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Have Cities Abandoned Home Rule?

Rick Su

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INTRODUCTION

Home Rule grants cities the power to act without state authorization.[1] It also provides them with protections from state interference.[2] The scope of these powers and protections have long been unclear.[3] But, given recent events, one might assume that a renewed debate over Home Rule is fast approaching. Cities today are increasingly at the forefront of controversial policy disputes, addressing a host of issues from the minimum wage and paid

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[*] Professor of Law, University at Buffalo School of Law; B.A., Dartmouth College; J.D., Harvard Law School.

1. *See* DALE KRANE, PLATON N. RIGOS & MELVIN B. HILL, HOME RULE IN AMERICA: A FIFTY-STATE HANDBOOK 11-12 (2001).

2. *See id.*

3. *See, e.g.*, Terrance Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643 (1963).

family leave, to immigration and LGBT rights.[4] At the same time, state governments seem more determined than ever to overturn these local efforts and limit the kinds of matters that cities can address.[5] A similar set of circumstances sparked the Home Rule movement at the turn of the twentieth century, in which cities and their supporters fought for greater municipal independence from the yoke of state control.[6] At the start of the twenty-first century, will Home Rule once again take center stage?

Despite the growing interest in urban policymaking, there are few signs that Home Rule is making much of a comeback. Indeed, if anything is striking about the contemporary state of Home Rule, it is how rarely it comes up at all. Home Rule is widely ignored in popular media. It is largely unfamiliar to the general public. Even the cities themselves seem indifferent. As they widen their regulatory efforts in the face of state opposition, cities today are often reluctant to invoke Home Rule as a legal basis for their actions. As they protest their mistreatment at the hands of states, few are framing their argument around Home Rule in their political appeals. In many instances, it is actually the cities themselves that have weakened—either directly or indirectly—the Home Rule authority that they had once fought so hard to secure.

Legal scholars have long complained that state courts and legislatures have undermined Home Rule and circumvented its protections.[7] But have cities abandoned Home Rule as well? Home Rule can be broadly conceived as both a bundle of legal rights and a set of political considerations. Yet the legal structure of Home Rule also relies on cities to take the lead in shaping its role and development. For Home Rule to be meaningful as a set of legal rights, those rights have to be consistently exercised and zealously defended. For Home Rule to be an effective political safeguard, its underlying values have to be vigorously articulated and regularly invoked. There is no shortage of proposals today on how Home Rule might be revived, reclaimed, or reformed.[8] But none of these are likely to succeed if cities remain on the sidelines.

This essay examines the future of Home Rule. Unlike other accounts, however, the focus here is on the part of the cities themselves. The central claim is that cities are crucial in shaping the role and development of Home

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4. *See infra* notes and accompanying text 20-21, 23, 26-27, 34-36.

5. *See infra* notes and accompanying text 26-39.

6. *See infra* notes and accompanying text 61-64.

7. *See, e.g.*, GERALD E. FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS 51 (2001); Kenneth A. Stahl, *Local Home Rule in the Time of Globalization*, BYU L. REV. (2016).

8. *See, e.g.*, Stahl, *supra* note 7; David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2257 (2003).

Rule. But the main concern is that cities today do not appear interested in doing so. To be sure, sharp disagreements about the desirability of Home Rule persist, especially when it comes to local involvement in policymaking.[9] Given its limitations, there may be good reasons why cities seem to be turning away, especially when alternative avenues to power are available. But there are also consequences when cities fail to take Home Rule seriously. These consequences extend well beyond Home Rule's prospects; they also strike at the very heart of how we think about the role of cities in American policymaking.

These arguments are set out in the following three Parts. Part I focuses on the role of Home Rule in an era of municipal activism. More specifically, it shows how recent city-state tensions over substantive policies raise serious questions about the standing of Home Rule today. Part II examines the relationship that cities have with Home Rule. While cities play an important role in shaping the legal and political development of Home Rule, thus far they do not seem deeply committed to this role. Part II provides several explanations for why cities seem uninterested in Home Rule, and why this may be a troubling development. Part III proposes some ways in which cities might—both individually and collectively—contribute to shaping the development of Home Rule. These proposals are drawn from how advocates have shaped legal developments in other fields. A brief conclusion follows.

I. WHY CITIES AND HOME RULE MATTER

A. The Municipal Revolution and the Backlash Against It

We are in the midst of an urban revolution. Enthusiasm for federal policies dominated much of the twentieth century. The "federalism revival" of the 1970s and 1980s shifted the balance towards states.[10] As we begin the twenty-first century, however, there is growing interest in the role of cities. For generations, cities were viewed as the source of American's most vexing challenges. Today, however, they are increasingly cast as the solution to many of our nation's most pressing problems. On social and economic issues, cities are celebrated for their innovative and forward-thinking policies.[11] In an era of gridlocked partisanship, local politics are hailed as a

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9. *See, e.g.*, Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, COLUM. L. REV. 1, 5 (1990); Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985 (1999).

10. *See generally* TIMOTHY J. CONLAN, FROM NEW FEDERALISM TO DEVOLUTION: TWENTY-FIVE YEARS OF INTERGOVERNMENTAL REFORM (2010).

11. *See generally* Richard Briffault, *Home Rule and Local Political Innovation*, 22 J.L. & POL. 1 (2006); Paul A. Diller, *Why Do Cities Innovate in Public Health? Implications of Scale and Structure*, 91 WASH. U. L. REV. 1219 (2014).

glimmer of hope amid America's democratic dysfunctions.[12] It may have once been common for policymakers to wonder whether cities were capable of governing themselves. Now influential thinkers are openly asking whether it would be better if "mayors ruled the world."[13]

This enthusiasm tracks the tremendous turnaround that many cities are now experiencing. Cities in the twentieth century were marked by depopulation, poverty, and fiscal distress.[14] Today, many are staging a historic comeback.[15] Interest in urban living is on the rise.[16] Businesses are flocking back into the downtown core.[17] And housing shortages and gentrification have replaced abandonment and blight as cities' central problems.[18] To be sure, the scope and pace of this urban revival is uneven—while Austin leads, Detroit lags. But it is also more widespread than one may think. Alongside the spectacular renaissance of major urban centers like New York City and San Francisco, rust-belt cities like Pittsburgh, Cleveland, and Buffalo are also showing signs of revitalization.[19] If there is greater interest in the role of cities today, it is due in part to the fact that they are once again becoming the cultural, economic, and social centers of American society.

Cities are not just doing better. They are also doing more. Although political gridlock stalls policy responses at the state and federal level, local policymakers, especially those in America's big cities, have been filling the void. On economic issues, cities have bolstered the push for the fifteen dollar

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12. *See* BRUCE KATZ & JENNIFER BRADLEY, THE METROPOLITAN REVOLUTION: HOW CITIES AND METROS ARE FIXING OUR BROKEN POLITICS AND FRAGILE ECONOMY (2013).

13. *See* BENJAMIN R. BARBER, IF MAYORS RULED THE WORLD: DYSFUNCTIONAL NATIONS, RISING CITIES (2013).

14. *See, e.g.*, JON C. TEAFORD, THE TWENTIETH-CENTURY AMERICAN CITY: PROBLEM, PROMISE, AND REALITY 130-53 (2016) (describing the plight of many of America's great cities and the national sense of an "urban crisis" in America).

15. *See generally* ALAN EHRENHALT, THE GREAT INVERSION AND THE FUTURE OF THE AMERICAN CITY (2012).

16. *See* Emily Badger, *Americans Are Paying More and More to Live in the Same Places They Once Abandoned*, WASH. POST, Jun. 27, 2016; Conor Dougherty & Robbie Whelan, *Cities Outpace Suburbs in Growth*, WALL ST. J., Jun. 28, 2012, at A2.

17. *See* Nelson D. Schwartz, *The Lure of Downtown*, N.Y. TIMES, Aug. 1, 2016, at B1; Lauren Weber, *Companies Say Goodbye to the 'Burbs—Young Talent Wants to Live in Chicago Not Libertyville; Dilemma for Older Workers*, WALL ST. J. (Dec. 4, 2013), http://www.wsj.com/articles/SB10001424052702304281004579222442197428538 [https://perma.cc/4T84-BEJG].

18. *See, e.g.*, Conor Dougherty, *In Cramped and Costly Bay Area, Cries to Build, Baby, Build*, N.Y. TIMES (Apr. 16, 2016), http://www.nytimes.com/2016/04/17/business/economy/san-francisco-housing-tech-boom-sf-barf.html [https://perma.cc/PZ2R-3EHY].

19. *See* Susan Milligan, *An Urban Revival in the Rust Belt*, U.S. NEWS & WORLD REP. (Sept. 2, 2014) http://www.usnews.com/news/articles/2014/09/02/an-urban-revival-in-the-rust-belt [https://perma.cc/JK2K-4R5L].

minimum wage and paid family leave, by adopting them as local policies.[20] On social issues, cities led the charge on same-sex marriage and continue to pave the way on protections for the LGBT community.[21] On public health, cities paved the way for the prohibition of trans-fats and indoor smoking, policies only later embraced at the state or federal level.[22] Even on global issues like immigration and climate change, cities are taking a stand. Immigration is hardly a traditional local issue, but cities are enacting a variety of policies regarding the settlement of immigrants and local involvement in immigration enforcement.[23] Global carbon emissions are well beyond the ability of any one city to control, but cities across the world are building the framework for a coordinated response, while nations struggle to reach an accord.[24] Cities may occupy the lowest rung in our federal system. On a growing number of policy issues, however, they have taken the lead in framing the debate.

The recent municipal activism is fueled by increasing demand from residents for their cities to do more, especially as representatives at the state and federal levels do less.[25] But it is also prompting a backlash at the state level. In recent years, states across the country have responded to municipal activism by passing laws specifically designed to block local regulations. These include preemption statutes that have struck down local laws that

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20. *See generally* Eric Morath, *Cities Set to Take the Minimum-Wage Stage*, WALL ST. J. (Jan. 3, 2015), http://www.wsj.com/articles/cities-set-to-take-minimum-wage-stage-14202 29294 [https://perma.cc/M6JD-UL36]; George Zornick, *The Paid Sick Leave Battle Widens in the States*, NATION, Mar. 8, 2013, https://www.thenation.com/article/paid-sick-leave-battle-widens-states/ [https://perma.cc/GVG7-KWCZ].

21. *See* Yishai Blank & Issi Rosen-Zvi, *The Geography of Sexuality*, 90 N.C. L. REV. 955, 957-58, 972 (2012).

22. *See generally* Raymen R. Assaf, *Overview of Local, State, and National Government Legislation Restricting Trans Fats*, 36 CLINICAL THERAPEUTICS 328 (2014); Charles R. Shipan & Craig Volden, *Bottom-Up Federalism: The Diffusion of Antismoking Policies from U.S. Cities to States*, 50 AM. J. POL. SCI. 825 (2006).

23. *See, e.g.*, Rick Su, *A Localist Reading of Local Immigration Regulations*, 86 N.C. L. REV. 1619, 1622 (2008).

24. *See* Harriet Bulkeley, *Cities and the Governing of Climate Change*, 35 ANN. REV. ENV'T. & RESOURCES 229, 231-34 (2010).

