HOME RULE AND LOCAL POLITICAL INNOVATION

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I. Introduction

During the fall of 2004, while most of the nation's attention was riveted on the presidential election, two intriguing political developments were occurring at the municipal level. In San Francisco on Election Day, voters cast their ballots in the Board of Supervisors election by using an unusual (for Americans) system of instant run-off voting (IRV), which enabled them to indicate their second and third choices in addition to their first preference. A few weeks later across the country in New York City, the City Council took a dramatic step when it overrode Mayor Michael Bloomberg's veto and significantly expanded the City's already noteworthy[1] campaign finance law. The old law, enacted in 1988, created a voluntary campaign financing program for candidates for local office who agree to spending limitations, disclosure requirements and contribution limitations that are much tighter than New York state's very loose limits on donations to local candidates.[2] The 2004 amendments extended the City's disclosure requirements and contribution limitations to all candidates for municipal office – even those not participating in the public funding program.[3] In addition, reacting to Bloomberg's expenditure of $73 million of his personal fortune in his successful quest for the mayoralty in 2001, the council voted not only to lift the

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

2 *See id.* at 8–13.

3 *See* N.Y. CITY COUNCIL LOCAL LAW 59–60 (2004), *available at* http://www.nyccouncil.info.

spending limit for a participating candidate facing a self-funded opponent but also to provide the participating candidate with an unprecedented six-to-one public funds match for qualifying private contributions.[4]

These developments in San Francisco and New York are examples of a broader phenomenon – political innovation at the local level. Even as the scope of local autonomy remains subject to fierce debate, a number of cities and counties across the country have revised their governmental and electoral processes, and experimented with new forms of political organization. Many of these – like alternative voting systems,[5] campaign finance reform,[6] term limits,[7] and conflict of interest regulation[8] – involve fairly dramatic changes. Other local initiatives, such as

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4 *See* N.Y. CITY COUNCIL LOCAL LAW 58, §6, (2004) (amending Section 3-706(3) of the Administrative Code of the City of New York), *available at* http://www.nyccouncil.info.

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

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

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

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

revisions of tax,[9] budget,[10] or legislative procedures,[11] or the size of the local legislative body,[12] are more prosaic. But large or small, these developments illustrate the capacity of local governments to restructure basic features of their political organization, and their interest in doing so.

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

This paper examines local political innovations, their reception in state courts, and some of the broader implications for home rule and political reform. Part II reviews some recent local political innovations, with particular attention to instant runoff voting and campaign finance reform. Part III analyzes the fate of local political innovations in state courts. Part IV discusses how the arguments found in the cases in Part III can be used to strengthen home rule. Part V concludes with a brief discussion of the external benefits of local political reform.

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

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

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

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

II. Local Political Innovation

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

Local governments have long been involved in political innovation and electoral reform. Two of the three principal forms of municipal organization – the city commission plan, and the council-manager system – were products of local innovation. The commission plan was developed by citizens in Galveston, Texas when the old mayor-council government proved unequal to the task of responding to the destruction resulting from a hurricane and tidal wave in September 1900. Although formal creation of the commission required state legislative action, the impetus was local.[13] So, too, the spread of the commission form, first to other cities in Texas and then throughout the country, was attributable to local demands, confirmed by local charter adoptions.[14] In 1907, Des Moines, Iowa "tempered the antidemocratic and centralizing features of the Texas idea by incorporating such techniques of direct democracy as initiative, referendum, and recall"[15] and a nonpartisan primary[16] into the commission system. As with the commission plan in Texas,

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13 *See, e.g.*, WILLIAM B. MUNRO, THE GOVERNMENT OF AMERICA'S CITIES 295–97 (1921).

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

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

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

the lack of home rule in Iowa meant that adoption of the manager system required state legislative authorization. But the enabling law "had originally been brought forward and urged," by the citizens of Des Moines and the adoption of the plan was contingent on voter approval.[17]

Shortly after that, Dayton, Ohio – acting, like Galveston, in the aftermath of a flood – became the first large city to adopt the council-manager form of city government.[18] Moreover, Dayton's innovation reflected the city's local legal autonomy. "The real starting point [for the city manager system] was the adoption of a home-rule amendment to the Ohio constitution in the year preceding. This made possible what many of the citizens had long desired – a scheme of local government adapted to local needs."[19] In the years that followed, the "Dayton plan" spread rapidly to many small and medium-sized cities.[20]

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

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17 MUNRO, *supra*, note 13, at 298.

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

19 *Id*. at 388-89.

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

In the early and middle decades of the twentieth century, some two dozen cities, including New York City, Cleveland, and Cincinnati, experimented with a variety of proportional representation ("PR") systems that sought to enable a wider range of interests to obtain seats in municipal legislative bodies.[21] The adoption of proportional representation "came about as part of municipal reform movements in the cities concerned,"[22] was frequently connected to other municipal reforms (like the council-manager system or nonpartisan elections), and was effectuated by local referenda rather than state authorization or imposition. Nearly all these local PR systems were also subsequently repealed, again typically by local referendum.[23]

Local governments also experimented with so-called semi-proportional electoral systems, which rely on districts rather than an-large elections, and provide for the election of multiple representatives from the same district, but bolster the position of electoral minorities. Under limited voting, for example, an individual voter can cast fewer votes than the number of seats to be filled from the voter's district. This enables a minority to win at least one seat from the district. Virtually all the experience with limited voting in the United States is at the local level. A number of city councils in Connecticut, New York and Pennsylvania have used this system. New York

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21 *See* Leon Weaver, *The Rise, Decline and Resurrection of Proportional Representation in Local Governments in the U.S.*, *in* POLITICAL CONSEQUENCES, *supra* note 16, at 139–53; Johnson v. City of New York, 9 N.E.2d 30, 39 (N.Y.1937) (upholding New York City PR law). Under PR, New York voters in 1945 elected two Communists (in addition to fourteen Democrats, three Republicans, two Liberals and two members of the American Labor Party) to the New York City Council, which precipitated a move to repeal PR. In 1947, the electorate, which had approved a Charter amendment adding PR in 1936, approved a Charter amendment abolishing PR, effective 1949.

22 Weaver, *supra* note 21, at 140.

23 *Id.* at 140–42.

City adopted this system for the election of borough-wide representatives to its city council in 1961,[24] and used it for two decades to facilitate the election of some non-Democrat council members in the Democratic Party-dominated city.

