

TOWARD A DEMOCRATIC THEORY OF HOME RULE

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ABSTRACT

Local democracy is under attack. By enacting what are known as “hyper pre-emption” laws, state legislatures across the country have slashed cities’ lawmaking authority, and with it, the democratic opportunities available to many voters. Home Rule, the doctrine that empowers cities, offers little recourse. Indeed, in most states, Home Rule gives state legislatures total preemption authority over cities, leaving cities powerless to defend their democratic prerogative.

This Note presents Home Rule in a novel light. Scholars, courts, and reformers have taken a narrow view of Home Rule, regarding it principally as a means of achieving substantive policy aims. Home Rule is much more than that. Today, most city governments—and the democratic opportunities they offer—exist by virtue of Home Rule. In many states, the doctrine is part of the state constitution. Home Rule is our codified guarantee of local democracy, inextricably connected to broader American federalism. State attacks on Home Rule must be recognized as attacks on democracy, and efforts to reform Home Rule must address that reality.

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I. INTRODUCTION

For voters in Key West, Florida, the November 2020 election was personal. That May, a group called the Key West Committee for Safer, Cleaner Ships collected signatures to put three amendments to the city's charter on the ballot.¹ The amendments amounted to legislation-by-referenda. Taken together, they would limit the size of cruise ships entering the city's deep-water port, cap the number of passengers that could disembark each day, and give docking preference to cruise lines with the best environmental records.² The amendments were motivated by short-term concerns about the spread of disease through ships³ and long-term concerns about the ships' impact on the Great Florida Reef.⁴

The amendments also posed a threat to the state's powerful cruise industry.⁵ On the path to the November 2020 ballot, they overcame a federal lawsuit, a state lawsuit, and a well-financed "vote no" campaign, all funded by major cruise lines.⁶ Nonetheless, over sixty percent of the city's voters approved each amendment.⁷ While most of the nation's attention was captured by the contentious presidential election, Key West voters celebrated a hard-fought victory at the local level.

Their success was short-lived. On January 5, 2021, a bill was introduced in the Florida Senate that would strip cities of the power to regulate

¹ *Who We Are*, KEY WEST COMM. FOR SAFER, CLEANER SHIPS, <https://www.safercleanerships.com/whoware> [<https://perma.cc/WF5U-LFQT>]; Nancy Klingener, *Key Westers Launch Campaign for 'Safer, Cleaner' — And Smaller — Cruise Ships*, WLRN (May 26, 2020), <https://www.wlrn.org/news/2020-05-26/ke4ykey-westers-launch-campaign-for-safer-cleaner-and-smaller-cruise-ships#stream/0> [<https://perma.cc/64GC-2F5X>].

² *Ballot Language*, KEY WEST COMM. FOR SAFER, CLEANER SHIPS, <https://www.safercleanerships.com/ballot-language> [<https://perma.cc/PF8M-LWC7>].

³ Craig Pittman, *FL Lawmakers Trying to Squash Key West Voters' Wishes, but Forget One Thing*, FLA. PHOENIX (Feb. 18, 2021), <https://floridaphoenix.com/2021/02/18/fl-lawmakers-trying-to-squash-key-west-voters-wishes-but-forget-one-thing/> [<https://perma.cc/MNU8-R66C>]; Klingener, *supra* note 1.

⁴ Pittman, *supra* note 3; see *Florida*, NOAA, <https://www.coris.noaa.gov/portals/florida.html> [<https://perma.cc/T9FR-92HZ>].

⁵ Pittman, *supra* note 3.

⁶ Nancy Klingener, *Key West Votes to Limit Number of Cruise Passengers and Ship Size*, WLRN (Nov. 4, 2020), <https://www.wlrn.org/2020-11-04/key-west-votes-to-limit-number-of-cruise-passengers-and-ship-size> [<https://perma.cc/NX9J-8XL6>]. Reporters at the Miami Herald showed the campaign deliberately obscured its donations through at least three intermediaries. See Taylor Dolven, Nicholas Nehamas & Gwen Filosa, *Cruise Industry Secretly Backed 'Dark Money' Key West Mailers — Through a 'Dark Money' Setup Meant to Obscure its Involvement, the Cruise Industry Funded Disinformation-Filled Mailers to Key West Voters*, MIA. HERALD (Dec. 13, 2020), <https://www.miamiherald.com/news/business/tourism-cruises/article247695955.html> [<https://perma.cc/86W8-7G6C>]. They characterized the campaign's messaging as "ominous and misleading": "The mailers and similar newspaper advertisements and text messages aimed to mislead voters to believe that if the cruise referendums passed, 911 response times would lag, the police department would be 'defunded,' and a '30% cut in tax revenue to the city' would cause a 'massive tax increase.'" *Id.*

⁷ Klingener, *supra* note 6; see KEY WEST, FLA. CHARTER art. VIII, § 8.01(b) (City Charter amendment process); FLA. STAT. § 166.031 (1995) (state analog).

their ports⁸—a power some argued Key West had exercised since 1828.⁹ The bill was a direct response to Key West’s referenda and started an uproar among environmentalists, local government leaders, and Key West voters.¹⁰ After heated debate, the preemption bill appeared all but dead,¹¹ but on the last day of the legislative session its language was slipped into another bill.¹² In its final form, Florida Senate Bill 1194 overturned the Key West referenda: it forbade Florida’s cities from doing precisely what Key West had done¹³ and applied retroactively.¹⁴ The preemption law was criticized as a rejection of the voters’ democratic will,¹⁵ but to any student of local government law, it came as no surprise that the state was well within its power in overriding the referenda.

In the federal Constitution, the *states’* lawmaking authority is guaranteed by the Tenth Amendment.¹⁶ Cities¹⁷ are mentioned nowhere—an omission that has hampered claims to local power since 1789.¹⁸ The standard articulation of cities’ legal status, expressly adopted by the U.S. Supreme

⁸ S.B. 426, 2021 Leg., Reg. Sess. (Fla. 2021). The early version was remarkable in its breadth: “notwithstanding any other law to the contrary, a local government may not restrict or regulate commerce in the seaports of this state All such matters are expressly preempted to the state.” *Id.*

⁹ See Pittman, *supra* note 3.

¹⁰ See Mary Ellen Klas, *Key West Business Owners Plead with Legislators over Port Bill: ‘Respect Our Vote.’* MIA. HERALD (Apr. 14, 2021), <https://www.miamiherald.com/news/politics-government/state-politics/article250666959.html> [<https://perma.cc/K4J9-ZW2S>].

¹¹ Jacob Ogles, *Ports Preemption Bill Sinks in the House*, FLA. POL. (Apr. 27, 2021), <https://floridapolitics.com/archives/424391-amendment-would-expand-scope-of-port-preemption-bill/> [<https://perma.cc/BP9B-GH2P>].

¹² Jacob Ogles, *Legislature Approves Port Preemption Bill to Undercut Key West Cruise Limits*, FLA. POL. (Apr. 28, 2021), <https://floridapolitics.com/archives/425154-legislature-approves-seaport-preemption-bill-to-stop-key-west-cruise-limits/> [<https://perma.cc/H8FU-2XYX>]; see S.B. 1194, 2021 Leg., Reg. Sess. (Fla. 2021).

¹³ That is, using the referendum process to regulate the size of ships, limit the number of passengers disembarking, and give preference to cruise lines based on environmental records. S.B. 1194, 2021 Leg., Reg. Sess. (Fla. 2021); FLA. STAT. § 311.25(1) (2021).

¹⁴ S.B. 1194, 2021 Leg., Reg. Sess. (Fla. 2021); FLA. STAT. § 311.25(2) (2021). Because the bill only preempts ballot initiatives, advocates have urged the Key West City Commission to pass an analogous ordinance. The commissioners have been hesitant to act. See Gwen Filosa, *Can Key West Limit Cruise Ships Despite a State Law That Says No? There May Be a Way*, MIA. HERALD (July 11, 2021), <https://www.miamiherald.com/news/local/community/florida-keys/article252680668.html> [<https://perma.cc/6HCA-CGCK>].

¹⁵ See Klas, *supra* note 10; Pittman, *supra* note 3.

¹⁶ U.S. CONST. amend. X.

¹⁷ “City” in this Note is used to refer to incorporated, general purpose local governments that exist pursuant to a charter. This definition does not include units of local government that exist solely by virtue of state statute.