25. *See, e.g.*, Andrew Ryan, *On Range of Issues, Mayors Are Taking the Initiative*, BOS. GLOBE (June 21, 2016), https://www.bostonglobe.com/metro/2016/06/20/federal-authority-last-century-big-city-mayors-are-new-power-centers/yyZlHolrjB8Dbpd6J2Yd1O/story.html [https://perma.cc/69TM-DZ8Y] (noting that cities felt more compelled in recent years to address urban issues that they feel state and federal governments are ignoring).

raised the minimum wage,[26] granted paid family leave,[27] or imposed residency requirements for certain municipal employees.[28] States are also moving towards so-called "death star" legislation that block cities from regulating entire fields altogether.[29] Pennsylvania, for example, enacted a law that prevents localities from imposing "duties, responsibilities, or requirements" upon any business.[30] Similarly, Texas now forbids localities from regulating "fracking" operations, including through their traditional zoning powers.[31] Further, states have become more punitive in their efforts to stifle local policymaking. Pennsylvania and Florida not only forbid localities from regulating firearms, but specifically authorize individuals and organizations to sue cities and local leaders if they do so.[32] Arizona recently enacted legislation that would withhold state funds from any city that regulates firearms, working conditions, or plastic shopping bags.[33]

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26. *See* Anna Louie Sussman, *States, Cities Clash on Pay and Benefit Rules*, WALL ST. J., May 31, 2016, at 1. *See also* Bill Kramer, *Localities Challenging State Preemption Laws*, MULTISTATE INSIDER, (Aug. 22, 2016), https://www.multistate.com/insider/2016/08/localities-challenging-state-preemption-laws/ [https://perma.cc/D2XN-NPNY] (reporting that twenty-one states have enacted laws preempting local minimum wage ordinances).

27. *See* Kramer, *supra* note 26, at 2 (reporting that fourteen states have enacted laws preempting local paid family leave policies).

28. *See, e.g.*, Lima v. State, 122 Ohio St. 3d 155, 160 (2009) (upholding a state law that bans localities from requiring employees to live in any specific area of the state).

29. *See* Niraj Chokshi, *Michigan May Soon End Local Control Over Minimum Wage, benefits and other labor issues*, WASH. POST, (June 17, 2015), https://www.washingtonpost.com/blogs/govbeat/wp/2015/06/17/michigan-may-soon-end-local-control-over-minimum-wage-benefits-and-other-labor-issues/ [https://perma.cc/68UX-GTWU] (describing preemptive legislation that is "so broad that opponents have taken to calling it the 'Death Star' bill. 'It would obliterate local control in Michigan, just as the Death Star obliterated Alderaan in Star Wars Episode IV,' says East Lansing Mayor Nathan Triplett").

30. *See* 53 PA. CONS. STAT. § 2962 (2016).

31. *See* Russell Gold, *Texas Prohibits Local Fracking Bans*, WALL ST. J., May 18, 2015, at 1.

32. *See* Fred Grimm, *Florida Lawmakers Use Preemption Laws to Stomp Out Urban Initiatives*, MIAMI HERALD, Apr. 18, 2016, at 2; Chris Potter, *Western Pennsylvania Governments Rethinking Their Gun-Control Ordinances*, PITTSBURGH POST-GAZETTE, Dec. 22, 2014, at 1-2. Florida's law is codified at § 790.33, FLA. STAT. (2011). Pennsylvania's law, 18 PA. CONS. STAT. § 6120 (2014), was recently struck down by the Pennsylvania Supreme Court for violating the state constitution's "single-subject" rule, which forbid the legislature from addressing more than one subject in a single state bill. *See* Leach v. Commonwealth, 141 A.3d 426 (Pa. 2016). A new bill addressing this defect has recently been introduced. *See* H.B. 2258, 2015 Leg. (Pa. 2015).

33. *See* Howard Fischer, *Bill Would Withhold Funding to Cities That Ignore State Laws*, TUCSON.COM (Feb. 17, 2016), http://tucson.com/news/local/bill-would-withhold-funding-to-cities-that-ignore-state-laws/article_629dc636-b2b1-5cb7-8c82-979f98c9aefe.html [https://perma.cc/RBN4-6QJD]. The bill was enacted in March of 2016. *See* State Shared Revenues—Withholding—Investigations and Investigators, 2016 Ariz. Legis. Serv. Ch. 35 (S.B. 1487).

Anti-local efforts also represent some of the most well publicized state laws in recent years. North Carolina's so-called "bathroom bill," for example, prohibiting transgender individuals from using public bathrooms that correspond with their gender identity,[34] was enacted at the start of 2016 to a wave of national controversy.[35] The impetus behind the law, however, was the City of Charlotte's own bathroom ordinance, which granted them that right. Indeed, not only did the state law overturn Charlotte's ordinance, it went further by stripping localities of the power to expand antidiscrimination protection for anyone in the LGBT community.[36] Similarly, when Arizona enacted its controversial immigration enforcement law in 2012, a national debate erupted over its encroachment on the federal government's exclusive jurisdiction over immigration.[37] But, as the original sponsor of the bill explained, the target of the law was actually Arizona cities like Phoenix, Tucson, and Flagstaff, which had enacted policies limiting the circumstances in which local law enforcement officials could participate in federal immigration enforcement.[38] In both cases, the state representatives who voted for these laws argued that city officials forced their hand.[39] As a result, their efforts were directed downwards in an effort to squelch municipal involvement in these issues.

These controversies lay bare the growing tension between cities and states. They also suggest the extent to which the traditional focus on the federal-state relationship is starting to give way to concerns about the city-state divide. But why are these fights becoming more common? Why now?

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34. *See* David A. Graham, *North Carolina Overturns LGBT-Discrimination Bans*, ATLANTIC (Mar. 24, 2016), http://www.theatlantic.com/politics/archive/2016/03/north-carolina-lgbt-discrimination-transgender-bathrooms/475125/ [https://perma.cc/4NDN-NWMK].

35. *See id. See also* Charlotte, N.C., Ordinance 7056 (Feb. 22, 2016) (Charlotte's anti-discrimination ordinance).

36. *See* Restrooms and Toilets—Occupancy—Single Sex, 2016 N.C. Laws. 2nd Ex. Sess. S.L. 2016-3 (H.B. 2) (preempting Charlotte's ordinance).

37. *See* Randal C. Archibold, *Arizona Enacts Stringent Law on Immigration*, N.Y. TIMES, Apr. 24, 2010, at A1. *See also* ARIZ. REV. STAT. ANN. § 11-1051, *amended by* Immigration and Border Security, Providing for Conditional Enactment, 2010 Ariz. Legis. Serv. Ch. 211 (H.B. 2162).

38. *See* Tim Steller, *Sr. Reporter: Sanctuary Cities in Arizona?*, TUCSON.COM (July 29, 2010), http://tucson.com/news/blogs/senor-reporter/sr-reporter-sanctuary-cities-in-arizona/article_871e8cd8-9b3c-11df-81d9-001cc4c03286.html [https://perma.cc/7WMZ-JD6Y]; Beth Duckett, *Scottsdale council members wouldn't take stand on SB 1070*, THE ARIZONA REPUBLIC (Aug. 15, 2010), http://archive.azcentral.com/community/scottsdale/articles/2010/08/15/20100815arizona-immigration-law-scottsdale-council.html [https://perma.cc/67CE-6JHR]

39. *See, e.g.*, Steller, *supra* note 38; Dan Boylan, *House Speaker: 'The Biggest Regret I Have on House Bill 2 is Messaging,'* CHARLOTTE OBSERVER (Sept. 8, 2016), http://www.charlotteobserver.com/news/politics-government/article100681517.html [https://perma.cc/L8FU-JGKX] ("When the Charlotte City Council 'went down a radical path' and passed its bathroom ordinance, it forced the state's Republican leadership to react" (quoting North Carolina House Speaker Tim Moore)).

One explanation is partisanship. Cities and states have long had their political differences.[40] In recent years, however, that divide has widened dramatically. Republican control of state governments is at its highest point in modern American history. Republicans hold the majority in seventy of the nation's ninety-nine legislative chambers, the governorship in thirty-one states, and control both the governor's mansion and the legislature in twenty-four states.[41] At the same time, Democrats have expanded their power in cities, especially those in Republican-controlled states; among the thirty largest cities in America in 2014, all but four were under democratic control.[42] It is no wonder, then, that the city-state divide today so closely mirrors longstanding policy divides between the two parties, including economic issues, immigration, and LGBT rights. Nor is it surprising that national political leaders and organizations have turned their attention to state and local policymaking. President Obama, for example, famously urged cities to pursue progressive policies after his efforts to do so at the federal level were repeatedly rebuffed by Congress.[43] On the other side of the aisle, the American Legislative Exchange Council ("ALEC"), a conservative organization with an outsized role in state politics, has made restrictions on local policymaking a key part of its political agenda.[44]

A second explanation for the increasing city-state conflict is a revived debate over longstanding questions about the role of centralized and decentralized governance in America's federal system.[45] On the one hand, supporters of local policymaking emphasize the pragmatism that guides city leaders, and their ability to tailor policies to the circumstances and needs of

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40. *See* Gerald Gamm & Thad Kousser, *No Strength in Numbers: The Failure of Big-City Bills in American State Legislatures, 1880-2000*, 107 AM. POL. SCI. REV. 663, 664 (2013).

41. Herman Schwartz, *One Party System: What Total Republican Control of a State Really Means*, REUTERS (Aug. 20, 2015), http://blogs.reuters.com/great-debate/2015/08/19/one-party-system-what-total-republican-control-of-a-state-really-means/ [https://perma.cc/5XDX-9TEW]. *See also* Sheryl Gay Stolberg, Michael D. Shear & Alan Blinder, *In Obama Era, G.O.P. Bolsters Grip in the States*, N.Y. TIMES, Nov. 13, 2015, at A1 ("'Republicans have more chambers today than they have ever had in the history of the party,' said Tim Storey, an analyst at the National Conference of State Legislatures. 'So they are in a dominant and historic position of strength in the states.'").

42. *See* Harold Meyerson, *The Revolt of the Cities*, AMERICAN PROSPECT (Apr. 22, 2014), http://prospect.org/article/revolt-cities [https://perma.cc/3CBX-M5N8]. The four cities with Republican mayors in 2014 were San Diego, Indianapolis, Fort Worth, and Oklahoma City. *See id*.

43. *See* Gregory Korte, *To Get Around Congress, Obama Turns to City Halls*, USA TODAY (May 26, 2015), http://www.usatoday.com/story/news/politics/2015/05/25/obama-state-and-local-strategy/27602149/ [https://perma.cc/2H6B-Q3ZX].

44. *See* Mary Bottari, *The ALEC-Backed War on Local Democracy*, PR WATCH (Mar. 31, 2015), http://www.prwatch.org/news/2015/03/12782/alec-backed-war-local-democracy [https://perma.cc/LK3M-A6RS].

45. *See, e.g.*, Michael Libonati, *Home Rule: An Essay on Pluralism*, 64 WASH. L. REV. 51, 51-52 (1989).

their particular community.[46] What constitutes a living wage or the consequences of readily available firearms varies widely from one local community to the next. On the other hand, advocates for state policymaking warn of the dangers of local policy patchworks, the insular perspective of local leaders, and the threat that unchecked local legislation poses to the sovereignty and interest of the state.[47] They argue that uniform laws, enacted with general state welfare in mind, are almost always preferable, especially when it comes to controversial issues that divide the state. Whether the underlying state and local laws actually reflect these values remains an open question. Yet arguments about the respective advantages of centralized and decentralized policymaking are as much a part of the current city-state controversy as the partisan divide that fuels it.