B. Instant Runoff Voting

Unlike proportional representation or limited voting, IRV does not directly limit the power of local majorities or increase the ability of political minorities to elect representatives to the local legislature, but IRV can strengthen the position of minor parties and independents. Under IRV, if no candidate in a district receives an outright majority of the first-place votes cast, the candidate with the fewest votes is eliminated and the votes for that candidate are reallocated to those voters' second choices. If that still fails to produce a majority winner, the process is repeated. This enables voters to vote for independent or third party candidates without the fear that they are "wasting" their votes or supporting a "spoiler." If a voter casts a first-place ballot for a long-shot candidate then either (i) one of the major contenders will win an outright majority – in which case the voter did not somehow help swing the election to someone she opposes – or, (ii) if no one of the major contenders wins an outright majority, her vote can also be counted in deciding which of the major candidates prevails. IRV, thus, facilitates a large number of competitors and gives a better sense of

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

the diversity of electoral opinion within the community,[25] while also producing a majority winner – and avoiding the cost of a runoff election.

Moreover, IRV proponents urge that it can promote more positive campaigning and less divisive politics. Candidates have an incentive not just to turn out their base but also to take positions that gain them the second- or third-place support of other voters. One news account of the San Francisco IRV election found the new electoral mechanism "has made campaigning more civilized," with candidates not only appealing for second- and third-choice votes, but opponents also appearing at each other's fundraisers, sharing Web sites and making cross-endorsements.[26]

San Francisco became the first American community in three decades[27] to adopt IRV, when in 2002 the city's voters approved the voting system for city elections. The system was first implemented in the November 2004 elections for the city's Board of Supervisors, and used again in 2005 in elections for the city-wide offices of assessor-recorder and city treasurer.[28] A survey of the 2004 election undertaken by political scientists at San Francisco State University found that

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25 *See Votes Would Carry More Weight with Instant Runoff*, DETROIT FREE PRESS, Oct. 21, 2004 (arguing that "the sophisticated system more accurately reflects voter sentiment").

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

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

28 *See* Ilene Lelchuk, *Incumbent S.F. Assessor Ting Wins After Tough Campaign*, S.F. CHRON., Nov. 9, 2005, at B3.

most voters felt they understood IRV, preferred it to the old system, and exercised the opportunity to vote for second and third choice candidates.[29] It is not clear whether IRV affected electoral outcomes. Of the seven supervisor seats up for election, candidates won outright majorities in three, and the first-place candidates were elected after the redistribution of second-choice votes in the other four. One Green was elected to the Board of Supervisors, but he replaced a Green who had been previously elected to that seat. In the two 2005 races, one candidate won with an outright majority in one race, while in another race the first-place candidate was not elected until after the redistribution of second-choice votes.[30] In both years, IRV saved the city the cost of mounting run-off elections.

San Francisco's adoption of IRV received considerable national attention and sparked interest in that voting system in other communities. Earlier in 2004, Berkeley, California adopted IRV,[31] and voters in Ferndale, Michigan approved IRV for future mayor and city council elections

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29 FRANCIS NEELY, LISEL BLASH & COREY COOK, AN ASSESSMENT OF RANKED-CHOICE VOTING IN THE SAN FRANCISCO 2004 ELECTION, FINAL REPORT 2–3 (2005), http://pri.sfsu.edu (follow "Reports" hyperlink).Although public reaction to IRV was generally positive, see Rachel Gordon & Ilene Lelchuk, *It's a Go; Premiere of Ranked-Choice Voting Method Mostly Gets a Thumbs-Up,* S.F. CHRON., Nov. 3, 2004, at B1, the first IRV election was marred by a software glitch, attributed to unexpectedly high turnout, that delayed the tallying of redistributed second place votes. See Suzanne Herel, *Election Aftermath: Turnout Swamped 'Ranked' Software,* S.F. CHRON., Nov. 5, 2004, at B1, Lee Romney, *San Francisco Officials Repair Voting Glitches: High Turnout Slowed the Tallying of 'Ranked Choice' Selections in a Supervisor's Contest,* L.A. TIMES, Nov. 6, 2004, at B6.

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

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

at a referendum held on Election Day 2004.[32] In March 2005, voters in Burlington, Vermont's largest city, voted to amend their charter to use IRV in mayoral elections.[33] Burlington's first use of IRV in 2006 was apparently sufficiently positive that the state is now considering IRV for elections to the U.S. Senate at its at-large House of Representatives seat. [34] Following a positive vote on an advisory ballot measure, the city council of Takoma Park, Maryland adopted IRV for all city elections, starting in November 2007.[35] In the November 2006 general elections, voters in both Minneapolis and Oakland, California approved IRV for future municipal elections. In 2006, the state of North Carolina authorized a pilot project on the use of IRV to take place in up to ten cities in 2007 and up to ten counties in 2008. [36] In May 2007, Cary, North Carolina voted to become the first North Carolina city to try IRV, starting in its October 9, 2007 elections.[37] Three localities – Aspen, Colorado; Sarasota, Florida; and Clallam County, Washington – have voted to place measures authorizing IRV in local elections on the ballot this November.[38]

C. Campaign Finance Reform

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

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

34 See Fair Vote, "Vermont State House and Senate Pass IRV Study Bill," http://fairvote.org/index.php?pafge=1730&articlemode=showspecific&showarticle=2683.

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

36 "Instant Runoff Voting in North Carolina," http://fairvote.org/media/irv/North%20Carolina%20IRV%20FAQS.pdf.

37 "Cary Will Make History With State's First Instant Runoff Election," http://fairvote.org/?page=703&articlemode=showspecific&showarticle=2666.

38 "IRV Moving Ahead: Three New Ballot Measures Proposed," http://www.fairvote.org/?page=19.

In recent years local governments have emerged as leaders in campaign finance regulation and in testing the limits of the restrictions on campaign finance limitations adopted by the United States Supreme Court in *Buckley v. Valeo*.[39] As at the federal and state levels, local interest in campaign financing mostly began in the aftermath of the Watergate scandal, and there were locally-adopted regulations of the financing of local election campaigns as early as 1974. A survey by the National Civic League in 2002 found that 135 city and county governments in eighteen states and the District of Columbia have adopted their own campaign finance laws. Although these measures vary considerably from community to community, collectively they deal with all the major elements of campaign finance regulation – disclosure, contribution limitations, expenditure limitations, and the provision of public funds to qualifying candidates. Contribution limitations are particularly widespread, and are found in roughly 115 localities.[40]

Local campaign reform measures have been daring, innovative, and wide-ranging. Two local governments challenged head-on the Supreme Court's determination in *Buckley* that expenditure limitations are unconstitutional. Albuquerque, New Mexico enacted spending limits for candidates for local office in 1974 and, amazingly enough, despite the *Buckley* decision those limits remained on the books and were apparently enforced through 1995. The limits were temporarily enjoined in 1997; were amended and restored in 1999; but, following a protracted

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39 424 U.S. 1 (1976).