¹⁸ See, e.g., David J. Barron, *The Promise of Cooley’s City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 487–89 (1999). But see Nikolas Bowie, *The Constitutional Right of Self-Government*, 130 YALE L.J. 1652, 1713–22 (2021) (showing that the First Amendment’s Assembly Clause was understood by some of its ratifiers to protect the right of local governments to legislate on their citizens’ behalf). For influential critiques of the notion of state supremacy, see generally Jake Sullivan, Comment, *The Tenth Amendment and Local Government*, 112 YALE L.J. 1935 (2003) (reviewing David J. Barron, *A Localist Critique of the New Federalism*, 51 DUKE L.J. 377 (2001)); Amasa M. Eaton, *The Right to Local Self-Government*, 13 HARV. L. REV. 441, 441 (1900).

Court in 1907,¹⁹ holds that cities are “political subdivisions” of the states,²⁰ “mere administrative conveniences . . . with no inherent lawmaking authority.”²¹ Cities exist at the behest of—and may be freely abolished by—the states they sit in.²²

To the extent a city does have lawmaking authority, it is owed to an affirmative “grant” from the state, usually in the form of the state constitution’s Home Rule provision.²³ In most states, including Florida, Home Rule empowers cities to pass any law the state legislature could—but allows the state to preempt any city law it wishes.²⁴ At first, the states’ unfettered preemption power was seen as a virtue of Home Rule. Reformers in the mid-twentieth century hoped the arrangement would foster collaboration between cities and states in solving the issues growing cities faced.²⁵ And in broad terms, that is what happened—until about a decade ago.

In a trend scholars call “hyper preemption,” state legislatures in recent years have passed hundreds of sweeping preemption laws to limit or override municipal lawmaking authority.²⁶ Hyper preemption laws target city policies that state governments find unfavorable, usually on grounds reflecting a national political agenda rather than any state-specific concern.²⁷ Their aim is broadly deregulatory. Rather than create policy, hyper preemption laws “intentionally, extensively, and at times punitively” forbid local governments from making it.²⁸

The rise of hyper preemption is related to a deeper democratic crisis in the United States that is the focus of this Note. In recent years, state legislatures across the country have exhibited an outright hostility toward democratic processes.²⁹ Consider that in 2012, the Florida legislature’s Republican majority received a minority of statewide votes, but retained a strong legisla-

¹⁹ *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178–79 (1907).

²⁰ *Id.* at 178.

²¹ Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1122 (2007); see JOHN F. DILLON, *TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS* 102 (1st ed. 1872).

²² See, e.g., *Hunter*, 207 U.S. at 178–79; DILLON, *supra* note 21, at 98.

²³ See Diller, *supra* note 21, at 1124–27 (describing the emergence of home rule as a source of city power); GERALD E. FRUG, RICHARD T. FORD & DAVID J. BARRON, *LOCAL GOVERNMENT LAW: CASES AND MATERIALS* 127–29 (6th ed. 2015).

²⁴ See Diller, *supra* note 21, at 1114, 1125–27; FLA. CONST. art. VIII, § 2(b) (“Municipalities shall have governmental, corporate and proprietary powers . . . and may exercise power for municipal purposes except as otherwise provided by law.”).

²⁵ See *infra* Section II.B.

²⁶ See Erin Adele Scharff, *Hyper Preemption: A Reordering of the State-Local Relationship?*, 106 GEO. L.J. 1469, 1476 (2018); Kenneth A. Stahl, *Preemption, Federalism, and Local Democracy*, 44 FORDHAM URB. L.J. 133, 145–46 (2017); Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 1997 (2018); Paul A. Diller, *The Political Process of Preemption*, 54 U. RICH. L. REV. 343, 361–62 (2020); RICHARD BRIFFAULT, LAURIE REYNOLDS & NESTOR M. DAVIDSON, *THE NEW PREEMPTION READER* 17–27 (1st ed. 2019) (surveying state preemption laws related to workplace regulation, immigration, public health, environmental protection, and technology and innovation).

²⁷ See Diller, *supra* note 26, at 344.

²⁸ Briffault, *supra* note 26, at 1997.

²⁹ See *infra* Section III.B.

tive majority because of gerrymandered district lines.³⁰ Nonetheless, that legislature was free to override a majority of Key West voters under the modern Home Rule regime. The Key West case is not unique. A growing chorus of scholarship and commentary has identified a severe democracy deficit in states across the nation.³¹

This Note reexamines Home Rule in light of the states' democracy deficit. It builds on the work of Professor Miriam Seifter, who articulates a functional view of democracy tailored to American federalism.³² Seifter argues that democracy in the United States is best conceived of in the aggregate. The two levels of the "federalist ladder"—state and federal—each offer some "democratic opportunity," or electoral processes that allow for majoritarian outcomes.³³ To the extent one level of government fails to provide opportunities for majority rule, another might serve as a democratic "counterweight."³⁴ This Note argues that the federalist ladder has a third rung—the city—and proposes a theory of Home Rule that responds to the democracy deficit in the United States.

A democratic theory of Home Rule situates the doctrine in our broader federalist order and recognizes its crucial role in American democracy. Scholars, courts, and reformers have generally ignored the democratic dimensions of Home Rule, treating the doctrine as merely a means of achieving substantive policy goals.³⁵ But city governments, and the democratic opportunity they offer, exist by virtue of Home Rule.³⁶ Just as the Tenth Amendment to the federal Constitution guarantees the states' power,³⁷

³⁰ J. GERALD HEBERT & RUTH GREENWOOD, MAKE DEMOCRACY COUNT: ENDING PARTISAN GERRYMANDERING 6 (2016), https://campaignlegal.org/sites/default/files/CLC_PartisanGerrymandering_Report_FINAL.pdf [<https://perma.cc/YB7K-N58K>].

³¹ See, e.g., Ronald Brownstein, *Democracy Is Already Dying in the States*, THE ATLANTIC (June 11, 2021), <https://www.theatlantic.com/politics/archive/2021/06/manchin-republicans-bipartisan/619167/> [<https://perma.cc/JN68-JE8P>]; Richard C. Schragger, *Federalism, Metropolitanism, and the Problem of States*, 105 VA. L. REV. 1537, 1590–92 (2019) ("The devolution of power to states is appropriate if states are 'closer to the people.' Examination of internal state political processes, however, reveals the limits of this claim.") (cleaned up); Miriam Seifter, *Further from the People? The Puzzle of State Administration*, 93 N.Y.U. L. REV. 107, 110–11 (2018); David Schleicher, *Federalism and State Democracy*, 95 TEX. L. REV. 763, 767–68 (2017). See also STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE (2018) (describing the recent erosion of democratic norms in the United States); CONSTITUTIONAL DEMOCRACY IN CRISIS? 5–9 (Mark A. Graber, Sanford Levinson & Mark Tushnet eds., 2018).

³² Miriam Seifter, *State Institutions and Democratic Opportunity*, 72 DUKE L.J. 275, 286–87 (2022).

³³ *Id.* at 286–88.

³⁴ *Id.* at 280. Seifter argues that while the federal system tends to entrench minority rule, the state constitutions contemplate a greater commitment to majoritarian rule. *Id.* While Seifter focuses on state institutions, this Note expands the picture to include local democratic opportunities.

³⁵ See *infra* Parts III and IV.

³⁶ A clear majority of states—forty-two, by a 2017 count—have Home Rule provisions in their constitutions or statutes. Paul A. Diller, *Reorienting Home Rule: Part 2—Remedying the Urban Disadvantage Through Federalism and Localism*, 77 LA. L. REV. 1045, 1065 (2017).

³⁷ U.S. CONST. amend. X.

Home Rule is many state constitutions' guarantee of local power. As Home Rule comes under attack by the states, reform efforts must account for its role in American democracy.

This Note proceeds as follows. Part II surveys the historical development of Home Rule, and shows that Home Rule as we know it today was shaped almost exclusively by the substantive policy aims of various reformers. Part III turns to the states. It observes that two phenomena—the “new federalism” and the “political subdivision” idea—have converged to concentrate tremendous substantive lawmaking authority in the states. It then examines the states' growing democracy deficit. In light of that concern, Part IV begins to articulate a theory of Home Rule that centers on its democratic dimensions and situates the doctrine within our broader constitutional order.

II. CITY POWER

Cities today are understood as “political subdivisions” of the states, deriving “their powers and rights wholly from” a state legislature.³⁸ Modern scholarship and Supreme Court doctrine treat the political subdivision idea as a constitutional rule,³⁹ and in most states, Home Rule grants state legislatures total authority to override city law.⁴⁰ In short, cities are not merely the ugly duckling of our federalist order—they are, by most accounts, omitted altogether.

