ARTICLES

THE CITY AND THE PRIVATE RIGHT OF ACTION

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Cities in most states enjoy broad "home rule" authority—that is, the presumptive power to regulate a wide range of subjects. In many of these states, however, home rule comes with a catch: cities are prevented from interfering with "private law." This Article argues that the "private law exception," as this doctrine is known, is an anachronistic relic of early twentieth century legal thought that ought to be retired outright. This Article explains how a subject-based view of the private law exception, which prevents cities from passing ordinances affecting subjects like contracts, property, and torts, is largely unenforced today. The more relevant and potent form of the private law exception, by contrast, prohibits cities from enacting ordinances that create private causes of action, thereby requiring local ordinances to be enforced exclusively by public means. This constraint limits both the effectiveness of local policy choices as well as their social impact. As this Article will show, the primary justification for the contemporary private law exception—protecting the interests of the state courts—is not sufficiently compelling to outweigh the costs to local policy experimentation that the exception imposes.

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INTRODUCTION

It has been more than a century since American cities first gained "home rule"—that is, the authority to legislate on a broad range of social and economic policies without prior state legislative approval. Using this authority, cities—and sometimes counties[1]—have increasingly led the way in adopting innovative social policies in areas like public health, civil rights, and environmental protection. Despite enjoying seemingly broad home-rule powers in the vast majority of states, however, cities in several states remain hamstrung by one particular doctrinal limitation on their regulatory authority: they cannot create civil liability between private parties. The lack of power to create private rights of action puts pressure on cities to enforce all ordinances themselves, a costly and inefficient method of ensuring that city policy choices are effectuated. Given the precarious state of municipal finances throughout the nation, the ability of cities to rely on private enforcement to effectuate local policy choices has never been more necessary. This Article argues that cities ought to have the authority to create private rights of action. In doing so, the Article explains why such authority not only fits within the structure of local government law, but also furthers the dynamic of policy experimentation that is the primary normative justification for home rule.

Judicial skepticism toward city authority to create private rights of action has a long pedigree. Shortly after the inception of home rule in the early twentieth century, a consensus developed that city power did not include the authority to regulate "private law." This ill-defined subject matter was said to in-

1. Although cities and counties both exercise home rule in some states, I shall as a matter of convenience usually refer only to "cities" when speaking generally of home-rule municipalities, which might also include townships, towns, boroughs, etc. *Cf.* Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1061-62 & n.4 (1980) (using "cities" to refer to cities as well as other "substate geographic areas").

clude topics like contracts, property, torts, wills and trusts, and domestic relations.[2] With little in the way of reasoned explanation, these areas were said to be of such a nature that uniform state regulation was required. The "civil or private law exception" to home-rule powers became a significant barrier to municipal social and economic policymaking, as just about any ordinance could be said to interfere with private law to some degree. For this reason, the ban on city regulation of private law has been relaxed in most states, at least with respect to the subject matters cities may regulate, although its doctrinal persistence occasionally raises problems for cities.

While the subject-based private law exception has faded to a considerable degree, the related but conceptually distinct category of municipal authority to create private rights of action has stubbornly persisted in many states, despite at least one scholar's previous attempt to demonstrate its inconsistency with the logic of home rule.[3] This Article argues that the modern private law exception is not just illogical, but also antithetical to home rule's normative justifications. By depriving cities of a critical weapon in their policy enforcement arsenal, the private law exception can significantly reduce the effectiveness of municipal policy choices. In addition to weakening policies that cities do adopt, the doctrine likely deters cities from enacting other, potentially beneficial regulations in the first place due to concerns about the costs and efficacy of public enforcement. Because it prevents cities from empowering harmed individuals with the right to seek private relief, the private law exception also weakens the ability of the community (i.e., the city) to define and punish conduct it deems wrongful. Making private enforcement more clearly available to municipal policymakers, therefore, will strengthen the efficacy and meaning of current local policy choices and lead to additional legislation that may serve the public good.

To be sure, there are good arguments in favor of retaining some version of the private law exception, and this Article will grapple with them. The most significant argument against city authority to create private rights of action objects to municipal commandeering of the state judiciary to vindicate city goals. At times, this argument is stated in technical terms: cities may not enlarge the jurisdiction of state courts by creating new causes of action. Although this argument has some merit, it too must succumb to the logic of not just home rule, but also the federal constitutional framework of local government. If cities are to serve as "convenient agencies" of the state, as envisioned by the United States Supreme Court in *Hunter v. City of Pittsburgh*,[4] their legal regimes ought to work in harmony with—rather than separately from—the state's. Indeed, because cities are "agencies" of the state rather than distinct sovereigns,

2. HOWARD LEE MCBAIN, THE LAW AND THE PRACTICE OF MUNICIPAL HOME RULE 673-74 (1916).

3. *See generally* Gary T. Schwartz, *The Logic of Home Rule and the Private Law Exception*, 20 UCLA L. REV. 671 (1973).

4. 207 U.S. 161, 178 (1907).

the state courts are obliged to supervise their actions to some degree. That locally created private rights of action might impose some additional costs on the state court system is not reason enough to deny cities this important enforcement tool, at least presumptively.

This Article will proceed in four Parts. Part I explores the history of the private law exception, tracing its evolution within two related contexts: the development of municipal home rule in the United States and changing conceptions of the public-private law distinction. Part I will explain why the definition of private law is critical to understanding the scope of any private law exception. More specifically, Part I will argue that the contemporary private law exception should be understood as a limitation on cities' authority to create private rights of action rather than a limitation of their ability to regulate certain substantive fields of law, and will demonstrate how courts have largely accepted this view in practice, even if not always in their rhetoric. Part II surveys the current legal landscape, describing the degree to which a complainant-based private law exception persists in many states, and how municipal practice is sometimes inconsistent with legal doctrine. Part III explains why cities should have the authority to create private rights of action, and why this power is an important one. Part III further demonstrates how cities have used this power—even when the doctrinal footing is shaky—in significant ways, particularly in the area of antidiscrimination law. Part IV then addresses the most substantial objection to allowing cities to create private rights of action—protecting the state courts from city-imposed costs, which I refer to as the "reverse-commandeering" argument—and explains why this objection does not justify a private law exception.

I. DEFINING THE PRIVATE LAW EXCEPTION

Before the emergence of home rule in the late 1800s, most states embraced Dillon's Rule.[5] Articulated by Judge John Dillon, an Iowa Supreme Court justice and then a federal circuit court judge, in his influential postbellum treatise on municipal corporations, the eponymous rule held that cities had scant inherent powers and could exercise only those powers specifically delegated to them

5. *See* WILLIAM BENNETT MUNRO, THE GOVERNMENT OF AMERICAN CITIES 53, 79 (1912) (noting that the fundamental principle that a state has total control over local government was "so well recognized that it is not nowadays open to question," and citing Dillon as a source of "[a] great deal of useful information"). Not all courts in pre-home-rule states, however, embraced Dillon's extreme view of presumptive city powerlessness. *E.g.*, Wong v. City of Astoria, 11 P. 295, 296 (Or. 1886) (holding that cities may exercise "police powers," even though Oregon had not yet adopted home rule); *see also* Paul A. Diller, *The Partly Fulfilled Promise of Home Rule in Oregon*, 87 OR. L. REV. 939, 942-44 (2009) (citing *Wong*, 11 P. 295).

by state law.[6] The United States Supreme Court largely embraced Judge Dillon's theoretical conception of local government in the 1907 *Hunter* case, in which the Court held that cities were mere "political subdivisions" and "convenient agencies" of the state that could be abolished at will.[7] Under Dillon's Rule, cities could regulate matters of "private law," however defined, only if the state legislature had granted them specific authority to do so. Dillon viewed any municipal power that might "touch the right to liberty or property"—by which Dillon, writing in the late nineteenth century, likely meant rights like "freedom of contract"—as "out of the usual range" of municipal powers, and urged that any such grants be read narrowly.[8]

Around the turn of the twentieth century, a dozen states adopted "home rule" provisions.[9] Rather than require a specific grant of power from the legislature to justify the city's regulation of a certain subject, these provisions offered cities a broader and more permanent source of authority from which to govern.[10] Many of the early home-rule provisions did not delegate plenary legislative authority to local governments, but rather delegated authority to cities to enact laws of "local" concern.[11] This form of home rule, often referred to as "imperio," conceived of cities and states as regulating distinct realms: cities were prohibited from legislating with respect to matters of state concern, while exercising full dominion over "local" matters.[12]

It was out of this imperio conception of home rule—now largely dated—that the private law exception to city authority emerged. Howard McBain, a political scientist and authority on constitutional law, published a detailed and influential treatise on home rule in 1916, in which he asserted that it was "common understanding" and "universally accepted" that "such general subjects as . . . domestic relations, wills and administration, mortgages, trusts, contracts, real and personal property, insurance, banking, corporations, and many others . . . are strictly of 'state concern,'" and therefore not "appropriate subjects of

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6. 1 JOHN F. DILLON, THE LAW OF MUNICIPAL CORPORATIONS § 9b, at 93 (2d ed. 1873) ("[Municipalities] possess no powers or faculties not conferred upon them, either expressly or by fair implication, by the law which creates them . . . .").

7. 207 U.S. at 178-79.

8. 1 JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 91 (Little, Brown, & Co. 4th ed. 1890) (1872).

9. *See* MCBAIN, *supra* note 2, at v (noting that as of 1916, twelve states had home-rule provisions).

10. *Id.*

11. *See* David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2290 (2003).

12. The term stems from a United States Supreme Court case in which the home-rule city of St. Louis was described as an "imperium in imperio," Latin for "empire within an empire." City of St. Louis v. W. Union Tel. Co., 149 U.S. 465, 468 (1893); *see also* City of New Orleans v. Bd. of Comm'rs, 640 So. 2d 237, 242-43 (La. 1994) (reviewing "imperio" model of home rule); Terrance Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643, 660-61 (1964) (same).

local control."[13] In oft-cited dicta, Judge Cardozo, while on the New York Court of Appeals, echoed somewhat the views of McBain in opining that "the law of domestic relations, of wills, of inheritance, of contracts, of crimes not essentially local (for example, larceny or forgery), the organization of courts, [and] the procedure therein," were all matters "exclusively" for the state.[14] The views of Cardozo and McBain ossified into settled doctrine over the next few decades as courts and academic commentators generally accepted as undisputed the abstract proposition that home rule did not include the authority to regulate private law.[15]

A. *The Private-Public Law Distinction*

But what exactly did courts and commentators mean by "private law," a term with a long pedigree but without a precise definition?[16] Attempts to divide law into separate "public" and "private" realms go back at least to Roman times, as chronicled by Justinian.[17] The distinction took on increased significance in European legal thought with the rise of the nation-state in the sixteenth and seventeenth centuries.[18] While monarchs and, later, parliaments had unrestrained power to make "public law," a countervailing effort developed, linked to natural rights theory, to carve out a distinctively "private" sphere free from the power of the sovereign.[19] In American legal history, the push to separate

13. MCBAIN, *supra* note 2, at 673-74.

14. Adler v. Deegan, 167 N.E. 705, 713 (N.Y. 1929) (Cardozo, C.J., concurring).

15. *See* Wagner v. Mayor of Newark, 132 A.2d 794, 800 (N.J. 1957) ("Matters that because of their nature are inherently reserved for the State alone [include] . . . master and servant and landlord and tenant relationships, matters of descent, the administration of estates, creditors' rights, domestic relations, and many other matters . . . ."); Sandalow, *supra* note 12, at 674 ("The grant of home rule power has not generally been understood as authorizing municipalities to enact purely private law, *i.e.* law governing civil relationships."); *see also* Comment, *Municipal Home Rule Power: Impact on Private Legal Relationships*, 56 IOWA L. REV. 631, 633 (1971) (stating that while there are exceptions in various situations, "the area of private law is generally considered . . . not within the scope of power of a home rule municipality"). The private law exception is sometimes referred to as the "private and civil law exception," since some home-rule provisions mention both "private" and "civil" law as areas (presumptively) outside of municipal authority. *See infra* note 47 (citing different state provisions). While there may be a difference between "private" and "civil" law or "private" and "civil" relationships, any difference is largely semantic and substantively negligible. *See* Schwartz, *supra* note 3, at 695-96. Hence, this Article will discuss the "private law exception" without separately addressing any "civil law exception."

16. *See generally* Randy E. Barnett, *Foreword: Four Senses of the Public Law-Private Law Distinction*, 9 HARV. J.L. & PUB. POL'Y 267 (1986).

17. DIG. 1.1.1(2) (Ulpian, Institutes 1) ("Of this subject [law] there are two divisions, public and private law. Public law is that which has reference to the administration of the Roman government; private law is that which concerns the interest of individuals . . . .").

18. Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1423 (1982).

19. *Id.*

private and public law was strongest in the late nineteenth and early twentieth centuries, around the same time municipal home rule began to develop. Legal elites of that era were highly suspicious of Progressive efforts to regulate social ills caused by the market economy.[20] They thus sought to insulate the realm of "voluntary" market transactions from "the dangerous and unstable redistributive tendencies of democratic politics" by drawing a sharp distinction between private and public law.[21] The United States Supreme Court infamously provided federal constitutional protection to the "private" realm in *Lochner v. New York*, when it held that New York's maximum-hours law interfered with "liberty of contract."[22] The notion of a private realm constitutionally immune to public intervention largely held steady in American jurisprudence until the 1930s.[23]

In addition to their suspicion of public regulation of the private realm generally, many turn-of-the-twentieth-century legal elites were especially suspicious of municipal regulation of the private sphere. They believed that cities were particularly susceptible to being corrupted by private actors who would exploit the city's need for a property tax base, and that cities were more likely than state legislatures to use their public authority to interfere with the separate, "neutral" sphere of the free market.[24] The private law exception, which prevented cities from regulating subjects like contracts, property, and torts, combined with the imperio conception of home rule dominant at the time, ensured that cities would act within a relatively narrow public sphere and avoid the redistributive or market-regulating policies deemed suspect by many legal elites.[25] The 1930s saw the end of the *Lochner* era and a significant increase in

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20. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 10-11 (1992) (noting the "powerful tendenc[y] in late-nineteenth-century law . . . to create a sharp distinction between what was thought to be a coercive public law—mainly criminal and regulatory law—and a non-coercive private law of tort, contract, property, and commercial law, designed to be resistant to the dangers of political interference").

21. Horwitz, *supra* note 18, at 1425.

22. 198 U.S. 45, 61 (1905).

23. *See, e.g.*, Adkins v. Children's Hosp., 261 U.S. 525, 553 (1923) (invalidating federal minimum wage law for women and children in District of Columbia because it interfered with "liberty of contract"). In contrast to its approach to maximum-hours and minimum wage laws, the *Lochner*-era Court upheld zoning regulations against a "takings" challenge in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 397 (1926), although three justices dissented, *see id.*, and the challenge had succeeded at the trial court level, *see* Ambler Realty Co. v. Village of Euclid, 297 F. 307, 317 (N.D. Ohio 1924).

24. *See* Barron, *supra* note 11, at 2283 ("[T]he city was understood as a limited coordinating mechanism through which property owners could secure their investments free from public interference . . . .").

25. *Id.* at 2284 (describing the "anti-redistributive, privatist conception of local power" as "dominant" in the late nineteenth and early twentieth centuries); *id.* at 2294-95 (arguing that the original purpose of home rule was "to confine local power to a quasi-private sphere" and "enable the city . . . to pursue the old conservative governmental vision" of minimal interference in the private realm).

government regulation of previously "private" subjects like contracts and property. Indeed, by the 1940s, many thought that the distinction between private and public law had been eradicated.[26] Nonetheless, the distinction has persisted in state-local relations and, to some degree, in other areas of law through the present day.[27]

When speaking of the distinction between private and public law, it is helpful to focus on two versions of the distinction: the *subject*- and *complainant*-based meanings.[28] The subject-based meaning of private law closely resembles the distinction articulated by Justinian, in which private law comprises the substantive areas that define the rights and duties private individuals and associations owe each other, without necessarily focusing on how those rights are enforced.[29] Public law, on the other hand, regulates the internal conduct of government and government's relationship to private parties.[30] Under this approach, which is similar to McBain's, private law includes the subjects of contracts, torts, property, corporations, agency and partnership, trusts and estates, remedies, and family law.[31] Public law, on the other hand, includes constitutional law, criminal procedure, tax, administrative law, and at least part of substantive criminal law.[32] In contrast to a subject-based approach, the complainant-based meaning of private law focuses on who has the power to initiate legal action. If the government is the only eligible complainant, as in criminal prosecution or (often) zoning code enforcement, the matter is public law. If, on the

26. *See* Horwitz, *supra* note 18, at 1426-27 ("By 1940, it was a sign of legal sophistication to understand the arbitrariness of the division of law into public and private realms."); *see also* Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 697 (2003) ("[T]oday's legal academy finds the very idea of private law conceptually incoherent, politically retrogressive, or both.").

27. The public-private distinction remains particularly important in Europe's Continental legal systems, *see* Paul Verbruggen, *The Public-Private Divide in Community Law: Exchanges Across the Divide* 1 (Eur. Univ. Inst., Working Paper LAW No. 2009/22) ("Continental lawyers do not know better than that the law can be divided in two principle [sic] domains: public and private law."), although "the idea of a clear dividing line between the two domains has lost support" even among Continental lawyers. *Id.*

28. It is worth noting that there are other versions of the exception not relevant here. *See, e.g.*, Barnett, *supra* note 16, at 267-68 (discussing versions of the distinction that focus on "the kinds of substantive standards used to assess" conduct and "the different kinds of institutions that may be charged with adjudicating and enforcing legal regulations").

29. *Id.* at 270-71.

30. *Id.*

31. *Id.* at 271. Barnett does not include family law within his list of private law subjects, but many other commentators do. *E.g.*, Michael P. Van Alstine, *The Judicial Power and Treaty Delegation*, 90 CALIF. L. REV. 1263, 1264 (2002).

32. As Barnett notes, "[t]hat part of the criminal law that concerns harms inflicted on discernible victims might be classified as private law according to [a subject-based] usage." Barnett, *supra* note 16, at 271 n.6; *cf.* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 70 & n.24 (1982) (plurality opinion) (noting that, for purposes of deciding whether an Article III tribunal may be replaced by an administrative agency, criminal prosecutions have always been treated as "private," rather than "public rights" cases).

other hand, the legal action may be brought by private parties, it is private law.[33]

The potential scope of any private law exception to home rule depends significantly on which meaning of private law is intended. If private law is subject-based, encompassing property, torts, contracts, and the other subjects listed by McBain, then the exception may sweep quite broadly, as much governmental action touches on one or more of these subjects. For instance, under a subject-based understanding of the private law exception, a city would be prohibited from passing a rent control ordinance since the ordinance interferes with the relationship between landlord and tenant rooted in contract and property law.[34] Similarly, a city would be prohibited from passing an antidiscrimination ordinance that applies to private employers, or a minimum wage ordinance, because such regulations interfere with the contractual relationship between the employer and employee.[35] Under the subject-based view of private law, it would not matter whether the above ordinances were enforced by public or private means. In other words, even if a minimum wage ordinance were enforced solely by the city through prosecutions for civil violations or misdemeanors, a subject-based private law exception would still be offended.