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

litigation, were ultimately struck down by the federal courts.[41] During that litigation, the federal trial court found on the record that for more than two decades the Albuquerque spending limits had promoted competitive elections, increased citizen confidence in government, led to high voter turnout, reduced the role of large donors, created opportunities for lower-income and lower-middle-income candidates, and generally improved the quality of electoral campaigns without limiting the ability of candidates to campaign effectively.[42] The court also found that the spending limits promoted competitive elections – all the Albuquerque mayors seeking reelection since the adoption of spending limits were defeated, compared with the 88% reelection rate of incumbent mayors in other cities.[43] Ultimately, the court concluded that based on the Supreme Court's *Buckley* decision it was "constrained to find" that the city's expenditure limits were unconstitutional, and the Tenth Circuit affirmed.[44]

Like Albuquerque, the City of Cincinnati adopted spending limits on city council candidates notwithstanding *Buckley*. That 1995 action was motivated in part by a desire to

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41 Initially, the district court denied the plaintiff mayoral candidate's request for a preliminary injnction, Homans v. City of Albuquerque, 160 F.Supp.2d 1266 (D.N.M. 2001); the Tenth Circuit reversed and granted a preliminary injunction. Homans v. City of Albuquerque, 264 F.3d 1240 (10th Cir. 2001). Following a trial on the merits, the district court ultimately held the spending limits unconstitutional, 217 F.Supp. 2d 1197 (D.N.M. 2002), and the Tenth Circuit ultimately affirmed, Homans v. City of Albuquerque, 366 F.3d 900 (10th Cir. 2004).

42 160 F. Supp.2d at 1268–70.

43 217 F.Supp.2d at 1200.

44 Homans v. City of Albuquerque, 366 F.3d 900 (10th Cir. 2004), affirming 217 F. Supp.2d 1197, 1206 (D.N.M. 2002).

challenge *Buckley*.[45] As with Albuquerque, however, the federal court of appeals held that *Buckley* "foreclose[d] . . . as a matter of law"[46] most of the city's arguments and invalidated the ordinance.

Some localities, while acting clearly within the contours of *Buckley*, have sought to develop innovative approaches to the problems posed by campaign money.[47] Several communities – including Richland, Washington, and Alta, Utah – have adopted voluntary spending limits with teeth. In Richland, a local ordinance asks candidates to abide by maximum expenditure limitations, and directs the city clerk to monitor spending levels, and publish in the local newspaper an advertisement indicating who is in compliance and who is not.[48] Alta, similarly, directs the city clerk to publicize which candidates have agreed to comply with voluntary limits and which have not. Westminster, Colorado amended its charter to include a stringent conflict of interests rule that bars any city councillor from both voting and participating in debate on any issue or matter coming before the Council "involving a benefit" to any person who donated $100 or

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Kruse v. City of Cincinnati, 142 F.3d 907, 910 (6th Cir. 1998).

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Id. at 915.

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

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NAT'L CIVIC LEAGUE, LOCAL CAMPAIGN FIN. REFORM: CASE STUDIES, INNOVATIVE AND MODEL LEGISLATION, (2005), *http://www.ncl.org/npp/lcfr/lcfr_first_ed_ summary.html*.

more to the councillor's campaign. Contributions above the conflict-of-interest threshold fell by fifty percent from the election before the adoption of the charter amendment to the election after.[49]

Local governments have also taken the lead in experimenting with the public funding of election campaigns. At the national level, there is public funding only in the presidential election, but the low level of funding provided and other technical features of the system have increasingly discouraged candidates from participating, particularly in the primary phase of the presidential election. Several states have partial public funding programs, although until recently most states that provided for some form of public funding offered candidates only modest grants, and most limited public funding to candidates for governor.[50] It is local government that has taken the lead in exploring public funding. A 2003 study found that sixteen cities or counties had adopted public funding programs, with twelve of those programs in operation.[51] Since then, Portland, Oregon

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See id. The recusal requirement does not apply where the benefit to the donor is "merely incidental to an issue or question involving the common public good."

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See MICHAEL L. MALBIN & THOMAS GAIS, THE DAY AFTER REFORM: SOBERING CAMPAIGN FIN. LESSONS FROM THE STATES 51–75 (1998). Hawaii, Minnesota, and Wisconsin have for some time provided some public funds to legislative candidates, but only Minnesota provides sufficiently public money to make the program attractive to candidates. *See id*. at 58, 71. The more recently adopted "clean money" reforms in Arizona and Maine have been far more ambitious and more comprehensive in providing support for state legislative candidates. *See* UNITED STATES GENERAL ACCOUNTING OFFICE, CAMPAIGN FIN. REFORM: EARLY EXPERIENCES OF TWO STATES THAT OFFER FULL PUBLIC FUNDING FOR POLITICAL CANDIDATES (May 2003), *available at* http://www.gao.gov/new.items/d03453.pdf (analyzing Arizona and Maine public funding programs). In 2005, Connecticut adopted a substantial public funding program for state elections, starting in 2008. See Note, Full Public Funding: An Effective and Legally Viable Model for Campaign Finance Reform in the States, 92 Cornell L. Rev. 733, 778-82 (2007). North Carolina has implemented a public funding program for judicial elections. See id. at 769-78.

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See Ryan, *supra* note 6, at 4. Of the four programs no longer in operation, three were terminated as the result of state-level voter initiatives, two in Washington state and one in California. There is a good argument that the California measure was terminated erroneously by a state court. Sacramento County had adopted public funding in 1986. In 1988, California voters passed Proposition 73, which banned the payment of public funds to candidates. In 1990, an intermediate California appellate court held that this preempted the Sacramento public funding system. County of Sacramento v. Fair Political Practices Comm'n., 271 Cal. Rptr. 802 (Cal. Ct. App. 1990). However, two years later, in a case in which Proposition 73 was used to challenge Los Angeles' public funding system, the California Supreme Court upheld the Los Angeles public funding program and labeled the *Sacramento* decision – which was possibly distinguishable because it involved a county and not a home rule city – "highly questionable."

adopted and implemented a substantial public funding program for candidates for mayor, city commissioner, and auditor.