This Part explains how we got here. It traces the two most important doctrinal developments in the legal history of American cities, Dillon's Rule and Home Rule, and shows that historical debates over city power have largely turned on instrumentalist goals. That is, the legal status of American cities has been shaped almost exclusively by the substantive policy aims of various groups, rather than by any inherent deference to local political autonomy or democracy. In light of that instrumentalist history, this Part seeks to challenge the notion that cities should be subordinate to states as a matter of democratic theory.

A. *Dillon's Rule and the “Political Subdivision” Idea*

American cities at the beginning of the nineteenth century were nothing like the vibrant public institutions we know today.⁴¹ Governed by wealthy property owners, the early American city was primarily a coordinating insti-

³⁸ *City of Clinton v. Cedar Rapids & Mo. River R.R. Co.*, 24 Iowa 455, 475 (1868); see also DILLON, *supra* note 21, at 1122.

³⁹ See Barron, *supra* note 18, at 509; Diller, *supra* note 21, at 1122 n.43 (“The Supreme Court endorsed Judge Dillon's rule [in *Hunter*], at least as a matter of federal constitutional law.”).

⁴⁰ Diller, *supra* note 36, at 1065.

⁴¹ See Gerald E. Frug, *City Making: Building Communities Without Building Walls* 45 (1999). See generally David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2281–85 (2003).

tution for market interests.⁴² City governments were responsible for little more than managing public markets, securing property interests, and keeping the peace.⁴³ In describing Philadelphia, one commentator remarked that the city's government “[b]oth in form and function . . . advertised the lack of concern for public management of the community.”⁴⁴ Cities legislated pursuant to fiscal and regulatory power delegated by the states, which could in theory have been martialed to serve more redistributive ends.⁴⁵ Nonetheless, the early American cities were decidedly anti-participatory, “designed to minimize the redistributive effects of general funding.”⁴⁶

Toward the end of the nineteenth century, concerns grew about cities' redistributive potential—along with political agitation to use it.⁴⁷ Those concerns gave rise to the first major doctrinal effort to subordinate cities to the states.⁴⁸ In 1872, the Iowa Supreme Court Justice John Dillon canonized the idea that cities are “political subdivisions” of the states in an influential treatise on local government law.⁴⁹ In Dillon's terms, cities were best understood as “mere administrative conveniences of the state with no inherent lawmaking authority.”⁵⁰ The “Dillon's Rule” regime limited a city's lawmaking authority to areas where the state legislature expressly granted it power.⁵¹ It further instructed judges construing municipal powers to resolve any doubt as to their scope against the municipality.⁵²

Judge Dillon's formulation reflected a laissez-faire constitutionalist view of American government.⁵³ For Dillon, the Constitution drew a hard line between the public and private spheres; accordingly, Dillon's rule sought to minimize public regulation of private life.⁵⁴ To be sure, Dillon's view was not merely a “crude effort to advance the interests of the rich.”⁵⁵

⁴² Barron, *supra* note 41, at 2283–84.

⁴³ *Id.*

⁴⁴ *Id.* at 2282 (quoting SAM BASS WARNER JR., *THE PRIVATE CITY: PHILADELPHIA IN THREE PERIODS OF ITS GROWTH* 9 (2d ed. 1987)).

⁴⁵ Barron, *supra* note 41, at 2284 (“[Cities] possessed the power, whether by express state legislative grant or by implied authority emanating from the state's municipal incorporation act, to establish fire districts, to protect the public health through quarantines, to bar public nuisances, to regulate vice, to provide for open passage along highways and rivers, and even to influence trade through the establishment and promotion of public markets for goods and groceries.”).

⁴⁶ *Id.* at 2283 (quoting ROBIN L. EINHORN, *PROPERTY RULES: POLITICAL ECONOMY IN CHICAGO, 1833–1872* 15 (1991)).

⁴⁷ See *id.* at 2285; FRUG, *supra* note 41, at 45.

⁴⁸ Barron, *supra* note 41, at 2285.

⁴⁹ DILLON, *supra* note 21, § 55, at 173; Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1109 (1980).

⁵⁰ Diller, *supra* note 21, at 1122.

⁵¹ Under Dillon's Rule, cities only possess lawmaking power that is (1) expressly granted to them by the state; (2) necessarily and fairly implied from that grant of power; or (3) crucial to the existence of local government. DILLON, *supra* note 21 § 9b, at 93.

⁵² *Id.* § 55, at 173.

⁵³ See Kenneth A. Stahl, *The Suburb as a Legal Concept: The Problem of Organization and the Fate of Municipalities in American Law*, 29 CARDOZO L. REV. 1193, 1206–07 (2008).

⁵⁴ Barron, *supra* note 18, at 506–07.

⁵⁵ Frug, *supra* note 49, at 1109.

He was instead concerned with the conceptual boundary between the public and private spheres.⁵⁶ To the extent public regulation had any role, Dillon felt it was best exercised by the centralized state government, where in his estimation the “men best fitted by their intelligence” would govern responsibly.⁵⁷

The impact of one state judge’s constitutional philosophy on contemporary notions of city power can hardly be overstated. While “Dillon’s Rule” as a legal doctrine has largely been supplanted by Home Rule,⁵⁸ the “political subdivision” idea remains the baseline formulation of the city-state relationship to this day.⁵⁹ So pervasive was Dillon’s vision of city subordination that it was treated by the Supreme Court as a quasi-constitutional principle in *Hunter v. City of Pittsburgh*.⁶⁰ Since *Hunter*, the Court and local government scholars have embraced Dillon’s “political subdivision” idea and affirmed the idea that states may abolish cities at their leisure.⁶¹

⁵⁶ *Id.* at 1110; Barron, *supra* note 18, at 508.

⁵⁷ Barron, *supra* note 18, at 508; Stahl, *supra* note 53, at 1206–07 (“In Dillon’s view, the cities’ indulgence of favored corporations was a symptom of their horrendous mismanagement and official corruption.”).

⁵⁸ Dillon’s Rule still exists in a few states but is generally understood to be incompatible with Home Rule. Diller, *supra* note 36, at 1065.

⁵⁹ See generally Barron, *supra* note 18, at 509 (“Dillon’s work has become such an established part of modern legal culture that, if there is one rule concerning local governments about which most persons are aware, it is his assertion that state law alone defines the scope of local governmental independence.”).

⁶⁰ 207 U.S. 161 (1907) (holding that there is no constitutional right to local self-government); Diller, *supra* note 21, at 1122 n.43. *Hunter* arose from a dispute over the city of Pittsburgh’s forced annexation of its neighbor Allegheny, which was orchestrated by the state legislature. The annexation succeeded, though a majority of Allegheny’s citizens voted against it. *Hunter*, 207 U.S. at 167. The Court’s vision of city subordination is as striking for its certainty as it is for its absolutism:

The number, nature, and duration of the powers conferred upon [municipal corporations] and the territory over which they shall be exercised rests in the absolute discretion of the state . . . The state, therefore, at its pleasure, may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the state is supreme, and its legislative body, conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States.

Id. at 178–79.

⁶¹ See, e.g., *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978) (“[*Hunter*] continues to have substantial constitutional significance in emphasizing the extraordinarily wide latitude that States have in creating various types of political subdivisions and conferring authority upon them.”); Barron, *supra* note 18, at 509 (“Dillon’s work has become such an established part of modern legal culture that, if there is one rule concerning local governments about which most persons are aware, it is his assertion that state law alone defines the scope of local governmental independence.”); Richard C. Schragger, *Localism All the Way Up: Federalism, State-City Conflict, and the Urban-Rural Divide*, 2021 Wis. L. REV. 1283, 1300 (2021).

B. Home Rule

As the Industrial Revolution took hold at the end of the nineteenth century, populations in the American cities grew rapidly.⁶² With few exceptions, cities did not rise to the occasion. Their governments were defined by corruption and poor fiscal management, and their inhabitants faced unsanitary and dangerous living conditions.⁶³ It was clear that as a practical matter, cities were not prepared to handle the problems of the Industrial Revolution.⁶⁴ Municipal governance thus became a focal point of legal scholarship in that era.⁶⁵ Out of that scholarship, Home Rule emerged.

Importantly, the Home Rule movement sought to adjust, rather than repudiate, the doctrine of Dillon's Rule. That is, the political subdivision idea had fully taken hold—it was taken for granted in the late nineteenth century that “state law alone define[d] the scope of local governmental independence.”⁶⁶ Home Rule powers were thus understood as a grant from a state to its cities, rather than some codified guarantee of a substantive right to self-governance.⁶⁷ Nonetheless, the Home Rule movement signaled a meaningful shift in the legal establishment's view of municipal power: if Dillon's Rule was founded on an overt skepticism of that power, Home Rule suggested a renewed faith.⁶⁸

1. The First Wave: Home Rule Immunity

The first Home Rule grant came as an amendment to the Missouri Constitution in 1875.⁶⁹ The grant, soon replicated across the country, gave cities “Home Rule immunity”: exclusive jurisdiction over matters of “local” concern.⁷⁰ By giving cities exclusive jurisdiction over local issues, this “first

⁶² Barron, *supra* note 41, at 2289.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* (“More articles were written on municipal government between 1882 and 1892 than had been written in the rest of that century.”).