If, on the other hand, private law is complainant-based, then rent control, antidiscrimination, or minimum wage ordinances are valid so long as they are enforced by the city exclusively. If, however, such ordinances allow enforcement by private parties, they violate the private law exception. In all likelihood, ordinances that grant private rights of enforcement do touch upon a traditional private law subject.[36] The converse is not necessarily true, however: ordinances

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33. Barnett, *supra* note 16, at 269-70. There are some legal actions, of course, that governments and private parties may initiate on essentially equal footing, such as breach of contract claims. The fact that the government may assert a legal action that a private party may also bring does not abnegate the characterization of such an action as private law. *See id.* at 269 (defining "private law" as comprising actions "usually" brought by private individuals).

34. *See, e.g.*, Marshal House, Inc. v. Rent Review & Grievance Bd., 260 N.E.2d 200, 207 (Mass. 1970).

35. *See* New Mexicans for Free Enter. v. City of Santa Fe, 126 P.3d 1149, 1160 (N.M. Ct. App. 2005) (deciding that a local minimum wage ordinance "is a private or civil law").

36. To be sure, there is the possibility that a local government might create a private right of action against *itself*. Strictly speaking, this might also fall within a complainant-based view of private law, and would certainly implicate the "reverse-commandeering" concerns discussed in Part IV below. These ordinances are a different beast, however. First, they raise questions of local government immunity. *See, e.g.*, Mack v. City of Detroit, 649 N.W.2d 47 (Mich. 2002) (considering whether city creation of private right of action against itself violates state immunity law). Second, they are not tied to the historic private law exception to the same extent as private rights of action against private parties. *See* Schwartz, *supra* note 3, at 688 ("Private law consists of the substantive law which establishes legal rights and duties between and among private entities, law that takes effect in lawsuits brought by one private entity against another." (footnotes omitted)). For these reasons, this Article will not deal extensively with that issue.

that regulate private law subjects do not constitute complainant-based private law so long as they are exclusively publicly enforced.

B. *The Evolution of the Private Law Exception*

When judges, lawyers, and commentators first formulated the private law exception in the early twentieth century, there was little need to clarify whether it was subject- or complainant-based. Although Progressive efforts to regulate the "private" market were emerging at the federal and state levels, almost all regulation of traditional private law subjects was still effectuated through common law rules enforced by private parties in the courts.[37] Hence, the subject- and complainant-based conceptions of private law then overlapped almost completely, a symmetry which the Supreme Court's *Lochner*-era jurisprudence sought to preserve. Nonetheless, as indicated by McBain's (and others') reference to specific subjects like contracts, property, and torts, the early private law exception was likely assumed to be at least subject-based.

As noted above, by the 1940s the subject-based conception of private law had begun to unravel.[38] The 1950s and 1960s witnessed even more public regulation of the formerly "private" sphere through state and federal civil rights laws.[39] Although the private law exception should have seemed increasingly anachronistic at the time, it was nonetheless preserved, at least to some degree, even as municipal power expanded. During the same period, many states abandoned the imperio conception of home rule in favor of an approach that abolished the judiciary's role in distinguishing between subjects that are more appropriately regulated at the state or local level.[40] Under this newer form of home rule, cities and states could regulate the same range of potential subjects

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37. *See* HORWITZ, *supra* note 20, at 10-11 (asserting that leading nineteenth-century legal thinkers viewed private law as "concerned only . . . with private transactions between private individuals vindicating their pre-political natural rights").

38. Horwitz, *supra* note 18, at 1426 (noting that for the thirty years following *Lochner v. New York*, 198 U.S. 45 (1905), "the most brilliant and original legal thinkers America has ever had devoted their energies to exposing the conservative ideological foundations of the public/private distinction[,] . . . ridicul[ing] the invisible-hand premise behind any assumption that private law could be neutral and apolitical").

39. *See* Maimon Schwarzschild, *Keeping It Private*, 44 SAN DIEGO L. REV. 677, 683-84 & n.20 (2007) (citing Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (2006), and Civil Rights (Fair Housing) Act of 1968, 42 U.S.C. §§ 3601-3619, as statutory enactments that "greatly modif[ied] what had been private common law").

40. *See* MODEL CONSTITUTIONAL PROVISIONS FOR MUNICIPAL HOME RULE intro. at 20 (Jefferson B. Fordham, Comm. on Home Rule of the Am. Mun. Ass'n 1953) [hereinafter AMA MODEL] (rejecting "the assumption that governmental powers and functions are inherently of either general or local concern"); *see also* City of La Grande v. Pub. Emps. Ret. Bd., 576 P.2d 1204, 1213 (Or. 1978) ("Nor is it generally useful to define a 'subject' of legislation and assign it to one or the other level of government."), *aff'd on reh'g*, 586 P.2d 765 (Or. 1978).

so long as a city's ordinances did not conflict with state law.[41] Because it, at least in theory, conditioned the extent of local authority upon preemption by the legislature, rather than judicial pronouncement, this form of home rule became known as "legislative." In no longer presuming there to be a universe of judicially determined subjects that cities could not constitutionally regulate, legislative home rule provided a less hospitable framework for a subject-based private law exception.

Rather than jettison the private law exception entirely, however, leading promoters of legislative home-rule initiatives in the 1950s and 1960s—namely, the American Municipal Association (AMA)[42] and the National Municipal League (NML)[43]—sought to modify the exception. The AMA specifically cited the need for at least some statewide uniformity in areas like contract and property law as the reason for preserving the exception.[44] In recognition of the obvious tension between expanded local authority and the potentially wide scope of a private law exception,[45] however, the AMA and NML proposed to temper the exception by allowing municipal infringements on private law when "incident to an exercise of an independent municipal power."[46] Eight states adopted this awkward compromise language or something similar for their home-rule provisions,[47] the current effect of which is discussed below.

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41. *See, e.g.*, MODEL STATE CONSTITUTION § 8.02 cmt. at 97 (Nat'l Mun. League 1963) [hereinafter NML MODEL].

42. The AMA was the forerunner of today's National League of Cities. Nat'l League of Cities, *NLC's History*, CITIESSPEAK.ORG, http://citiesspeak.org/nlcs-history (last visited May 11, 2012).

43. The NML was a prominent advocate for "good government" reform; it is now known as the National Civic League. *See A History of the National Civic League*, NAT'L CIVIC LEAGUE, http://www.ncl.org/index.php?option=com_content&view=article&id=98&Itemid=177 (last visited May 11, 2012).

44. *See* AMA MODEL, *supra* note 40, intro. at 21 ("Traditionally, the states have not given local units any [power to enact private law] for obvious reasons. Few would want a system under which the law of contracts and of property varied from city to city.").

45. *See id.* ("[T]he exercise of municipal powers has a more or less direct bearing upon private interests and relationships. . . . It is the theory of the draft that a proper balance can be achieved by enabling cities to enact private law only as an incident to the exercise of some independent municipal power."); *see also* Jefferson B. Fordham, *Home Rule—AMA Model: American Municipal Association Plan Gives Broad Powers to Cities but Retains Legislative Control*, 44 NAT'L MUN. REV. 137, 142 (1955).

46. AMA MODEL, *supra* note 40, § 6, at 19; *accord* NML MODEL, *supra* note 41, § 8.02, at 16.

47. MASS. CONST. art. II, § 7, *amended by* MASS. CONST. art. LXXXIX (preventing cities from "enact[ing] private or civil law[s] governing civil relationships except as an incident to an exercise of an independent municipal power"); N.M. CONST. art. X, § 6(D) (stating that home-rule power does not include "the power to enact private or civil laws governing civil relationships except as incident to the exercise of an independent municipal power"); ARK. CODE ANN. § 14-14-805 (2011) (prohibiting county legislative bodies from passing "[a]ny legislative act that applies to or affects any private or civil relationship, except as an incident to the exercise of local legislative authority"); DEL. CODE ANN. tit. 22, § 802 (2011) (denying municipalities the "power to enact private or civil law governing civil relationships except as

Writing after the AMA and NML promulgated their model home-rule provisions, Gary Schwartz attempted to clarify the meaning of the private law exception in his seminal 1973 article. Schwartz focused on the model provisions' use of the term "civil relationships." For Schwartz, this term denoted "the relationship between plaintiff and defendant in a civil private lawsuit."[48] In this sense, Schwartz appeared to view the private law exception as primarily complainant-based.[49] At other points in the article, however, Schwartz's definition of private law veered more toward the subject-based.[50] Irrespective of Schwartz's commendable attempts at clarification, however, confusion regarding the meaning of a private law exception to municipal authority persists. Leading home-rule scholars still either refer to the exception without extensive definition,[51] or assume that the exception remains primarily subject-based.[52] Courts sometimes invoke it without clarifying whether the exception is subject- or complainant-based or both.[53] Before attacking a complainant-based private

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an incident to an exercise of an independent municipal power"); GA. CODE ANN. § 36-35-6(b) (2011) (preventing municipalities from enacting laws affecting civil or private relationships "except as is incident to the exercise of an independent governmental power"); IND. CODE ANN. § 36-1-3-8(a) (West 2011) (withholding from local government units "[t]he power to prescribe the law governing civil actions between private persons"); IOWA CODE ANN. § 331.301(1) (West 2011) (stating that the grant of home-rule power to counties "does not include the power to enact private or civil law governing civil relationships, except as incident to an exercise of an independent county power"); *id.* § 364.1 (prohibiting cities from "enact[ing] private or civil law[s] governing civil relationships, except as incident to an exercise of an independent city power"); S.D. CODIFIED LAWS § 6-12-6 (2011) ("The power of a home rule unit does not include the power to: [e]nact private or civil law governing civil relationships except as incident to the exercise of an independent county or municipal power . . . .").

48. Schwartz, *supra* note 3, at 696.

49. *Id.* at 695-96; *id.* at 688 (defining "private law" as "law that takes effect in lawsuits brought by one private entity against another"); *see also id.* at 689 (noting that "block[ing] off entire subject matter areas . . . as innately 'private law'" was "somewhat contrary to [his] definition" of private law).

50. *E.g.*, *id.* at 711-12 (discussing private law as including contracts, torts, and property); *id.* at 755-56 (explaining how a doctrinal alternative to the private law exception might exempt certain subjects from municipal power). Similarly, Jefferson Fordham, drafter of the AMA and NML provisions so intently analyzed by Schwartz, appeared to embrace a subject-based conception of the private law exception to some degree by referring to the law of contracts and property in describing its scope. *See, e.g.*, AMA MODEL, *supra* note 40, intro. at 21 ("Few would want a system under which the law of contracts and property varied from city to city.").

51. *E.g.*, Barron, *supra* note 11, at 2348 (noting that the category of "'private or civil affairs' . . . has always been something of a mystery").

52. *E.g.*, Richard C. Schragger, *Cities as Constitutional Actors: The Case of Same-Sex Marriage*, 21 J.L. & POL. 147, 155 (2005) (reciting subject-based definition of private law exception that includes torts, contracts, property, and domestic relations).

53. *E.g.*, McCrory Corp. v. Fowler, 570 A.2d 834, 838, 840 (Md. 1990) (invalidating county antidiscrimination ordinance on grounds that it created private right of action, while also noting that county may not regulate areas of torts and contracts); *see also* Marshal House, Inc. v. Rent Review & Grievance Bd. of Brookline, 260 N.E.2d 200, 204 (Mass.

law exception, therefore, which is the primary goal of this Article, I will briefly explain why a subject-based version of the exception is both ill conceived and, fortunately, infrequently invoked.

C. *The Withered Subject-Based Private Law Exception*

Despite the recent efforts of some legal scholars to rehabilitate it,[54] the public-private law distinction is as untenable today as it was exposed to be by the middle of the twentieth century. In fact, public regulation of formerly private realms has only increased since then, including significant changes in landlord-tenant[55] and consumer protection law,[56] as well as the wholesale emergence of environmental law.[57] Further, the protean nature of the private law category invites unrestrained judicial policymaking, as almost any form of government regulation will touch a private law subject in some way. Hence, a robust subject-based view of the private law exception would seriously erode the local autonomy that home rule offers.[58]

Moreover, the traditional justification for a subject-based private law exception—that cities might create multiple and conflicting laws of, say, contracts or torts[59]—in some ways attacks a straw man. First, it is highly unlikely that any city would seek to drastically rewrite the entire law of property, or contract, or torts, each of which includes an amalgam of both statutory and common law rules. Such an undertaking would not only be extraordinarily time-consuming

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1970) (noting substantial "[a]mbiguity" and "uncertainty" regarding meaning of "private law exception"); New Mexicans for Free Enter. v. City of Santa Fe, 126 P.3d 1149, 1160 (N.M. Ct. App. 2005) ("While there are no bright-line divisions between public law and private law, private law has been defined as consisting 'of the substantive law which establishes legal rights between and among private entities, law that takes effect in lawsuits brought by one private entity against another.'" (citation omitted) (quoting Schwartz, *supra* note 3, at 688)).

54. *See* Horwitz, *supra* note 18, at 1427 (observing the "surprising vitality" of the public-private distinction in law).

55. *E.g.*, Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1081-82 (D.C. Cir. 1970) (recognizing a privately enforceable "implied warranty of habitability" based on the municipal housing code's regulations).

56. Robert B. Leflar & Robert S. Adler, *The Preemption Pentad: Federal Preemption of Products Liability Claims After* Medtronic, 64 TENN. L. REV. 691, 746-47 (1997) (concluding that Congress enacted the consumer protection statutes of the 1960s and 1970s in order "to supplement private law").

57. Robert V. Percival, *Regulatory Evolution and the Future of Environmental Policy*, 1997 U. CHI. LEGAL F. 159, 159 (noting that before the 1970s, environmental law was a "highly decentralized system built on private law principles").

58. Schwartz, *supra* note 3, at 690-91.

59. *See, e.g.*, AMA MODEL, *supra* note 40, intro. at 21 ("Few would want a system under which the law of contracts and of property varied from city to city."); Sandalow, *supra* note 12, at 678-79 (asserting that "chaos would ensue" if "thousands of cities and villages" had the power "to adjust contract, property, and the host of other legal relationships between private individuals").

and expensive but also against the city's self-interest. A city with its own canon of contract law or property rules would likely scare away investment.[60] Of course, there are examples of cities regulating private law subjects like employment discrimination, affordable housing, and the minimum wage in a manner that appears indifferent to the effects on private investment. Richard Schragger has explained why even in an age of globalization, cities may be less vulnerable to capital flight than commonly thought,[61] and how this dynamic explains the relative assertiveness of some cities in enacting redistributive and other "progressive" legislation.[62] These economically "localist" measures, however, are not attempts to rewrite the basic laws of contracts or property, but rather targeted incursions into the vast "white space" created by these private law doctrines. For example, a city requiring employers to pay a higher minimum wage[63] or to provide health care to their employees[64] is not enacting a "distinctive law of contract," but is merely adding a required term to the potential scope of a contract.

Second, a city's attempt to change a "fundamental" rule of a private law subject is highly likely to be adjudged preempted and therefore invalidated, at least when the subject in question has been addressed by the state legislature.[65] To be sure, when an ordinance potentially contravenes a "fundamental" rule of the common law, the idea of that rule "preempting" the ordinance is conceptually problematic. Because a state legislature is almost always free to override a

60. There is always the possibility that cities, following the lead of some states, could enact private law ordinances that attempt to create a friendlier climate for businesses, such as by making corporate disclosures less onerous or by allowing banks to charge a higher interest rate than allowed by state law, much as some states have done. *See, e.g.*, Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 81 & n.262 (2008) (discussing how "haven states" like Delaware and South Dakota allow banks to charge higher interest rates on credit cards issued to national customers). Any such attempts are likely to run afoul of intrastate preemption doctrine, however, which usually allows cities to enact ordinances that are more stringent than state law, but not less so. *See* Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1145-46 (2007).

61. Richard C. Schragger, *Mobile Capital, Local Economic Regulation, and the Democratic City*, 123 HARV. L. REV. 482, 520-22 (2009).

62. *Id.* at 528-38. *See generally* CLAYTON P. GILLETTE, LOCAL REDISTRIBUTION AND LOCAL DEMOCRACY 72-105 (2011) (explaining why local governments may pass redistributive legislation despite "orthodox" public-choice narrative to the contrary).

63. *See* SANTA FE, N.M., CITY CODE § 28-1.5 (2011), *upheld in* New Mexicans for Free Enter. v. City of Santa Fe, 126 P.3d 1149, 1173 (N.M. Ct. App. 2005).

64. S.F., CAL., ADMIN. CODE §§ 14.1-14.8 (2011), *upheld in* Golden Gate Rest. Ass'n v. City & Cnty. of S.F., 546 F.3d 639 (9th Cir. 2008) (holding that the federal Employee Retirement Income Security Act (ERISA) does not preempt the employer spending requirements established by the San Francisco Health Care Security Ordinance).

65. As Schwartz noted, much of the subject-matter private law exception might be explained by "a rather mundane application" of the doctrine of preemption. Schwartz, *supra* note 3, at 691-92. For more on intrastate preemption, including on how its application is often not "mundane" but quite controversial, see generally Diller, *supra* note 60.

common law rule by statute,[66] one might expect that cities, exercising delegated legislative authority, are able to do the same. The desire to preserve some uniformity with respect to the common law, therefore, may be the primary reason the drafters of the AMA and NML home-rule provisions retained a private law exception. The exception, however, is a clumsy way to preserve such uniformity. As an initial matter, much private law that was once—even fifty years ago, at the time of the AMA and NML provisions' drafting—regulated by common law rules, is now regulated by statute.[67] Hence, with respect to these subjects, courts can apply ordinary rules of statutory preemption rather than rely on a private law exception to preserve uniformity.[68] In areas where no such codification has occurred, it is tempting to say that ordinances that conflict with "fundamental" rules of private law—like, say, the requirement of consideration for a valid contract—ought to be invalidated in order to preserve minimal uniformity. This argument, however, raises serious concerns. It leaves the judiciary enormous discretion to decide which common law rules are "fundamental." Moreover, if it is necessary to preserve the uniform applicability of "fundamental" rules throughout the state, it is not clear why such rules should be limited to the private law realm. There are a variety of potentially "fundamental," common law rules that might not necessarily qualify as private law subjects, such as the law of privilege.[69] If the private law exception has a subject-based meaning,

66. Only a constitution, whether federal or state, can restrain a legislature from overriding the common law. Possible limitations include takings clauses (whether federal or state), *see, e.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015, 1016 n.7 (1992) (noting that legislative deprivation of property interests protected by the common law may constitute "taking" requiring just compensation under the Fifth Amendment), or remedies clauses found in many state constitutions, *see* David Schuman, *The Right to a Remedy*, 65 TEMP. L. REV. 1197, 1208 (1992) (surveying "remedy guarantee[s]" in state constitutions and noting that many "freeze[] into permanence the [common] law of the framers' time").