There is a certain irony, of course, that states now find themselves arguing against the same "localist" values that they so effectively used in attacking the expansion of federal authority.[48] Yet it is also true, as many state leaders point out, that the legal standing of the state vis-à-vis the federal government differs in many important ways from the legal standing of the city in relation to the state.[49] Understanding the city-state battles of today, then, requires an understanding of the legal landscape upon which they are fought.

B. The Question of Legal Authority and the Rise of Home Rule

Cities and states are increasingly at odds over substantive policies. Their political conflict, however, also raises a legal question: what is each entity legally entitled to do? Do cities have the authority to set, entirely on their own, economic policies like the minimum wage, or social policies like LGBT rights? Can states unilaterally preempt local policies, or go so far as to prevent cities from regulating altogether? The policies underlying these disputes may be new, but the legal questions that they raise are not.[50] A century earlier, similar tensions sparked a national debate.[51] From that emerged a political movement aimed at restructuring the basic legal

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46. *See, e.g.*, KATZ & BRADLEY, *supra* note 12, at 6.

47. *See, e.g.*, Josh Eidelson, *Arizona Has a Plan to Get Revenge on Its Pro-Worker Cities*, BLOOMBERG (Mar. 15, 2016), https://www.bloomberg.com/news/articles/2016-03-15/help-workers-risk-losing-money-for-cops [https://perma.cc/5HA7-Z6WU].

48. *See* David J. Barron, *A Localist Critique of the New Federalism*, 51 DUKE L. J. 377, 378-79 (2001) (describing and critiquing the use of localist arguments in favor of federalism and state rights).

49. *See, e.g.*, Eidelson, *supra* note 47 (Arizona Senate President Andy Biggs stating that "[c]ities 'think that they're an independent and sovereign entity from the state, which is not true—they're a creature of the state[.]'").

50. *See* Kenneth E. Vanlandingham, *Municipal Home Rule in the United States*, 10 WM. & MARY L. REV. 269, 276 (1968).

51. *See* Lynn A. Baker & Daniel B. Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, 86 DENV. L. REV. 1337, 1338 (2008).

relationship between cities and their state.[52] This movement, and the legal reforms that resulted, is what we now know as Home Rule.[53] Given the parallels, it would seem that the development of Home Rule has a lot to tell us about the current fight over city policymaking today.

Home Rule defines the basic legal standing of local governments and their relationship with the state.[54] To understand its significance, we must examine the legal rules which preceded it. Traditionally, cities and other localities in American law were understood as "creatures" of the state.[55] Unlike individuals or corporations, they were thought to possess no inherent powers other than those given to them through state delegation.[56] The translation of this legal concept into practice is captured by "Dillon's Rule"—named after John Dillon, who penned one of the earliest treatises on municipal corporations.[57] Under Dillon's Rule, a city should not undertake actions, nor enact any regulations, without first securing enabling legislation from the state. If ambiguity exists as to whether the state has given such authorization, Dillon's Rule instructs courts to rule against the locality.[58]

The purpose of Dillon's Rule was to ensure that the state maintained a tight leash on municipal activities. Not long after the rule gained widespread acceptance, however, criticism about the way state governments "interfer[ed] with the affairs of cities for political or sinister purposes" was already beginning to mount.[59] Trust in the state, many urban commentators came to believe, was misplaced. State officials, they argued, lacked knowledge over the unique challenges that cities faced, especially as urbanization and industrialization expanded their social and economic roles.[60] Even worse, critics saw states' frequent meddling in local affairs as

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52. *See* Michael Libonati, *Home Rule: An Essay on Pluralism*, 64 WASH. L. REV. 51, 67-71 (1989).

53. *See generally id.*

54. *Id.* at 51-52.

55. *See* Hunter v. City of Pittsburgh, 207 U.S. 161, 178-79 (1907); DELOS FRANKLIN WILCOX, THE AMERICAN CITY: A PROBLEM IN DEMOCRACY 314 (1904).

56. *See* FRUG, *supra* note 7, at 17-19.

57. *See id.* at 45-48. *See also* JOHN FORREST DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS (1875).

58. *See* FRUG, *supra* note 7, at 25-26, 72. *See also* Jesse J. Richardson Jr., *Dillon's Rule Is From Mars, Home Rule Is From Venus: Local Government Autonomy and the Rules of Statutory Construction*, 41 PUBLIUS: J. FEDERALISM 662, 662-64 (2011) (arguing that Dillon's Rule is, foremost, a rule of judicial construction). For an example of how this rule of construction is applied, see *Oleson v. Town of Hurley*, 691 N.W.2d 324, 329 (S.D. 2004) (holding that an express delegation of power for a town to sell alcohol and operate a municipal bar does not include, within that delegation, the power to sell food).

59. *See* Howard Lee McBain, *Home Rule for Cities*, 5 PROC. ACAD. POL. SCI. N.Y.C. 263, 263-64 (1915).

60. *See, e.g.*, Frank Johnson Goodnow, *Municipal Home Rule: A Study in Administration* 24 (1895).

extravagant, inept, and corrupt.[61] Cities wanted more power to respond to local problems and shape their future. Effectuating this required an alternative structure for organizing the city-state relationship.

Home Rule provided that alternative. At the turn of the twentieth century, a coalition of academics, municipal leaders, and urban reformers rallied around a set of legal proposals to empower cities and free them from the excesses of state control.[62] They urged states to adopt—either through constitutional amendments or legislation—a set of reforms to these ends.[63] Advocates of Home Rule did not seek to overturn the underlying legal premise of Dillon's Rule—they did not, for example, assert that cities possessed inherent powers independent of the state. Yet Home Rule sought to rebalance the city-state relationship by tweaking how power and entitlements were allocated between the two. If Dillon's Rule held that cities drew all of their power from state delegation, Home Rule expanded that delegation to include nearly all the powers that the state could delegate with respect to local affairs.[64] If Dillon's Rule imagined that cities were creations of state law, Home Rule gave cities the power to draft their own charters and determine for themselves the powers they wished to exercise, the responsibilities they wished to assume, and the governmental structure within which they operated.[65] And if Dillon's Rule imagined that states might preempt local legislation, Home Rule imposed limits on the situations and contexts in which they could do so. States were prohibited from enacting "special legislation" targeting a specific locality.[66] In some cases, they were prohibited entirely from acting on "local matters" altogether.[67]

Although changing the legal structure of the city-state relationship was central to the Home Rule movement, even more important were the kinds of cities that these reforms would make possible. To be sure, there was no single vision of what cities might do with Home Rule.[68] While some imagined a dramatic expansion of city government, others desired a return

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61. *See* WILCOX, *supra* note 55 at 314-16.

62. *See* Barron, *supra* note 8, at 2277-88.

63. *See generally* Vanlandingham, *supra* note 50.

64. *See* CHESTER JAMES ANTIEAU, ANTIEAU ON LOCAL GOVERNMENT LAW §§ 3.20-.22 (1997). *See also* Sandalow, *supra* note 3, at 650-52.

65. *See generally* Charles M. Kneier, *City Government in the United States* (1934). *See also* HOWARD LEE MCBAIN, THE LAW AND THE PRACTICE OF MUNICIPAL HOME RULE (1916).

66. *See*, *e.g.*, KRANE ET AL., *supra* note 1, at 10-12. The prohibition against special legislation is not limited to localities; it also applied to a variety of other targeted legislation. *See generally* Justin R. Long, *State Constitutional Prohibitions on Special Laws*, 60 CLEV. ST. L. REV. 719 (2012).

67. *See* Lynn A. Baker & Daniel B. Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, 86 DENV. L. REV. 1337, 1341 (2008).

68. *See* Barron, *supra* note 8, at 2277-88.

to a more limited form.[69] While some saw the city as a vehicle for democratic expression, others thought it should govern through administrative expertise.[70] Where there was agreement was that cities should be more than simply "mere legal functionaries of the state," that they might themselves be "integral institutions in . . . efforts to reform government" more generally.[71] Moreover, given rapid urbanization and the new challenges this raised, proponents of Home Rule believed cities needed the flexibility to experiment with different approaches free from the restraint of state control.[72] From this perspective, Home Rule was not simply a means of reallocating power from the state to the city. Rather, it also serves as a framework through which cities could continuously renegotiate their relationship with the state.[73]

It makes sense, then, that the legal changes were never thought to be sufficient on their own. Equally important in the eyes of Home Rule reformers was the need for "an intelligent, well-directed home-rule *spirit*" in favor of local initiative—one that needed to be "awake[ned] in the state[s] to make [Home Rule] effective."[74] After all, the Home Rule movement never sought to free cities entirely from state control; local autonomy, in the purest sense, was never the goal.[75] Yet reformers believed the legal restraints that Home Rule imposed, along with the political sentiment for local action that it would arouse, would limit state interference to only those instances where it was absolutely necessary and clearly justified.[76] The law of Home Rule set the stage. But it was the political standing of Home Rule, its framers imagined, that would determine its legacy.

Home Rule proved immensely popular.[77] By one count, all but six states had adopted Home Rule in some form.[78] In some states, Home Rule was amended into the state constitution.[79] In others, it was enacted by statute.[80] To be sure, the implementation of Home Rule varies from state to state. Moreover, these variations have become more pronounced as subsequent

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69. *See id.* at 2292-2300, 2309-21.

70. *See id.* at 2300-09.

71. *See id.* at 2321.

72. *See, e.g.*, MCBAIN, *supra* note 65 at 6-10.

73. *See, e.g.*, DANIEL J. ELAZAR, BUILDING CITIES IN AMERICA: URBANIZATION AND SUBURBANIZATION IN A FRONTIER SOCIETY 239 (1987).

74. *See* Delos F. Wilcox et al., *Home Rule for Cities*, 5 PROC. ACAD. POL. SCI. N.Y.C. 68, 341 (1915).

75. *See* Vanlandingham, *supra* note 50, at 280.

76. *See* Wilcox et al., *supra* note 74, at 341.

77. *See* JON C. TEAFORD, THE UNHERALDED TRIUMPH: CITY GOVERNMENT IN AMERICA, 1870-1900 103-31 (1984).

78. *See* KRANE ET AL., *supra* note 1, at 493-95.

79. *See* Vanlandingham, *supra* note 50, at 277.

80. *See id.* at 273-74.

amendments and judicial interpretations further refined its scope.[81] Nevertheless, many of the basic features described above remain across the states that have embraced Home Rule.

C. The Plight of Home Rule

Home Rule expanded the legal power of cities and their political standing with the state. Given its widespread adoption, one might assume that cities today have broad discretion to experiment with local policies and meaningful protections from state interference. Yet as the response to the recent municipal activism illustrates, local policymaking is still largely seen as a novelty. States continue to believe that they are entitled to block or overturn local laws, and micromanage the policy areas that cities and other localities can address.[82] In many ways, the manner in which today's city-state conflicts are playing out do not differ all that much from the Dillon's Rule era that gave rise to Home Rule in the first place.[83] Why has so little changed?

One reason is that Home Rule has proven to be an unreliable source for legal authority. In many states that adopted it, courts have been reluctant to abandon Dillon's Rule, continuing to defer to the will of the state.[84] As a result, judicial interpretations of Home Rule tend to construe narrowly the types of issues that qualify as "local affairs" to be decided by cities, but construe broadly the powers that the states reserve for themselves.[85] State legislatures have also been reluctant to recognize the limited independence that Home Rule granted localities. They quickly found ways to circumvent the prohibition against "special" legislation by drafting "general" laws that in effect only apply to a single or small subset of localities.[86] States have also urged an expansive view of what constitutes a "statewide concern" so as to further limit what would constitute a "local affair" under Home Rule.[87] This is not to say that Home Rule had no effect. Yet the areas where Home Rule tended to be upheld were over issues like land-use that had traditionally

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81. *See* Kenneth Vanlandingham, *Constitutional Municipal Home Rule Since the AMA (NLC) Model*, 17 WM. & MARY L. REV. 1 (1975) (describing a second round of constitutional amendments to Home Rule, and judicial interpretations regarding them, starting in the 1950s).