⁶⁶ Barron, *supra* note 18, at 509.

⁶⁷ The literature and case law are replete with descriptions of Home Rule power as a “grant.” See, e.g., Barron, *supra* note 41 at 2295 (“That limit on [city charters'] scope was rooted in state constitutional provisions that granted home rule only over matters of traditionally ‘local’ concern”); Diller, *supra* note 21, at 1132 (“By granting units of local government more substantive powers, the criticism goes, states only enable [localities]—particularly well-heeled suburbs—to better pursue their selfish motives.”); *New Orleans Campaign For a Living Wage v. City of New Orleans*, 825 So. 2d 1098, 1103 (La. 2002) (“Article VI, § 4 of the 1974 Louisiana Constitution grants the City both the power of initiation and the power of immunity.”); *City of Chicago v. StubHub!, Inc.*, 979 N.E.2d 844, 860 (Ill. 2012) (Thomas, J., dissenting) (“[T]he constitution grants home rule units broad powers to perform any function pertaining to their government and affairs.”).

⁶⁸ Diller, *supra* note 21, at 1124.

⁶⁹ Barron, *supra* note 41, at 2290; MO. CONST. of 1875, art. IX, §16. The amendment afforded Home Rule powers to cities with populations over 100,000, but at the time, St. Louis was the only such city in Missouri. Barron, *supra* note 41, at 2290.

⁷⁰ Barron, *supra* note 41, at 2290.

wave” of Home Rule created a system of quasi-dual sovereignty within the states.⁷¹ That said, proponents of the first wave of Home Rule were not motivated by any commitment to local autonomy for its own sake. Home Rule immunity instead resulted from the efforts of urban reformers with a wide range of visions for the future of municipal policy, ranging from those who would preserve “the idealized small-scale, low-tax, low-debt, highly privatized . . . ideal of local government” to those who desired more “collective action” and the municipalization of formerly private tasks.⁷² Home Rule’s early proponents saw tinkering with the state-city legal relationship as a means of facilitating policy that would address the urban crisis.⁷³

In practice, Home Rule immunity eventually frustrated those reformist aspirations. State court judges were instructed to identify a distinctly “local” sphere within which cities could operate, and usually, that resulted in a limited scope of policymaking authority.⁷⁴ The cities that boomed in the early twentieth century did so in large part because of influence at the state level and expansion by annexation, rather than Home Rule immunity.⁷⁵ Toward the middle of the twentieth century, Home Rule immunity’s “local” limitation began to threaten the cities’ very existence.⁷⁶ As “white flight” began to afflict urban centers, newly incorporated suburbs were granted Home Rule immunity of their own, meaning cities could no longer annex them.⁷⁷ The increase in incorporated suburbs dried up urban tax bases and entrenched racial and economic division in metropolitan areas.⁷⁸ Thus, Home Rule immunity “increasingly seemed a means through which the privileged insulated themselves in suburbia.”⁷⁹ To urban reformers, this was antithetical to the redistributive potential they once saw in city government.⁸⁰

⁷¹ Diller, *supra* note 21, at 1124–25; Barron, *supra* note 41, at 2290. A recent survey shows that fifteen states have retained some form of municipal immunity from state preemption. Diller, *supra* note 36, at 1105–14.

⁷² See Barron, *supra* note 41, at 2294, 2309. Each vision persists to some extent in Home Rule today. *Id.* at 2322.

⁷³ *Id.* at 2291.

⁷⁴ See Diller, *supra* note 21, at 1125. Cf. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), in which Supreme Court abandoned a similar doctrine established in *National League of Cities v. Usery*, 426 U.S. 833 (1976). The *Usery* Court held that the commerce clause forbade Congress from interfering with “traditional government functions” at the state and local level. *Id.* at 852. The *Garcia* Court, by a 5–4 vote, rejected that test, arguing lower courts had difficulty identifying which state and local functions were “traditional.” *Garcia*, 469 U.S. at 1011.

⁷⁵ See Barron, *supra* note 41, at 2323–24. *Hunter v. City of Pittsburgh*, discussed above, arose from such an annexation dispute. 207 U.S. 161, 178–79 (1907).

⁷⁶ See Barron, *supra* note 41, at 2326.

⁷⁷ *Id.* at 2323–25.

⁷⁸ *Id.* For a more detailed examination of the social and economic impacts of suburban incorporation, see Sheryll D. Cashin, *Localism, Self-Interest and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985, 2016–21, 2026–27 (2000).

⁷⁹ Barron, *supra* note 41, at 2325.

⁸⁰ *Id.* at 2323–26.

2. *The Second Wave: Home Rule Initiative*

The “second wave” of Home Rule looked to inject more flexibility into urban cities’ legislative authority.⁸¹ Drafted in 1953 by the American Municipal Association (now the National League of Cities), “Home Rule initiative” would give municipalities unlimited legislative authority, subject to total preemption authority by the states.⁸² The proponents of Home Rule initiative aspired to “metropolitan integration” by empowering cities to address the issues of suburban incorporation.⁸³ With greater policymaking authority, cities could tax suburban commuters, enter into interlocal agreements, and even regulate beyond their boundaries to the extent the legislature permitted.⁸⁴

Debates around the second wave of Home Rule were not concerned with the scope of cities’ substantive authority.⁸⁵ It was taken for granted that cities should have increased authority to address their crises.⁸⁶ Proponents of the second wave were instead concerned with the extent to which urban cities should regulate beyond their boundaries in order to achieve metropolitan integration.⁸⁷ Their solution was total preemption power for the states: unlike the courts, which tended to curb the scope of city authority, the state legislatures “could freely fashion the most sensible rules for the incorporation of new municipalities or the alteration of local boundaries, whether through annexation, consolidation, or dissolution.”⁸⁸ Also, by the mid-1950s, Dillon’s “political subdivision” idea was taken as constitutional fact.⁸⁹ Thus, while the introduction of overlapping spheres of authority created the potential for preemption disputes, that overlap was understood as a virtue of Home Rule immunity.⁹⁰

In the conventional telling, the Home Rule movement was “a pro-democratic effort to increase local autonomy.”⁹¹ And as a doctrinal matter, it appeared to be. Each move away from Dillon’s Rule devolved power from the state to the city, which would seemingly evince an increased faith in the capability of cities. But as Judge David Barron has shown, the Home Rule movement was shaped almost entirely by policy concerns, rather than any inherent deference to local autonomy.⁹² The first wave sought to tackle the

⁸¹ See Diller, *supra* note 21, at 1125–26.

⁸² See JEFFERSON B. FORDHAM, MODEL CONSTITUTIONAL PROVISIONS FOR MUNICIPAL HOME RULE 6 (1953); see also Diller, *supra* note 21, at 1125; Barron, *supra* note 41, at 2326–27.

⁸³ Barron, *supra* note 41, at 2328.

⁸⁴ FORDHAM, *supra* note 82, at 10–11.

⁸⁵ Barron, *supra* note 41, at 2328.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 2327.

⁸⁹ See *supra* notes 60–61 and accompanying text.

⁹⁰ See Diller, *supra* note 21, at 1124; Barron, *supra* note 41, at 2327–28.

⁹¹ See Diller, *supra* note 21, at 1124.

⁹² See Barron, *supra* note 41, at 2288–2322.

urban crisis arising from the Industrial Revolution, while the second wave sought to address the issues of suburban incorporation.

Perhaps this is no surprise. The “political subdivision” idea regards cities as “mere administrative conveniences” of the states,⁹³ and the policy issues Home Rule addressed were grave threats. That said, Home Rule is the doctrine that licenses most cities’ very existence: it is for modern cities what the Tenth Amendment is for the states. On a conceptual level, the fact that Home Rule is agnostic to local autonomy poses a threat to democracy in today’s cities, where economic and political activity in the United States is increasingly and overwhelmingly concentrated.⁹⁴ Under the current regime, for instance, many states still have the legal authority to unilaterally dissolve cities without justification.⁹⁵ On a practical level, state legislatures across the country have curbed local autonomy, and cities are ill-equipped to defend themselves.