67. *See generally* Gunther A. Weiss, *The Enchantment of Codification in the Common-Law World*, 25 YALE J. INT'L L. 435, 498-531 (2000) (describing the history of codification of formerly common law areas of law in the United States). For example, much of contract law has been codified by the Uniform Commercial Code (UCC). *See id.* at 520-27. Likewise, landlord-tenant law is now governed largely by statute in a majority of states. *See* Richard L. Costella & Christopher S. Morris, *West Virginia Landlord and Tenant Law: A Proposal for Legislative Reform*, 100 W. VA. L. REV. 389, 400 & n.72 (1997) (noting that "[t]he majority of states now have statutes that establish an implied warranty of habitability," and citing these statutes); Melissa T. Lonegrass, *Convergence in Contort: Landlord Liability for Defective Premises in Comparative Perspective*, 85 TUL. L. REV. 413, 424 n.53 (2010) (listing the twenty-one states that adopted the Uniform Residential Landlord and Tenant Act in some form). Of course, in some areas of private law, like torts and parts of property law, legal reformers pushed to clarify the law through the Restatement, which relies on common law courts to implement its proposed rules, rather than codification. *See* Weiss, *supra*, at 517-20.

68. There is some variation among state courts as to what they consider the ordinary rules of preemption. *See* Diller, *supra* note 60, at 1140-57 (surveying different approaches).

69. Indeed, then-Judge Cardozo's articulation of something like a private law exception specifically included matters not exclusively private, like "the organization of courts

these rules would be susceptible to local abrogation or alteration but private, "fundamental" rules would not be, an inconsistency without a compelling justification.

Given the problems of allowing the judiciary to decide which common law doctrines are sufficiently "fundamental" that local interference with them should be invalidated, it is preferable to rely on preemption by the state legislature to protect any state interest in uniformity.[70] Indeed, state legislatures routinely preempt local ordinances that they (if not the courts) deem inconsistent with state law; legislatures also preempt local ordinances that they dislike for policy or political reasons. State legislatures often preempt even before a controversial local ordinance goes into effect,[71] or sometimes even before any particular city in the state is considering a specific ordinance.[72] Most state legislatures can act with great dispatch if they deem the matter of sufficient urgency. Of the five states whose legislatures meet on a biannual basis and which, therefore, would be in a worse position to preempt controversial local laws quickly,[73] two have little or no home rule.[74] For the other three, this particular argument against a subject-based private law exception is admittedly weaker, but even in these three states—Montana, North Dakota, and Texas—

[and] the procedure therein." Adler v. Deegan, 167 N.E. 705, 713 (N.Y. 1929) (Cardozo, C.J., concurring).

70. In the few states with an imperio form of home rule, the legislature's power to preempt may be limited to matters of "state concern." *See supra* note 12 and accompanying text. In such states, however, it is likely that many, if not most, private law subjects would be considered matters of "statewide concern" and, therefore, subject to preemption. *See, e.g.*, City of Northglenn v. Ibarra, 62 P.3d 151 (Colo. 2003). It is also possible that courts would consider private law subjects to be beyond local authority even in the absence of preemption by the legislature. *See supra* notes 9-15 and accompanying text (explaining the link between the private law exception and the imperio model of home rule).

71. For instance, the Tennessee State Legislature recently preempted Nashville-Davidson County's attempt to require chain restaurants to post calorie counts before the local regulation even went into effect. *See* 2010 Tenn. Pub. Acts 614; Jenny Upchurch, *Nashville Restaurants Ordered to Post Calories*, WATE NEWS (Mar. 6, 2009), http://www.wate.com/story/9959808/nashville-restaurants-ordered-to-post-calories?redirected=true.

72. The Utah State Legislature preempted local governments from requiring chain restaurants to post calorie counts before any local governing body in the state even seriously considered the matter. *See* UTAH CODE ANN. §§ 10-8-44.5, 17-50-329 (2012); Heather May, *No Calorie Count on Utah Menus?*, SALT LAKE TRIB. (Feb. 19, 2009), http://www.sltrib.com/news/ci_11741787 (noting that the legislature passed a menu-labeling preemption bill "at the behest of the Utah Restaurant Association" despite the fact that no local governments were "currently considering menu regulations").

73. These states are Arkansas, Montana, Nevada, North Dakota, and Texas. *See* Diller, *supra* note 60, at 1167 & n.265. Oregon amended its constitution in 2010 to allow for annual sessions. *See* OR. CONST. art. IV, § 10.

74. These two states are Arkansas and Nevada. *See* DALE KRANE ET AL., HOME RULE IN AMERICA: A FIFTY-STATE HANDBOOK 50, 270 (2001).

the legislature may meet in a special session to consider matters deemed urgent.[75]

Assuming, therefore, that city enactment of ordinances that substantially conflict with statewide private law subjects is both unlikely to occur in the first place and, when it does happen, likely enough to be preempted, might we still find a reason to exempt—at least presumptively—this entire area from municipal regulation? The costs associated with discerning and complying with local law are not so great as to justify an exception. Writing forty years ago, Schwartz posited that the costs of compliance with local law might, at least in theory, be so high that a municipal regulation of private law should be invalidated.[76] Schwartz noted that "[c]ity law is usually available only at a limited number of law libraries, rarely outside the particular city," and is often "both inadequately codified and poorly indexed."[77] For Schwartz, therefore, "the poor accessibility of city legal documents" greatly increased the likelihood of "error in the ascertainment of city law."[78] It almost goes without saying that four decades after Schwartz wrote, the Internet has reduced dramatically the costs of ascertaining municipal law. All major cities and counties post their codes on their proprietary websites, accessible to all Internet users,[79] and online databases, such as Municode.com, aim to consolidate as many city and county codes as possible into one searchable location.[80] Although some of these online

75. *See* MONT. CONST. art. V, § 6 (allowing governor or majority of members to call special session); N.D. CONST. art. IV, § 7 (allowing governor to call special session); TEX. CONST. art. III, § 40 (allowing governor to call special session of no more than thirty days).

76. Schwartz, *supra* note 3, at 752-53. Schwartz was somewhat noncommittal regarding the doctrinal foundation for such an invalidation, relying alternatively on Commerce Clause principles—namely, the "undue burden" inquiry, *id.* at 752 (stating that "resort to the undue burden veto would be justified" for particularly onerous local ordinances)—and state law. With respect to the latter, it appears that Schwartz proposed a narrower exception to home rule than the private law exception—an "extreme inefficiency exception"—as a basis for invalidating local ordinances that might also fail the "undue burden" inquiry. *Id.* at 753.

77. *Id.* at 749.

78. *Id.* at 753; *see also id.* at 749 (noting that inadequate codification and poor indexing of city law "makes individual ordinances hard to find, and makes it quite likely that pertinent ordinances will not be uncovered by the lawyer's research efforts").

79. The author was able to find ordinances for every city whose ordinances he attempted to find through the city's own website, sometimes after being redirected to Municode.com, as discussed below in note 80.

80. *See* MUN. CODE CORP., http://www.municode.com (last visited May 11, 2012). While Municode.com does not include every city and county in the nation, in some states its coverage is approaching universality. *E.g.*, *Municode Library: Florida*, MUN. CODE CORP., http://www.municode.com/Library/ClientListing.aspx?stateID=9 (last visited May 11, 2012) (listing Florida city and county codes). Also, thus far, Municode.com offers much of its service for free. *See* Lisa Smith-Butler, *Cost Effective Legal Research Redux: How to Avoid Becoming the* Accidental Tourist*, Lost in Cyberspace*, 9 FLA. COASTAL L. REV. 293, 323 (2008) ("[Municode.com] is presently providing free Internet access to the full text of many codes and ordinances for the fifty states.").

versions are "unofficial," bearing disclaimers warning against their reliability,[81] most are updated on a relatively frequent basis. The risk, therefore, of a lawyer "excusabl[y]" and "inadvertent[ly]" failing to come across a municipal ordinance relevant to his client, as Schwartz described it, has been radically reduced.[82]

Undoubtedly, it often costs private actors who operate statewide more to comply with multiple regulatory regimes than it would to comply with just one regime. Even so, these increased costs are a price to be paid for the nonuniformity in regulation envisioned as a potential benefit of home rule. Moreover, where considered especially onerous, costly local regulations of private law subjects are likely to propel the suffering businesses to lobby the state legislature for statewide preemption of the particular field in which cites are operating. Their chances of obtaining relief will often be pretty good.[83]

As a descriptive matter, some courts in states with AMA- or NML-inspired home-rule provisions still nominally embrace a subject-based view of private law. Perhaps out of fear of its potential reach, however, most of these courts hesitate to rely on a subject-based exception as a ratio decidendi.[84] Even when courts feel they cannot avoid the private law exception's subject-based sweep, they may interpret generously the "independent power exception" thereto—which operates as an "exception to the exception."[85] For instance, in a chal-

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81. *See*, *e.g.*, Erika Wayne, *National Inventory of Legal Materials—Bits and Pieces*, LEGAL RES. PLUS (June 15, 2010), http://legalresearchplus.com/2010/06/15/national-inventory-of-legal-materials-bits-and-pieces ("Of the nearly 540 municipalities and counties in California, most have online codes and ordinances; however, approximately 40% of these legal materials state that they are not 'official' and have a strong Web disclaimer about use of the online version."). It bears noting that cities are not alone in issuing disclaimers regarding the "official" or "authentic" status of their online legal materials; many states do the same. *See* RICHARD J. MATTHEWS & MARY ALICE BAISH, AM. ASS'N OF LAW LIBRARIES, STATE-BY-STATE REPORT ON AUTHENTICATION OF ONLINE LEGAL RESOURCES 12 (2007).

82. *See* Schwartz, *supra* note 3, at 753.

83. *See* Diller, *supra* note 60, at 1148.

84. *E.g.*, City of Atlanta v. Morgan, 492 S.E.2d 193, 195 (Ga. 1997) (upholding Atlanta's domestic partnership registry against challenge that it interfered with private law because Atlanta did not purport to recognize a "family relationship" through the registry); New Orleans Campaign for a Living Wage v. City of New Orleans, 825 So. 2d 1098, 1108 (La. 2002) (invalidating higher minimum wage for New Orleans on preemption grounds, but not addressing private law exception argument).

85. *See supra* note 47 and accompanying text. Although Indiana has an express private law exception with no "independent power exception" thereto, IND. CODE ANN. § 36-1-3-8(a)(2) (West 2011), the courts have recognized an "independent power exception" anyway. *See* Burgin v. Tolle, 500 N.E.2d 763, 767 (Ind. Ct. App. 1986). Among the states with express private law exceptions, only Louisiana lacks an "independent power exception" thereto, whether rooted in constitutional or statutory text or judicial interpretation. LA. CONST. art. VI, § 9. Even in Louisiana, however, the state supreme court has been hesitant to rely on the private law exception to invalidate local legislation. *See, e.g.*, *New Orleans Campaign for a Living Wage*, 825 So. 2d at 1108. It bears noting that Georgia's constitutional home-rule provision for counties lacks an "independent power exception" to the private law exception, GA. CONST. art. IX, § 2, but its statutory home-rule provision for cities contains one, GA.

lenge to Santa Fe's enactment of a minimum wage higher than that imposed by state (and federal) law, the New Mexico Court of Appeals concluded that the ordinance regulated private law primarily because it affected the contractual relationship between private employer and employee, and not just because it also contained a private right of action for aggrieved employees.[86] Nonetheless, the court found that the ordinance's infringement on private law was merely incidental to Santa Fe's exercise of its police and "general welfare" powers, which had been granted to cities by state statute, separate from the constitutional home-rule grant.[87] As a doctrinal path to preserving local control, the "independent power exception" is tortuous: it requires courts to search for another power separate from the broad-based grant of authority in the home-rule provision in order to sustain a local ordinance. One of the primary purposes of home rule, however, is to abnegate the need for piecemeal statutory delegations of power to enable cities to regulate new subjects.[88] In the New Mexico example, it just so happened that the state legislature had also passed a "general welfare" statute for cities, thereby allowing the courts this awkward doctrinal route to upholding Santa Fe's minimum wage.[89]

To be sure, the subject-based view of the private law exception has not been entirely eradicated or evaded. The courts in Massachusetts, which has a private law exception in its state constitution, have invoked a subject-based exception to invalidate local laws that regulate the "private" subject of real property law.[90] Moreover, in some states whose home-rule provisions make no express reference to "private law," courts sometimes apply the doctrine of implied preemption in a manner redolent of a subject-based exception. For instance, in *Li v. State*, the Oregon Supreme Court considered whether a county ordinance

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CODE ANN. § 36-35-6(b) (2011) (stating that municipalities may not enact civil or private law affecting civil relationships "except as is incident to an independent governmental power").

86. New Mexicans for Free Enter. v. City of Santa Fe, 126 P.3d 1149, 1160 (N.M. Ct. App. 2005) (citing with approval *Marshal House, Inc. v. Rent Review & Grievance Bd. of Brookline*, 260 N.E.2d 200, 206 (Mass. 1970), for the proposition that "public enforcement is not dispositive of the private law nature of an ordinance").

87. *Id.* at 1162-64; *cf.* City of Atlanta v. McKinney, 454 S.E.2d 517, 522 (Ga. 1995) (Sears, J., concurring) (finding Atlanta's domestic partnership ordinance valid because, although it interfered with the "private law" subject of family law, it was enacted pursuant to the city's "independent" authority to provide benefits to its employees).

88. NML MODEL, *supra* note 41, at 97 (stating that home rule "endows counties and cities . . . with all the lawmaking power of the state legislature" in part because of the difficulties of "secur[ing] from a legislature the authority to perform an additional function of government").

89. *See New Mexicans for Free Enter.*, 126 P.3d at 1162 (citing N.M. STAT. ANN. §§ 3-17-1(B), 3-18-1(F), 3-18-1(G) (West 2011)).

90. *See, e.g.*, *Marshal House*, 260 N.E.2d at 208 (invalidating local rent control ordinance); *see also* Bannerman v. City of Fall River, 461 N.E.2d 793, 795 (Mass. 1984) (following *Marshal House* in invalidating local condominium conversion ordinance); CHR Gen., Inc. v. City of Newton, 439 N.E.2d 788, 790 (Mass. 1982) (same).

permitting gay marriage was preempted by the definition of marriage under state law.[91] Despite some ambiguity in the state statute defining marriage,[92] and a system of home rule that gives counties broad authority,[93] the court held that the state law preempted the county ordinance in light of the state's "exclusive authority" over marriage.[94] In a similar vein, the California Supreme Court, in *American Financial Services Ass'n v. City of Oakland*, held that state law preempted a local ordinance that attempted to combat "predatory" mortgage lending, in part because of what the court considered the state's "historical role" in regulating mortgage lending.[95] That *Li* and *American Financial*—both nominally preemption cases—concerned domestic relations and mortgages, two private law subjects included within McBain's exception to local authority, indicates that a subject-based private law exception may backhandedly influence preemption cases, even in states that lack an express private law exception.[96]

Notwithstanding Massachusetts and the occasional sneaking of the subject-based private law exception through the backdoor of preemption, Schwartz's observation from four decades ago has largely held steady as an empirical proposition: a *subject-based* private law exception does not significantly limit local autonomy, at least in most home-rule states.[97] This is a salutary develop-

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91. 110 P.3d 91 (Or. 2005).

92. *Id.* at 96 (citing OR. REV. STAT. ANN. § 106.010 (West 2011)). Although the court did not make note of it, the statute contained no expressly preemptive language. *See* OR. REV. STAT. ANN. § 106.010 (West 2011).

93. *See* TOLLENAAR & ASSOCS., ASS'N OF OR. CNTYS., COUNTY HOME RULE IN OREGON 46 (2005) (explaining that all counties in Oregon can exercise the "police power," whether pursuant to statutory or constitutional home rule).

94. *Li*, 110 P.3d at 99-100. Indeed, the court did not even engage in its standard intrastate preemption analysis, in which local government enactments are presumed valid so long as they do not impose criminal punishment. *See* City of Portland v. Dollarhide, 714 P.2d 220, 227 (Or. 1986); *see also* Diller, *supra* note 5, at 940, 945-55.

95. 104 P.3d 813, 822 (Cal. 2005).

96. *See also infra* notes 305-06, 313-15and accompanying text (discussing cases from Maryland and North Carolina that relied in part on subject-based private law concerns to invalidate local private rights of action).

97. Schwartz, *supra* note 3, at 701 ("As authority . . . [the cases relying on a subject-based private law exception] add up to very little.").

Aside from the private law exception, there are a handful of other, somewhat idiosyncratic state constitutional provisions and laws that restrain local regulation of the private sphere. Pennsylvania state law prohibits localities from regulating the "duties, responsibilities or requirements placed upon businesses." 53 PA. CONS. STAT. § 2962(f) (West 2011). In a significant recent case, the Pennsylvania Supreme Court interpreted this provision expansively so as to prevent Pittsburgh from adopting an ordinance that prevented the layoffs of janitors by private firms. *See* Bldg. Owners & Mgrs. Ass'n of Pittsburgh v. City of Pittsburgh, 985 A.2d 711 (Pa. 2009). The dissent would have interpreted the statute more narrowly, and argued that the majority's reading would eviscerate the home-rule powers of cities. *Id.* at 716-19 (Todd, J., dissenting). North Carolina has a constitutional provision that prohibits the General Assembly from enacting "any local, private, or special act . . . [r]egulating labor, trade, mining, or manufacturing." N.C. CONST. art. II, § 24(1)(j). Although this provision does not restrain local governments per se, it has been held to prohibit the state legisla-

ment, but as the next Part demonstrates, the complainant-based version of the private law exception retains significant vitality. This version of the exception also restrains local autonomy in significant ways, as Part III will explain more fully.

II. A SURVEY OF THE COMPLAINANT-BASED PRIVATE LAW EXCEPTION

This Part briefly surveys the states' constitutional or statutory home-rule provisions and interpretive case law to assess the current state of the complainant-based private law exception. More detailed information is provided in the Appendix. The survey reveals that at least nine states' courts are "skeptical" or outright hostile to the notion of municipally created private law. In their opinions, some of these courts cite one of the leading treatises on local government law—McQuillin's *Law of Municipal Corporations*—for the supposedly "well-established general rule . . . [that] an ordinance cannot directly create a civil liability of one citizen to another."[98] The next group of states—totaling twenty-four—is characterized as having an "ambiguous" jurisprudence with respect to a complainant-based private law exception. In these states there is either nonexistent or conflicting case law on the matter. In the next group of approximately nine states, the judiciary has so far approved the creation of locally created private rights of action. Even in these "permissive states," however, the courts that have addressed the matter have done so with varying degrees of depth and clarity. In the handful of permissive states with clear precedent upholding city-created private rights of action, the case law has come from the states' intermediate appellate courts rather than their highest courts. Finally, the remaining eight states are non-home-rule states, or states that subscribe to Dillon's Rule.[99]

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ture from granting to just one county the authority to enact antidiscrimination legislation. *See* Williams v. Blue Cross Blue Shield of N.C., 581 S.E.2d 415, 428-30 (N.C. 2003).