82. *See supra* notes 26-33 and accompanying text.

83. *Compare supra* notes 26-33 and accompanying text (describing contemporary state preemption of city legislation), *with* MCBAIN, *supra* note 65, at 5-12 (describing legislative "interference" in the Dillon's Rule era).

84. *See, e.g.*, F.J. Macchiarola, *Local Government Home Rule and the Judiciary*, 48 J. URB. L. 335, 337 (1971).

85. *See, e.g.*, Daniel B. Rodriguez, *Localism and Lawmaking*, 32 RUTGERS L.J. 627, 632, 639 (2001).

86. *See, e.g.*, Barkley Clark, *State Control of Local Government in Kansas: Special Legislation and Home Rule*, 20 U. KAN. L. REV. 631, 638 (1972).

87. *See, e.g.*, FRUG, *supra* note 7, at 51.

been subject to local control,[88] and thus where Home Rule was least needed. As a result, the promise that Home Rule would usher in an era of municipal innovation, and offer cities a greater role in determining their future, never came to pass.

But how about the Home Rule "spirit?" Early proponents of Home Rule were optimistic that public support for local self-determination would serve as an enduring safeguard in state politics.[89] One would strain, however, to see much of that spirit today. There is little acknowledgement or awareness of Home Rule in public discourse. Many urban scholars see Home Rule as ineffective and inconsequential.[90] State legislatures have shown little regard for Home Rule as a reason to exercise self-restraint.[91] And other than as a platform for securing policy changes at the state or federal level, few among the general public seem to know why city policymaking, especially on controversial matters, is worthwhile. This is not to say that passion for local control is now entirely absent. But in today's political landscape, such sentiments tend to be associated with the concept of state rights rather than municipal Home Rule.

The plight of Home Rule since its widespread adoption has led a small subset of legal scholars to argue for reforms. The myriad possibilities that Home Rule imagined for cities in the twentieth century are still being explored in the twenty-first. There are some who wish to see the original vision of Home Rule reclaimed, so that cities can address local issues that affect them and their neighbors.[92] There are others who believe that the scope of Home Rule needs to be expanded beyond the limits of "local affairs" so that cities can deal with the host of national and global impacts on their communities.[93] Many, like the original Home Rule proponents, believe that cities and their residents should have a larger voice in determining what any such reforms should entail.[94] Others have argued that what is needed is clearer lines between spheres of state and local authority.[95] Of course, not all legal scholars believe that Home Rule is worth saving; there are many

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88. *See* Briffault, *supra* note 9, at 39-40.

89. *See* Wilcox et al., *supra* note 74, at 336.

90. *See*, *e.g.*, FRUG, *supra* note 7, at 50-51.

91. *See* George D. Vaubel, *Toward Principles of State Restraint Upon the Exercise of Municipal Power in Home Rule*, 22 STETSON L. REV. 643, 652-55 (1993).

92. *See*, *e.g.*, Barron, *Reclaiming Home Rule*, *supra* note 8.

93. *See*, *e.g.*, Stahl, *supra* note 7.

94. *See* GERALD E. FRUG & DAVID J. BARRON, CITY BOUND: HOW STATES STIFLE URBAN INNOVATION 231-32 (2013).

95. *See* Sandalow, *supra* note 3.

who believe that because the underlying premise of Home Rule, local self-determination, was misguided, the doctrine should be reconsidered.[96]

Despite the different views of Home Rule, most local government scholars believe that state courts and legislatures are primarily responsible for why Home Rule never lived up to its promise. Cities, in their telling, are the victims, let down by states' implementation of Home Rule, which deprived them of the powers that they fought so hard to secure. But is this telling accurate? Might cities bear some of the responsibility for Home Rule's decline?

II. CITIES AND THEIR RELATIONSHIP TO HOME RULE

Much has been written on how Home Rule has shaped the role of the American city. But little attention has been paid to the role of cities in shaping the legal and political development of Home Rule. The fate of the American city and, more specifically, its participation in American policymaking, will likely depend on how and whether Home Rule is redefined for the twenty-first century. Yet the role of Home Rule today, and its prospects for expansion or reform ultimately rests in the hands of the cities themselves. In short, cities are not only the beneficiaries of Home Rule. They are also, its stewards.

This Part outlines why cities are so important to the legal and political development of Home Rule. It also assesses whether and how cities have carried out this responsibility. Given the recent surge of municipal activity, it may be too early to conclude that cities have abandoned Home Rule, as the title of this essay suggests. Yet there is also little to suggest that cities are committed to Home Rule's long-term development. On the legal front, cities are often reluctant to rely on claims of Home Rule, either as a justification for local legislation or as a defense against state efforts to overturn them. On the political front, one would strain to hear Home Rule being raised as an argument for local authority or state restraint. Indeed, in many cases, cities have been responsible for undermining the very powers and protections that they once fought to secure.

It is hard to fault cities for taking this stance. After all, as argued below, Home Rule has proven time and time again to be an unreliable source of power and protection. It has developed over time an unfavorable reputation, especially with respect to cities, which undermines its political appeal. Moreover, cities have come to rely on alternative avenues to power—either by appealing to the state directly, or circumventing states in favor of support

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96. *See* Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346 (1990).

from the federal government. For most cities today, Home Rule is simply too costly and ineffective for supporting the actions that they wish to pursue.

Yet the reluctance on the part of cities to take Home Rule seriously might be precisely why they so often find it ineffectual. The failure on the part of cities to formulate a coherent legal theory of Home Rule, and their inability to advance a compelling vision of their role in American politics, might be why cities find their policymaking efforts so constrained. Eschewing Home Rule may prove at times to be an effective short-term strategy. But forgoing the use of Home Rule only makes it harder to justify why cities should be making major policy decisions in the first place.

A. Stewards of Home Rule

The future of the American city rests on Home Rule. Yet the future of Home Rule also lies in the hands of the American city. The reason for this relationship is rooted in the legal structure of Home Rule. It is also a basic function of how rights and authority are defined through law and the political process.

One reason cities are important to the legal and political development of Home Rule lies in how legal rights are realized in American law. Legal rights are not self-actualizing: they exist only when claimed, they wither if not exercised, and they risk obsolescence as times change. Civil rights legislation was on the books for nearly a century before concerted litigation efforts in the 1960s and 1970s finally transformed it into a meaningful bulwark against racial discrimination.[97] States were thought to have faded into insignificance in the twentieth century until they collectively fought to resurrect constitutional federalism on the grounds of "state rights."[98] Federal laws against sex discrimination were narrowly construed until advocates successfully expanded their scope to cover sexual harassment,[99] the handling of sexual assault allegations, and protections for the LGBT community.[100] In each of these cases, the "right" in question had long been secured. Yet the standing and scope of these rights were only realized by repeated and often coordinated efforts on the part of those the rights were meant to protect.

At the same time, the importance of cities is also part of the legal structure of Home Rule itself. State courts may be responsible for defining the limits of Home Rule authority. It is up to the cities, however, to act on the basis of

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97. *See, e.g.*, RISA L. GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS 238-70 (2010).

98. *See, e.g.*, JON C. TEAFORD, THE RISE OF THE STATES: EVOLUTION OF AMERICAN STATE GOVERNMENT 195-224 (2002).

99. *See* Carrie N. Baker, *Sexual Harassment: Law For Women, by Women*, *in* FEMINIST LEGAL HISTORY: ESSAYS ON WOMEN AND LAW 223 (Tracey Jean Boisseau & Tracey A. Thomas eds., 2011).

100. *See, e.g.*, SCOTT BARCLAY, MARY BERNSTEIN & ANNA-MARIA MARSHALL, QUEER MOBILIZATIONS: LGBT ACTIVISTS CONFRONT THE LAW 201-02 (2009).

that authority, claim it in defending the legality of their actions, and advocate on behalf of a particular interpretation.[101] Home Rule imposes limits on the ways that state officials can meddle in local affairs, and is supposed to reflect a state's political commitment to local self-determination. Yet local leaders are responsible for upholding the legal and political protections of Home Rule, by either challenging special legislation in court or advocating in favor of local control in the state house. Home Rule sought to empower cities. It also offered them some degree of protection from the state. But more so than the local government structure that it replaced, Home Rule imposes the responsibility for defending and defining the scope of the right on the cities themselves.

The special responsibility of cities with respect to Home Rule involves more than their efforts to adopt a particular local policy or resist a specific state mandate. Like the development of legal rights more generally, this responsibility extends to the long-term development of Home Rule as well. This is because Home Rule establishes a uniform standard through which municipal powers are defined. Under Dillon's Rule, cities received specific delegations of power from the state, and because those delegations are often given solely to a particular city, state courts interpreted these delegations of power on a case-by-case basis. Home Rule, however, purported to be a broad delegation of power to either all or broad categories of localities within a state. As a result, the specific manner in which Home Rule is invoked, or whether it is invoked at all, sets a precedent for its future use. This system rewards strategic use of Home Rule in ways that establish a coherent path for its development. It also benefits from collective and coordinated action among Home Rule localities, as the success of one translates into gains for others. Similar considerations led policy advocates of issues like same-sex marriage and racial desegregation to develop coordinated political and litigation strategies.[102]

Cities are also critical to reforming or reimaging the current legal structure of Home Rule. Cities played a central role in the initial adoption of Home Rule. Their grievances established the groundwork for the political movement that emerged at the turn of the twentieth century.[103] Their aspirations shaped the basic structure of the Home Rule Amendments that many states adopted.[104] More importantly, they mobilized popular support

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101. *See* FRUG & BARRON, *supra* note 94.

102. *See* Stephanie Wang, *Do Local Laws Really Protect Rights of LGBT Hoosiers?*, INDY STAR (Apr. 4, 2004), http://www.indystar.com/story/news/politics/2015/04/04/local-laws-really-protect-rights-lgbt-hoosiers/25274065/ [https://perma.cc/LJF6-MZWD]; *see also infra* note 113 (summarizing state laws).

103. *See* FREDERIC C. HOWE, THE CITY, THE HOPE OF DEMOCRACY 159-60 (1906).

104. *See, e.g.*, DENNIS R. JUDD & TODD SWANSTROM, CITY POLITICS 93-94 (9th ed. 2015) (describing support for the Home Rule movement by the National Municipal League).

for Home Rule by articulating a vision of what cities might do and what they might become.[105] This is why one of the central components of Home Rule is the power for localities to design, amend, and frame their own municipal charters without state interference. These are also the reasons why any successful political movement to modify the basic Home Rule structure will likely require cities to play a prominent part, if not take the lead altogether. Unless cities are willing and able to articulate why reforms to Home Rule are necessary, and what vision of the city would be possible as a result, it is unlikely that Home Rule, or any effort to alter it, would make its way into a state's political agenda.

In short, cities are not only the intended beneficiaries of Home Rule. The very structure of Home Rule also imposes upon them the responsibility of safeguarding its role, guiding its jurisprudential development, and elevating its political standing. The powers and protections of Home Rule are not self-actualizing. They are only as important as the cities believe them to be.