Public funding programs have been adopted in cities large – New York City, Los Angeles, San Francisco – midsize – Austin, Texas, Portland, Oregon, Tucson, Arizona – and small, Cary, North Carolina, and Petaluma, California. The New York, Los Angeles, and Tucson programs have been considered particularly successful.[52] Tucson's system has been in operation the longest – since 1985 – while the New York and Los Angeles systems date back to 1988 and 1990 respectively. In all three systems, public matching funds are provided to qualifying candidates who agree to comply with spending limits and abide by various administrative requirements. In Tucson, New York, and Los Angeles, public funds are available for candidates for all municipal offices, and both the public match and the spending limit have been sufficiently attractive to candidates that in recent years most serious candidates have chosen to participate.[53] These programs have reduced candidates' dependence on large private donations and increased the role

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Johnson v. Bradley, 841 P.2d 990, 1001 (Cal. 1992). The fourth defunct public funding program, in Cincinnati Ohio, was terminated by a local ballot measure. *See* CENTER FOR GOVERNMENTAL STUD., PUBLIC FINANCING LAWS IN LOCAL JURISDICTIONS 5 n.1 (2005) *available at* http://www.cgs.org/publications/docs/ PublicFinancingLaws2005.pdf.

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See RYAN, *supra* note 1. *See also* PAUL RYAN, CENTER FOR GOVERNMENTAL STUD., ELEVEN YEARS OF REFORM: MANY SUCCESSES-MORE TO BE DONE, CAMPAIGN FINANCING IN THE CITY OF LOS ANGELES (2001), *available at* http://www.cgs.org/publications/docs/lacamp_fin.pdf [hereinafter RYAN, ELEVEN YEARS]; PAUL RYAN, CENTER FOR GOVERNMENTAL STUD., POLITICAL REFORM THAT WORKS: PUBLIC CAMPAIGN FINANCING BLOOMS IN TUCSON (2003), *available at* http://www.cgs.org/publications/ docs/Political_Reform_That_Works.pdf [hereinafter RYAN, PUBLIC FINANCING BLOOMS].

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See RYAN, *supra* note 1, at 21–23 (candidate participation rate was 79% in New York City in 2001 elections); RYAN, ELEVEN YEARS, *supra* note 52, at 18–19 (serious candidate participation in Los Angeles was 70% in 2001); RYAN, PUBLIC FINANCING BLOOMS, *supra* note 52, at 9–11 (100% participation rate in Tucson program in 2001 and 2003 elections).

of small donors; expanded the ability of women, people of color, and grass-roots candidates to run for office; and have generally contributed to more competitive municipal elections.[54]

These cities and the other communities using public funding have experimented in interesting ways with how to determine which candidates qualify for public funds, how much to give candidates, how to distribute the funds, and how to finance and administer their programs. Thus, Los Angeles has demonstrated the benefits of a public financing trust fund – adopted as a charter amendment – in assuring a "consistent and reliable" source of funding."[55] Tucson has shown that administration of the program by the city clerk, rather than a separate ethics commission or campaign finance board, can be an effective and professional way of implementing public funding.[56] And New York has indicated that public grants plus spending limits need not be a pro-incumbent device, as some critics of public funding have suggested.[57] By amending its law in 1998 to provide an unprecedented $4-to-$1 match for individual donations of $250 or less from New York City residents, the city council not only democratized campaign funding but also contributed to the increased competitiveness of city council elections.[58] In 2007, the City amended the law again, raising the match rate to $6 to $1 for contributions up to $175 from City residents,

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See RYAN, *supra* note 1, at 15–21; RYAN, ELEVEN YEARS, *supra* note 52, at 19–28.

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New York's law provides another model for a program funding mechanism "equally well insulated from political pressures." *See* RYAN, *supra* note 1, at 28; RYAN, Eleven Years, *supra* note 52, at 25.

56
See RYAN, PUBLIC FINANCING BLOOMS, *supra* note 52, at 16.

57
See BRADLEY A. SMITH, UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM 98–102 (2001).

58
See RYAN, *supra* note 1, at 15–18.

raising the spending limits, increasing the maximum funds payment, and adopting "pay-to-play" rules that lower the permissible maximum contribution from individuals or entities doing business with the City and making such donations no longer eligible for public matching funds.[59] Several of the cities that provide public funding– including Austin and San Francisco as well as Los Angeles and New York – have also sought to use public funds to improve the quality of municipal election campaigns by requiring candidates who participate in the public funding program to participate in public debates.[60]

The various city and county public funding programs have also had to address a central challenge to all public funding programs – the ability of nonparticipating candidates, including wealthy, self-funded office seekers, and independent committees to engage in unlimited spending. Certainly, Michael Bloomberg's expenditure of $73 million of his personal fortune in his quest for the New York mayoralty in 2001 indicates the limits of any voluntary funding and limits system.[61] To deal with the challenge posed by high-spending non-participants, Austin, Los Angeles, Oakland, and San Francisco eliminate the spending limit in any electoral contest when independent expenditures designed to influence that race exceed a specified amount.[62] New York eliminates the spending limit when a participating candidate faces a nonparticipating opponent

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59 New York City Campaign Finance Board, "New Legislation Alters Fundraising Rules and Limits for 2009 Election," http://www.nyccfb.info/press/2007-07-16.pdf.

60 *See* Ryan, *supra* note 6, at 11–12.

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

62 Ryan, *supra* note 6, at 11.

who receives contributions or makes expenditures in excess of 50% of the spending limit, and it also increases the public match. The law also now permits a participating candidate facing a high-spending non-participating opponent to receive a public grant of up to 125% of the spending limit.[63] Portland, Oregon also provides that a participating candidate who is outspent by nonparticipating candidates and/or independent expenditures may be eligible for additional matching funds.64

D. Other Local Innovations in the Local Governance Structure

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

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

64 "City Campaign Fund: General Information (as applies to May 2008 Primary Election)," http://www.portlandonline.com/auditor/index.cfm?c=38751.