98. 6 EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 22:1 (3d ed., rev. vol. 2007) [hereinafter MCQUILLIN 2007]; *see, e.g.*, Massey v. Town of Branford, No. X10NNHCV04048778SCLD, 2006 WL 1000309, at *8 (Conn. Super. Ct. Mar. 28, 2006) (citing 6 EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 22:1 (3d ed., rev. vol. 1998) [hereinafter MCQUILLIN 1998]); Yellow Freight Sys., Inc. v. Mayor's Comm'n on Human Rights, 791 S.W.2d 382, 384 (Mo. 1990) (citing 6 EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 22:1 (3d ed., rev. vol. 1988)).

99. This group includes Alabama, Arkansas, Nevada, New Hampshire, Vermont, Virginia, West Virginia, and Wyoming. *See* KRANE ET AL., *supra* note 74, at 24-25, 50, 270, 278, 419, 433, 446, 468. To be precise, Arkansas's constitution has a relatively broad county home-rule provision, which includes a private law exception, ARK. CODE ANN. § 14-14-805 (2011) (prohibiting county legislative bodies from passing "[a]ny legislative act that applies to or affects any private or civil relationship, except as an incident to the exercise of local legislative authority"), but no corresponding provision for cities, KRANE ET AL., *supra* note 74, at 50. Even in Virginia, one of the strongest Dillon's Rule states, Arlington County passed a human rights ordinance that expands antidiscrimination law to include sexual orientation. ARLINGTON CNTY., VA., CODE § 31-3 (2011). The ordinance was challenged as a violation of Dillon's Rule, however, and it is unclear to what extent it has been or is being enforced by the county. *See* Bono v. Arlington Cnty. Human Rights Comm'n., 72 Va. Cir. 256,

In these states, which are excluded from the detailed analysis that follows, cities only have the authority to prescribe a private right of action when specifically permitted to do so by state law.

In surveying the states, it must be recognized that each state's home-rule system is premised on its own constitutional and/or statutory provisions. Given the textual and historical differences among states, caution is advised (and here used) when attempting to place a state into a particular category. Indeed, as will be seen, even states with an express private law exception in their home-rule provisions vary significantly in how they interpret its scope. Also, within a state, home rule may vary between city and county—with one having more power than the other—as well as among different cities and among different counties. For instance, if a state lacks county home rule, that may be reason enough for a court to determine that a county may not create a private right of action.[100] My doctrinal argument in favor of municipal authority to create a private right of action assumes a sound legal basis—namely, a reasonably empowering system of home rule—for a court to find such power to exist. Where such a basis is missing, this Article's normative arguments militate in favor of a statutory or constitutional change to a state's local government system to permit locally created private rights of action.

A. *Skeptical States*

I characterize nine home-rule states as "skeptical" toward local authority to create private rights of action.[101] These states merit the "skeptical" label for at least one of a handful of reasons: (1) the courts therein have flatly rejected the validity of local private rights of action; (2) the states have an express private law exception in their constitutional or statutory home-rule provisions, and the judiciary has indicated that the provision has bite in the complainant-based sphere; or (3) the courts therein have construed legislative authority to create private rights of action more narrowly for local governments than for the state. I provide further details about each state in the Appendix.

256, 259 (2006) (declining to decide issue of county authority due to lack of standing by plaintiff).

One might add South Dakota to the list of states with weak or no home rule. Although the state constitution expressly allows for home rule, S.D. CONST. art. IX, § 2, the state supreme court nonetheless applies Dillon's Rule in construing local powers. *See, e.g.*, Olesen v. Town of Hurley, 691 N.W.2d 324, 328 (S.D. 2004). Because South Dakota has a home-rule provision, however, I have included it with the "ambiguous" home-rule states due to a lack of case law on the question of local private rights of action.

100. *E.g.*, Youssef v. Anvil Int'l, 595 F. Supp. 2d 547, 557-58 (E.D. Pa. 2009) (concluding that a non-home-rule county, such as Lancaster County, does not have the authority to create a private right of action).

101. These states are Connecticut, Delaware, Illinois, Indiana, Louisiana, Maryland, Missouri, New Jersey, and North Carolina.

Despite these states' apparent skepticism, some cities therein have nonetheless forged ahead and passed ordinances establishing private rights of action that apparently have not been invalidated by the courts. Some of these rights are in the realm of antidiscrimination—whether in housing, employment, or public accommodations—often pursuant to a specific grant of authority by the state legislature,[102] but others appear to be based on nothing more than general home-rule authority.[103] There is a variety of potential explanations for the tension between municipal practice, on the one hand, and the case law and constitutional provisions, on the other, in these states. The municipal private rights of action may be seldom invoked by plaintiffs. When and if they are, defendants may not be raising the private law exception argument in opposition. Further, even if defendants are raising this argument, courts may shy away from addressing it, at least in published opinions. My aim is not to invite challenges to these ordinances on the basis of the private law exception, but rather to illustrate that case law and municipal practice are not always in harmony.

Another inconsistency in certain "skeptical" states lies in their judge-made doctrine: some of these states allow the violation of an (otherwise publicly enforced) ordinance's standard of care to constitute negligence per se, a practice which effectively recognizes municipal authority to create private rights of action.[104] For instance, Connecticut, like many states, recognizes that a violation of a municipal housing code by a landlord that results in harm to a tenant is negligence as a matter of law.[105] While in such an instance the local ordinance does not actually create the cause of action, it alters the private law framework that would otherwise determine liability, thereby piercing a large hole in the notion that cities are powerless to define "private" legal obligations.[106] One might attempt to harmonize these states' skepticism toward local private rights of action with their practice of relying on municipal standards in negligence suits by asserting that courts simply choose, for sensible policy reasons, to allow municipal law to define the level of "due care" within the framework of

102. *E.g.*, IND. CODE ANN. § 22-9-1-12.1 (West 2011) (authorizing creation of local civil rights commissions with investigative and enforcement authority). As the Appendix explains, however, the existence of authorizing legislation does not completely resolve the tension between doctrine and practice in these states, as cities have generously interpreted their delegated authority to permit protecting groups not specifically referred to by state law.

103. For instance, Chicago; Newark, New Jersey; and Wilmington, Delaware, have enacted private rights of action related to various subjects outside of the antidiscrimination context. *See infra* notes 212-13, 224, and accompanying text.

104. Schwartz, *supra* note 3, at 704.

105. *See* Panaroni v. Johnson, 256 A.2d 246, 253 (Conn. 1969) (citing RESTATEMENT (SECOND) OF TORTS § 286 cmts. a, c (1977); *id.* § 287 cmt. a).

106. *See, e.g.*, *id.* In some states, a violation of an ordinance may—but does not automatically—constitute a violation of the standard of care. *E.g.*, Miller v. Cruickshank, No. 06AP-1088, 2007 WL 1748152, at *3 (Ohio Ct. App. June 19, 2007); Kerns v. G.A.C., Inc., 875 P.2d 949, 961 (Kan. 1994).

traditional negligence.[107] The permitted private right of action remains the traditional common law cause of negligence, rather than a newly minted, independent private right of action under local law.[108] While this retort has some theoretical appeal, it is of no practical significance as the city ordinance still affects state common law obligations.[109] Indeed, perhaps for this reason, courts in two "skeptical" states—namely, Delaware and Indiana—have rejected the notion that municipal law ought to affect a party's liability in negligence.[110] In sum, while these nine states may be skeptical toward city-created private causes of action, their skepticism is neither ironclad nor consistent.

B. *Ambiguous States*

In approximately twenty-four states,[111] there is no clear judicial authority for or against the proposition that cities may create private rights of action; hence, I classify these twenty-four states as "ambiguous." In about half of these states, the courts have not weighed in at all on the matter of local authority to create private rights of action. In the other half, as the Appendix explains in more detail, the courts have addressed the municipal private right of action question in the context of negligence only,[112] or have issued conflicting or inconclusive decisions on the matter. Some states in this category have textual private law exceptions in their home-rule provisions (whether statutory or constitutional) based on the NML or AMA models, albeit with an "independent power exception" thereto.[113] Although there is no case law on the specific issue of municipally created private rights of action in this subset of ambiguous states, it is possible that their courts would scrutinize locally created private rights of action more closely because of their home-rule provisions' texts.[114]

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107. Schwartz, *supra* note 3, at 704.

108. *Id.*

109. *See id.* at 705.

110. *E.g.*, NVF Co. v. Garrett Snuff Mills, Inc., No. CIV.A. 96C-01-230-JE, 2002 WL 130536, at *4 (Del. Super. Ct. Jan. 30, 2002) (concluding that under the county home-rule statute's private law exception, the county cannot create a private right of action directly or indirectly through negligence per se); Burgin v. Tolle, 500 N.E.2d 763, 767 (Ind. Ct. App. 1986).

111. These states are Alaska, Arizona, Georgia, Idaho, Iowa, Kansas, Kentucky, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, and Wisconsin.

112. Because city ordinances providing the foundation for negligence actions have long coexisted—albeit uneasily—with the private law exception in even "skeptical" states, *see supra* notes 104-05 and accompanying text, such precedents are not enough from which to infer that cities generally have the authority to create private rights of action in these states.

113. *See supra* note 47.

114. Indeed, in both Georgia and Massachusetts, the courts have grappled with the question of whether the private law exception limits the subjects that a city may regulate,

Much like their counterparts in skeptical states, cities in ambiguous states have created some private rights of action by local ordinance. Many of these are in the antidiscrimination field, often pursuant to authority specifically delegated by the state,[115] although some appear to be premised on home-rule authority alone.[116]

C. *Permissive States*

The final category consists of the nine home-rule states in which there is at least reasonably clear judicial authority permitting the creation of private causes of action by cities and counties.[117] As the Appendix illustrates in more detail, the degree to which these states have approved the local creation of private rights of action ranges from emphatic approval by an intermediate appellate court to the mere implied affirmation of such authority by courts of different levels. States in the latter group have either stated matter-of-factly that city ordinances may create a private right of action without necessarily holding that the ordinances in question did so, or have adjudicated locally created private

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with Massachusetts, most notably, continuing to use a subject-based private law exception in some instances. For the Georgia experience, see *City of Atlanta v. Morgan*, 492 S.E.2d 193, 195 (Ga. 1997) (upholding Atlanta's domestic partnership registry against challenge that it interfered with private law because Atlanta did not purport to recognize a "family relationship" through the registry); *City of Atlanta v. McKinney*, 454 S.E.2d 517, 522 (Ga. 1995) (Sears, J., concurring) (finding Atlanta's domestic partnership ordinance valid because although it interfered with the private law subject of family law, it was enacted pursuant to the city's "independent" authority to provide benefits to its employees); and *Porter v. City of Atlanta*, 384 S.E.2d 631, 634 & n.3 (Ga. 1989) (citing Georgia's private law exception for the proposition that "[t]he power of a municipal governing authority to regulate or limit legitimate business activities is not unfettered"). For Massachusetts, see note 90 above and accompanying text. *But see* Flynn v. City of Cambridge, 418 N.E.2d 335 (Mass. 1981) (upholding local condominium conversion ordinance despite interference with private law because it was passed pursuant to "independent power" delegated by legislature); Bloom v. City of Worcester, 293 N.E.2d 268 (Mass. 1973) (upholding local antidiscrimination ordinance despite allegation that it interfered with private law). Narrow judicial construction of local authority is particularly likely in South Dakota, where the courts have retained Dillon's Rule despite the state constitution's home-rule provision. *See supra* note 99 and accompanying text.

115. *See, e.g.*, *infra* note 331 and accompanying text.

116. Minnesota is one such state. *Compare* ST. PAUL, MINN., CODE OF ORDINANCES § 183.02(5) (2011) (prohibiting employment discrimination on the basis of, inter alia, "familial status"), *with* MINN. STAT. ANN. § 363A.08 (West 2011) (not including "familial status" in list of prohibited bases for employment decisionmaking). For discussion of a now-repealed section of the Minnesota Code that provided special authority to the Minneapolis City Council to endow its civil rights commission with "any and all powers" granted by the Minnesota Human Rights Act, see *County of Hennepin v. Civil Rights Commission of Minneapolis*, 355 N.W.2d 458, 460 (Minn. Ct. App. 1984).

For examples of city-enacted private causes of action outside of the antidiscrimination field in this category of states, see below notes 218-19, 223, and accompanying text.

117. These states are California, Colorado, Florida, Hawaii, Maine, New Mexico, New York, Oregon, and Washington.

rights of action without entertaining any challenge to municipal authority to enact them. The lack of any such challenge could reflect a settled understanding that local governments have the authority to create private rights of action, or it may indicate only that litigants have failed to bring the issue to the courts' attention.

In conclusion, the authority of local governments to create private rights of action under current judicial doctrine is far from certain in most home-rule states. Even in "permissive" states, the judicial imprimatur, where given expressly, has come from the states' intermediate appellate courts rather than from their highest courts. Despite the mixed jurisprudence on the question, cities in many states have created private rights of action in certain contexts, sometimes by acting pursuant to a specific delegation of power from the state legislature. Of course, if the authority of cities to create private rights of action were clearer, there would likely be many more such locally created private rights of action. The next Part explains why this would be a beneficial development.

III. HOME RULE, LOCAL POLICY EXPERIMENTATION, AND THE PRIVATE LAW EXCEPTION

In the majority of home-rule states where the state constitution is silent on the subject, the state legislature may expressly delegate to cities the power to create private rights of action in the face of judicial ambivalence or hostility. Any argument in favor of local authority to create private rights of action, therefore, must explain why such authority is desirable as a baseline rule without requiring additional legislative action. In contrast to a Dillon's Rule regime that presumes city powerlessness, home rule provides presumptive city authority to engage in a wide variety of governmental activities.[118] Hence, the arguments against a default categorical exception to city power—specifically, the complainant-based private law exception—inevitably overlap to a great degree with the arguments for home rule generally. Because a full-throated defense of home rule is outside the scope of this Article, I will present the most compelling arguments for local autonomy only in abridged form while asking the reader to assume that home rule is normatively appealing. Having established that premise, this Part then pivots to a more specific discussion of why home-rule cities should have the authority to create private rights of action.

118. NML MODEL, *supra* note 41, at 97 (noting that home rule "reverse[s]" Dillon's Rule).

A. *Local Experimentation and Policy Percolation*

At the risk of oversimplifying, the two most prominent arguments in favor of home rule are the policy experimentation and communitarian positions.[119] The latter, which traces its lineage to Alexis de Tocqueville's paeans to 1840s New England township government, values local government for increasing citizen interest in government and offering more opportunities for participation in civic affairs.[120] Communitarians argue that citizens are more likely to care about issues that are local in scope.[121] Further, the relative ease by which residents can contact and influence their local officials as compared to state and national officials facilitates democratic involvement.[122] Moreover, the abundance of local offices makes it much more likely that citizens will serve as local elected officials than as state legislators or members of Congress, allowing more citizens to both participate in and learn about the process of government.[123] Finally, some communitarian theorists hypothesize that the smaller and more intimate nature of local government offers the best hope for raising the level of civility in America's public sphere.[124]

The experimentation argument for local power, on the other hand, generally extols not the benefits of the processes by which local policies are adopted, but rather the benefit of the multitude of policies themselves, however adopted. This school of thought is often linked to the well-known work of Charles Tiebout, who famously hypothesized that citizens—or "consumer-voters," as he called them—would vote with their feet in choosing where to live among a

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119. Diller, *supra* note 60, at 1127-32.

120. *See* BRIAN E. ADAMS, CAMPAIGN FINANCE IN LOCAL ELECTIONS: BUYING THE GRASSROOTS 6-9 (2010) (discussing "citizen involvement" and "deliberative democracy" in the context of local government, and citing Tocqueville).

121. *E.g.*, 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 104 (Phillips Bradley ed., Vintage Books 1990) (1840) ("It is difficult to draw a man out of his own circle to interest him in the destiny of the state, because he does not clearly understand what influence the destiny of the state can have upon his own lot. But if it is proposed to make a road cross the end of his estate, he will see at a glance that there is a connection between this small public affair and his greatest private affairs; and he will discover, without its being shown to him, the close tie that unites private to general interest.").

122. ADAMS, *supra* note 120, at 5-10 (summarizing arguments for the proposition that the "small size" of local governments "is necessary for widespread citizen participation in politics"); Roderick M. Hills, Jr., *Romancing the Town: Why We (Still) Need a Democratic Defense of City Power*, 113 HARV. L. REV. 2009, 2027 (2000) (reviewing GERALD E. FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS (1999)) ("[C]itizens personally contact local elected officials more frequently than their federal or state counterparts . . . .").

123. ADAMS, *supra* note 120, at 7 (noting that there are more than "85,000 local governments in the United States with almost 500,000 elected positions," which "creates ample opportunities" for direct citizen engagement in government); Hills, *supra* note 122, at 2027 ("[A]bout three percent of adult Americans have served on some sort of local board.").

124. ADAMS, *supra* note 120, at 8; Hills, *supra* note 122, at 2027-28 (citing JANE J. MANSBRIDGE, BEYOND ADVERSARY DEMOCRACY 23-25 (1980)).

number of municipalities.[125] Tiebout thus viewed "exit," rather than "voice," as the primary method by which consumer-voters would express their preference for a particular mix of municipal policies.[126] This collective expression of private preferences would function as the market "signal" policymakers—whom Tiebout envisioned as technocratic "city managers"—might consider in deciding which policies to adopt.[127]

Whether municipal policies are adopted through a process of communitarian decisionmaking or unilaterally by a city manager, the sheer number of municipalities—thousands, compared to fifty states and one national government—is likely to lead to a multitude of local government policies. Home rule thus allows for a far greater number of policy "laboratories" than state-level federalism.[128] Because cities operate at a much smaller scale than the state or national governments, a system of home rule generally allows cities to try out new policies with less risk to the residents of the rest of the state and nation.[129] If the new policy succeeds—that is, if it is effective at accomplishing its goals and is not perceived as too costly, either to the municipality or to other actors affected by its operation—other municipalities are likely to emulate it. Once the policy has percolated "out" to a number of municipalities, it may also percolate "up" to either the state or federal levels or both.[130]

Examples of municipal policies percolating out and up in recent years are myriad. Two illustrative cases are antismoking and menu-labeling regulations. The first American city to adopt a ban on smoking in all enclosed public spaces, including bars and restaurants, was San Luis Obispo, California, in 1990.[131] At the time, many people considered such a comprehensive smoking ban radical, and no states were seriously considering a similar policy.[132] Two decades

125. Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418-19, 422 (1956).

126. *See generally* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY (1970) (comparing "exit" and "voice").

127. *See* Tiebout, *supra* note 125, at 419-20. To be precise, Tiebout hypothesized that cities with populations above the optimal size would make choices designed to push residents out, while cities with populations below their optimal size would make policy choices designed to attract new residents. *Id.*

128. Diller, *supra* note 60, at 1114 (citing New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

129. *Id.* at 1170-71.