B. Shunning Home Rule

Cities bear much of the responsibility for shaping the legal and political development of Home Rule. This Partassesses how cities have shouldered this responsibility. To be sure, some cities are relying on Home Rule to enact local legislation and contest state efforts to constrain them.[106] In this vein, the most recent wave of municipal activism shows some promise. However, most cities remain uncommitted to taking an active role in shaping Home Rule's legal and political development. And even if more cities are becoming interested in what Home Rule can offer, its prospects are hampered by decades of municipal neglect. But inaction is only part of the reason why Home Rule has withered in the hands of cities. It is also a consequence of how local leaders have come to understand and perceive Home Rule in their day-to-day activities.

1. Cities and the Law of Home Rule

At the most basic level, Home Rule can be thought of as a bundle of rights. The right of cities to manage local affairs. The right of cities to determine the role and structure of municipal governance. The right of cities, as Delos Wilcox explained, "to *do things*."[107]

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105. *See, e.g.*, DANIEL O. PROSTERMAN, DEFINING DEMOCRACY: ELECTORAL REFORM AND THE STRUGGLE FOR POWER IN NEW YORK CITY (2013) (describing New York City's push for Home Rule as a state constitutional amendment).

106. *See, e.g.*, Kentucky Rest. Ass'n v. Louisville/Jefferson Cty. Metro Gov't, No. 2015-SC-000371-TG, 2016 WL 6125883 (Ky. Oct. 20, 2016) (a local, albeit unsuccessful, defense of municipal minimum wage ordinance on the ground of Home Rule).

107. *See* Wilcox et al., *supra* note 74, at 330 (1915) (emphasis in original).

But if Home Rule can be thought of as a bundle of rights, then its significance is tied to the manner and extent to which cities claim them. It is only through its exercise that the boundaries of Home Rule can be tested and defined. And it is only by litigating Home Rule that cities can shape its interpretation.

Cities, however, are often reluctant to draw upon their Home Rule authority. There are exceptions, of course, and these tend to draw the most attention. But for every city that boldly exercises its Home Rule authority, there are many more less visible cases in which local leaders chose to refrain. While Seattle successfully passed a minimum wage ordinance without state authorization,[108] cities like Cambridge and Boston tabled similar efforts because of concerns that it fell outside of their Home Rule authority.[109] Instead, they decided to lobby the state for authorization.[110] Similarly, Bloomington and Evansville joined a number of Indiana localities in expanding anti-discrimination protections to include members of the LGBT community.[111] But concerns about their Home Rule authority also led them to limit enforcement to cases where the accused party *voluntarily* agrees to being investigated, essentially rendering the protections useless.[112] Would these cities have prevailed if they had passed the legislation that they wanted, and relied entirely on their Home Rule authority to do so? Hard to say. But by refraining, a judicial interpretation was never rendered, and the true scope of their Home Rule authority was never defined.

If cities are reluctant to invoke the powers granted to them by Home Rule, they are even more hesitant when it comes to its protections. Admittedly, courts have historically deferred to state efforts to block or mandate local policies, even though one of the primary goals of Home Rule was to limit state interference in local affairs. Yet cities have also been averse to claiming these protections. As such, the legal protections that Home Rule offers are rarely considered. Take, for example, the fight over local involvement in immigration enforcement. States passed a number of state laws penalizing or repealing local "sanctuary" policies that limit the ability of local law enforcement to participate in federal immigration enforcement.[113] Many of

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108. *See generally* Seattle, WASH. MUN. CODE § 14.19 (2015).

109. *See* Marc Levy, *Task Force Looking at Local Minimum Wage Ordered to Report Back By End of December*, CAMBRIDGE DAY (June 14, 2016), http://www.cambridgeday.com/2016/06/14/task-force-looking-at-local-minimum-wage-ordered-to-report-back-by-end-of-december/ [https://perma.cc/B5HQ-WAN3].

110. *See id.*

111. *See* Wang, *supra* note 102.

112. *See id*.

113. *See, e.g.*, ARIZ. REV. STAT. ANN. § 11-1051(F)-(H) (2010) (creating a private cause of action to sue for civil penalties any "policy that limits or restricts the enforcement of federal immigration laws to less than the full extent permitted by federal law"). *See also, e.g.*, MO.

these state laws even mandate that law enforcement officials take particular actions irrespective of countervailing local policies.[114] Many cities protested; some even joined federal efforts to strike these laws down as unconstitutional.[115] Yet despite the fact that Home Rule was enacted in part to prevent states from taking over municipal police departments—a popular move in the era of Dillon's Rule—no city has challenged these laws on this particular ground. Would cities prevail if they did so? Again, hard to say. Yet what is telling is that such a challenge was never seriously considered, much less made.[116]

Cities are also reluctant to revisit past interpretations of Home Rule once they have been handed down. Of course, precedent matters a lot in American law. But legal precedents can also be reversed, and policy advocates—on such issues as gun rights, abortion, and LGBT protections—frequently develop legal and political strategies with the aim of overturning unfavorable decisions.[117] When it comes to Home Rule, however, cities seldom pursue such a strategy. This is the case even when the precedent is particularly weak. Take, for example, *Wholesale Laundry Board of Trade, Inc. v. City of New York*, in which New York's high court struck down the city's effort to enact one of the country's first municipal minimum wage ordinance in 1962.[118] Despite the significance of its holding, the opinion itself was simply

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REV. STAT. § 67.307(b)(2) (2009) ("Any municipality that enacts or adopts a sanctuary policy shall be ineligible for any moneys provided through grants administered by any state agency or department until the sanctuary policy is repealed or is no longer in effect."); GA. CODE ANN. § 36-80-23(c) (2009) ("Any local governing body that acts in violation of this Code section shall be subject to the withholding of state funding or state administered federal funding other than funds to provide services specified in subsection (d) of Code section 50-36-1.").

114. *See* ARIZ. REV. STAT. ANN. § 11-1051(B) (2010).

115. *See* Brief for the Arizona Cities of Flagstaff, Tolleson, San Luis, and Somerton as Amici Curiae Supporting Appellee, United States v. Arizona, 641 F.3d 339 (9th Cir. 2011), (No. 10-16645), 2011 WL 5162523. *See also* Brief for the City of Tucson as Amici Curiae Supporting Appellee, United States v. Arizona, 641 F.3d 339 (9th Cir. 2011), (No. 10-16645), 2010 WL 5162524.

116. Indeed, the closest argument that has been made was one by New York City against a federal anti-sanctuary policy, in which they asserted that the federal government was violating federalism principles by unconstitutionally "commandeering" the New York Police Department, which it claimed was a central operation of the state.

117. *See, e.g.*, MICHAEL WALDMAN, THE SECOND AMENDMENT: A BIOGRAPHY (2014) (describing the legal movement to overturn existing precedent on the second amendment right to bear arms, and its success in establishing it as an "individual right"). *See also* JAMES RISEN & JUDY L. THOMAS, WRATH OF ANGELS: THE AMERICAN ABORTION WAR (1998) (describing legal and political efforts to undermine abortion rights after *Roe v. Wade*). *See also* CRAIG A. RIMMERMAN, FROM IDENTITY TO POLITICS: THE LESBIAN AND GAY MOVEMENTS IN THE UNITED STATES 45-81 (2002) (describing the legal strategies adopted by the LGBT movement to overturn precedent denying civil rights protections for the LGBT community).

118. Wholesale Laundry Bd. of Trade, Inc. v. City of New York, 234 N.Y.S.2d 862 (App. Div. 1962).

a one-sentence affirmation of the lower court followed by two written dissents.[119] The underlying rationale of the lower court's opinion—that the city lacked the Home Rule authority to enact the prevailing wage law because it was in conflict with the state's minimum wage, which, in the court's opinion, operated as a floor and a ceiling—has since been called into question in a number of subsequent decisions.[120] Moreover, cities in other states have prevailed on similar grounds since *Wholesale Laundry* was decided.[121] Yet, despite some urging to do so,[122] New York City has never seriously challenged this decision, even as its desire to address wages in the city remains strong.

Perhaps this critique is too harsh. After all, as noted earlier, Home Rule has not fared well under judicial scrutiny.[123] And even when a plausible case can be made for challenging an unfavorable decision, there are often good reasons why a city may avoid doing so. Legal challenges can hold up implementation, which may be problematic when what the city is trying to do is time-sensitive. Litigation is also costly, in terms of both financial and political capital. Even if a city is assured that it has the legal authority to enact a local regulation, it may fear that litigation would draw unwanted attention from the state. States have the power to preempt local legislation. And once the attention of a state is drawn to a local policy that it disagrees with, the state can go beyond preemption and decide to strip localities of the power to regulate on the subject of that law entirely.[124]

Even more important than the "push" factors that may have driven cities away from Home Rule, however, are the "pull" factors drawing them toward alternative means of achieving local objectives. Since state legislatures and courts never truly renounced Dillon's Rule, cities remain equally attracted to the certainty that the rule's process provides. Many cities still see securing explicit state authorization, or convincing the state to act directly, as the most

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119. *See id.*

120. *See, e.g.*, People v. Judiz, 344 N.E.2d 399, 402 (N.Y. 1976) ("while State law evinces an intent to cover, quite broadly, most of the possible categories . . . [,] the city ordinance is aimed at the prevention of a particular type of abuse. One does not depend on the other, nor are they inconsistent with one another."); People v. Cook, 312 N.E.2d 452, 457 (N.Y. 1974) (noting that unless preemption is limited to situations where the intention is clearly to preclude the enactment of varying local laws, "the power of local governments to regulate would be illusory.").

121. *See, e.g.*, New Mexicans for Free Enter. v. City of Santa Fe, 126 P.3d 1149 (N.M. Ct. App. 2005).

122. *See* Michael Cabasso, *Raising New York City's Minimum Wage: Why Is This a State Issue?*, JUST FAMILIES (May 2, 2014), http://www.justfamilies.org/raising-new-york-citys-minimum-wage-why-is-this-a-state-issue/ [https://perma.cc/F9ND-JERG].

123. *See supra* notes 84-88 and accompanying text.

124. *See supra* note 36 and accompanying text.

dependable way of implementing policy.[125] And if the state is not forthcoming, or passes legislation that frustrates the city's interests, cities have learned that the best way to circumvent the state is to appeal to the federal government, rather than asserting their local authority.[126] In this respect, the basic mechanism imagined by Dillon's Rule continues to survive, even in states that have replaced it with Home Rule. Greater federal involvement in local affairs opens up a new avenue for cities to achieve their goals.

But there is evidence that cities do not always eschew Home Rule as a calculated choice. Rather, cities sometimes do so because local leaders fail to understand what Home Rule enables them to do. Many cities have internalized the limits of Home Rule to such an extent that they no longer see it as a basis for legal authority. In some instances, they have come to perceive Home Rule as no more than a means of requesting state authorization. Consider, for example, a report on Home Rule in Massachusetts based on interviews of municipal officials regarding their use and perception of Home Rule.[127] While many local leaders professed pride in the state's reputation as a strong Home Rule state, nearly all of them struggled to name an instance when they relied on Home Rule to act without specific state authorization.[128] Even more troubling were the many local officials who, when asked generally about Home Rule, described it in terms of the "Home Rule Petition"—a Dillon's Rule-like process through which localities can request special legislation from the state.[129]

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125. *See, e.g.*, FRUG & BARRON, CITY BOUND: HOW STATES STIFLE URBAN INNOVATION, *supra* note 94 at 67; Levy, *supra* note 109.

