged in by other courts considering local political innovation, the Pennsylvania court explained that “matters affecting merely the *personnel* and *administration* of offices local to Philadelphia” are of “no concern to citizens elsewhere” and, thus, a matter that Philadelphia could decide for itself.<sup>156</sup> The Washington Supreme Court similarly upheld the authority of a city to extend health insurance benefits to the domestic

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<sup>155</sup> Devlin v. City of Philadelphia, 862 A.2d 1234, 1246–1247 (Pa. 2004)

<sup>156</sup> *Id.* at 1242 (quoting Lennox v. Clark, 93 A.2d 834, 845 (Pa. 1953)).

partners of city employees on the theory that municipal employee benefits are a matter of local concern directly connected to the underlying goals of home rule autonomy.<sup>157</sup> Courts in Illinois,<sup>158</sup> Colorado,<sup>159</sup> and California have placed aspects of the city and county employer-employee relationship within the core of home rule. Indeed, in 2003 the California Supreme Court invalidated, on home rule grounds, a state law requiring binding arbitration of economic issues between counties and unions representing firefighters and law enforcement officers.<sup>160</sup> The court said that counties are free to choose binding arbitration, but that due to the centrality of the public employment relationship to home rule, binding arbitration cannot be imposed on them.

To be sure, most states have broad authority to regulate the municipal employment relationship. Moreover, unlike the structures of local self-governance or the rules for local elections, municipal employment rules can have external effects since many municipal employees are nonresidents. But much as the organization of local government is a critical matter for local people, the municipal employment relationship is crucial for local governance, and the predominant concern with the municipal employment relationship is local. Whether through balancing or through subjecting state laws to clear statement rules, localities should consider trying to extend local control over local government to include local control over local personnel.

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<sup>157</sup> *Heinsma v. City of Vancouver*, 29 P.3d 709 (Wash. 2001).

<sup>158</sup> *See, e.g., Demick v. City of Joliet*, 135 F.Supp. 2d 921, 928 (N.D. Ill. 2001) (discussing a municipal home rule ordinance that preempts a state municipal code provision dealing with municipal employees).

<sup>159</sup> *See, e.g., City & County of Denver v. State*, 788 P.2d 764 (Colo. 1990) (invalidating state law banning most municipal residency requirements for municipal employees).

<sup>160</sup> *County of Riverside v. Superior Court*, 66 P.3d 718 (Cal. 2003). *See also* *Sonoma County Org. of Pub. Employees v. County of Sonoma*, 591 P.2d 1 (Cal. 1979) (invalidating state law that prohibited the distribution of certain funds to local public agencies that granted their employees cost-of-living increases); *Ector v. City of Torrance*, 514 P.2d 433 (Cal. 1973) (holding that municipal home rule provision governing residency supersedes inconsistent state law).

Local taxation, particularly taxation focused on real property within the locality, is another area where the combination of close connection to effective local self-government and limited external effects might support efforts to extend the zone of local autonomy. To be sure, taxation is generally heavily state regulated and nearly all states sharply limit local fiscal powers or deny that home rule includes the power to tax. But some local control over local taxation is necessary to make local self-government effective. If local people decide that they would rather pay higher taxes in order to fund new programs or to avoid cutting existing programs, the costs of this decision are borne largely internally, and the decision should be up to local residents. Given the widespread political hostility to taxation, it is unlikely that such decisions will be undertaken lightly. Moreover, local government taxing decisions are constrained not just by their voters but by an often intense interlocal economic competition for businesses, jobs and taxpayers. The ability of mobile residents and firms to flee a high-tax jurisdiction to a low-tax neighbor, along with local electoral control, provides a significant check on local taxing decisions. But the key point is that local taxation, like the rules and procedures of local government organization is primarily a local matter as well as critical to effective local self-governance.<sup>161</sup>

## V. Implications for Political Reform

Many years ago, Justice Brandeis famously offered a defense of federalism in terms of the possibility that state autonomy provides for innovation. As he observed, “a single courageous state

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<sup>161</sup> See *Fisher v. County of Alameda*, 24 Cal. Rptr. 2d 384, 389 (Cal. Ct. App. 1993) (upholding local real estate transfer tax in conflict with a state ban on such taxes). The court found there was no “extramunicipal concern” that would justify state limitation of local power and that “we may not find an extramunicipal concern simply in the expression of a legislative desire to restrict local powers of taxation. Such a legislative objective would be directly at odds with the home rule of charter cities.” *Id.*

may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”<sup>162</sup> Well, if the fifty states are laboratories for public policy formation, then surely the 3,000 counties and 15,000 municipalities provide logarithmically more opportunities for innovation, experimentation and reform. Thousands of local governments provide thousands of arenas for innovation and for testing the costs and benefits of those innovations.

San Francisco’s implementation of IRV garnered nationwide attention and sparked new thinking about alternative voting systems as a means of enabling the articulation of a wider range of political views. The many cities experimenting with different types of campaign reform sustain political movements that are frustrated by special interests and legislative gridlock at the state and national levels. The results of reformed local elections will also provide valuable lessons for state and national reformers when the time is ripe for state or national action. We know far more about the workability, benefits, and costs of IRV and public funding of election campaigns as a result of the innovative actions of cities like San Francisco, Tucson, Los Angeles, and New York. Although the case for home rule is typically made in terms of the benefits for city residents in obtaining greater opportunities for democratic participation, in tailoring local policies to local preferences, or even in obtaining the benefits of interlocal competition, the local political reforms demonstrate that the benefits of home rule are far from purely local.

Indeed, these cases indicate that both the cost and the benefit side of the equation support local autonomy in political innovation. The costs of these initiatives are entirely local. As a result, there is no external interest in preventing local experimentation with new electoral systems or governmental procedures. But the benefits will be external – by providing new information about the consequences

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<sup>162</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

of particular innovations – as well as internal. There is, thus, a broad systemic interest in encouraging local political experimentation and in interpreting home rule to make such local innovation possible and to protect it from claims of state preemption.