Local governments have adopted term limits for local officials,[65] changed the size of the local legislature,[66] altered the rules for filling vacancies in local office,[67] and subjected state-created local offices – like the coroner and register of wills – to local accountability, hiring, conduct, and ethics codes and local reporting requirements.[68] Other local measures have imposed distinctive local conflict of interest rules,[69] changed election procedures,[70] and adopted specific

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

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

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

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

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

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

local procedures for local legislation,[71] local budget review,[72] approval of franchises,[73] and consideration of tax increases.[74] There is no consistent theme to these measures. Some local actions provided for more direct popular involvement in local decision-making,[75] while others provided for less.[76] Some of the California cases reveal local efforts to make it easier to impose new local taxes than the state of California, directed by Proposition 13 and its progeny, would allow.[77] Perhaps the dominant impression is simply one of local tinkering with the rules and procedures of local governance in light of particular local needs, preferences, and circumstances.

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

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

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

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

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

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

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

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

Not all local efforts at political innovation provoke legal challenge. I am not aware of any court decisions concerning San Francisco's adoption of IRV, Tucson's longstanding public funding system, or New York City's campaign finance law – although New York City's extension of its contribution restrictions and disclosure requirements to candidates who do not participate in the voluntary public funding system certainly opens it to legal attack. Moreover, some challenges to local political innovations concern not the scope of local autonomy but other state constitutional constraints. The principal argument against Seattle's public funding program turned on the Washington constitution's public purpose requirement,[78] while Albuquerque's term limits provision was challenged under the New Mexico Constitution's Qualifications Clause.[79]

Nonetheless, the most common issues have involved home rule and preemption, especially preemption. Most courts that have considered these cases have found that home rule provides local governments with the power to initiate changes in local governance procedures.[80] Preemption has generated more controversy.

Sometimes the preemption problem is posed by a specific state law clearly targeting the type of local ordinance in question. Los Angeles, for example, adopted its public funding system shortly after the state's voters had passed a ban on public funding of candidates. More frequently,

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See City of Seattle v. State, 668 P.2d 1266 (Wash. 1983).

79
See Cottrell v. Santillanes, 901 P.2d 785 (N.M. Ct. App. 1995).

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

the arguably conflicting state law is part of a general state code which spells out the rules and procedures for local elections or governance. These codes can provide a useful framework or model for local governments. Particularly for the many small local governments that may lack the legal and financial resources to engage in extensive research and develop their own forms, they constitute a ready-made "off the shelf" governmental and electoral structure. These localities need not reinvent the wheel but can simply use the rules and procedures the state has provided. So, too, it would be difficult to deny the state's interest in assuring fair procedures and workable local government structures for its residents who live within local borders and depend upon those localities for government services. Although these laws address core local matters, they are also matters of state concern.

Based on our usual assumptions about the limited scope of local autonomy, it would appear that the conflict of legitimate state and local concerns is a recipe for state preemption and local defeat. Instead, to a surprising degree, state courts have enabled the local interest in determining the structures and procedures of local politics and governance to prevail. Either the courts have engaged in balancing and concluded that the local interest outweighs the state's, or they have strained to read the relevant state laws as implicitly permitting local departures from the state-prescribed norm.

Two of the classic distinctions in home rule thinking – whether home rule is based on a state constitutional provision[81] or only a state statute,[82] or whether the home rule is of the *imperio* form vesting localities with both initiative and immunity from inconsistent laws on the same subject or merely of the *legislative* form, granting broad initiative powers but making them subject to state legislative preemption[83] – appear not to matter much. Local governments have prevailed even when their home rule is statutory, or of the *legislative* constitutional form. What really seems to matter is the judicial recognition that local control of local governance is of central importance to the local self-determination that is home rule while posing little or no threat or cost to the localities or the state beyond local borders.

A. Balancing of State and Local Interests

The most striking case involving the express balancing of state and local interests in local election regulation is *Johnson v. Bradley*, in which the California Supreme Court upheld Los Angeles's municipal candidate public funding program in the teeth of the voter-initiated Proposition 73, a state-wide measure that flatly banned the public funding of any election

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See, e.g., Johnson v. Bradley, 841 P.2d 990, 993 (Cal. 1992).

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

83
Compare Johnson, 841 P.2d at 993 (finding no preemption under California's constitution, which provides for local power with respect to municipal affairs) *with* State *ex rel.* Haynes v. Bonem, 845 P.2d 150, 154 (N.M. 1992) (finding no preemption under New Mexico constitution, which provides that home rule does not apply to "legislative powers . . . denied by general law").

campaign.[84] The court found that the Los Angeles measure fell within the state constitution's grant to charter cities – such as Los Angeles – of plenary authority to "make and enforce all ordinances and regulations in respect to municipal affairs."[85] The court also acknowledged that the "the integrity of the electoral process, at both the state and local level, is undoubtedly a statewide concern."[86] As the court noted, without such an understanding it would be difficult to sustain the application of statewide campaign finance disclosure provisions or conflict of interest rules to charter cities that have not adopted their own disclosure or ethics laws. The court, however, declined to defer to the state's mere assertion of a theoretical interest in local electoral integrity. In light of the local self-governance interest at stake, the court required the state to demonstrate both that the state law is "reasonably calculated to resolve such statewide concerns," and "narrowly tailored to intrude as little as possible on legitimate local interests."[87] As there was no evidence that the ban on public funding in political campaigns "advances in any way the goal of enhancing the integrity of the local electoral process,"[88] the court concluded that the municipal interest in structuring local elections outweighs the asserted state interest in local integrity.

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84 841 P.2d at 991.

85 *Id*. at 994.

86 *Id*. at 1003.

87 *Id*. at 1001, n.18.

88 *Id*. at 1003.

Johnson gave considerable weight to the localness of the Los Angeles measure – that is, that it affected only Los Angeles and not other localities or the state itself. The challengers to local public funding asserted that the state's ban on public funding would serve the statewide concern of "the protection of the public fisc." [89] The court acknowledged that the "conservation of the *state's* limited funds is a statewide concern," but it emphasized that the public funds in question were entirely municipal. The lack of external effects offset the finding of a state concern and supported the conclusion that local funding of local candidates is primarily a local matter.

Johnson's balancing of state and local interests affected other cases involving political innovation in California. In *Cawdrey v. City of Redondo Beach,* the court of appeal, relying on *Johnson,* upheld a charter city's adoption of term limits for its mayor and council members. [90] The court explained that the "manner of election" of municipal officers is a core municipal affair,[91] so that adoption of term limits easily fell within the home rule grant. But the court also found that the extensive state specification of the qualifications for holding local office – which did not include term limits – was intended by the state to occupy the field of municipal office eligibility.[92] Despite

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Id. at 1001.