126. *See, e.g.*, Brief for Arizona Cities of Flagstaff, Tolleson, San Luis, and Somerton as Amici Curiae Supporting Appellee, United States v. Arizona, 641 F.3d 339 (9th Cir. 2011), (No. 10-16645), 2011 WL 5162523. *See also* Brief for the City of Tucson as Amici Curiae Supporting Appellee, United States v. Arizona, 641 F.3d 339 (9th Cir. 2011), (No. 10-16645), 2010 WL 5162524 (local officials in Arizona supporting federal efforts to strike down state immigration law on federal constitutional grounds); Thomas Gryta, *FCC Votes to Allow Municipal Broadband, Overruling Two States' Laws*, WALL ST. J. (Feb. 26, 2015), http://www.wsj.com/articles/fcc-votes-to-allow-municipal-broadband-overruling-two-states-laws-1424969156 [https://perma.cc/X6CN-36R8] (describing local efforts to convince the FCC to promulgate regulations preempting state laws limiting municipal broadband operations).

127. DAVID J. BARRON, GERALD E. FRUG & RICK T. SU, DISPELLING THE MYTH OF HOME RULE 23 (2004).

128. *See id.* at 9, 18-20.

129. *See id.* at 14. This finding was anecdotally echoed by a student who had worked for many years in the Massachusetts state legislature. She admitted to me that she was puzzled by the way that Home Rule was being described in class because, in her experience, she had never heard it referred to as anything but a process by which localities can petition the state for specific powers to act.

Cities' failure to take advantage of Home Rule stifles their legal development. Even when cities invoke Home Rule to justify local action or defend against state interference, they often lack a clear view of how to guide judicial interpretations of Home Rule in the long run. Cities may bristle at the ways states laws foreclose local action, or the narrow readings of Home Rule that state courts adopt, but they often accept these limitations without giving any thought to how they might be reversed. The problem is that cities are not developing a clear idea of how they want Home Rule to operate. Nor are cities advancing any substantive visions of what the role of cities should be in a Home Rule structure.

2. Cities and the Politics of Home Rule

Discussions of Home Rule today tend to focus on the legal powers and protections that it offers. Yet early proponents of Home Rule never believed that the legal adoption of Home Rule was enough to ensure those powers and protections. Equally important, in their view, was the need to instill a commitment to Home Rule as a "state of mind"[130]—one that would operate as a political safeguard in state politics. The idea was that even when states are not legally barred from foreclosing local action, they might nevertheless refrain in the face of political pressure.[131]

But if Home Rule depends on its "accept[ance] in spirit as well as in letter,"[132] cities are poor evangelists for its cause. They seldom raise Home Rule in their political appeals. They rarely make the case that local self-determination is meaningful in defending local legislation, or that local policy decisions should be entitled to deference. At most, local leaders champion the substance of their policies that they are pursuing, and why they are superior to the state's position. What is missing is any effort to assert the values and principles of Home Rule itself.

Consider, for example, how cities have reacted, in recent years, to state efforts to stifle local policymaking. When local ordinances are blocked by state law, local leaders often speak out publicly against the state. But in most cases, their focus is on the substantive impact of the state's actions, rather than how it interferes with the substantive values of Home Rule. Thus, when the mayor of Charlotte condemned the state for enacting preemptive legislation against the city's LGBT protections, she zeroed in on the discriminatory nature of the state law and the consequences it will have on

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130. THOMAS HARRISON REED, MUNICIPAL GOVERNMENT IN THE UNITED STATES 133 (Rev. ed. 1934).

131. *See* Wilcox et al., *supra* note 74, at 332.

132. *See id*. at 341.

perceptions of the city and the state.[133] She did not call any attention, however, to the broad powers that the state had already delegated to its cities, nor to the commitment to local control that the state's delegation represented. Similarly, when Arizona mandated local participation in immigration enforcement, many local leaders raised concerns that the state mandate would undermine community policing efforts in immigrant neighborhoods and run afoul of the federal government's exclusive jurisdiction over immigration.[134] Aside from arguments that the state law amounted to an "unfunded mandate,"[135] however, few local leaders criticized the law as an infringement on the spirit, if not the law, of Home Rule in Arizona.

Even when states endorse local action on controversial issues, local leaders seem just as disinterested in bolstering the policymaking role of cities independent of the state. Indeed, in New York, the state affirmed local efforts to raise the minimum wage and provide universal early childhood education, after Governor Cuomo made minimum wage and universal childhood education a priority in the 2014 legislative session. However, many saw this measure as an effort to coopt New York Mayor de Blasio's agenda and to prevent the city from acting on its own.[136] Mayor de Blasio criticized the terms of the state's plan and argued that his proposal, upon which he had campaigned, would be better for the city.[137] But few, not even the Mayor, focused on New York's status as a Home Rule state, and whether principles of Home Rule weighed in favor of the city taking the lead.

The problem is not just that cities are not raising Home Rule in their political appeals. It is also that they are not advancing a substantive vision of the city and why they should have control over their affairs. Recall that one of the main goals of Home Rule was to create the legal space in which cities can decide their own organizational structure and what role city governments will play. But cities today do not seem particularly interested in making a compelling case for why cities matter. When they pursue a

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133. *See* Katie Zezima, *Charlotte Set Off the Fight Over the 'Bathroom Law.' Now It's Dealing With the Fallout*, WASH. POST (May 10, 2016), http://www.washingtonpost.com/news/post-nation/wp/2016/05/10/charlotte-grapples-with-fallout-over-north-carolina-bathroom-law/ [https://perma.cc/Z6CA-DU3G].

134. *See, e.g.*, Phil Gordon, *Not in My State: Anti-Immigration Law Doesn't Reflect the Beliefs of Arizona's People*, WASH. POST (Apr. 24, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/04/23/AR2010042304469.html [https://perma.cc/NWS9-PSQD].

135. *See* Garin Groff, *Cities Uncertain What Impact S.B. 1070 Rules Will Have on Their Wallets, Image*, E. VALLEY TRIB., July 1, 2010.

136. *See* Michael M. Grynbaum & Thomas Kaplan, *Pre-K Plan Puts Cuomo at Odds With de Blasio on Funding*, N.Y. TIMES (Jan. 22, 2014), http://www.nytimes.com/2014/01/22/nyregion/cuomo-prekindergarten-proposal.html [https://perma.cc/4429-DQH4].

137. *See* Thomas Kaplan & Javier C. Hernández, *De Blasio, on Cuomo's Turf, Stands By Pre-K Strategy*, N.Y. TIMES (Jan. 27, 2014), http://www.nytimes.com/2014/01/28/nyregion/in-albany-de-blasio-seeks-approval-for-pre-k-tax-plan.html [https://perma.cc/RM7P-VBB6].

particular policy, they are often active in making the case for why that policy is good for their community. Sometimes, they go so far as to assert that the need for city action is because of inaction at the state and federal level.[138] But what is missing is any substantive vision of what kind of city is possible if they could make their own policies.

Cities are not necessarily unjustified in eschewing Home Rule in their political appeals, because such appeals may be a political liability. Since the idea of "local control" was used to resist the expansion of Civil Rights in the 1960s, it has become associated with parochialism, small-mindedness, and outright bigotry.[139] The Supreme Court further reinforced this association in the 1970s when it invoked "local autonomy" in striking down inter-district school desegregation and to justify inter-district school funding disparities.[140] If early proponents of Home Rule believed that public support could be generated by drawing upon the appeal of local governance, events in the twentieth century greatly undermined perceptions of the local among the American public.

On top of the negative political connotations of "local control" and "local autonomy," Home Rule is also frequently portrayed as anti-city.[141] Urban commentators place much of the blame for the troubles faced by cities—white flight, urban decline, and fiscal distress—on the dominance of Home Rule.[142] Sprawl, residential exclusion, and metropolitan fragmentation, they argue, are testaments to the undue potency of Home Rule, especially among suburban communities and over traditional local powers like land-use.[143] From this perspective, Home Rule is not associated with city empowerment. If anything, Home Rule highlights the horizontal competition between cities and suburbs, and the impossibility of developing a collective vision of Home Rule that will satisfy them all.

Given the diminished political standing of Home Rule, and the draw of alternative avenues to power, it is not surprising that cities are reluctant to

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138. *See, e.g.*, Shaila Dewan, *States Are Blocking Local Regulations, Often at Industry's Behest*, N.Y. TIMES (Feb. 24, 2015), http://www.nytimes.com/2015/02/24/us/govern-yourselves-state-lawmakers-tell-cities-but-not-too-much.html [https://perma.cc/Q3S5-GRHA] ("Some local governments say they pass their own regulations only when the state has failed to act, or when they have a unique situation.").

139. JERALD E. PODAIR, THE STRIKE THAT CHANGED NEW YORK: BLACKS, WHITES, AND THE OCEAN HILL-BROWNSVILLE CRISIS 44 (2008); GIRARDEAU A. SPANN, RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA 137 (1993).

140. *See* Joan C. Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law*, WIS. L. REV. 83, 118 (1986).

141. *See* Barron, *supra* note 8, at 2329-34 (describing the rise of these arguments).

142. *Id.* at 2266-76 (describing this view).

143. *See, e.g.*, Cashin, *supra* note 9, at 1988; Donald F. Norris, *Prospects for Regional Governance Under the New Regionalism: Economic Imperatives Versus Political Impediments*, 23 J. URB. AFF. 557, 558, 562-63 (2001).

invoke it in their political appeals. In defending a particular local policy, especially from state interference, cities may be right to focus their arguments on the substantive merits rather than the value of local self-determination. Yet this calculus is also precisely why the Home Rule spirit that fueled the original movement has withered. It is also why arguments in favor of one local policy rarely carry over to attempts by cities to address other issues at the local level. If cities are increasingly at the political mercy of their states, it is in large part because they have failed to articulate why that should not be the case.

3. Undermining Home Rule

So far, this Article has surveyed examples where cities have refrained from invoking Home Rule in law and politics. But neglect is only one way in which cities are abandoning Home Rule. In many cases, cities also play an active role in undermining the powers and protections that Home Rule provides. To be sure, these cases often involve situations where arguing against Home Rule leads to a desired outcome, at least in the short term. Moreover, they tend to revolve around bouts of intra-city conflict, in which different factions in a city are fighting for control. Despite these purposes, this strategy establishes longstanding precedents that undermine Home Rule and its appeal as a basis for local authority.

There is perhaps no city in which local leaders directly challenge their own Home Rule authority as frequently as New York City. In recent years, a number of sensational fights between the mayor and the city council have resulted in litigation. The mayor has sued the city council, alleging that a law enacted over his veto is preempted by state or federal law.[144] The city council has sued the mayor, contesting his refusal to implement a law that they enacted.[145] Many of these lawsuits turn on interpretations of the city's charter, and the manner in which it allocates powers and responsibilities between the mayor and the council.[146] But they also frequently raise issues concerning Home Rule, especially when the state or state laws are invoked as support for a particular side.