130. *Id.* at 1129.

131. *See* CITY OF SAN LUIS OBISPO, INTRODUCTION TO THE NEW NO SMOKING ORDINANCE 2 (2010), *available at* http://www.slocity.org/specialactivities/download/smokingbrochure.pdf.

132. Robert Reinhold, *In a Smoking Ban, Some See Ashes*, N.Y. TIMES, Aug. 15, 1990, at A22 (discussing opposition to a ban on smoking in restaurants considered by Los Angeles months after San Luis Obispo's ban, and noting that, if adopted, "Los Angeles would become the only major city in the country to ban smoking in eating places").

later, more than half the states have adopted similar bans,[133] often after cities within such states first adopted a ban.[134] If antismoking regulations spread quickly in twenty years, the rise of menu-labeling legislation was meteoric. In 2006, New York City adopted regulations requiring chain restaurants to post prominently the calorie content of items for sale on their menu boards.[135] Numerous counties, as well as five states, adopted similar legislation over the next three years.[136] Ultimately, in March 2010, the United States Congress adopted national menu-labeling standards as part of the Patient Protection and Affordable Care Act.[137] Within three years, therefore, New York City's lone policy had essentially become national policy.[138]

While the "laboratory" function is an undoubted virtue of home rule, it is a virtue not just because cities are likely to adopt a multitude of random policies. Rather, home rule permits local adoption of certain policies that might never be

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133. Am. Nonsmokers' Rights Found., *Summary of 100% Smokefree State Laws and Population Protected by 100% U.S. Smokefree Laws* 1 (Apr. 1, 2012), http://www.no-smoke.org/pdf/SummaryUSPopList.pdf (noting that twenty-nine states ban smoking in restaurants and bars, twenty-eight ban smoking in other workplaces, and twenty-three ban smoking in all workplaces, restaurants, and bars).

134. *See, e.g.*, Patrick Kabat, Note, *"Till Naught but Ash Is Left to See": Statewide Smoking Bans, Ballot Initiatives, and the Public Sphere*, 9 YALE J. HEALTH POL'Y L. & ETHICS 128, 139 n.36 (2009) (observing adoption of "more stringent local bans" in Allegheny County, Pennsylvania, and Ames, Iowa).

135. New York City's initial menu-labeling regulation, promulgated in 2006, was invalidated as preempted by federal law. N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health, 509 F. Supp. 2d 351, 353 (S.D.N.Y. 2007). However, its successor, N.Y.C., N.Y., HEALTH CODE tit. 24, § 81.50 (2011), has been sustained against preemption challenges. N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health, 556 F.3d 114, 117 (2d Cir. 2009).

136. *See* Tamara Schulman, Note, *Menu Labeling: Knowledge for a Healthier America*, 47 HARV. J. ON LEGIS. 587, 592-93 (2010) (listing other jurisdictions that adopted menu-labeling regulations).

137. Pub. L. No. 111-148, § 4205(b), 124 Stat. 119, 573, 573-77 (2010) (codified at 21 U.S.C. § 343(q)(5)(H) (Supp. IV 2010)). The Act requires posting of nutritional content at food chains with twenty or more locations, while the New York City regulation applied to chains with as few as fifteen locations. *Compare id.*, *with* N.Y.C., N.Y., HEALTH CODE tit. 24, § 81.50. The Act also covers a broader array of products, such as vending machines and buffet lines. Patient Protection and Affordable Care Act § 4205(b). However, the Act contains a preemption provision which will likely prevent New York City from imposing its stricter standards. *Id.* § 4205(d).

138. As this Article goes to press, the federal menu-labeling standards are not yet operational. The Patient Protection and Affordable Care Act required the FDA to implement the national standards by administrative rule. Patient Protection and Affordable Care Act § 4205(b) (requiring proposed regulations within one year). The FDA issued its proposed rules in April 2011. Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments, 76 Fed. Reg. 19,192 (proposed Apr. 6, 2011) (to be codified at 21 C.F.R. pts. 11, 101). The FDA expects to publish final rules by June 30, 2012. *Implement Section 4205 of the Patient Protection and Affordable Care Act*, FDA, http://www.accessdata.fda.gov/FDATrack/track-proj?program=healthcare-reform&id=ACA-4205-Implementation (last visited May 11, 2012). It plans to make them operational within six months thereafter. Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments, 76 Fed. Reg. at 19,219.

adopted first by state legislatures or Congress due to the relative strengths of certain interest groups at those levels of government. Given the increased costs of lobbying and running political campaigns at the state and federal level, well-funded interest groups are likely to have more clout at the state and federal levels than they do at the local level.[139] Moreover, the sheer multitude of local governments makes it difficult for even well-funded interest groups to respond to every local attempt to legislate in a manner that may adversely affect their interests. To be sure, interest groups may always seek to stamp out local legislation through preemption, whether in the legislature or the courts.[140] For a variety of reasons, however, from judicial resistance to legislative inertia, interest groups' efforts to preempt will not always succeed.[141] Moreover, local action on a particular subject may spur the legislature to address a subject it would otherwise not have, even if some of the pressure to address the subject comes from interest groups seeking preemption. Local action can thus serve as a "destabilizing force" in state—and sometimes, national—politics, breaking the policy stasis in a particular area and forcing legislators to address a subject they might otherwise avoid entirely.[142]

By functioning as a destabilizing force, local action can shift the state policy axis in a direction less favorable to well-funded interest groups that oppose policies that may benefit the public good. Assuming that money can be a baleful influence on the political process (which, of course, is hardly an uncontroversial proposition),[143] the possibility of local action can temper the influence

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139. *See* Diller, *supra* note 60, at 1138; Clayton P. Gillette, *Local Redistribution, Living Wage Ordinances, and Judicial Intervention*, 101 NW. U. L. REV. 1057, 1115 (2007) ("State officials are likely to need more substantial contributions to mount election campaigns [than local officials] . . . ."). *But see* ADAMS, *supra* note 120, at 54 ("[O]n a per vote basis, city elections are even more expensive than many state and federal elections . . . .").

The United States Supreme Court's decision in *Citizens United v. FEC*, 130 S. Ct. 876, 907, 913, 917 (2010), which held that corporations have a First Amendment "right" to spend freely on "independent" political broadcasts, has increased and will likely only further increase the influence of money in elections at the federal level. *See* Editorial, *Some Sunshine for the Campaign Jungle*, N.Y. TIMES, May 1, 2011, at WK9 (asserting that *Citizens United* "inspired a $138 million binge of hidden donors in [the 2010] midterm elections"). The same is likely true at the state level as well. *See, e.g.*, W. Tradition P'ship v. Attorney Gen., 271 P.3d 1 (Mont. 2011) (considering challenge to Montana's ban on independent campaign expenditures by corporations), *stay granted*, 132 S. Ct. 1307 (2012).

140. *See* Diller, *supra* note 60, at 1133-40.

141. *See id.* at 1150.

142. *Id.* at 1129 (citing Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 21 (2007); Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015 (2004)).

143. *See* McConnell v. FEC, 540 U.S. 93, 153 (2003) ("Just as troubling to a functioning democracy as classic *quid pro quo* corruption is the danger that officeholders will decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder. Even if it occurs only occasionally, the potential for such undue influence is manifest."), *overruled by*

of campaign money on the statewide and national political agenda. For instance, returning to the issue of calorie disclosure, it is likely that the lobbying power of the fast food industry would have prevented any state legislature from adopting a menu-labeling law in the absence of local action. Once New York City and other local jurisdictions began enacting menu-labeling ordinances in 2006, however, the issue came to the attention of state legislators. The legislative action most preferred by national fast food chains and their franchisees was likely complete preemption of local menu-labeling ordinances, and in at least three states they achieved exactly that result.[144] In other states, however, such as California, where complete preemption was not politically feasible, the fast food industry likely preferred a uniform state standard to an emerging amalgam of local standards. While the state standard for menu labeling that resulted in California was more forgiving than that of the most ambitious municipality,[145] it was still far more exacting than the nonexistent statewide regulatory regime that existed prior to the first local action on the subject.

As the next Part explains, the ability to create private rights of action can lower cities' costs for enforcing policy choices. The persistence of the complainant-based private law exception, therefore, likely impedes municipal policy experimentation insofar as cities lack (or think they lack) the authority to choose from the full slate of enforcement mechanisms. Eradicating the exception, therefore, will produce even more innovative policies at the local level that may ultimately spread to the state and federal levels. Because this process can help counter the role of money on the political process writ large, home rule unrestrained by a complainant-based private law exception is likely to promote some communitarian values as well.

B. *Private Right of Action as Policy Implementation Tool and Means of Affirming Community Norms*

If local policymaking is largely a salutary dynamic, it follows that cities ought to have at their disposal—at least presumptively—the most robust means

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Citizens United, 130 S. Ct. 876; *see also* Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 387-97 (2009) (explaining campaign money's nefarious impact on political process).

144. 2008 Ga. Laws 361 (amending GA. CODE ANN. § 26-2-373 (2011)); 2010 Tenn. Pub. Acts 614 (amending TENN. CODE ANN. § 68-14-303 (2011)); 2009 Utah Laws 1194 (codified at UTAH CODE ANN. §§ 10-8-44.5, 17-50-329) (LexisNexis 2011).

145. For instance, although San Francisco's ordinance required disclosure of calories, saturated fat, carbohydrates, and sodium, as did the state law, it also had specific standards for pizza, stricter standards for brochures (requiring disclosure of protein, total fat, artificial trans fat, cholesterol, and fiber), and only exempted special food items offered for thirty days or less, whereas the former California law excluded special foods offered for fewer than 180 days. *Compare* S.F., CAL., HEALTH CODE art. 8, § 468, *with* CAL. HEALTH & SAFETY CODE § 114094 (West 2009), *repealed and replaced by* 2011 Cal. Legis. Serv. ch. 415 (West) (harmonizing state menu labeling law with federal requirements imposed by the Patient Protection and Affordable Care Act).

for implementing the policies they adopt. Specifically prohibiting cities from relying on private rights of action necessarily limits the effectiveness and social meaning of any municipal policy choice. In the absence of private enforcement, cities must rely on public enforcement of either the civil or criminal variety, which usually seeks fines for "violations" of an ordinance.[146] Legal scholars, particularly in the torts field, have long debated the primary purpose of the Anglo-American legal system's tradition of private enforcement. Some say private enforcement allows for increased deterrence. Under this view, which focuses on the effectiveness of a regulatory rule, because potential tortfeasors know that those they might harm can sue them directly, they are less likely to break the rules and inflict harm. Other scholars have argued that private enforcement is important for distinct reasons like retribution or personal dignity. The effectiveness of private enforcement, they assert, is secondary to the sense of justice and personal dignity that private enforcement uniquely confers. While these debates are lively and interesting, this Article need not resolve them nor even pick a side. Rather, both accounts offer compelling support for local authority to create private rights of action.

1. *Increased rule compliance*

In almost all circumstances, the combination of private rights of action and public enforcement is likely to be more effective at ensuring regulatory compliance than public enforcement alone, assuming that the level of public enforcement remains constant. While this assertion may seem obvious, consider the following illustration. Assume that a city passes an ordinance prohibiting discrimination in employment on the basis of sexual orientation (presumably in a state where discrimination on such basis is not already illegal). If this ordinance provides for a private cause of action in addition to public enforcement, employers need fear that if they fire an employee on account of sexual orientation, the employee might either sue them directly or contact a public enforcement body that could then sue them, prosecute them, or both. In a public enforcement-only regime, by contrast, an employee fired on account of sexual orientation may only contact a public enforcement body to ask that it take legal action. The public enforcement body may decline to take such action—even in an apparently meritorious case—for a variety of reasons, including lack of resources and politics. If private enforcement is not an option, the employee fired on account of sexual orientation will have no recourse. Where private enforcement is an option, however, the employee may still pursue his case, provided, of course, that he can bear any associated legal fees.[147] The option of private en-

146. 9A MCQUILLIN 2007, *supra* note 98, § 27:6 ("[P]rosecutions for violations of ordinances are generally not 'criminal' . . . .").

147. To be sure, the costs of legal representation may limit the ability of certain potential plaintiffs to pursue their cases, as, unlike criminal defendants, civil plaintiffs are not constitutionally entitled to legal representation. *See generally* DAVID UDELL & REBEKAH DILLER,

forcement, therefore, is likely to more effectively deter employers who behave like the "Holmesian bad man" than would an ordinance enforced by public means alone.[148]

Private enforcement may also increase regulatory compliance because it often allows for finer calibration between conduct and punishment.[149] In addition, private enforcement often leads to damage awards that are far greater than the normal amount of a municipal fine. Publicly prosecuted violations of local ordinances often seek relatively small fines that are the same, or fall within a narrow range, regardless of the harm caused to private persons.[150] Because private enforcement, by contrast, usually relies on compensatory damages—often of larger sums—as the primary means of deterrence, it can frequently more effectively deter conduct that results in legally recognized harm to victims. To be sure, a public enforcement scheme can, in theory, be more finely calibrated to the harm inflicted by the alleged wrongdoer. An ordinance might require that more severe violations receive greater fines, or longer jail sentences. Similarly, a public enforcement scheme might just mete out more severe penalties—irrespective of the degree of rule-breaking—than private enforcement, thereby increasing deterrence. As a practical matter, however, increased calibration or more severe penalties are less likely to occur in the public context for a variety of reasons. City councils may be hesitant to establish harsh fines or criminal penalties that are unrelated to the perceived importance of an ordinance for fear that such punishments would lack the public acceptance necessary for a legal sanction to function well.[151] When fines are calibrated to the severity of the offense, public officials may be less inclined to pursue hefty fines than private victims, given their lack of a personal stake in the reward.[152] Moreover, in the criminal context, the potential severity of local punishment may be limited by state and federal law. In many states, cities are prohibited from creating felo-

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BRENNAN CTR. FOR JUSTICE, ACCESS TO JUSTICE: OPENING THE COURTHOUSE DOOR (2007), *available at* http://www.brennancenter.org/content/resource/access_to_justice_opening_the_courthouse_door.

148. *See* O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

149. I recognize that "punishment" is a loaded term since many civil enforcement systems, like torts, aim (or purport to aim) primarily to "compensate" the victim rather than punish the perpetrator. Hence, for the reader bothered by the use of "punishment," perhaps "consequence" is a better choice.

150. *See, e.g.*, CHI., ILL., MUN. CODE ch. 2-160-120 (2011) ("Any person who violates any provision of this ordinance as determined by this commission shall be fined not less than $100.00 and not more than $500.00 for each offense."); *see also* 9A MCQUILLIN 2007, *supra* note 98, § 27:5 (discussing ordinance enforcement by civil fine).

151. *See generally* Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996).

152. *See* Alden v. Maine, 527 U.S. 706, 810 (1999) (Souter, J., dissenting) (describing as "implausible" the claim "that enforcement by a public authority without any incentive beyond its general enforcement power will ever afford [a] private right [of action] a traditionally adequate remedy"). To be sure, in some instances public officials may be motivated by the political credit they receive for aggressive enforcement.

nies,[153] and many states rely on municipal courts to adjudicate ordinance violations.[154] Because municipal courts usually function without a jury, their sentences may not go beyond the six months' imprisonment allowed by the federal Constitution.[155]

In obtaining the increased compliance that private enforcement offers, cities are likely to benefit fiscally. Given the dire economic situations in which many local governments find themselves today,[156] the prospect of fiscal relief offered by private enforcement is extremely significant. Many cities currently devote limited resources to enforcement of their ordinances, and some have felt compelled to cut even more recently.[157] While it is theoretically possible for cities to recoup the money they spend on public enforcement costs through fine recovery, that is highly unlikely to occur with predictable regularity given the vagaries of private conduct, and it is not even necessarily desirable. Indeed, it may well be that a civil fine of $500, for instance, for violation of a city ordinance is sufficient to ensure acceptable levels of compliance with the ordinance and is deemed a normatively appropriate amount by city leaders and residents. Such a fine, however, may fall far short of compensating the city for the prorated costs it incurs from public enforcement of the ordinance. If a city felt compelled to raise its fines to a level sufficient to compensate for enforcement—say, $20,000—that level might be considered too harsh by the community and, therefore, politically unacceptable. In many instances, therefore, a city will need to expend public funds to publicly enforce its ordinances. Private enforcement, on the other hand, requires no public expenditure beyond the costs of the court system. These costs are usually paid by the state—or, in some instances, by the state and county—rather than primarily by the city or county. Whether a municipally created private right of action unfairly imposes externalities on the state-funded judicial system is an argument I consider below;[158] for now it suffices that private rights of action can save municipalities money in enforcing their policy goals.

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153. *See* Diller, *supra* note 60, at 1136 n.105; Wayne A. Logan, *The Shadow Criminal Law of Municipal Governance*, 62 OHIO ST. L.J. 1409, 1435 (2001) (observing that "localities can prescribe punishments *under* [but not *at*] the felony level") (emphasis added).

154. *See infra* Part IV (discussing municipal court systems).

155. *See* Codispoti v. Pennsylvania, 418 U.S. 506, 515-17 (1974). For more on municipal courts, see Part IV.A below.

156. Ianthe Jeanne Dugan & Kris Maher, *Muni Threat: Cities Weigh Chapter 9*, WALL ST. J., Feb. 18, 2010, at C1.

157. *See, e.g.*, Andrew O'Brien, *Code Enforcement: Boots on the Streets*, PALM COAST OBSERVER (July 14, 2011), http://www.palmcoastobserver.com/news/palm-coast/News/071420111629/Code-Enforcement-Boots-on-the-streets (discussing proposed cuts to code enforcement in Palm Coast, Florida); Amanda Ricker, *City to Lay Off Code Enforcement Officer*, BOZEMAN DAILY CHRON. (June 2, 2011), http://www.bozemandailychronicle.com/news/article_2ae6800a-8ca5-11e0-89d4-001cc4c002e0.html (noting that Bozeman, Montana, cut its sole code-enforcement officer despite the position having existed for thirty years).

158. *See infra* Part IV.B.

By offering the potential to save cities money without reducing policy effectiveness, private rights of action allow cities to adopt policies they may feel financially unable to adopt when public enforcement is the only option. For instance, a city in a state with a complainant-based private law exception might decline to pass an ordinance banning discrimination on the basis of sexual orientation because the city lacks the money to prosecute violations. In the absence of the exception, the city might feel free to pass such an ordinance and allow for it to be enforced privately, or perhaps provide for some public enforcement but at a lower level than that which would be necessary if it were not complemented by private enforcement.