III. THE STATES’ DEMOCRACY PROBLEM

This Part turns to the states. Thus far, the discussion has shown that the political subdivision idea led to legal subordination of cities to the states. The “new federalism” movement has operated similarly, devolving substantive regulatory authority from the federal to the state level. This Part argues that these phenomena have worked together: the political subdivision idea and the new federalism have converged to concentrate tremendous substantive lawmaking authority at the state level.

This Part calls that arrangement into question. It traces the rise of the new federalism, in politics and then in the courts, and shows how it has expanded the states’ authority. Next, it presents one of the Note’s core arguments: that many states have become hostile to democracy. To be clear, the claim is not that local governments are democratically superior to state governments. Local governments are susceptible to many of the same democratic ills as the states.⁹⁶ Rather, the claim is a structural one. If democracy in the United States depends on democratic opportunity being diffused across different levels of government,⁹⁷ an unusual concentration of authority in the states is cause for concern.

⁹³ Diller, *supra* note 21, at 1122.

⁹⁴ See Schragger, *supra* note 31, at 1540.

⁹⁵ Michelle Wilde Anderson, *Dissolving Cities*, 121 *YALE L.J.* 1364, 1377 (2012).

⁹⁶ See Schleicher, *supra* note 31, at 776 (showing “substantial evidence that city council races in big cities are extremely second order”). Sam Rosen’s reporting uncovered the overt racism that motivated at least the early cityhood movement around Atlanta: “Two spokesmen for Sandy Springs[, a newly incorporated city, had] promised to ‘build up a city separate from Atlanta and your Negroes and forbid any Negroes to buy, or own, or live within our limits.’” Sam Rosen, *Atlanta’s Controversial ‘Cityhood’ Movement*, *THE ATLANTIC* (Apr. 26, 2017), <https://www.theatlantic.com/business/archive/2017/04/the-border-battles-of-atlanta/523884/> [<https://perma.cc/4T5N-QV8U>].

⁹⁷ See Seifter, *supra* note 32, at 298–304.

A. *The New Federalism and Concentrated State Power*

In his first inaugural address, President Ronald Reagan promised to “restore federalism,” and in doing so ushered in a new paradigm for the state-federal relationship.⁹⁸ The “new federalism” movement emerged from broad conservative backlash against the federal government’s progressive policies in the 1960s and 1970s.⁹⁹ The Reaganite new federalism did not aspire to an increased regulatory role for the states, but rather opposed regulation at any level.¹⁰⁰ The movement’s intellectual leaders were motivated by a libertarian impulse to reduce “civilian governmental activity at all levels,” to cut taxes, and to deregulate industry.¹⁰¹ In invoking the rhetoric of “states’ rights,” the new federalist movement sought to decentralize authority in order to achieve deregulation.¹⁰² Like Dillon’s Rule, the new federalism movement was concerned with the redistributive elements of government, and quelled those concerns by shifting the balance of constitutional authority to the states.¹⁰³ And like the “political subdivision” idea, the new federalism was an overwhelming success.¹⁰⁴

In the 1990s, the new federalism proliferated in the courts. New federalist doctrines like the anti-commandeering principle¹⁰⁵ and the presumption against preemption of state law by federal law¹⁰⁶ have given state law increasingly rigorous protection from federal interference. Decisions in the new federalist traditions give state governments significant authority over

⁹⁸ President Ronald Reagan, First Inaugural Address (Jan. 20, 1981).

⁹⁹ See, e.g., Abner J. Mikva, *Deregulating Through the Back Door: The Hard Way to Fight a Revolution*, 57 U. CHI. L. REV. 521, 522–24 (1990); Harry N. Scheiber, *Redesigning the Architecture of Federalism—an American Tradition: Modern Devolution Policies in Perspective*, 14 YALE L. & POL’Y REV. 227, 290–93 (1996). As Professors Yishai Blank & Issi Rosen-Zvi have shown, the term “new federalism” was coined in 1969 by President Richard Nixon. Yishai Blank & Issi Rosen-Zvi, *Reviving Federal Regions*, 70 STAN. L. REV. 1895, 1932–33 (2018) (citing Address to the Nation on Domestic Programs, PUB. PAPERS 637, 638, 642–43 (Aug. 8, 1969)). Nixon’s new federalism contemplated increased regulation—just not at the federal level. Nixon envisioned the devolution of federal administration into smaller regions, “plac[ing] greater reliance on state and local governments, [and] moving federal decisionmaking out of Washington and closer to the people.” *Id.*

¹⁰⁰ See President Ronald Reagan, First Inaugural Address (Jan. 20, 1981).

¹⁰¹ Scheiber, *supra* note 99, at 293 (citing TIMOTHY CONLAN, *NEW FEDERALISM: INTERGOVERNMENTAL REFORM FROM NIXON TO REAGAN 180–82* (1988)).

¹⁰² See *id.* at 293–94 (arguing that the Reagan-era conservative moment used decentralization to pare back social programs it disfavored).

¹⁰³ *Id.* at 290 (arguing that while “the intense preoccupation of conservatives with the issues of centralized versus decentralized power is cast, typically, in terms of ‘principled’ beliefs rooted deeply in the old federal creed,” the overriding force behind the new federalism was a desire to minimize government intervention in private markets).

¹⁰⁴ See Mikva, *supra* note 99, at 521 (“Before six months of the Reagan presidency had passed, 180 regulations had been withdrawn, modified, or delayed; half as many rules were being proposed as compared to the previous year; and the Federal Register, the daily record of all new regulations, had lost one-third of its volume.”).

¹⁰⁵ See e.g., *New York v. United States*, 505 U.S. 144, 149 (1992).

¹⁰⁶ See, e.g., *De Buono v. NYSA-ILA Med. and Clinical Servs. Fund*, 520 U.S. 806, 814 (1997).

crucial government functions like administering federal health insurance,¹⁰⁷ regulating firearms,¹⁰⁸ and structuring access to the ballot.¹⁰⁹ In *Shelby County v. Holder*, for instance, the Court struck down a key provision of the federal Voting Rights Act of 1965¹¹⁰ on the ground that federal review of state electoral processes was “a drastic departure from basic principles of federalism.”¹¹¹ Since 1965, Section 5 of the Voting Rights Act had imposed a “preclearance requirement” on new voting measures passed by states with a history of racial discrimination.¹¹² The Court struck down Section 4(b), which contained the “coverage formula” that identified which states would be subject to federal scrutiny under Section 5.¹¹³

The convergence of the political subdivision idea and the new federalism has given the states a remarkable amount of lawmaking authority within our constitutional order. They are insulated from much federal law by new federalism doctrines and omnipotent over local law because of the political subdivision idea.¹¹⁴ That concentration of power has largely been the result of converging instrumentalist projects: the political subdivision idea restricts local authority, while the new federalism restricts federal authority, each in the name of broadly anti-participatory interests. Two implications follow. First, it is clear as a practical and theoretical matter that Home Rule plays an important structural role in our federalist system. As Home Rule expands or contracts, the power of the state legislatures does the opposite. Second—and more crucially—in a federalist democracy, where democratic opportunity depends on even distribution of lawmaking authority, a disproportionate concentration of power in one level of government creates the risk that democracy writ large is eroded.¹¹⁵

B. *The State of State Democracy*

There is a democracy problem in most American states today.¹¹⁶ In terms of sheer volume, democratic participation in state government is strikingly low. Voter turnout in state legislative elections is generally below fifty

¹⁰⁷ See *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 588 (2012).

¹⁰⁸ See *United States v. Lopez*, 514 U.S. 549, 581 (1995).

¹⁰⁹ See *Shelby County v. Holder*, 570 U.S. 529, 535 (2013).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 556–57.

¹¹⁴ See *supra* Section II.A.

¹¹⁵ See generally *The Federalist* No. 10 (James Madison); Seifter, *supra* note 32.

¹¹⁶ See, e.g., Brownstein, *supra* note 31; Schragger, *supra* note 31, at 1590–92 (“The devolution of power to states is appropriate if states are closer to the people. Examination of internal state political processes, however, reveals the limits of this claim.”); Seifter, *supra* note 31, at 110–11; Schleicher, *supra* note 31, at 767–68; see also LEVITSKY & ZIBLATT, *supra* note 31; CONSTITUTIONAL DEMOCRACY IN CRISIS?, *supra* note 31.

percent,¹¹⁷ and voters' knowledge of state government is similarly low: a 2010 study showed that fewer than half of voters knew which party controlled their state's House and Senate.¹¹⁸ Many state legislatures, for their part, seem eager to *reduce* democratic participation.¹¹⁹ This Section canvasses four antidemocratic qualities that have recently been ascribed to the states—countermajoritarian legislatures, voting rights abuses, interest group capture, and hyper preemption—to demonstrate that a growing number of states have seemingly become hostile to majoritarian democracy.