Consider, for example, the battle over the prevailing wage law in *Mayor of the City of New York v. Council of City of New York*.[147] In 2012, the city council enacted a law requiring certain employers tied to subsidies or leases with the city to pay their workers a "prevailing wage."[148] This law was one of the city's many efforts to work around the prohibition of local municipal

144. *See, e.g.*, Mayor of N.Y. v. Council of N.Y., 780 N.Y.S.2d 266 (Gen. Term 2004).
145. *See, e.g.*, Council of N.Y. v. Bloomberg, 846 N.E.2d 433, 436 (N.Y. 2006).
146. *See, e.g.*, Mayor of N.Y. v. Council of N.Y., 874 N.E.2d 706 (N.Y. 2007).
147. No. 451369/12, 2013 WL 3989036 (N.Y. Sup. Ct. Aug. 2, 2013).
148. *See id.* at *1. The law at issue is Local Law No. 27 (1940) of City of New York.

wage ordinances imposed by *Wholesale Laundry Board of Trade, Inc. v. City of New York*.[149] However, the city enacted the law over the veto of Mayor Bloomberg, who feared that it would deter businesses from entering the city.[150] The mayor challenged the law in state court, alleging that it was preempted by the state minimum wage law.[151] In response, the city council argued that the law only applied to employers who chose to conduct business with the city, and was thus more akin to the contractual wage stipulations upheld in *McMillen v. Browne*.[152] In the end, the mayor prevailed.[153] But in finding for the mayor, the court adopted an expansive reading of *Wholesale Laundry*—one that applied not only to regulatory efforts by the city to raise the minimum wage, but also conditions imposed on businesses with which it had dealings.[154] As a result, the decision not only overturned the local law before the court, but also limited the city's ability to address wages going forward. All this, of course, in order to settle an intra-city dispute.[155]

An even more telling example of how local leaders have undermined Home Rule is the case of *Greater New York Taxi Association v. State of New York*.[156] At issue was a state law authorizing the mayor of New York to issue 18,000 livery cab licenses and sell an additional 2000 taxi medallions.[157] The state law thus only affected New York City, and transferred the city council's traditional powers to the mayor. The legal question was whether the state law was a "special legislation," requiring the city council's approval through a "Home Rule Message."[158] Again, the lawsuit involved a fight between the mayor and the city council—the state law was enacted at the behest of Mayor Bloomberg, who sought state authorization when the city

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149. *See id.* at *5 (describing the city council's contention that law fell outside of the ambit of *Wholesale Laundry*).

150. *See id.* at *2, *5; Michael M. Grynbaum, *Bloomberg Sues City Council to Overturn Two Laws Raising Wages*, N.Y. TIMES, July 28, 2012, at A20.

151. *See id.* at *4.

152. *See* Memorandum of Defendant at 38, City of N.Y. v. Council of N.Y., No. 451369/12, 2013 WL 3989036 (N.Y. Sup. Ct. Aug. 2, 2013) (citing McMillen v. Browne, 200 N.E.2d 546 (N.Y. 1964)).

153. *See id.*

154. *See id.*

155. Interestingly, this precedent ended up having a short shelf life. When Bill de Blasio succeeded Michael Bloomberg as the mayor of New York, his administration joined forces with the city council to convince the state court to vacate this decision. *See* Ben James, *NYC, City Council Lay Down Swords in Suit Over Wage Law*, LAW360 (Aug. 11, 2014), http://www.law360.com/articles/565734/nyc-city-council-lay-down-swords-in-suit-over-wage-law [https://perma.cc/ZT27-3J2V].

156. 993 N.E.2d 393 (N.Y. 2013).

157. *See id.* at 397-99.

158. *See id.* at 400-01.

council rebuffed his efforts to enact it at the local level.[159] But what started as an intra-city fight soon metastasized into a legal precedent with far-reaching consequences for cities throughout New York.[160] Despite finding that the law in question was "special legislation," the court recognized an exception that made it easier for the state to successfully circumvent the protections of Home Rule and legislate on matters that affect only one city.[161] It did so by holding that "Home Rule Messages" are unnecessary if the state can establish that a "substantial state interest" was involved, and that this interest can be established merely on the basis of the "stated purpose and legislative history of the act in question."[162] The amicus brief from New York City's corporation counsel urging this interpretation probably played one role in the court's decision to adopt it.[163] But it is ironic—or telling—that the city played such a crucial role in establishing a precedent undermining Home Rule protections for all cities going forward.

C. Reconsidering Home Rule

The legal and political standing of Home Rule has waned. Many of the reasons for this are tied to the behavior and perceptions of the cities themselves. The next Part, suggests ways in which cities might retake the reins. But before that, it is necessary to address some concerns that the foregoing analysis may have raised.

First, even if we are concerned about municipal power, one might wonder whether Home Rule is necessary at all. Cities are reluctant to rely on Home Rule as a basis for their legal authority. Yet that does not mean that cities are entirely powerless when it comes to advancing local objectives. States often delegate the legal powers that cities request.[164] The federal government frequently supplies financial resources and manpower when state support is lacking.[165] And many local concerns end up being addressed by state or federal law. Does it matter if cities cannot act on their own if they can instead influence state or federal policies?

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159. *See* Roberta A. Kaplan, *New York City Taxis and the New York State Legislature: What Is Left of the State Constitution's Home Rule Clause After the Court of Appeals Decision in the Hail Act Case*, 77 ALB. L. REV. 113, 115-16 (2014).

160. *See id.* at 124.

161. *Greater N.Y. Taxi Ass'n*, 993 N.E.2d at 400.

162. *Id.*

163. *See* Kaplan, *supra* note 159, at 120.

164. *See generally* Nancy Burns & Gerald Gamm, *Creatures of the State: State Politics and Local Government, 1871-1921*, 33 URB. AFF. REV. 59, 64 (1997) (arguing that state governments were historically accommodating with respect to local requests for state delegation under Dillon's Rule).

165. *See, e.g.*, TED ROBERT GURR & DESMOND KING, THE STATE AND THE CITY (1987) (describing growth of federal support for cities when state support declined).

Cities are not powerless in contemporary law and politics. But it is important to recognize that the soft influence wielded by cities is, at best, an imperfect substitute for the legal entitlements and political power that Home Rule promised. There are many practical reasons why cities might need the power to take initiative on issues that have failed to attract state or national attention, or the flexibility to experiment with different policies at a local scale before they are implemented more broadly. Even more important is the sense of agency that Home Rule provides to cities and their residents. Seeking permission is different from the power to act. Selecting representatives to lobby is different from electing them to make policy. There is growing concern among Americans today that the government is increasingly disconnected from the people it represents. Yet if the government that is closest to the people lacks the power to respond to and act on their demands, it is difficult to see how that sentiment can be reversed.

While some wonder if Home Rule is necessary, others might ask whether Home Rule is enough to advance local policymaking. Even if one is sympathetic to the vision set forth by Home Rule's framers, there is still the question of whether the legal and political framework that they settled on actually makes that vision possible. As history has shown, Home Rule has been particularly vulnerable to narrow readings by state courts, and creative circumvention by state legislatures. Despite the many arguments raised on behalf of Home Rule in the past, its stature has diminished in the heart and imagination of the general public. Perhaps a new municipal revolution is necessary—a different vision of local power for changing times.

For any reforms to be effective, cities will have to be actively involved. Without cities defending the legal scope of Home Rule and raising its political profile, it is difficult to imagine public support for a more meaningful expansion. Nor can a better vision of municipal power be designed without understanding why cities are so reluctant to rely on the Home Rule authority that many of them currently possess.

At the same time, maybe the existing structure of Home Rule is not as problematic as it may seem. The vague standards that it employs certainly create a lot of uncertainty—over what constitutes a "local affair" or what qualifies as a "special legislation."[166] Yet such standards make Home Rule adaptable to changing times, and flexible enough to allow municipal innovations to flourish.[167] Home Rule, after all, was never intended to be a static list of municipal powers and state restrictions. It was always imagined to be a framework in which the role of cities, and their relationship with the

166. *See supra* notes 85-88 and accompanying text.

167. *See* Harvey Walker, *Toward a New Theory of Municipal Home Rule*, 50 NW. U. L. REV. 571, 583-85 (1955).

state, can be continuously renegotiated in services of a number of different ends.[168] Even if we can agree on a sphere of local authority and insulate it from state interference, as some have suggested,[169] that sphere will probably need to be revisited from time to time. The current structure of Home Rule does not eliminate that negotiation. It simply requires the city to play its part.

At this point, one may wonder whether too much is required of cities. Should cities be the ones to steward the legal and political development of Home Rule? And even if they should, are they capable of doing so? The original Home Rule movement's optimism about cities and their role with respect to Home Rule may have been overly optimistic. Perhaps cities are simply not suited to the legal and political maneuvering that Home Rule requires of them.

It is easy enough to respond with a list of what cities have accomplished, and how that demonstrates their capacity to negotiate the legal and political landscape on behalf of Home Rule. Home Rule is important to the legal and political standing of cities, and recognizing that might incentivize cities to play a more significant role. But the truth is that, in the end, cities will have the kind of Home Rule that they deserve. Showing that they are capable and willing to advance a substantive vision of their role in American governance, and advocating a vision of Home Rule that gets them there, is tied to the broader question of whether cities are entitled to Home Rule at all.

III. HOW CITIES MIGHT SHAPE HOME RULE

Although Home Rule is important to the fate of the American city, cities thus far seem uncommitted to shaping their legal and political development. But what would such a commitment look like? How would it differ from what cities are already doing? The goal in this Part is not to advance any particular vision of Home Rule. This is something that cities need to decide for themselves. Yet there are some steps—with respect to litigation strategy, political mobilization, and interlocal collaboration—that cities must take for Home Rule to serve as a vehicle for rethinking their role for the twenty-first century.

A. Legal Push and Litigation Strategy

First, cities should be more willing to invoke the legal powers of Home Rule to justify their action. They should do so not only when their actions fall squarely within Home Rule, but also in cases where their Home Rule authority to act is unclear. In addition, cities should invoke Home Rule to

168. *See supra* notes 68-73 and accompanying text.
169. *See, e.g.*, Sandalow, *supra* note 3.

shield themselves from state interference, especially when the state seeks to circumvent legal barriers erected for their protection. As noted earlier, because the powers and protections that Home Rule affords are inherently unclear,[170] courts are often the only place where their scope is defined. As such, a willingness to assert Home Rule as a legal claim, and litigate its meaning before a state court, is the only way to clarify the outer limits of Home Rule's powers and protections.

But cities should not litigate Home Rule in a haphazard manner, or even anytime a plausible claim should be made. Rather they should proceed with a clear vision of how they would like to see Home Rule develop. Doing so will likely involve a certain degree of soul-searching, because cities will need to define the role they would like to play in policymaking, and the interests of their communities going forward. It will also require cities to connect their visions of their roles with the legal powers and protections necessary to realize them.

Developing a substantive vision of their city—a "city future," if you will[171]—is central to understanding what kind of Home Rule structure might be desirable. But equally important is crafting a litigation strategy that will achieve this vision. As civil rights advocates have long recognized, seminal judicial successes are rarely won in a vacuum. They are often built on a number of smaller victories that establish the necessary precedent and build momentum towards the desired outcome.[172] Laying the proper foundation requires careful planning with respect to what kinds of issues should be presented before a court and in what order, along with the types of cases that will best serve as the vehicle for raising those issues. Sometimes the ideal test case materializes naturally. Other times, they may need to be manufactured.

A legal approach to Home Rule like the one described above is certainly more involved than mayors or municipal legal departments are used to. It requires a willingness to fight legal battles not only for immediate gain, but also in the interest of returns down the road. It is an approach that revolves around defining long-term goals, not only with respect to a vision for the city, but also a litigation strategy to get it there. Local leaders often have the best interests of their cities at heart. But, as shown above, they often do not have the wherewithal or the foresight to see litigation, especially litigation on the basis of Home Rule, as a path towards fulfilling those interests.[173]

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170. *See id.*

171. *See* FRUG & BARRON, *supra* note 94, at 141.