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

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Cawdrey, 19 Cal. Rptr. 2d at 179, 188.

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Id. at 186.

the head-on conflict, the local term limit prevailed because the predominant interest was local. As the court noted, the "persons primarily affected . . . are City council members and residents. Council members can only exercise the City's police powers within the City, and [the term limits provision] has at most a minimal extraterritorial effect."[93] There was no need for a uniform state law on local term limits – and no harm from local variation – because "term limits for City officials have to do solely with local concerns."[94] To be sure, there was some state interest in the terms of municipal officeholders, given that municipal decisions inevitably affect nonresidents "who enter a city, or work or own property in it."[95] Those concerns underscored the state's general interest in the quality of local government – concerns which support the legitimacy of the many state laws dealing with eligibility to serve in local government. But if these concerns are treated as controlling then "virtually all aspects of modern city government are of statewide concern" and that would "nullify" the state constitution's grant of home rule.[96] Protecting home rule required the court to treat the greater local interest as determinative.

Similarly, in *Traders Sports, Inc. v. City of San Leandro,*[97] the court upheld a local three percent gross receipts tax on businesses that sell concealable firearms and ammunition for

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93 *Id.*

94 *Id.*

95 *Id.* at 187.

96 *Id.*

97 112 Cal. Rptr. 2d 677 (Cal. Ct. App. 2001).

concealable firearms. The city council had adopted the measure by a simple majority vote and then submitted it to the city's voters, who approved it. However, as a result of Proposition 62, a voter-initiated statewide statute, state law requires a two-thirds council vote, as well as voter approval, in order to adopt or increase local taxes. The court found that the local measure and the state law were in direct conflict. Following *Johnson v. Bradley*, the court emphasized both the predominant local concern in the procedures for adopting local taxation and the state statute's lack of narrow tailoring to advance the state's asserted concern with promoting voter control over taxation. First, the court noted that the question of the percentage of council votes needed to put a measure on the ballot "is precisely the sort of matter to fall within the decision-making power of a home rule municipality. It is a subject that is predominantly, if not entirely, of interest to the citizens of San Leandro."[98] Indeed, in a classic statement of the theory of home rule, the court rhetorically asked:

> After all, who else can best determine the proper balance between the powers delegated to the elected representatives of San Leandro to propose a local tax measure, and the powers reserved to the residents of San Leandro to enact such a tax measure? Certainly, it is the people of San Leandro, who are familiar with local conditions, who are best able to regulate such matters by means of charter provisions and municipal codes.[99]

Although the statute addressed an area of legitimate state concern – voter control over taxation – the San Leandro procedure still gave the voters the ultimate power to approve or reject a new tax. As a result, the state's requirement of a two-thirds council vote before the measure could even be sent to the voters was "not narrowly calculated" to advance the state's interest

98 *Id.* at 685.

99 *Id.*

"while at the same time it invades the right of a charter city to conduct local elections – an area that is historically a municipal affair."[100] The court concluded that "San Leandro is constitutionally empowered to require a voting majority different from that set out in [state law]."[101]

This balancing technique – with the local interest in local self-governance dominating over state concerns – is not limited to California. In Connecticut, the state supreme court has repeatedly upheld local measures that apparently conflict with general state laws setting out rules for local governance on the theory that these are matters of predominant local concern. Thus, the court ruled that the town of Windham could by charter provision make it more difficult for local residents to force a local referendum vote on a budget matter than state law would have allowed. The court acknowledged the conflict between the state and local measures, and did not doubt the authority of either the state or the locality to legislate concerning the issue. It concluded that because the question of referral to the voters is a "matter of local concern," state law did not preempt the conflicting charter provision.[102] The court noted that the rationale for home rule is that "issues of local concern are most logically answered locally, pursuant to a home rule charter, exclusive of the provisions of the General Statutes."[103] The court continued:

> [W]hether Windham's primary legislative body – the board of selectmen – can be compelled to hold a referendum on the petition of the town's voters . . . is of purely

100 *Id*. at 686.

101 *Id*. at 687.

102 Windham Taxpayers Ass'n v. Windham, 662 A.2d 1281, 1292 (Conn. 1995).

103 *Id*. at 1293.

> local interest . . . in that it relates to concerns that are of particular importance to the town itself. It is of no import to the rest of Connecticut whether the town of Windham…holds a second referendum.[104]

The Connecticut Supreme Court also upheld the authority of the town of Naugatuck to provide for separate referenda on the education budget and the rest of the town budget rather than hold a referendum on an integrated general spending-plus-education budget, as provided by state law. The court found that the state and local measures conflicted, but ruled in favor of the town as "matters concerning a town budget are of local rather than statewide concern."[105] While both education and education spending are matters of statewide concern, to protect local autonomy the court defined the area of conflict not as the broad field of education finance but, more narrowly, as "the particular *procedure* pursuant to which a municipality adopts its budget, including the procedure it employs in adopting the education component of the budget."[106] The state could impose substantive educational mandates, but the local education budget procedure, which has no effect outside the municipality, "is not *itself* a matter of statewide concern."[107]

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104 *Id*. at 1293–94.

105 Bd. of Educ. v. Town & Borough of Naugatuck, 843 A.2d 603, 613 (Conn. 2004).

106 *Id.*

107 *Id.*

In *State ex rel. Haynes v. Bonem*,[108] the New Mexico Supreme Court took a particularly creative approach to balancing a state-local conflict over the size of the Clovis city commission. New Mexico law provided that commissions should have five members; Clovis wanted an eight-member body. The court asked whether the state law was a "general" one, which, under the New Mexico constitution, would displace an inconsistent local measure. Although the state law was certainly general in form – it provided simply that a municipality having a commissioner-manager form of government is to have five commissioners, it applied generally throughout the state, and it did not make exceptions for any municipality or category of municipalities – the court determined "[e]ven if a statute applies to all municipalities throughout the state, it is not necessarily a general law if it does not relate to a matter of statewide concern."[109] Although "[d]etermining whether a matter is of statewide or local concern is not always an easy task,"[110] the court "easily conclude[d]" the size of the governing body of Clovis "is a subject that is predominately, if not entirely, of interest to the citizens of the City of Clovis."[111] As a result, the city could have eight commissioners, notwithstanding the inconsistency with state law.