1. *Countermajoritarian Legislatures*

Professor Miriam Seifter has identified a striking democratic breakdown in many states that she calls the countermajoritarian legislature.¹²⁰ A legislature is countermajoritarian when over half the voters in a state support one party, but the legislature is controlled by members of the other.¹²¹ The prominence of the issue is striking: “Between 1968 and 2016, thirty-eight states experienced at least one manufactured majority as a result of a general election in their state senate, while ten states did not. Similarly, forty states experienced at least one manufactured-majority election in their state house, while eight states did not.”¹²² In a constitutional order founded in part on a commitment to majoritarian decisionmaking,¹²³ a countermajoritarian state legislature is “startling to foundational ideals of democracy.”¹²⁴

The roots of legislative countermajoritarianism are partly circumstantial. Professors Jonathan Rodden and Jowei Chen have shown that the geographic spacing of political groups in the United States has an outsized impact on representation, because in most states legislators represent single-member districts.¹²⁵ The problem is rooted in partisan sorting—the phenomenon where members of the same political party tend to live near one an-

¹¹⁷ Jan Brennan, *Increasing Voter Turnout in Local Elections*, 109 NAT'L CIVIC REV. 16, 17 (2020) (showing that in cities with high participation rate, turnout was between 28% and 47%, and in cities with low participation rate, turnout was between 6% and 14%).

¹¹⁸ Steven Michael Rogers, *Accountability in a Federal System* 35 (Sept. 2013) (Ph.D. dissertation, Princeton University), <http://stevenrogers.com/Dissertation/Rogers-Dissertation.pdf> [<https://perma.cc/U9FE-VV3J>].

¹¹⁹ See *infra* Section III.B.2.

¹²⁰ See Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1762–68 (2021).

¹²¹ *Id.* at 1762–63.

¹²² *Id.* at 1764.

¹²³ See *id.* at 1734–35. See also ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 34–35 (1956) [hereinafter DAHL, PREFACE]; Robert A. Dahl, *The City in the Future of Democracy*, 61 AM. POL. SCI. REV. 953, 959–60 (1967) [hereinafter Dahl, *Future of Democracy*].

¹²⁴ See Seifter, *supra* note 120, at 1762.

¹²⁵ See *Where Are the Lines Drawn?*, ALL ABOUT REDISTRICTING, <https://redistricting.ils.edu/redistricting-101/where-are-the-lines-drawn/> [<https://perma.cc/D54D-H945>].

other.¹²⁶ Voters clustered in urban spaces (who tend to be Democrats) are poorly represented in single-member districted state legislatures, whereas voters spread over rural spaces (who tend to be Republicans) are well represented.¹²⁷ This phenomenon has contributed to outright “manufactured majorities” or exaggerated majorities.

To be sure, the state legislatures are not without fault. The countermajoritarianism of state legislatures is most apparent when a legislature acts against the express wishes of a state-wide majority. In Missouri, for example, a majority of voters in a constitutional referendum chose to expand Medicaid after seven years of state government inaction.¹²⁸ But after the vote, the legislature refused to implement the program, claiming the amendment failed to provide language to guide the program’s implementation.¹²⁹ After drawn-out litigation, the Missouri Supreme Court unanimously held that the legislature was obligated to implement the program.¹³⁰ In Florida, the legislature refused to meaningfully implement a constitutional amendment designed to regulate pollution in the Everglades,¹³¹ and passed legislation to ban the smoking of marijuana after seventy-one percent of voters opted to legalize it.¹³² More recently, when voters in a Florida referendum chose to reenfranchise felons, the state legislature enacted a law conditioning enfranchisement on the repayment of all court fees—effectively prohibiting the vast majority of felons from voting.¹³³

2. Voting Rights Abuses

Closely related to the issue of countermajoritarian legislatures is partisan gerrymandering—the uniquely American system where political officials are in charge of shaping the districts that elect them.¹³⁴ As the Supreme Court has given state governments increasing control over democratic

¹²⁶ See Jowei Chen & Jonathan Rodden, *Unintentional Gerrymandering: Political Geography and Electoral Bias in Legislatures*, 8 Q.J. POL. SCI. 239, 240–41 (2013).

¹²⁷ See Seifter, *supra* note 120, at 176162.

¹²⁸ See Sarah Kliff, *Missouri’s Medicaid Expansion Is on Again*, N.Y. TIMES (July 30, 2021), <https://www.nytimes.com/2021/07/23/upshot/missouris-medicaid-expansion-is-on-again.html> [<https://perma.cc/6GZS-5BCE>].

¹²⁹ See *id.*

¹³⁰ See *id.*

¹³¹ See Mary Ellen Klas, *Sugar’s Decades-Long Hold Over Everglades Came with a Price*, MIA. HERALD (July 12, 2016), <https://www.miamiherald.com/news/local/environment/article88992067.html> [<https://perma.cc/PEQ9-KRKC>].

¹³² See Samantha J. Gross, *Smokable Medical Pot Is Now Legal in Florida After Ron DeSantis Signs Bill*, TAMPA BAY TIMES (Mar. 18, 2019), <https://www.tampabay.com/florida-politics/2019/03/18/smokable-medical-pot-is-now-legal-in-florida-after-ron-desantis-signs-bill> [<https://perma.cc/THF3-8QG5>].

¹³³ See *Jones v. Governor of Florida*, 975 F.3d 1016 (11th Cir. 2020) (upholding the law). For an excellent analysis of Florida’s felon reenfranchisement saga, see *Note, Jones v. Governor of Florida*, 134 HARV. L. REV. 2291 (2021).

¹³⁴ See Nicholas O. Stephanopoulos, *Our Electoral Exceptionalism*, 80 U. CHI. L. REV. 769, 780 (2013).

processes,¹³⁵ partisan gerrymandering and restrictive voting laws have run rampant. Partisan gerrymandering has led to vote dilution for clustered groups and has pushed state legislators to further ideological extremes.¹³⁶

In *Rucho v. Common Cause*,¹³⁷ the Supreme Court held that federal courts may not address challenges to partisan gerrymandering in the states.¹³⁸ In dissent, Justice Kagan predicted that allowing state legislatures to oversee redistricting would “maximize the power of some voters and minimize the power of others,” such that “a party in office at the right time can entrench itself there for a decade or more, no matter what the voters would prefer.”¹³⁹

The thrust of the evidence suggests she was right. In a stump speech, the Wisconsin Gubernatorial candidate Tim Michels proclaimed that “Republicans will never lose another election in Wisconsin after I’m elected governor,” a clear reference to aspirations for partisan gerrymandering.¹⁴⁰ Following President Trump’s loss in the November 2020 election and subsequent allegations of widespread voter fraud, “Republican lawmakers in 43 states had introduced more than 250 bills that would make it more difficult to vote.”¹⁴¹ These laws, which limit opportunities to vote and impose technical hurdles, disproportionately impact the ability of minority groups to vote.¹⁴²

3. Interest Group Capture

A growing body of research suggests interest group capture is at its apex in state government.¹⁴³ The problem is a unique threat to state democ-

¹³⁵ See *supra* Section III.A.

¹³⁶ Nicholas O. Stephanopoulos, *The Causes and Consequences of Gerrymandering*, 59 WM. & MARY L. REV. 2115, 2117–18, 2120 (2018).

¹³⁷ 139 S. Ct. 2484, 2506–07 (2019) (holding that gerrymandering on allegedly partisan grounds is not reviewable by federal courts).

¹³⁸ *Id.* at 2498–2500.

¹³⁹ *Id.* at 2512 (Kagan, J., dissenting).

¹⁴⁰ Reid J. Epstein, *Wisconsin Republicans Stand on the Verge of Total, Veto-Proof Power*, N.Y. TIMES (Nov. 4, 2022), <https://www.nytimes.com/2022/11/04/us/politics/wisconsin-voting-republicans-supermajorities.html> [https://perma.cc/9U8Y-X3V8]. Mr. Michels was not elected. Molly Beck, Katelyn Ferral & Madeline Heim, *Wisconsin Gov. Tony Evers Defeats Tim Michels to Win Second Term in 2022 Midterm Election*, MILWAUKEE J. SENTINEL (Nov. 9, 2022), <https://www.jsonline.com/story/news/politics/elections/2022/11/09/tony-evers-defeats-tim-michels-in-2022-wisconsin-governor-election/69597058007/> [https://perma.cc/ANY4-5K3N].