172. *See, e.g.*, CLEMENT E. VOSE, CAUCASIANS ONLY: THE SUPREME COURT, THE NAACP, AND THE RESTRICTIVE COVENANT CASES 50-73 (1959) (describing the NAACP litigation strategy with respect to residential segregation).

173. *See supra* Section II.B.3.

B. Political Mobilization

Although litigation strategies are important, cities must also take an active role in shaping their political standing outside of the courtroom. A city's commitment to Home Rule extends beyond shaping the legal claims that Home Rule offers. In some cases, this may involve taking control of how Home Rule is understood and portrayed in the political arena. In other cases, it may require cities to lead political movements aimed at reforming Home Rule in states that have it, or adopting it in states that do not. Political mobilization proved critical to the initial rise of Home Rule.[174] It makes sense that the political standing of Home Rule remains important to its future.

Home Rule's political standing is particularly important at the state level. The fact is, no matter how expansive Home Rule is defined, it will never insulate cities entirely from state interference. Nor should it. But whether or how states respond to local efforts to enact substantive policies also depends on how state leaders perceive the role of local governments in their state. From this perspective, Home Rule is more than just a set of legal entitlements that allows cities to push back against their states. It is also a political outlook on the role of cities and other localities in American governance—one that might sway how states interact with their localities. Of course, this requires Home Rule to attain a kind of political salience in the state political process that currently seems to be lacking.

Elevating the political standing of Home Rule in state politics is no simple task. But the states' own struggle against federal power, and their successful effort in bolstering federalism in American law and politics, offers a guide. In many ways, the political standing of states in our federal system rests on constitutional language that is just as vague as language regarding cities under Home Rule.[175] Moreover, in the mid-twentieth century, the very concept of "state rights" was similarly tarred by its association with Jim Crow and state resistance to desegregation.[176] Therefore, many questioned whether states still mattered as the scope of federal policymaking expanded.[177] Yet persistent advocacy by states, accompanied by strategic litigation efforts, forced the federal government to take seriously the interest

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174. *See generally*, PROSTERMAN, *supra* note 105.

175. *See generally* EDWARD A. PURCELL, ORIGINALISM, FEDERALISM, AND THE AMERICAN CONSTITUTIONAL ENTERPRISE: A HISTORICAL INQUIRY (2007).

176. *See generally* WILLIAM H. RIKER, FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE (1964).

177. *See generally* TEAFORD, THE RISE OF THE STATES: EVOLUTION OF AMERICAN STATE GOVERNMENT, *supra* note 98.

of states in the design of federal programs and the implementation of federal law.[178]

Cities might similarly reorient the culture of state politics. To be sure, the mantra of "state rights" has considerably more political salience than "municipal rights" today, even though the values associated with the two are similar. The partisan divide that now separates many cities from their state also seems insurmountable, especially as cities seek to address local issues that are also national controversies.[179] Yet early proponents of Home Rule were convinced that cities could prevail if they could rally the general public to their cause, and unify cities behind a common vision of municipal power.[180] After all, the state legislature is in many ways simply a collective of local delegations. And it may be possible that state courts would be more inclined to side with cities if they believed popular support of Home Rule was growing. But all of this requires cities and other localities to raise the values of Home Rule as a political consideration, and craft a political message that would resonate with the general public.

C. Concerted Effort

Developing a litigation and political strategy for Home Rule is a daunting task for even the most well-resourced cities, but cities need not go at this task alone. Indeed, any meaningful effort in bolstering Home Rule will likely require a collective vision and coordinated action.

This Article has focused on Home Rule from the perspective of the vertical tensions between cities and states. But the lack of collective action among localities is also a major reason for Home Rule's decline. The problem is that cities and other local communities tend to see themselves enmeshed in a zero-sum game. They compete for residents and development opportunities. They jostle for businesses and the tax revenues that they bring. They are jealous of one another and, when collaborative opportunities present themselves, fear exploitation at each other's hands.[181] As a result, localities are often reluctant to enter into inter-local agreements even when permitted by state law.[182] This competition also explains why they often find themselves on opposite sides of controversial policy debates.

Although local leaders struggle to find common ground on substantive policies, they might be able to reach consensus over whether Home Rule is

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178. *See* CONLAN, *supra* note 10.

179. *See generally* Schwartz, *supra* note 41, and Stolberg, *supra* note 41. *See also* Meyerson, *supra* note 42.

180. *See* Wilcox et al., *supra* note 74, at 332-33.

181. *See* David J. Barron & Gerald E. Frug, *Defensive Localism: A View of the Field From the Field*, 21 J.L. & POL. 261, 265, 270-86 (2005).

182. *See id.* at 282-83.

worth supporting, and if so, how to implement it. As James Gardner and Antoni Ninet argue, this was precisely the common ground that the American states were able to reach in defending federalism and state power from federal encroachment.[183] Comparing the stability of the federal system in the U.S. to the collapse of such an arrangement in Spain, they attribute the U.S.' success to the degree to which American states were willing to set aside their differences in key battles and compete collectively—through litigation and political lobbying—against the federal government.[184]

Early proponents of Home Rule believed that this kind of collaboration was necessary to ensure Home Rule's future. As one advocate colorfully explained: if all the cities in a state "have a common interest in an identical list of powers, conferred upon them by the legislature, the legislature cannot invade that pool of powers except over our dead bodies."[185] In states that have embraced Home Rule, there is no better way to shape its development than through the joint commitment of all its cities and localities. And in states that have yet to adopt Home Rule, there is no better way to push them to follow suit than through the joint advocacy of local leaders.

Collective action on Home Rule, however, need not be limited to cities and localities within a given state. It is also possible to imagine fruitful collaboration across state lines. Despite the subtle variations that exist from state to state, a common language and structure unites Home Rule provisions across the country.[186] Therefore, while no state court is bound to follow the interpretation of another state, judges often refer to out-of-state cases in rendering their own decisions on various provisions of Home Rule.[187] Cities should use this practice to their advantage, coordinating litigation strategies to encourage victories in jurisdictions amenable to a favorable interpretation to cascade from state to state. Coordinating efforts in this manner will not

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183. *See* James Gardner & Antoni Abad I Ninet, *Sustainable Decentralization: Power, Extraconstitutional Influence, and Subnational Symmetry in the United States and Spain*, 59 AM. J. COMP. L. 491, 493 (2011).

184. *See id.* at 513-27.

185. *See* Wilcox et al., *supra* note 74, at 70 (expressing his belief "that the legislature will be restrained by the public opinion of the state and by the united power of the cities of the state from improperly limiting the powers granted by the constitution.").

186. Many Home Rule provisions are shared, often in identical language, from state to state.

187. *See, e.g.*, City of Atlanta v. McKinney, 454 S.E.2d 517, 520 (Ga. 1995) (citing the Massachusetts decision in *Marshal House, Inc. v. Rent Rev. & Grievance Bd. of Brookline*, 260 N.E.2d 200, 204 (Mass. 1970), to interpret an identical provision in Georgia's Home Rule statute). *See also* New Orleans Campaign for a Living Wage v. City of New Orleans, 825 So. 2d 1098, 1116 (La. 2002) (Weimer, J., concurring); New Mexicans for Free Enter. v. City of Santa Fe, 126 P.3d 1149, 1160-62 (N.M. Ct. App. 2005) (rejecting the *Marshal House* interpretation).

only increase the likelihood that a particular vision of Home Rule disseminates, but will generate publicity and create political momentum.

Although the most difficult part of collective action is coordinating interested parties, platforms for inter-local collaboration already exist. "Leagues" of cities,[188] "associations" of counties,[189] and "conferences" of mayors[190] have been founded both nationally and as separate organizations in many states. And they all have been central to coordinating actions among their members. These organizations have traditionally focused on political lobbying,[191] and in recent years, on securing specific policies or grants at the state or federal level.[192] But they might once again serve as vehicles for Home Rule. The precursors to many of these organizations were instrumental to the movement that turned Home Rule into the dominant local government structure at the turn of the twentieth century.[193] It was also the concerted effort by the American Municipal Association that advocated for the most recent reconsideration of Home Rule in the 1950s and 1960s.[194]

Home Rule need not be a force for fragmentation and balkanization, as many local government scholars fear.[195] Indeed, for Home Rule to survive, cities need to tap into the collective spirit that once united them a century earlier.

CONCLUSION

Given the state of American politics, cities will likely continue to play a major role in a number of policy disputes going forward. What that role might be will depend on the legal and political development of Home Rule. There are already a number of proposals for how Home Rule might be

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188. These include the National League of Cities, the Colorado Municipal League, and the Virginia Municipal League, among others.

189. These include the National Association of Counties, County Executives of America, and local entitles like the Washington State Association of Counties.

190. The U.S. Conference of Mayors is the most prominent. It is also accompanied by local organizations like the New York Conference of Mayors.

191. *See* ARNOLD R. HIRSCH & RAYMOND A. MOHL, URBAN POLICY IN TWENTIETH-CENTURY AMERICA (1993).

192. *See, e.g.*, *2013-2014 Statement of Legislative Policy*, OHIO MUN. LEAGUE, http://www.omlohio.org/Publications/13-14%20leg%20policy%20statement.pdf [https://perma.cc/T78S-JXJA]. *See also 2016-2017 Policy Statement*, COLO. MUN. LEAGUE, https://www.cml.org/Legislative/Policy-Development/CML-Policy-Statement/ [https://perma.cc/QBK7-UW4V].

193. *See, e.g.*, *About the League: History*, MICH. MUN. LEAGUE, http://www.mml.org/newsroom/about_history.html [https://perma.cc/A4GG-B53W].

194. *See* Vanlandingham, *supra* note 81, at 2-4. *See also* JOSEPH FRANCIS ZIMMERMAN, CONTEMPORARY AMERICAN FEDERALISM: THE GROWTH OF NATIONAL POWER 168-69 (1992).

195. *See, e.g.*, Briffault, *supra* note 9, *Part I—The Structure of Local Government Law*, at 15-16.

reformed.[196] But the prospect for these reforms depends largely on the actions of the cities themselves. Will cities take the lead in shaping the future of Home Rule and, in turn, the role of cities in the twenty-first century? Or will Home Rule, and efforts to reform it, wither as cities look elsewhere for the power and authority to act?

As financial advisors are fond of pointing out, past performance is no guarantee of future results. Yet if recent history is any guide, the prospects for Home Rule are bleak. Cities are not playing an active role in shaping Home Rule's jurisprudential and political development. Even more troubling are signs that cities are turning away from Home Rule altogether. On the legal front, cities are often reluctant to rely on claims of Home Rule, either as a justification for local legislation or as a defense against state efforts to overturn them. On the political front, one would strain to hear Home Rule being raised as an argument for local autonomy or state restraint. Indeed, in many cases, cities are actively undermining the very powers and protections that they once fought to secure.

But cities need not accept the existing structure of Home Rule, or how it is currently implemented. Cities can take control of the Home Rule authority that they have been given, through law and politics. Cities should decide for themselves what kind of city they would like to be, and work collectively to realize a Home Rule structure that will get them there. It may be too early to conclude that cities have abandoned Home Rule. Yet it is not too late for cities to reclaim it.

196. *See supra* notes 92-95 and accompanying text.