In these balancing cases, the courts upheld local efforts to change basic aspects of local government structure or procedure or local elections, despite a conflict with state law, on a finding

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108 State *ex rel.* Haynes v. Bonem, 845 P.2d 150 (N.M. 1992).

109 *Id*. at 155.

110 *Id*. at 156.

111 *Id*. at 157.

that the matter was both part of the core of local self-determination and had little or no effect on the state As a result, the local measures could prevail for those localities choosing to break with the state's approach, while the state laws remained in effect for all the other localities which had not attempted to depart from them.

B. Finding No State Intent to Preclude Local Variation

Another technique state courts have used to sustain local political innovations that are arguably inconsistent with state laws has been to find that the state did not intend to preclude local variation from the state-prescribed norm. One version of this, nicely articulated by the Supreme Judicial Court of Maine, treats the state's laws governing local government organization as a model but not a mandate for local compliance. In a case involving the decision of the town of York to adopt charter provisions – dealing with such issues as the budget committee, secret ballot voting, recall elections, and the election of the moderator for town referenda – which departed from general state laws, the court found that not all state laws concerning local governance are binding commands. Instead, some are mere "models" from which a locality is free to depart. Moreover, "not all 'model' provisions were so labeled." Indeed, none of the arguably conflicting state law provisions in the York case had been explicitly designated as a model. However, because the charter provisions at issue advanced local autonomy without conflicting with the state purposes underlying the state law, the court found that the state laws could be treated as "models" rather than binding commands that would displace inconsistent local laws. In other words, not only did the court find that the legislature intended to create two types of laws dealing with home rule localities – models and preemptive directives, but it concluded that these state rules and

procedures dealing with local governance would be treated as models unless the state expressly articulated an intent to preempt.[112]

Other state courts have reached a similar result by adopting a kind of state constitutional or state legislative "clear statement" doctrine as a precondition for preemption of local actions concerning local government structure. Thus, the New York court of appeals concluded that under the state's revised and expanded home rule constitutional amendment of 1964, county governments enjoy the power to fill vacancies in county legislative offices, notwithstanding conflicting state laws that gave that power to the state legislature. The court found there was no "clearly articulated decision by the State legislature to intrude upon a domain which county legislatures presumptively control." As the court suggested, "the spirit of home rule" envisioned that localities would enjoy "great autonomy in experimenting with the manner in which their local officers, including legislative officers, were to be chosen." Such local control would allow the counties to "choose that structure of local government which is best tailored to serve particular community needs." In the absence of convincing evidence that the constitutional provision authorizing the legislature to provide for filling vacancies in office meant to limit the presumptive local control over local officer selection, the court concluded that the state constitution permitted counties to opt out of the standard vacancy-filling procedure provided by the legislature.[113]

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112 School Comm. v. Town of York, 626 A.2d 935, 944 (Me. 1993).

113 Resnick v. County of Ulster, 376 N.E.2d 1271 (N.Y. 1978).

Similarly, in *In re Sanchez*,[114] the Supreme Court of Texas held that a local election procedure, which gave candidates for mayor and city commissioner more time to file to run for office than the state's Election Code allowed, was not preempted. The court found that the local filing deadline was well within home rule's provision for local self-government, but also did not doubt the legitimacy of state regulation of the procedures for local elections. Assuming the state could preempt an inconsistent local rule dealing with local election procedure, the court ruled the state "must do so with 'unmistakable clarity.'"[115] The court concluded, through a rather impressive double incorporation by reference, that a phrase in the state statutory filing deadline that permitted another filing "as otherwise provided by [the state Election Code]" picked up another provision of the Code enabling home rule cities to prescribe application requirements in municipal elections; as a result, state law did not preempt the local ordinance with the requisite unmistakable clarity.[116] Moreover, the court subsequently specifically rejected the argument of the Texas Secretary of State in an amicus brief filed in support of rehearing, that "allowing home rule cities to set any filing deadline they want" would have an adverse effect on the state.[117]

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81 S.W.3d 794 (Tex. 2002).

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Id. at 796 (quoting Dallas Merchant's & Concessionaire's Ass'n, v. City of Dallas, 852 S.W.2d 489, 491 (Tex. 1993)).

116
Id. at 797. *See also* City of Houston v. Todd, 41 S.W.3d 289 (Tex. App. 2001) (reading narrowly a state statute permitting referenda on grant of street franchises in order to avoid preemption of Houston charter provision and council action giving franchise to a light rail authority without a referendum).

117
Sanchez, 81 S.W.3d at 800.

In *Caulfield v. Noble*,[118] the Connecticut Supreme Court similarly focused on the absence of an explicit statement of preemptive intent from the Connecticut legislature. In *Caulfield*, the town of New Canaan, pursuant to its charter, decided to put a year-end surplus into a special account, rather than use it to reduce the next year's tax rate, as apparently required by state law. Under Connecticut law "a municipality has no inherent powers of taxation except those expressly granted by the legislature" which "can be lawfully exercised only in strict conformity to the terms by which they are given."[119] Nonetheless, however limited the powers of municipalities concerning taxation generally, "the imposition of real property taxes, a matter concerning the ordinary town corporate budget, incidental to the existence of the organized municipal corporation, is a local matter."[120] With that background assumption, the court turned to the arguably preemptive state legislation and found "there is no indication that the legislature intended the statute to prevail in the face of the specific provisions of the local charter."[121]

The New Mexico Supreme Court also signalled support for this preemption/clear statement requirement in the *Haynes* decision previously discussed. In a portion of its opinion it labeled unnecessary to the case at hand but "helpful in resolving future cases,"[122] the court underscored the

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118
420 A.2d 1160 (Conn. 1979).

119
Id. at 1164.

120
Id. at 1165.

121
Id. at 1166.

122
New Mexico *ex rel*. Haynes v. Bonem, 845 P.2d 150, 157 (N.M. 1992).

need for a clear legislative statement of intent to preempt. The state's provision for five city commissioners did not indicate a clear intent to fix the number of commissioners or prevent home rule municipalities from adopting a different number. There was no "limitation that the number of commissioners be set at *only* a stated number."[123] As with the Maine Supreme Judicial Court's decision in *York*, a state law concerning local structure was to be treated as a model, not a mandate.[124]

IV. Implications for Home Rule

The significance of this modest jurisprudence of state political innovation should not be overstated. The case sample is small, and the selection of states limited. Some of the more ambitious local innovations – like New York City's 2007 "pay to play" law and its 2004 extension of contribution limits and disclosure requirements to all candidates, not just those opting into the voluntary public funding system – have not been tested. In many states, home rule is far more limited and preemption more extensive than these cases suggest. Nevertheless, the cases do indicate arguments that can be advanced to bolster the local position in state-local conflicts.