¹⁴¹ Matt Vasilogambros, *Republican Wave of Voting Restrictions Swells*, PEW RSCH. CTR. (Mar. 25, 2021), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/03/25/republican-wave-of-voting-restrictions-swells> [https://perma.cc/A92P-ZGEL].

¹⁴² See, e.g., Gary J. Simson, *Election Laws Disproportionately Disadvantaging Racial Minorities, and the Futility of Trying to Solve Today’s Problems with Yesterday’s Never Very Good Tools*, 70 EMORY L.J. 1143, 1145–48 (2021); Nicholas Stephanopoulos & Jowei Chen, *The Next Front in the Gerrymandering Wars: Which People Get Counted?*, WASH. POST (Feb. 24, 2021), <https://www.washingtonpost.com/outlook/2021/02/24/gerrymandering-count-people-adults/> [https://perma.cc/FW97-CCJB].

¹⁴³ See, e.g., Ryan T. Moore & Christopher T. Giovinazzo, *The Distortion Gap: Policymaking Under Federalism and Interest Group Capture*, 42 PUBLIUS 189, 193–94 (2012)

racy, as each party's national agenda shapes its state-level agenda, limiting the extent to which state legislation addresses the needs of the state.¹⁴⁴ In the legislatures, well-funded groups like the Heritage Foundation and the American Legislative Exchange Council ("ALEC") have worked to advance policies unlikely to succeed at the federal level.¹⁴⁵ And the issue is endemic across branches: as Eric Lipton's Pulitzer Prize-winning investigation showed, interest groups have aggressively lobbied state attorneys general to advance their agendas.¹⁴⁶ The democracy problem here becomes apparent when interest groups advance the very same laws from state to state. That is, state legislators are advancing bills written by national organizations with a national agenda, rather than a state one, in mind.

4. *Hyper Preemption*

Hyper preemption is another form of attack on democracy. Rather than coordinate with local governments, state legislatures passing hyper preemption laws seek to broadly prohibit local political activity.¹⁴⁷ Hyper preemption laws are usually "propelled by trade association and business lobbying."¹⁴⁸ Most are not written by legislators, but instead adopted from proposals written by national interest groups.¹⁴⁹ That is, rather than addressing local concerns, hyper preemption bills seek merely to prohibit substantive regulations. Common examples include the state prohibition of plastic bag bans,¹⁵⁰ field preemption of firearm regulations,¹⁵¹ and bans on municipal minimum wage laws.¹⁵²

(showing interest group influence distorts policymaking at the state level more than the federal level); see generally Brian J. Gerber & Paul Teske, *Regulatory Policymaking in the American States: A Review of Theories and Evidence*, 53 POL. RSCH. Q. 849, 862–64 (2000) (reviewing empirical findings on interest group influence).

¹⁴⁴ See Schleicher, *supra* note 31, at 772–80.

¹⁴⁵ Michael Wines, *As Washington Stews, State Legislatures Increasingly Shape American Politics*, N.Y. TIMES (Aug. 29, 2021), <https://www.nytimes.com/2021/08/29/us/state-legislatures-voting-gridlock.html> [<https://perma.cc/J9HH-6ESS>]; Nancy Scola, *Exposing ALEC: How Conservative-Backed State Laws Are All Connected*, THE ATLANTIC (Apr. 14, 2012), <https://www.theatlantic.com/politics/archive/2012/04/exposing-alec-how-conservative-backed-state-laws-are-all-connected/255869/> [<https://perma.cc/9TPC-ZW5F>].

¹⁴⁶ Eric Lipton, *Lobbyists, Bearing Gifts, Pursue Attorneys General*, N.Y. TIMES (Oct. 28, 2014), <https://www.nytimes.com/2014/10/29/us/lobbyists-bearing-gifts-pursue-attorneys-general.html> [<https://perma.cc/WBB3-P5DS>].

¹⁴⁷ Briffault, *supra* note 26, at 1997.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 1997, 2000–01.

¹⁵⁰ See *State Plastic Bag Legislation*, NAT'L CONF. OF STATE LEGISLATURES (Feb. 8, 2021), <https://www.ncsl.org/environment-and-natural-resources/state-plastic-bag-legislation> [<https://perma.cc/5F62-FXPV>].

¹⁵¹ See, e.g., FLA. STAT. § 790.33(3)(a) (2021).

¹⁵² See *Living Wage Mandate Preemption Act*, AM. LEGIS. EXCH. COUNCIL (Jan. 28, 2013), <https://alec.org/model-policy/living-wage-mandate-preemption-act/> [<https://perma.cc/8XAF-XLPH>] (presenting a model state law designed to "prohibit[] political subdivisions from enacting laws establishing 'living wage' mandates on private businesses").

The most striking feature of hyper preemption is its antidemocratic bent. The bills have been punitive and retaliatory, such that local lawmaking is deterred before the fact. Many hyper preemption bills punish local leaders responsible for policies that have been preempted;¹⁵³ in Florida, a municipal official responsible for a gun regulation may be personally liable for up to \$5,000 in civil damages.¹⁵⁴ As the Key West case demonstrates, legislatures have not been shy about striking down city referenda with overwhelming local support. When a legislature not only inhibits local initiative, but rejects a local polity's majoritarian will, it would seem the state has crossed into overt hostility toward local democracy.

IV. TOWARD A DEMOCRATIC THEORY OF HOME RULE

Our constitutional order has traditionally recognized two levels of sovereignty: federal and state.¹⁵⁵ The federal Constitution has long been characterized as antimajoritarian.¹⁵⁶ Structural features like the Senate, the Electoral College, and the guarantee of life tenure for Article III judges suggest the framers were wary of—and by some accounts, hostile to—the will of the people as a whole.¹⁵⁷ James Madison famously celebrated the federal Constitution's "total exclusion of the people, in their collective capacity" as "a most advantageous superiority in favor of the United States."¹⁵⁸ Madison's views clearly do not square with modern notions of democracy. Among scholars and the broader public,¹⁵⁹ there is wide agreement that majority rule is a necessary component of true democracy.¹⁶⁰

¹⁵³ Briffault, *supra* note 26, at 2002–07.

¹⁵⁴ See FLA. STAT. § 790.33(3) (2021).

¹⁵⁵ See generally Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 22–23 (2010); JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018) (describing the constitutions of states and how they compare with the federal Constitution).

¹⁵⁶ See, e.g., Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 900 (2021) ("A number of 'strong anti-majoritarian features' have been hardwired into the federal Constitution from the start."); MICHAEL J. KLARMAN, *THE FRAMERS' COUP* 608 (2016); LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* 4–6 (1994).

¹⁵⁷ KLARMAN, *supra* note 156, at 608.

¹⁵⁸ THE FEDERALIST NO. 63, at 355 (James Madison) (Clinton Rossiter ed., 1999) (emphasis omitted).

¹⁵⁹ Meagan Day & Bhaskar Sunkara, *Think the Constitution Will Save Us? Think Again*, N.Y. TIMES (Aug. 9, 2018), <https://www.nytimes.com/2018/08/09/opinion/constitution-founders-democracy-trump.html> [<https://perma.cc/7RK5-4M58>] ("Donald Trump is in the White House, despite winning almost three million fewer votes than Hillary Clinton. The Senate, the country's most powerful legislative chamber, grants the same representation to Wyoming's 579,315 residents as it does to 39,536,653 Californians. Key voting rights are denied to citizens in the District of Columbia, Puerto Rico and other United States territories. The American government is structured by an 18th-century text that is almost impossible to change.").

¹⁶⁰ See Seifter, *supra* note 120, at 1741. See also DAHL, PREFACE, *supra* note 123, at 34–35; Dahl, *Future of Democracy*, *supra* note 123, at 959–60. Cf. *The Contemporary Debate over Supreme Court Reform: Origins and Perspectives Before Presidential Comm'n on the*

In theory, the state constitutions present a wealth of opportunity for majoritarian democracy. Scholars of state constitutional law have long argued that the federal Constitution is “an incomplete text” that contemplates a substantive role for the state constitutions in the realm of democracy.¹⁶¹ For instance, the federal Constitution does not itself give anyone the right to vote; instead, it “incorporates the voter qualifications established by states.”¹⁶² And unlike the federal Constitution, the state constitutions tend to regard “the majority of the political community as the principal and normatively superior decisionmaker.”¹⁶³ They provide for a variety of ballot initiatives and for majoritarian elections of judges and executive officers, while the federal Constitution provides for neither.¹⁶⁴ As the discussion thus far has shown, however, the states have seemed ill-equipped to preserve, let alone advance, democratic opportunity¹⁶⁵—at least not without meaningful structural protections.