Determining the precise mixture of public and private enforcement, including the penalties provided by each system, that can best promote compliance is, of course, impossible in the abstract. Any such determination will depend on numerous factors, including the resources devoted to public enforcement and the availability and affordability of private legal services in the jurisdiction. It is theoretically possible that the availability of a municipally created private right of action might reduce the effectiveness of municipal policy choices. A city council less interested in policy effectiveness than other matters might opt to replace reasonably effective public enforcement with a less effective private enforcement scheme. Even without private enforcement, however, such a council would have been free to reduce or scrap its public enforcement scheme. Complainant-based private law only raises a special concern if the availability of private enforcement somehow makes it easier for the council to mask politically its decision to weaken enforcement overall. Without any evidence of this seemingly unlikely phenomenon, it is a rather weak reason to retain a complainant-based private law exception.

2. *Promotion of individual dignity and community norms*

In addition to increased rule compliance and deterrence, private rights of action serve other goals. Private enforcement empowers the individuals most affected by a violation to decide for themselves whether to seek relief rather than to rely on the grace of public officials; in this sense, private enforcement uniquely promotes individual dignity.[159] As some have argued in the torts context, this function is distinct from—and perhaps even more important than—any increased deterrence that may result from a system of private enforcement.[160] By empowering individuals, "civil recourse" scholars argue, private

159. John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 607 (2005) ("Tort law involves a literal empowerment of victims—it confers on them standing to demand a response to their mistreatment.").

160. *See, e.g.*, John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625, 1641 (2002) (arguing that "civil recourse" better explains the torts system's

enforcement promotes equality, allowing relatively powerless plaintiffs to seek recourse from even the most powerful.[161] To be sure, the costs of litigation and legal representation may limit the ability of certain individuals to pursue a private right of action,[162] but the path remains open for individuals with the will and means to pursue it. Further, by offering individuals an opportunity to obtain redress for injuries in a public forum, a system of private enforcement can contribute to political legitimacy.[163]

Private rights of action also promote the dignity of the individual by assuring that the harmed individual receives compensation for the injuries suffered. Money recovered by civil violation enforcement, on the other hand, often goes to the public fisc. While local governments might redistribute the money recovered through public enforcement to the private individuals harmed by the violator's conduct,[164] such redistribution is apt to require an extensive—and expensive—sorting process that private enforcement can perform by itself. In comcompensating or rewarding the harmed person directly, private rights of action serve corrective justice in a way that public enforcement cannot.[165] To be sure, private enforcement is not perfect; as noted above, litigation and legal representation costs can hinder the ability of harmed parties to obtain relief. Nonetheless, the pursuit of private relief remains at least possible—and in some cases, highly likely—when private enforcement is available as a means of enforcing municipally created obligations.

The dignity- and justice-serving benefits of private enforcement stand apart from its potential to increase regulatory compliance. Returning to the example of sexual orientation discrimination, a private cause of action, as opposed to exclusive public enforcement, empowers the victim of such discrimination to decide whether and when to sue his employer and how much relief to seek. As

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reliance on private rights of action than "the dominant modern academic conception . . . which treats [tort law] as a system for deterring antisocial conduct").

161. *See* Goldberg, *supra* note 159, at 607 ("[T]ort law helps maintain and promote a nonhierarchical conception of social ordering."); Jason M. Solomon, *Equal Accountability Through Tort Law*, 103 NW. U. L. REV. 1765, 1807-09 (2009) (arguing that tort law reinforces social equality by "setting up a vehicle for individuals to bring to account others who have harmed them").

162. *See supra* note 147.

163. *See* Goldberg, *supra* note 159, at 607 (noting that because tort law empowers victims to bring their own suits, it "demonstrates to citizens that the government has a certain level of concern for their lives, liberties, and prospects").

164. Cities may be restrained in their redistribution of public funds to private parties by state constitutional public-purpose clauses. *See* Dale F. Rubin, *Constitutional Aid Limitation Provisions and the Public Purpose Doctrine*, 12 ST. LOUIS U. PUB. L. REV. 143, 143 n.1 (1993) (detailing such provisions).

165. The literature on corrective justice as a basis for tort law and other forms of civil relief is voluminous. *See, e.g.*, JULES L. COLEMAN, RISKS AND WRONGS (1992); ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW (1995); Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449 (1992). For an exposition on the differences between "corrective justice" and "civil recourse," see Zipursky, *supra* note 26.

such, the victim is personally able to hold accountable the perpetrator of the discrimination against him; in doing so, the victim affirms his dignity and status in the political community.[166] Moreover, a locally created private right of action allows an individual to vindicate the locality's interest in declaring certain conduct wrongful. Most civil recourse scholars have assumed that the conduct punished through the tort system is "wrongful," without assessing the political processes by which conduct earns such a label.[167] In this sense, civil recourse scholars assume an almost prepolitical, or perhaps apolitical, notion of "wrong."[168] In the home-rule context, by contrast, the ability of cities to create private rights of action affirms the power of the city to declare what conduct is wrong. In this sense, private enforcement serves a communitarian norm—namely, the right of the community to decide, through the local political system, what conduct is wrongful and why and how it should be punished or deterred. When a victim of sexual orientation discrimination sues under a local ordinance, therefore, he is not only affirming his own dignity but also the community's (i.e., his city's) power to decide that discrimination on the basis of sexual orientation is wrongful. Private enforcement, therefore, plays an important role in reinforcing the value of local democracy, which this Article assumes, as asserted and explained above, is a normative good.

In sum, the private cause of action is an important tool for effectuating governmental policies while at the same time empowering individuals, with some obvious advantages over exclusive public enforcement. This is not to say, however, that private enforcement is always desirable. There may be good reasons why municipal policymakers, like federal or state lawmakers, choose to rely exclusively on public enforcement in certain instances. My point is only that this choice, at least in home-rule jurisdictions, ought to be for municipal policymakers to make in the first instance, and state legislators (through preemption) in the second, rather than prohibited by the courts through enforcement of a complainant-based private law exception.

C. *Examples of Municipally Created Private Rights of Action*

Despite the doctrinal ambiguity created by the private law exception, cities and counties have nonetheless forged an impressive body of complainant-based private law, vividly demonstrating home rule's value as an incubator of policy experimentation. Cities have contributed substantially to the development of antidiscrimination law and have created innovative private causes of action in other areas as well. Cities thus play a significant role in defining the legal rights

166. Solomon, *supra* note 161, at 1796-97 (discussing the "recognition respect" that an injured party demands by acting against a wrongdoer).

167. *E.g.*, *id.* at 1807-09.

168. *E.g.*, Zipursky, *supra* note 26, at 737 (discussing how various torts allow the "wronged . . . to have an avenue of recourse against the wrongdoer").

enforceable between private parties, despite the persistence of the private law exception in both judicial and academic perception. Even in states whose courts have expressed blatant hostility toward locally created private rights of action, cities have sometimes forged ahead regardless, as noted above.[169]

Cities have led the development of antidiscrimination law since the middle of the twentieth century, often laying the foundation for expanding the categories protected by state or federal law. For instance, in the 1950s and early 1960s, before the passage of the federal Civil Rights Act of 1964 and the federal Fair Housing Act of 1968, a number of cities banned discrimination in housing, public accommodations, or employment on the basis of race.[170] By regulating private property and contracts, these early civil rights ordinances touched on traditional private law subjects, but did so only through public enforcement, either by prosecution for a misdemeanor or violation,[171] or by suspending or

169. *See supra* Part II.A-B.

170. *See* John R. Thompson Co. v. District of Columbia, 203 F.2d 579, 599-600 (D.C. Cir.) (citing numerous ordinances from other cities prohibiting racial discrimination in employment, housing, and public accommodations), *rev'd*, 346 U.S. 100 (1953); *see also* Pamela H. Rice & Milton Greenberg, *Municipal Protection of Human Rights*, 1952 WIS. L. REV. 679, 688-89 (revealing that a handful of cities had antidiscrimination ordinances that applied to private employment). Early municipal antidiscrimination ordinances met with mixed success in the courts. *Compare* Chi. Real Estate Bd. v. City of Chi., 224 N.E.2d 793 (Ill. 1967) (upholding Chi., Ill., Fair Housing Ordinance (Sept. 11, 1963) (current version at CHI., ILL., MUN. CODE §§ 5-8-010 to -140 (2011))), Marshall v. Kan. City, 355 S.W.2d 877 (Mo. 1962) (en banc) (upholding KAN. CITY, MO., REV. ORDINANCES § 39.261 (1960) (current version at KAN. CITY, MO., REV. ORDINANCES § 38.131 (Municode through 2011 Ordinance No. 110805)), which punishes discrimination on the basis of race or color in restaurants as a misdemeanor), Martin v. City of New York, 201 N.Y.S.2d 111 (Sup. Ct. 1960) (upholding New York City's Local Law 80, which prohibited owners of multiple private dwellings from discriminating on the basis of race, color, or religion), Porter v. City of Oberlin, 205 N.E.2d 363 (Ohio 1965) (sustaining city ordinance prohibiting discrimination in rental or sale of housing on account of race, creed, or color), *and* Stanton Land Co. v. City of Pittsburgh, 33 Pa. D. & C.2d 756 (1963) (upholding Pittsburgh's 1958 housing discrimination ordinance), *with* Midwest Emp'rs Council, Inc. v. City of Omaha, 131 N.W.2d 609 (Neb. 1964) (invalidating Omaha ordinance prohibiting employment discrimination because power was not delegated to city and subject matter was of statewide, not local, concern), *and* Terry v. City of Toledo, 205 N.E.2d 376 (Ohio 1965) (invalidating as vague Toledo ordinance prohibiting housing discrimination on basis of race, creed, or color).

171. *E.g.*, *Marshall*, 355 S.W.2d at 879-80 (citing KAN. CITY, MO., REV. ORDINANCES § 39.261) (deeming violation a misdemeanor punishable by fine between $25 and $200); *Midwest Emp'rs Council*, 131 N.W.2d at 611 (citing Omaha, Neb., Ordinance 22,026 (Feb. 6, 1962) (current version at OMAHA, NEB., MUN. CODE § 13-88 to -98 (Municode through 2011 Ordinance No. 39209) (enforcing civil rights ordinance through fines of up to $500 or jail sentences of up to six months); *Stanton Land Co.*, 33 Pa. D. & C. at 758 (citing Pittsburgh, Pa., Ordinance 523 (Dec. 15, 1958) (current version at PITTSBURGH, PA., CODE § 659.03 (Municode through 2011 Ordinance 9-2011))) (enforcing violations of fair housing requirements through "penal sanction" of a "modest fine"); *The Civil Rights Era in Albuquerque*, ALBUQUERQUE, http://www.cabq.gov/humanrights/public-information-and-education/diversity-booklets/black-heritage-in-new-mexico/the-civil-rights-era-in-albuquerque (last visited May 11, 2012) (discussing Albuquerque, N.M., Civil Rights Ordinance (Feb. 12, 1952) (current version at ALBUQUERQUE, N.M., CODE § 11-3-7 (2011)), and its enforcement

revoking a license granted by the city.[172] Many cities also established local civil rights commissions, often called "human rights commissions" or "human relations commissions" (HRCs),[173] that focused on civil rights issues.[174] These commissions initially had modest powers, with some authorized to investigate civil rights violations but many focusing on public education campaigns and conciliation instead.[175]

Since the 1950s and 1960s, the number of cities with civil rights ordinances has grown exponentially.[176] Many of these cities have added protected classes beyond those covered by federal or state law. For instance, while federal law prohibits employment and housing discrimination on the basis of race, color, religion, sex, national origin,[177] or disability[178] (as well as age for employment[179] and familial status for housing[180]), cities also prohibit discrimination

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of violations of nondiscrimination in places of public accommodations by fine of up to $300 or imprisonment in city jail or both); *see also* Rice & Greenberg, *supra* note 170, at 685, 691-93 (surveying enforcement of early antidiscrimination ordinances and finding that enforcement was public in the form of criminal prosecution, a lawsuit by the city, or the cutting off of city funds).

In contrast to the above ordinances, New York City's housing discrimination ordinance, Local Law 80, passed in 1957 and known as the Sharkey-Brown-Isaacs Law, provided for civil, rather than criminal, enforcement by the city. *See* N.Y.C., N.Y., Local Law 80 (Dec. 30, 1957) (current version at N.Y.C., N.Y., ADMIN. CODE tit. 8, ch. 1 (2012)); Comment, *Validity of Municipal Law Barring Discrimination in Private Housing*, 58 COLUM. L. REV. 728, 728 & n.6 (1958) (noting that law allowed for New York City's Corporation Counsel "to bring equitable enforcement proceedings in" state court and that a criminal enforcement provision was dropped from an earlier version of the bill).

172. *E.g.*, *Chi. Real Estate Bd.*, 224 N.E.2d at 797 (citing Chi., Ill., Fair Housing Ordinance) (enforcing housing antidiscrimination provisions through suspension or revocation of realtor's city license, and also allowing city to sue for suspension or revocation of state license).

173. These local commissions may have other names like Equal Rights Commission, *e.g.*, ANCHORAGE, ALASKA, MUN. CODE § 5.10.020 (Municode through 2011 Supp. No. MA 52), and Commission on Civil Rights, *e.g.*, MINNEAPOLIS, MINN., CODE § 141.10 (Municode through 2012 Ordinance No. 2012-Or-005).

174. *See, e.g.*, *Chi. Real Estate Bd.*, 224 N.E.2d at 797 (citing Chi., Ill., Fair Housing Ordinance).

175. *See* Rice & Greenberg, *supra* note 170, at 693-94 (discussing Philadelphia and Minneapolis civil rights commissions).

176. *See* Thomas H. Christopher, *Beware of Local Governments in Assessing Applicable Employment Laws*, 28 EMP. REL. TODAY 85, 86-88 (2001) (noting that "well over a hundred cities and counties across the country" have their own antidiscrimination laws applicable to private employers).

177. 42 U.S.C. § 2000e-2 (2006) (outlawing discrimination in employment on basis of race, color, religion, sex, and national origin); *id.* § 3604 (prohibiting discrimination in housing on same bases).

178. *Id.* § 3604 (prohibiting discrimination in housing on basis of disability); *id.* § 12112 (prohibiting disability employment discrimination, with certain exceptions).

179. 29 U.S.C. § 623.

180. 42 U.S.C. § 3604.

on the basis of categories like sexual orientation,[181] gender identity,[182] height,[183] weight,[184] physical appearance,[185] marital status,[186] parental or family status,[187] source of income,[188] military or veteran status,[189] educational association,[190] prior psychiatric treatment,[191] AIDS or HIV status,[192] ex-offender

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181. *E.g.*, ORLANDO, FLA., CODE § 57.14 (Municode through 2011 Ordinance No. 2011-54); ATLANTA, GA., MUN. CODE §§ 2-1381, 94-68, 94-112 (Municode through 2012 Ordinance No. 2012-01); CHI., ILL., MUN. CODE § 2-160-030 (2011); INDIANAPOLIS-MARION CNTY., IND., MUN. CODE § 581-101 (Municode through 2011 Ordinance No. 61); LAWRENCE, KAN., CODE § 10-109 (2012); St. Louis, Mo., Ordinance 62,710 (Oct. 2, 1992); CINCINNATI, OHIO, CODE § 914-3 (Municode through 2012 Ordinance No. 002-2012); CLEVELAND, OHIO, CODE § 663.02 (2011); CHARLESTON, W. VA., CODE § 62-81 (Municode through 2011 Ordinance No. 7471); *see also* ABA Section of Family Law, *A White Paper: An Analysis of the Law Regarding Same-Sex Marriage, Civil Unions, and Domestic Partnerships*, 38 FAM. L.Q. 339, 358 (2004) (noting that, as of 2004, 255 cities and counties had ordinances prohibiting sexual orientation discrimination).

182. Mary Whisner, *Enact Locally*, 102 LAW LIBR. J. 497, 505 (2010) (noting that over one hundred cities and counties prohibit discrimination on the basis of gender identity); *see also Scope of Explicitly Transgender-Inclusive Anti-Discrimination Laws*, TRANSGENDER L. & POL'Y INST. (July 2008), http://www.transgenderlaw.org/ndlaws/ngltftlpichart.pdf.

183. *E.g.*, ANN ARBOR, MICH., CODE ch. 112, § 9:151 (Municode through 2011 Ordinance No. 11-20).

184. *E.g.*, *id.*

185. *E.g.*, MADISON, WIS., MUN. CODE § 39.03 (Municode through 2010 Online Update 53).

186. *E.g.*, DENVER, COLO., MUN. CODE § 28-93 (Municode through 2012 Ordinance No. 98-12); CHI., ILL., MUN. CODE §§ 2-160-030, 5-8-020; MADISON, WIS., MUN. CODE § 39.03.

187. *E.g.*, CHI., ILL., MUN. CODE § 2-160-030; ANN ARBOR, MICH., MUN. CODE ch. 112, § 9:151 (banning discrimination on basis of "family responsibilities"); PORTLAND, OR., MUN. CODE § 23.01.050 (2012).

188. In prohibiting "source of income" discrimination, cities often aim to stop landlords from refusing to rent to persons who receive government housing vouchers. *See* Tamica H. Daniel, Note, *Bringing Real Choice to the Housing Choice Voucher Program: Addressing Voucher Discrimination Under the Federal Fair Housing Act*, 98 GEO. L.J. 769, 771 (2010). For a list of cities with "source of income" discrimination bans, see POVERTY & RACE RESEARCH ACTION COUNCIL, KEEPING THE PROMISE: PRESERVING AND ENHANCING HOUSING MOBILITY IN THE SECTION 8 HOUSING CHOICE VOUCHER PROGRAM app. B (2011), *available at* http://www.prrac.org/pdf/AppendixB-Feb2010.pdf (listing thirty-eight cities or counties that prohibit "source of income" discrimination).

189. *E.g.*, DENVER, COLO., CODE § 28-93; BOS., MASS., MUN. CODE § 12-9.3 (2011). "Military status" is sometimes a broader category than "veteran status" because it encompasses active-duty armed forces personnel in addition to those who have been discharged. *E.g.*, DENVER, COLO., CODE § 28-92 (defining "military status" as "[b]eing or having been in the service of the military").

Federal law prohibits discrimination in employment on the basis of past or current membership in the armed forces. *See* 38 U.S.C. § 4311 (2006). There is no similar federal provision with respect to housing or public accommodations discrimination.