The significance of balancing – and of the fact that localities have prevailed in a fair number of balancing cases – may be surprising. It is often assumed that such balancing leads to the

123 *Id*. at 158.

124 The "clear statement" requirement can protect local autonomy in substantive areas as well as with respect to local control of the structure of local government. In *New Mexicans for Free Enterprise v. City of Santa Fe*, 126 P.3d 1149 (N.M. App. 2005), the court of appeals upheld the city of Santa Fe's "living wage" ordinance, which requires certain large local employers to pay an hourly minimum wage well above the minimum wage set by the state. The New Mexico court rejected the argument that the state minimum wage law preempted the local ordinance, finding that the state law did not expressly deny to the city the power to set a higher local minimum wage.

balancing away of local rights and powers in favor of vague and open-ended, but preemptive, state concerns. The rise of the *legislative* home rule model – which trades away all local immunity in order to assure greater scope to local initiative – is surely at least in part attributable to the sense that local governments usually lose when balancing is the rule. Yet, local governments sometimes prevail when courts balance. The key to local success in the balancing cases appears to be the combination of the intense local interest in the structures and procedures of local governance, with the absence of external effects or state-wide costs from local variations.

This was perhaps suggested by Justice Hans Linde's often-cited opinion in *City of La Grande v. Public Employees Retirement Board* distinguishing between state laws addressed to "substantive social, economic, or other regulatory objectives of the state" and those "addressed to . . . the structures and procedures of local agencies."[125] In the former case, there would be no balancing and state law would automatically prevail. But because the latter type of state law burdens the "central object" of home rule – allowing the people of the locality "to decide upon the organization of their government and the scope of its powers" -- the state's law would have to be balanced and justified against the local law. To Justice Linde's focus on the close connection between local measures dealing with local self-government and home rule, the more recent cases add an almost economic concern with externalities and the lack thereof. The judicial recognition that people outside Los Angeles don't care whether Angelenos spend their tax dollars on paying for candidates' campaigns or that New Mexicans outside Clovis have no interest in the size of the

125 576 P.2d 1204, 1215 (Ore. 1978).

Clovis governing board – tied to the importance of these matters to the localities that have acted on these measures – were critical to the vindication of home rule in those cases.

The "models, not mandates" and the clear statement cases also make an important analytical point – that state and local interests may be reconciled by treating general state laws dealing with local government structure, procedure, and elections as templates, or off-the-shelf models, for local governments which may be superseded by local governments that prefer to do things their own way.[126] There is nothing inherently wrong about state governments legislating about local matters. Such legislation may be useful to local governments, and assure a basic level of local government efficacy and integrity. But the purpose and ultimate effect of such measures should be to assure that some rules and procedures are in place to deal with basic governance questions, not to preclude local variation by those localities that want alternatives– at least not until state law clearly rules out local variation.

A handful of courts have also applied these ideas in cases dealing with local regulation of municipal employees. The Pennsylvania Supreme Court recently held that Philadelphia's extension of health and other employment benefits to the same-sex "Life Partners" of the city's employees fell within the city's "explicit authority to legislate regarding matters of local concern."[127] In words similar to the analysis in the political innovation cases, the Pennsylvania court explained that "matters affecting merely the *personnel* and *administration* of offices local to

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

127 Devlin v. City of Philadelphia, 862 A.2d 1234, 1246–1247 (Pa. 2004)

Philadelphia" are of "no concern to citizens elsewhere" and, thus, a matter that Philadelphia could decide for itself.[128] The Washington Supreme Court similarly upheld the authority of a city to extend health insurance benefits to the domestic partners of city employees on the theory that municipal employee benefits are a matter of local concern directly connected to the underlying goals of home rule autonomy.[129] Courts in Illinois,[130] Colorado,[131] and California have placed aspects of the city/county employer-employee relationship within the core of home rule. Indeed, in 2003 the California Supreme Court invalidated, on home rule grounds, a state law requiring binding arbitration of economic issues between counties and unions representing firefighters and law enforcement officers.[132] The court said that counties are free to choose binding arbitration, but that due to the centrality of the public employment relationship to home rule, binding arbitration cannot be imposed on them.

To be sure, most states exercise broad authority over the municipal employment relationship. Moreover, unlike the structures of local self-governance or the rules for local

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128 *Id.* at 1242 (quoting Lennox v. Clark, 93 A.2d 834, 845 (Pa. 1953)).

129 Heinsma v. City of Vancouver, 29 P.3d 709 (Wash. 2001).

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

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

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

elections, municipal employment rules can have external effects since many municipal employees are nonresidents. Still, these cases, like the political structure cases, suggest lines of argument potentially useful for local government lawyers.

V. Implications for Political Reform

Justice Brandeis famously defended federalism in terms of the opportunity it provides for government innovation. As he observed, "a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[133] Well, if the fifty states are laboratories for public policy formation, then surely the 3,000 counties and 15,000 municipalities provide logarithmically more opportunities for innovation, experimentation and reform. Thousands of local governments provide thousands of arenas for innovation and for testing the costs and benefits of those innovations.

San Francisco's IRV system, New York City's campaign finance reforms, and other local political developments have drawn national attention, as they address basic questions of political participation and governance that are significant throughout the country. We already know more about the workability, benefits, and costs of IRV and the public funding of election campaigns as a result of the innovative actions of cities like San Francisco, Tucson, Los Angeles, and New York. Although the case for home rule is typically made in terms of the benefits for city residents in obtaining greater opportunities for democratic participation and in tailoring local policies to local

133 New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

preferences, needs and concerns, the local political reforms demonstrate that the benefits of home rule are far from purely local.

As these cases indicate, both costs and benefits support local autonomy in political innovation. The costs of these initiatives are entirely local. There is no external interest in preventing local experimentation with new electoral systems or governmental procedures. But the benefits will be external – by providing new information about the consequences of particular innovations – as well as internal. There is, thus, a general systemic interest in encouraging local political experimentation and in interpreting home rule to make such local innovation possible and to protect it from claims of state preemption.