Home Rule would seem to be one such protection, but local government scholarship largely fails to connect the doctrine to broader American federalism. With scant few exceptions,¹⁶⁶ the literature has taken what I call the “instrumentalist view” of Home Rule. The instrumentalist view treats Home Rule as an instrument of policy rather than an end in itself. For instance, in responding to hyper preemption, most Home Rule scholarship has centered on the political valence of the fight between states and cities¹⁶⁷ and

Sup. Ct. of the U.S. 20–21 (2021) (statement of Nikolas Bowie, Assistant Professor, Harvard Law School), <https://www.whitehouse.gov/wp-content/uploads/2021/06/Bowie-SCOTUS-Testimony-1.pdf> [<https://perma.cc/RA3Y-4K5Y>] (arguing majority rule is appropriate as a means of preserving democratic norms).

¹⁶¹ Bulman-Pozen & Seifter, *supra* note 156, at 902 (quoting Donald S. Lutz, *The United States Constitution as an Incomplete Text*, 496 ANNALS AM. ACAD. POL. & SOC. SCI. 23, 32 (1988)).

¹⁶² *Id.* at 902 (quoting ALEXANDER KEYSAR, *THE RIGHT TO VOTE* 83–89 (rev. ed. 2009)).

¹⁶³ *Id.* at 899.

¹⁶⁴ *Id.* at 872–78.

¹⁶⁵ See generally Seifter, *supra* note 32, at 280 (arguing that while the federal system tends to entrench minority rule, the state constitutions contemplate a greater commitment to majoritarian rule).

¹⁶⁶ See, e.g., Diller, *supra* note 26, at 343 (arguing that state preemption power should be limited to the extent it is not the product of a credibly majoritarian lawmaking process); NAT'L LEAGUE OF CITIES, *PRINCIPLES OF HOME RULE FOR THE 21ST CENTURY* 27 (2020), <https://www.nlc.org/wp-content/uploads/2020/02/Home-Rule-Principles-ReportWEB-2-1.pdf> [<https://perma.cc/QX6Q-4ZBA>]; David Schleicher, *Federalism and State Democracy*, 95 TEX. L. REV. 763 (2017) (arguing federalism literature does not account for the shortcomings of state and local democracy); Nestor M. Davidson, *Local Constitutions*, 99 TEX. L. REV. 839 (2021).

¹⁶⁷ See, e.g., RICHARD BRIFFAULT, NESTOR DAVIDSON, PAUL A. DILLER, OLATUNDE JOHNSON & RICHARD C. SCHRAGGER, AM. CONST. SOC'Y, *THE TROUBLING TURN IN STATE PREEMPTION: THE ASSAULT ON PROGRESSIVE CITIES AND HOW CITIES CAN RESPOND* (2017), https://www.acslaw.org/wp-content/uploads/2017/09/ACS_Issue_Brief_-_Preemption_0.pdf [<https://perma.cc/D992-E9L4>]; David Schleicher, *Constitutional Law for NIMBYs: A Review of 'Principles of Home Rule for the 21st Century' by the National League of Cities*, 81 OHIO STATE L.J. 883, 888, 910–13 (2021); KIM HADDOW, LOC. SOLS. SUPPORT CTR., *UNDER THE COVER OF COVID: A SURVEY OF 2020-2021 STATE PREEMPTION TRENDS* 5 (2021), <https://static1.squarespace.com/static/5ce4377caeb1ce00013a02fd/t/604faee2e641222b084316ff/1615834855353/LSSC-UndertheCoverofCovid-March2021.pdf> [

has sought to adjust Home Rule to reconcile political differences.¹⁶⁸ An earlier era of local government scholarship responded mostly to the problem of urban sprawl and critiqued Home Rule for allowing cities to exclude marginalized and low-income populations.¹⁶⁹ And some of the earliest commentators on local government law—those that developed Dillon’s Rule and Home Rule itself—were focused on the potential of local governments’ latent regulatory power.¹⁷⁰ To be sure, these were all salient issues worthy of scholarly attention. And as a conceptual matter, it is no surprise earlier scholarship took the instrumentalist view. Cities are not recognized as sovereign under the federal Constitution,¹⁷¹ and once cities had Home Rule, their relationship with the states was largely cooperative, meaning their democratic prerogative was not threatened.¹⁷² But as this Note shows, that has changed—local democracy is at risk, and a paradigm shift is in order.¹⁷³

A democratic theory of Home Rule recognizes the doctrine as a crucial part of our broader federalist order, connected to American constitutionalism and the long-term fate of American democracy. A strong, local-protective version of Home Rule would both diffuse power from the states and protect opportunities for democratic participation at the local level. It also finds support in a long tradition of local democracy in the United States. In *Democracy in America*, Alexis de Tocqueville presented American cities as the original locus of democratic participation.¹⁷⁴ For de Tocqueville, participation in the local political process was central to the voting-eligible American’s sense of dignity, and to the fledgling nation’s economic vigor.¹⁷⁵ More

566L] (“Since 2011, state legislatures have passed preemption laws barring local control over a large and growing set of public health, economic, environmental, and social justice policy solutions.”).

¹⁶⁸ See, e.g., Nestor M. Davidson, *The Dilemma of Localism in an Era of Polarization*, 128 YALE L.J. 954, 990 (2019). See generally Richard Briffault, *Home Rule and Local Political Innovation*, 22 J.L. & POL. 1 (2006); Stahl, *supra* note 26.

¹⁶⁹ See, e.g., David Schleicher, *City Unplanning*, 122 YALE L.J. 1670, 1692, 1704–17 (2013); Richard Briffault, *Smart Growth and American Land Use Law*, 21 ST. LOUIS U. PUB. L. REV. 253, 262–63 (2002); Cashin, *supra* note 78, at 1988; GERALD FRUG & DAVID J. BARRON, *CITY BOUND: HOW STATES STIFLE URBAN INNOVATION* (2008) (describing the tension between state and local power and how state politics limit cities’ choices).

¹⁷⁰ See generally DILLON, *supra* note 21; Fordham, *supra* note 82.

¹⁷¹ See, e.g., Barron, *supra* note 18, at 487 (indicating that the notion of state supremacy as a constitutional matter has not gone unchallenged); Bowie, *supra* note 18, at 1680–85; Richard C. Schragger, *Cities as Constitutional Actors: The Case of Same-Sex Marriage*, 21 J.L. & POL. 147, 167–78 (2005); Sullivan, *supra* note 18, at 1935.

¹⁷² See *supra* Section II.B.

¹⁷³ See *supra* Section III.B.

¹⁷⁴ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 74 (Henry Reeve & Francis Bowen eds., 1863).

¹⁷⁵ *Id.* at 320–21 (“The humblest individual who co-operates in the government of society acquires a certain degree of self-respect; and as he possesses authority, he can command the services of minds more enlightened than his own. . . . He takes a part in political undertakings which he did not originate, but which give him a taste for undertakings of the kind. . . . I have no doubt that the democratic institutions of the United States, joined to the physical constitution of the country, are the [indirect] cause . . . of the prodigious commercial activity of the inhabitants.”).

recent historical work by Professor Nikolas Bowie has shown that the desire to assemble in local democracy gave rise to the dispute that sparked the American Revolution.¹⁷⁶ While Home Rule lacks the historical pedigree of the federal Constitution, it is the doctrine that enables and protects a long-standing democratic tradition.

V. CONCLUSION

State attacks on Home Rule must be recognized as attacks on local democracy, and efforts to reform Home Rule must address that reality. A promising development is the National League of Cities' recent Home Rule reform proposal, *Principles of Home Rule for the 21st Century*.¹⁷⁷ The *Principles* include a model state constitutional provision giving cities "full authority to manage their own democratic process and structure of governance."¹⁷⁸ They would also require state preemption laws to be "narrowly tailored," which would limit states' ability to broadly preempt city law.¹⁷⁹ Voters concerned about the future of local democracy can—and perhaps must—look beyond their state legislatures: in eighteen states, the constitution can still be amended by popular referendum.¹⁸⁰

¹⁷⁶ Bowie, *supra* note 18, at 1682–83.

¹⁷⁷ NAT'L LEAGUE OF CITIES, *supra* note 166. In 1953, the National League of Cities, then the American Municipal Association, published the proposal behind the "second wave" of Home Rule reform. See *supra* Section II.B.2.

¹⁷⁸ NAT'L LEAGUE OF CITIES, *supra* note 166, at 27.

¹⁷⁹ *Id.* at 26.

¹⁸⁰ Those states are Arizona, Arkansas, California, Colorado, Florida, Illinois, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, and South Dakota. Bulman-Pozen & Seifter, *supra* note 156, at 876 n.86.