190. ANN ARBOR, MICH., CODE ch. 112, § 9:151.

191. BOS., MASS., MUN. CODE § 12-9.3.

192. *E.g.*, S.F., CAL., POLICE CODE art. 38 (2011); ANN ARBOR, MICH., MUN. CODE ch. 112, § 9:151. Although neither mentions it explicitly, the Americans with Disabilities Act (ADA) and the Fair Housing Amendments Act (FHAA) have been held to protect persons

status,[193] and political ideology,[194] even when state law does not. Most cities' civil rights ordinances apply to public accommodations in addition to employment and housing, and some apply to other settings like credit transactions,[195] home delivery services,[196] and insurance policies.[197] Further, in the context of housing discrimination, many cities' civil rights ordinances lack the exceptions found in federal law. For instance, under federal law, a live-in landlord who owns three or fewer units is free to discriminate on the basis of race, sex, national origin, etc.;[198] such an owner, however, would be barred from discriminating under many cities' civil rights laws on those bases and whatever else is

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with HIV and AIDS from discrimination in employment, public accommodations, and housing. *See* Bragdon v. Abbott, 524 U.S. 624 (1998) (holding that HIV infection is a "disability" under the ADA); Giebeler v. M & B Assocs., 343 F.3d 1143, 1147 (9th Cir. 2003) (holding that, per *Bragdon*, HIV and AIDS infection is a "handicap" under the FHAA). In addition to covering the gaps left open by federal law, *see infra* notes 195-99 and accompanying text, the protection offered by municipal ordinances' express references to HIV and AIDS status is not contingent upon judicial interpretation. Notably, in *Bragdon*, the Supreme Court split five-to-four on the question of whether HIV status constituted a "disability" under the ADA. *See* 524 U.S. at 657 (Rehnquist, C.J., concurring in the judgment and dissenting in part). Although the ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified in scattered sections of 29 and 42 U.S.C.), has likely strengthened the majority view in *Bragdon*, "[T]he question remains whether courts will more consistently determine that HIV/AIDS is a disability per se." Lisa M. Keels, *"Substantially Limited:" The Reproductive Rights of Women Living with HIV/AIDS*, 39 U. BALT. L. REV. 389, 414 (2010).

193. BOS., MASS., MUN. CODE §§ 12-9.2 to .3 (prohibiting discrimination in employment or housing on basis of arrest without conviction, conviction of minor misdemeanors, or conviction of a misdemeanor more than five years ago); MADISON, WIS., CODE § 39.03 (Municode through 2010 Online Update 53) (prohibiting discrimination in employment or housing on basis of arrest without conviction).

194. *E.g.*, SEATTLE, WASH., MUN. CODE § 14.04.040 (Municode through 2012 Ordinance No. 123772); MADISON, WIS., CODE § 39.03.

195. *E.g.*, CHI., ILL., MUN. CODE § 2-160-060 (2011) (prohibiting discrimination in "credit transaction[s]" or "bonding" on basis of numerous categories, including sexual orientation, parental status, military discharge status, and source of income). By contrast, the Equal Credit Opportunity Act, the federal statute, bans only credit discrimination "on the bases of race, color, religion, national origin, sex or marital status, or age." 15 U.S.C. § 1691(a)(1) (2006).

196. *E.g.*, S.F., CAL., POLICE CODE § 3305.1 (prohibiting discrimination in "home delivery services" by persons and businesses on numerous bases).

197. *E.g.*, ANCHORAGE, ALASKA, MUN. CODE § 5.20.030 (Municode through 2011 Supp. No. MA 52) (prohibiting discrimination by insurance companies on basis of "race, color, sex, religion, national origin, marital status, age, or physical or mental disability").

198. 42 U.S.C. § 3603(b) (exempting the owners of single-family homes from the Fair Housing Act's nondiscrimination provisions in certain instances, such as when they sell without using a real estate broker).

covered by municipal law.[199] Cities and counties have thus dramatically altered the substantive antidiscrimination law applicable to millions of Americans.[200]

In addition to broadening the substantive scope of their antidiscrimination ordinances in recent decades, cities and counties have strengthened the public enforcement powers of their HRCs and provided direct private rights of action to persons alleging violations of the ordinances. Beyond their original educational and outreach missions, many HRCs exercise both enforcement and adjudicative powers. HRCs commonly investigate allegations of illegal discrimination,[201] attempt to conciliate disputes,[202] and hold administrative hearings when mediation fails.[203] Insofar as the municipal HRC pursues the complainant's claim, enforcement undoubtedly contains a significant public component.[204] Particularly when the penalty is a civil fine or criminal sentence, as it is in some cities, such schemes may be described as "public."[205] In other cities with public prosecution, however, relief may go directly to the private complainant in the form of, say, back pay or reinstatement for hiring discrimination.[206] Given the private nature of these remedies, the antidiscrimination schemes in these cities can be seen as a public-private hybrid.[207]

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199. *E.g.*, ANCHORAGE, ALASKA, MUN. CODE § 5.20.020 (prohibiting discrimination in the sale, rental, or use of real property with no exceptions).

200. *But see* Chad A. Readler, Note, *Local Government Anti-Discrimination Laws: Do They Make a Difference?*, 31 U. MICH. J.L. REFORM 777, 812 (1998) (concluding that local antidiscrimination laws are "rarely used and have a limited impact").

201. *E.g.*, ANCHORAGE, ALASKA, MUN. CODE chs. 5.50 & 5.60; S.F., CAL., POLICE CODE § 3307.

202. *E.g.*, ANCHORAGE, ALASKA, MUN. CODE § 5.60.040 (calling for a "conciliation conference" between the alleged discriminating party and staff from the Equal Rights Commission when an investigation finds "substantial evidence" of discrimination); DENVER, COLO., MUN. CODE § 28-109 (Municode through 2012 Ordinance No. 98-12).

203. *E.g.*, ANCHORAGE, ALASKA, MUN. CODE § 5.70.010; DENVER, COLO., MUN. CODE § 28-111 ("The agency may hold a formal hearing upon a finding of probable cause to believe that discrimination has occurred.").

204. *E.g.*, ANCHORAGE, ALASKA, MUN. CODE § 5.70.010 (authorizing commission staff to present case of complainant in public hearing); DENVER, COLO., MUN. CODE § 28-111(d) ("The case in support of the complainant shall be presented at the hearing by one (1) of the agency's attorneys . . . ."). Some cities also allow the city attorney to sue the alleged discriminating party directly in state court. S.F., CAL., POLICE CODE § 3307(d)(2); St. Louis, Mo., Ordinance 67,119, § 8(12) (June 13, 2006).

205. *E.g.*, S.F., CAL., POLICE CODE § 3308 (empowering district attorney to prosecute housing discrimination as a misdemeanor); CHI., ILL., MUN. CODE § 2-160-120 (2011) (authorizing penalty between $100 and $500 for each violation of human rights ordinance); St. Louis, Mo., Ordinance 67,119, § 17 (prescribing penalty of a $250 to $500 fine, ninety days in prison, or both).

206. *E.g.*, ANCHORAGE, ALASKA, MUN. CODE § 5.70.130(D) (authorizing HRC to award, inter alia, hiring, reinstatement, and back pay); DENVER, COLO., MUN. CODE § 28-112(a) (same).

207. In some such systems, the commission may seek enforcement of the local agency's order in state court. *E.g.*, LAWRENCE, KAN., CODE § 10-108.21 (2012); St. Louis, Mo., Ordinance 67,119, § 13. In others, the local commission's order is self-enforcing but may be ap-

On the most private end of the spectrum, some cities create private rights of action for victims of alleged discrimination outright, with or without requiring exhaustion of a local administrative process.[208] As noted above, one explanation for the seeming incongruity between the private law exception and local private rights of action in the antidiscrimination field is that in some states, the state legislature has specifically delegated such authority to cities.[209] In other states, however, there is limited or no such delegated authority,[210] and in some of these states, courts have invalidated local antidiscrimination ordinances.[211] In these states, the private law exception impedes local authority much like Dillon's Rule.

Aside from negligence and antidiscrimination, cities have created private causes of action in myriad other areas. Cities have been particularly interested in establishing private causes of action to assist in the enforcement of affordable housing and "living wage" ordinances. On affordable housing, San Francisco, Seattle, and Wilmington, Delaware, have created private causes of action for tenants who are pushed out by landlords seeking to convert residences to condominiums in violation of local law.[212] San Francisco and Chicago also provide a private right of action to tenants whose rent has been raised in violation of the terms of public assistance provided to the landlord.[213] With respect to wages, many local governments have established private causes of action for the enforcement of ordinances that require city contractors to provide certain minimum wages and benefits to their employees.[214] A few cities, including Santa Fe, New Mexico, have established a private cause of action for the en-

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pealed by the respondent to state court. *See, e.g.*, City of Pittsburgh Comm'n on Human Relations v. DeFelice, 782 A.2d 586 (Pa. Commw. Ct. 2001) (hearing appeal of award by the Pittsburgh Commission on Human Relations of damages and attorneys' fees for housing discrimination).

208. *Compare* S.F., CAL., POLICE CODE § 3307(c) (not requiring exhaustion), *and* PORTLAND, OR., MUN. CODE § 23.01.080 (2012) (same), *with* GAINESVILLE, FLA., CODE § 8-51(h)(1) (Municode through 2011 Ordinance No. 110175) (requiring exhaustion), *and* MINNEAPOLIS, MINN., MUN. CODE § 141.60 (Municode through 2012 Ordinance No. 2012-Or-005) (same).

209. *See supra* notes 102, 115, and accompanying text.

210. *See supra* notes 103, 116, and accompanying text.

211. *E.g.*, McCrory Corp. v. Fowler, 570 A.2d 834 (Md. 1990). As noted below, *see infra* note 307 and accompanying text, the Maryland state legislature later responded to *McCrory* by authorizing some local antidiscrimination legislation.

212. S.F., CAL., ADMIN. CODE § 41A (2011); WILMINGTON, DEL., MUN. CODE §§ 9-36 to -47 (Municode through 2012 Ordinance No. 12-003); SEATTLE, WASH., MUN. CODE § 22.206.160 (Municode through 2011 Ordinance No. 123772).

213. S.F., CAL., ADMIN. CODE § 40.31; CHI., ILL., MUN. CODE § 2-45-140(L) (2011).

214. *E.g.*, ANN ARBOR, MICH., MUN. CODE ch. 23, §§ 1:811-:820 (Municode through 2011 Ordinance No. 11-20); N.Y.C., N.Y., ADMIN. CODE § 6-109(e)(2) (2011).

forcement of a citywide minimum wage ordinance that applies to all employers with more than a certain number of employees.[215]

In addition to affordable housing and worker pay, cities have established private causes of action in a potpourri of other areas, ranging from the significant to the peculiar. New York City provides a private right of action to victims of gender-motivated violence,[216] as well as to persons aggrieved by violations of the city's Right-to-Know Law, which requires entities storing hazardous materials to publicly disclose such activity.[217] Cincinnati allows private enforcement of its clean air ordinance.[218] Cleveland provides aggrieved consumers a private right of action under its consumer protection ordinance.[219] A handful of cities enacted mortgage-regulation ordinances that provide private rights of action to alleged victims of "predatory lending," some of which have been invalidated in cases discussed elsewhere.[220] Los Angeles recently passed an ordinance allowing harassed cyclists to sue motorists directly.[221] Miami-Dade County, Florida, provides a private right of action to cable companies against landlords who have impeded their ability to access a property to construct or repair cable facilities.[222] Boston allows tenants to sue landlords who do not perform a crime prevention survey before renting out their property,[223] and Newark, New Jersey, provides a private right of action against the parents or guardians of minors who have damaged others' property.[224]

Many of the ordinances highlighted in this section undoubtedly regulate private law subjects. What is more remarkable is that they blatantly create pri-

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215. *See* New Mexicans for Free Enter. v. City of Santa Fe, 126 P.3d 1149, 1160 (N.M. Ct. App. 2005) (discussing SANTA FE, N.M., CITY CODE § 28-1.8(C) (2011)); *see also* S.F., CAL., ADMIN. CODE § 12R.7(c) (providing that any person aggrieved by violation of city minimum wage ordinance may bring civil action in court of competent jurisdiction); *infra* notes 332-36 and accompanying text (discussing Pittsburgh janitor wage ordinance that provided for enforcement by private right of action).

216. N.Y.C., N.Y., ADMIN. CODE §§ 8-901 to 907. The New York City Council expressly noted that it adopted the ordinance in response to the Supreme Court's invalidation of the Violence Against Women Act, 42 U.S.C. § 13981 (2006), in *United States v. Morrison*, 529 U.S. 598 (2000). N.Y.C., N.Y., ADMIN. CODE § 8-902.

217. Community Right-to-Know Law, N.Y.C., N.Y., ADMIN. CODE §§ 24-701 to -718; *id.* § 24-714 (private right of action provision).

218. CINCINNATI, OHIO, MUN. CODE § 1001-29 (Municode through 2012 Ordinance No. 002-2012) ("citizen action" provision).

219. CLEVELAND, OHIO, CODE § 643.11 (2011).

220. *See infra* Part IV.C. Los Angeles, for example, has an anti-"predatory lending" ordinance with a private right of action. L.A., CAL., MUN. CODE § 47.108 (2011). Note, however, that the recent state court decision invalidating Oakland's similar ordinance raises questions about the provision's validity. See *American Financial Services Ass'n v. City of Oakland*, 104 P.3d 813, 815 (Cal. 2005), which is discussed above in Part I.C.

221. L.A., Cal., Ordinance 181817 (July 25, 2011).

222. MIAMI-DADE CNTY., FLA., MUN. CODE § 8AA-28.1 (Municode through 2011 Ordinance No. 11-100).

223. BOS., MASS., MUN. CODE § 9-12.2 (2011).

224. NEWARK, N.J., MUN. CODE § 20:17-1 (2011).

vate rights of action despite the continued judicial and academic skepticism of local, complainant-based private law. These examples demonstrate how cities can use private rights of action to further policy experimentation. The elimination of the complainant-based private law exception, however, would no doubt result in more such experimentation as well as more effective and meaningful local policies.

IV. THE REVERSE-COMMANDEERING COUNTERARGUMENT

Before proceeding to the primary argument against local authority to create private rights of action, I will briefly address the nonuniformity objection, which traditionally presumes a subject-based view of private law.[225] Per the objection, cities may not legislate with respect to private law because their doing so would create the proverbial "patchwork quilt" of laws to which private actors would be subject.[226] Despite the declining importance of the subject-based private law exception, courts and commentators have continued to stress uniformity as the touchstone by which alleged municipal infringements on private law should be measured.[227] I explained in Part I why the potential costs of nonuniformity do not justify a subject-based private law exception. As a justification for a complainant-based private law exception, nonuniformity is even weaker. Assuming that cities are free to enact regulations that govern formerly "private law" subjects so long as they are enforced publicly, affected persons and entities will incur roughly the same compliance costs as they would if the regulations were enforced through a private right of action.[228] While private rights of action may be more effective than public-only enforcement, and, therefore, a private right of action could increase compliance costs somewhat, one would expect the primary driver of compliance costs to be the increased costs of complying with a unique local regulation, however enforced.

The weightier argument for a complainant-based private law exception is that municipal private rights of action externalize costs onto the state court sys-

225. *See supra* notes 13-15 and accompanying text.

226. New Mexicans for Free Enter. v. City of Santa Fe, 126 P.3d 1149, 1163 (N.M. Ct. App. 2005).

227. *E.g.*, *id.* at 1161; *see also* Am. Fin. Servs. Ass'n v. City of Oakland, 104 P.3d 813, 823 (Cal. 2005) (citing a need for "uniform treatment" of mortgages in invalidating local anti-"predatory lending" ordinance); McCrory Corp. v. Fowler, 570 A.2d 834, 838 (Md. 1990) (invalidating a local antidiscrimination ordinance in part because of the need for "uniform application" of certain "private" legal doctrines); Comment, *supra* note 15, at 636 (citing "statewide uniformity and predictability" as a reason for the private law exception).

228. I say "roughly" because, as argued above, a private right of action may increase compliance with a particular regulatory regime, particularly if the regulated firms or individuals behave like the "Holmesian bad man" and comply only to the extent necessary to avoid enforcement penalties. *See supra* Part III.B.1.

tem in the pursuit of city-specific goals.[229] In this sense, cities creating private rights of action to be litigated in state courts might be said to "commandeer" the state courts to serve their ends. Because the "commandeering" principle is usually associated with a higher level of government requiring a lower level of government to perform a particular function,[230] I refer to the phenomenon described here as "reverse commandeering."[231] The reverse-commandeering argument, while fundamentally normative, is sometimes stated in technical terms. Specifically, the claim is made that home rule does not give cities the authority to expand the jurisdiction of the state courts, which cities allegedly do by creating new private rights of action enforced in those courts. Regardless of the terminology used, this Part will explain why the reverse-commandeering objection does not justify a private law exception.

The reverse-commandeering argument has more currency in states where cities and counties do not fund or administer their own courts, and thus the entire judicial apparatus for disposing of municipally created claims is state-funded and maintained. Assuming that judicial resources are finite, municipally created claims might deprive the judiciary of resources to handle matters of state law or require additional funding from statewide revenue sources. If the latter, residents of cities that do not create private rights of action, or that create rights of action that are invoked less frequently in state court, subsidize the enforcement of policy choices by the cities that create frequently litigated private rights of action. One might consider this potential subsidy problematic from the standpoint of state-local relations, and a valid reason for recognizing a private law exception.[232]

A. *The Structure of State and Municipal Courts*

In assessing the reverse-commandeering claim, it is useful to review the extent of local responsibility for court systems in home-rule jurisdictions. If cities fund their own courts that hear municipally created private rights of action, the reverse-commandeering objection would weaken. While an extensive survey of state court systems is beyond the scope of this Article, a few general ob-

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229. *See, e.g.*, Am. Fin. Servs. Ass'n v. City of Toledo, 830 N.E.2d 1233, 1249 (Ohio Ct. App. 2005), *rev'd on other grounds*, 859 N.E.2d 923 (Ohio 2006); Sims v. Besaw's Café, 997 P.2d 201, 204-05 (Or. Ct. App. 2000) (en banc) (reciting defendant's argument).

230. *See* Printz v. United States, 521 U.S. 898, 925 (1997) (discussing federal "commandeering" of state governments).

231. This Article is not the first to use that term. *See* James Leonard, *The Shadows of Unconstitutionality: How the New Federalism May Affect the Anti-Discrimination Mandate of the Americans with Disabilities Act*, 52 ALA. L. REV. 91, 183 n.646 (2000) (letting "others decide whether 'reverse commandeering' should enter the English language," albeit as a reference to state coercion of federal resources).

232. *See generally* Laurie Reynolds, *Home Rule, Extraterritorial Impact, and the Region*, 86 DENV. U. L. REV. 1271 (2009) (discussing courts' concern with municipal policies that have an "extraterritorial impact").

servations are in order. The first is that the court systems of most states remain highly fractured in terms of organization and funding, despite court reformers' long-held goal of achieving "court unification" in each state.[233] Unification is generally considered to include consolidation of court structure, centralized management, centralized rulemaking, centralized budgeting, and state financing.[234] Even in some states with the highest degrees of centralization and state funding, however, there remain municipal or local courts of some sort.[235] Conversely, at least three states do not have any municipal or county courts, but lack other characteristics of unification.[236] In most states, court structure and funding remains divided between the state and local levels of government to varying degrees.

Even in those states with municipal or county courts, however, the jurisdiction of such courts is often limited to ordinance violations and/or minor civil matters. For instance, in New Jersey and Washington, municipal courts hear only misdemeanors and traffic violations,[237] while in Louisiana and Ohio, municipal courts may hear civil matters but only up to $50,000 and $15,000, respectively.[238] Even if these courts have the authority to hear locally created private rights of action, the monetary limits on their jurisdiction will often exclude such claims, given that plaintiffs may be seeking tens of thousands of dollars or more in damages. Moreover, plaintiffs relying on local private rights of action may often be asserting state statutory or common law claims as well. Indeed, in those states where municipal authority to create private causes of action is reasonably well established, such as Oregon and New York, plaintiffs routinely file their city-created claims in the "regular," state trial courts of general jurisdiction—called "circuit courts" in Oregon, and "supreme courts" in New York—even though both states have municipal courts of some sort.[239]

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233. *See* Andrew Schepard, *Special Issue on Unified Family Courts: "The White Flame of Progress,"* 46 FAM. CT. REV. 217, 218-19 (2008) (tracing court unification movement back to Roscoe Pound's address to the ABA in 1906).

234. James D. Gingerich, *Out of the Morass: The Move to State Funding of the Arkansas Court System*, 17 U. ARK. LITTLE ROCK L.J. 249, 251 (1995).

235. *See State Court Structure Charts*, NAT'L CENTER FOR ST. CTS., http://www.courtstatistics.org/Other-Pages/State_Court_Structure_Charts.aspx (last visited May 11, 2012) (linking to information on the structure of each state's court system, and showing that Hawaii, Massachusetts, and Rhode Island have municipal or local courts).

236. These states are Idaho, North Carolina, and Virginia. *See id.* (linking to information on the relevant states).

237. *See id.* (linking to information on New Jersey and Washington).

238. *See id.* (linking to information on Louisiana and Ohio).

239. *See, e.g.*, Priore v. N.Y. Yankees, 761 N.Y.S.2d 608 (App. Div. 2003) (adjudicating plaintiff's local claim that was filed in state supreme court); Sims v. Besaw's Café, 997 P.2d 201, 203 (Or. Ct. App. 2000) (en banc) (noting that plaintiff filed claims under city ordinance and state statute and tort law in circuit court). It should be noted that while many cities in Oregon have municipal courts, *see Oregon Justice/Municipal Court Registry*, OR. JUD. DEP'T (Aug. 24, 2011), http://courts.oregon.gov/OJD/docs/courts/OtherCourts/JP-Muni_Court_Registry_by_City.pdf, the state's most populous city (by far)—Portland—does not.

B. *Local Law in the State Court System*

Although there are many county and municipal courts, state court systems still handle much of the responsibility for adjudicating locally created private causes of action, thus creating the potential reverse-commandeering problem described above. Even assuming that every home-rule state had a municipal court in every city that created a private right of action, and every one of these courts had no damages limit and could hear pendent state law claims,[240] the state court system would still need to be available at some point for appellate review. It is axiomatic that the state's highest court must have the final say over interpretations of state law, and thus that court would need to be available to decide any state law claims pendent to claims based on municipal ordinances. Even in cases of "pure" municipal law, the state's appellate and highest court would still need to be available for review as a matter of due process and state sovereignty. Going back to *Hunter v. City of Pittsburgh*, the United States Supreme Court has reaffirmed that municipalities are "agencies" of the state.[241] The Court has further clarified that cities and counties are not "sovereigns" for the purposes of constitutional sovereign immunity[242] or the Fifth Amendment's "separate sovereigns" double jeopardy exception.[243] Allowing a municipal court to have final authority on matters of municipal law would contravene these fundamental principles and might also offend the federal Constitution's prohibition on establishing sovereign entities within states.[244]

Moreover, for much the same reason that state appellate review of locally created private rights of action heard first in local court would be required, state appellate court review of municipal law is already required when cities prosecute ordinance violations.[245] By allowing for private rather than public prosecution, a city does not generally impose a materially different burden on the state court system. As a practical matter, many states allow their municipal courts to hear publicly prosecuted local violations and misdemeanors but not civil cases, or only civil cases with a low damages threshold.[246] In these states, therefore, the burden on state courts may be increased by locally created private

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See Sims, 997 P.2d at 210 n.17 (discussing OR. REV. STAT. ANN. § 3.136(1) (West 2012), which shifted prosecution of Portland municipal violations from municipal court to state circuit court).

240. Indeed, in such a scenario, it would be the state that is free-riding off of the city rather than vice versa.

241. Hunter v. City of Pittsburgh, 207 U.S. 161, 178 (1907).

242. N. Ins. Co. of N.Y. v. Chatham Cnty., 547 U.S. 189 (2006).

243. Waller v. Florida, 397 U.S. 387 (1970).

244. U.S. CONST. art. IV, § 3.

245. Schwartz, *supra* note 3, at 748 n.356 (dismissing anticommandeering objection to city authority to create private law on grounds that it "proves too much," since "[c]ity law is interpreted and enforced by state courts almost always at the trial level and always on appeal").

246. *See supra* notes 237-38 and accompanying text.

rights of action. If so, however, this increased burden militates more in favor of expanding the functions of municipal courts than carving out a complainant-based private law exception to municipal authority.[247] In addition, in many states, the potential burden imposed on state courts by locally created private rights of action is greatly mitigated by local administrative exhaustion requirements. Many cities establish their own administrative schemes for discrimination claims that plaintiffs must exhaust before filing suit in state court.[248] Even when exhaustion is not mandatory, administrative review can siphon off cases that might otherwise have gone straight to state court.[249]

Despite the filter of local administrative review and the necessity of state appellate judicial review for any action premised on local law, locally created private rights of action may impose a greater cost on the state court system in states where municipal courts handle only publicly prosecuted municipal violations. Even in these states, however, the costs imposed on the state court system are likely to be modest. In many instances, if not most, parties are likely to litigate local private rights of action in conjunction with state-based claims. For example, in *Sims v. Besaw's Café*, the plaintiff alleged unlawful discrimination on the basis of sexual orientation, as prohibited by a Portland ordinance, while also pursuing state common law and statutory claims against his employer.[250] In such cases, the local and state claims may share a common or overlapping factual basis, and the incremental burden imposed on the court system by adjudicating the city-created claim will often be small.

Even assuming that reverse commandeering does impose significant costs on the state court system, the private law exception is a rather blunt instrument to wield in response to it. The state legislature, after all, may always respond to fiscal concerns by preempting the particular local law that creates the problem.[251] Preemption, too, can be a blunt tool, but the fact that it stems from the legislature gives it more democratic legitimacy, and it need not always be

247. It may be that municipal court jurisdiction is limited to violations, misdemeanors, and small civil claims because these types of cases do not necessarily require a jury. States are free under the federal Constitution, however, to heighten the monetary threshold of civil claims heard without a jury, as the Seventh Amendment has never been incorporated against the states. McDonald v. City of Chi., 130 S. Ct. 3020, 3035 n.13 (2010). On the other hand, the vast majority of state constitutions require juries to decide civil actions, albeit at different monetary thresholds. Paul Mogin, *Why Judges, Not Juries, Should Set Punitive Damages*, 65 U. CHI. L. REV. 179, 181 n.14 (1998) (citing forty-seven state constitutions that contain a civil jury requirement).

248. *See supra* note 208 and accompanying text.

249. *Cf., e.g.*, S.F., CAL., POLICE CODE art. 33, § 3307(b)-(c) (2006) (providing that exhaustion is not required, but that local administrative proceeding is an alternative to civil action in state court).

250. 997 P.2d 201, 203 (Or. Ct. App. 2000) (en banc).

251. This assumes, of course, that the city ordinance is not considered a "protected" local matter in an imperio home-rule state. *See supra* note 12 and accompanying text. Moreover, if the preemptive state law is not of general applicability, it may violate a state constitutional ban on special legislation.

wielded in the bluntest manner. For instance, a legislature concerned about the frequent litigation of a city's antidiscrimination ordinance in state court could require that the city establish a more thorough administrative process to weed out some cases that might otherwise have gone straight to state court.

On a more general level, as agents of the state of which the judiciary is also a part, home-rule cities and counties ought to have at least a presumptive ability to use state institutions to further their goals. Cities and counties routinely execute state functions, such as providing public education, securing the public health, collecting taxes, and enforcing state law.[252] For these essential and costly services, cities and counties often receive limited or no financial assistance from the state.[253] The imposition of some costs on the state judicial system by the local creation of a private right of action is an example of cities taking something "back" from the state that relies on them so heavily. Although this argument carries more normative than legal force, it is consistent with federal constitutional doctrine that treats municipal corporations as "political subdivisions" of the state rather than sovereign entities.[254] This doctrine conceives of municipalities as "convenient agencies" of the state, presumably working with the state to accomplish state objectives.[255] Home rule has modified this relationship by recognizing that cities may have something to offer the state as well, both as a more effective means of self-government and as a laboratory for policy experimentation.[256] These goals are furthered by local authority to create private causes of action, whatever their effect on the state court system.

C. *Recent Case Law and the "Jurisdictional" Objection*

In two fairly recent cases, at least some judges have been receptive to the technical version of the reverse-commandeering argument—namely, that municipally created private rights of action illegally enlarge the jurisdiction of state courts. In *American Financial Services Ass'n v. City of Toledo*, a group of banks challenged Toledo, Ohio's "predatory lending" ordinance as impliedly preempted by state law and as ultra vires.[257] An intermediate appellate court

252. *See* Nat'l League of Cities v. Usery, 426 U.S. 833, 851 n.16 (1976) (describing "traditional operations of state and local governments"), *overruled on other grounds by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985); Michelle Wilde Anderson, *Cities Inside Out: Race, Poverty, and Exclusion at the Urban Fringe*, 55 UCLA L. REV. 1095, 1140-41 (2008) (explaining counties' provision of services).

253. *See, e.g.*, Phyllis E. Mann, *Ethical Obligations of Indigent Defense Attorneys to Their Clients*, 75 MO. L. REV. 715, 724-25 (2010) (explaining state-local funding mixes for public defenders). *See generally* GERALD E. FRUG & DAVID J. BARRON, CITY BOUND: HOW STATES STIFLE URBAN INNOVATION (2008).

254. Hunter v. City of Pittsburgh, 207 U.S. 161, 178 (1907).

255. *Id.*

256. Diller, *supra* note 60, at 1117.

257. 830 N.E.2d 1233 (Ohio Ct. App. 2005). The challenge was one of a handful in Ohio to municipal lending laws, *see also, e.g.*, Am. Fin. Servs. Ass'n v. City of Cleveland,

held that some of the publicly enforceable provisions of the Toledo ordinance were valid,[258] but the provisions enforceable by a private right of action were outside of Toledo's home-rule authority because they "attempt[ed] to regulate the jurisdiction of the [state] courts."[259] The Ohio Supreme Court ultimately held that the Toledo ordinance was impliedly preempted, without addressing the jurisdictional issue raised by the appellate court.[260] In *Sims v. Besaw's Café*, the Portland ordinance expressly provided "a cause of action in any court of competent jurisdiction" for those alleging they had been harmed by a violation of the ordinance.[261] The defendant employer argued that the private cause of action was invalid because it added to the jurisdiction of state courts, which only the legislature had the power to do.[262] A majority of the Oregon Court of Appeals rejected this argument, but the dissent and the trial court found it convincing.[263] In dissent, Judge Edmonds argued that under the majority's decision, Oregon cities and counties could "compel enforcement of [their] legislation by appropriating state courts . . . to [their] own use."[264] Judge Edmonds viewed such action as a violation of "state sovereignty" and a "usurpation" of the state's authority over its courts.[265]

As articulated by Judge Edmonds, the "jurisdictional" argument confuses a city's creation of new *substantive* law with the expansion of the state courts' adjudicative jurisdiction—that is, their authority to decide certain cases.[266] Every state has at least one trial-level court that exercises general civil jurisdiction—in other words, a court that has the power to hear all cases in which it may exercise personal jurisdiction over the defendant in keeping with state statutes and federal due process principles.[267] Such courts may hear disputes

858 N.E.2d 776 (Ohio 2006); City of Dayton v. State, 813 N.E.2d 707 (Ohio Ct. App. 2004), but the only one in which the jurisdictional argument received any favorable judicial treatment. The Dayton ordinance provided for enforcement by private right of action. *City of Dayton*, 813 N.E.2d at 710 (citing DAYTON, OHIO, REV. CODE GEN. ORDINANCES §§ 112.40-.44 (Municode through 2012 Ordinance No. 29990-01)). However, the courts did not pay any particular attention to this aspect of the ordinance.

258. *City of Toledo*, 830 N.E.2d at 1245 (upholding some publicly enforceable elements of ordinance as not preempted).

259. *Id.* at 1249 ("In creating a private right of action . . . the city acted outside the scope of its home-rule authority by attempting to regulate the jurisdiction of the courts.").

260. *See* Am. Fin. Servs. Ass'n v. City of Toledo, 859 N.E.2d 923 (Ohio 2006); *see also City of Cleveland*, 858 N.E.2d 776.

261. 997 P.2d 201, 203 (Or. Ct. App. 2000) (en banc) (quoting PORTLAND, OR., MUN. CODE § 23.01.080(E) (2012)).

262. *Id.* at 204-05.

263. *Id.* at 203; *id.* at 216 (Edmonds, J., dissenting).

264. *Id.* at 219 (Edmonds, J., dissenting).

265. *Id.* at 219, 221.

266. *See* PETER HAY ET AL., CONFLICT OF LAWS: CASES & MATERIALS 37 (13th ed. 2009) (defining "jurisdiction to adjudicate").

267. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (holding that due process requires only that the defendant have "certain minimum contacts with [the forum] such

between parties based on the substantive law of other sovereigns—whether that of other states, the United States, or even foreign countries—provided personal jurisdiction over the defendant is appropriate.[268] To be sure, there are some exceptions to this otherwise general jurisdiction, such as enforcing the penal and tax provisions of foreign entities,[269] enforcing foreign law that contradicts the public policy of the state,[270] or hearing claims based on a law that reserves exclusive jurisdiction in a particular forum.[271] There is no obvious reason, however, why municipal law ought to constitute an exception of its own. If anything, given the need for the state courts to supervise decisions by municipal entities, state court jurisdiction over municipal law—particularly over any decisions made by municipal courts—is not just advisable but constitutionally required.[272]

Creating a legal right and remedy where they never existed is not the same as enlarging jurisdiction, even if it adds to a court's workload. For instance, in *Sims*, had there been no Portland ordinance upon which the plaintiff could rely, and assuming that the allegation of discrimination on the basis of sexual orientation was the only wrong of which the plaintiff complained,[273] the plaintiff would have failed to state a claim upon which relief could be granted.[274] The state trial court would still have had jurisdiction over his claim provided it had personal jurisdiction over the defendant; it would simply have used its jurisdiction over the claim to dismiss it. If, as Judge Edmonds's position would seem to suggest, lack of a substantive remedy is the same as lack of jurisdiction, there would be no reason to have two separate bases for dismissal in the rules of civil procedure.[275] As Judge Armstrong noted writing for the *Sims* majority, "The effect of the Portland ordinance is to change the law that bears on such a claim,

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that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'" (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940))).

268. *Sims*, 997 P.2d at 205-06 (majority opinion).

269. Eric A. Posner & Cass R. Sunstein, Chevron*izing Foreign Relations Law*, 116 YALE L.J. 1170, 1181 (2007).

270. *Id.* at 1182.

271. Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1096 (2010) ("Congress possesses undoubted power to divest state courts of jurisdiction as a necessary and proper means of achieving legitimate federal purposes."). The "ecclesiastical abstention" doctrine, rooted in the First Amendment's Establishment Clause, is another exception to state courts' general jurisdiction. Serb. E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 714 (1976).

272. *See supra* notes 241-44 and accompanying text. Indeed, this proposition raises an interesting hypothetical question: if Portland had established its own courts to hear city-created private rights of action, would Judge Edmonds have viewed the private right of action provision as ultra vires because it would inevitably require state appellate court review?

273. In fact, the plaintiff asserted both state statutory and common law claims in addition to his claim under the ordinance. *Sims*, 997 P.2d at 203.

274. *See* OR. R. CIV. P. 21(A)(8) (authorizing dismissal of civil action for "failure to state ultimate facts sufficient to constitute a claim"); *see also* FED. R. CIV. P. 12(b)(6).

275. *See, e.g.*, FED. R. CIV. P. 12(b)(1), (6); OR. R. CIV. P. 21(A)(1), (8).

making it one on which the employee *can* prevail"; this alone does not mean that the ordinance has changed the jurisdiction of the court.[276]

Like local private rights of action, publicly enforced local ordinances may ultimately be adjudicated before higher-level state courts, a possibility which proponents of the "jurisdictional" objection ignore. For instance, in *City of Toledo*, the Ohio appellate court apparently did not view the publicly enforceable sections of Toledo's "predatory lending" law as unlawfully enhancing the jurisdiction of state courts. These sections were largely enforced criminally, with violations of the ordinance subject to prosecution as a misdemeanor.[277] Presumably, these misdemeanors were to be prosecuted in Toledo's municipal court, which has jurisdiction over such matters.[278] Any appeal from municipal court, however, would ultimately reach Ohio state courts; in this sense, Toledo's publicly enforced ordinance would also add to the workload of state courts, albeit at the appellate level.[279] Moreover, a bank that feared enforcement of the ordinance's misdemeanor provision could always file suit for an injunction in state circuit court. Indeed, that is the manner in which the challengers to the Cleveland and Toledo ordinances proceeded.[280] Likewise, in *Sims*, had Portland's ordinance been enforced only through public means, whether as a civil violation or as a criminal misdemeanor, an employer fearing enforcement could have resorted to the state's circuit courts to enjoin enforcement of the ordinance.[281]

To assert that state courts presumptively have jurisdiction over locally created private rights of action is not to say that the concerns regarding appropriation are ill-founded in every case. As noted above, it may well be that certain locally created private causes of action add significantly to the workload of the state courts. The state legislature may respond in numerous ways, including by expressly withdrawing the authority of the local government to create the type of private cause of action at issue, by expressly withdrawing the authority of

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276. *Sims*, 997 P.2d at 207. Judge Armstrong's further conclusion that the ordinance did not "add to the function or duties of the circuit court," *id.*, is correct only if "duties" is defined narrowly. Obviously, a law that makes it significantly harder to dismiss certain complaints for failure to state a claim will add to the court's "duties" insofar as the court may have to allow the case to proceed to discovery and summary judgment and, perhaps, trial. That is not the same, however, as saying that the ordinance expands the court's jurisdiction or, perhaps, "function."

277. Am. Fin. Servs. Ass'n v. City of Toledo, 830 N.E.2d 1233, 1245 (Ohio Ct. App. 2005) (citing TOLEDO, OHIO, MUN. CODE § 795.23 (2011)), *rev'd on other grounds*, 859 N.E.2d 923 (Ohio 2006).

278. *See* OHIO REV. CODE ANN. § 1901.20 (LexisNexis 2012).

279. *Id.* § 1901.30 (providing for appeals from municipal court to the state court of appeals).

280. *See* Am. Fin. Servs. Ass'n v. City of Cleveland, 858 N.E.2d 776, 779 (Ohio 2006); *City of Toledo*, 830 N.E.2d at 1233.

281. The fact that the state circuit court would undoubtedly have jurisdiction over such an action is further evidence that city-created private rights of action do not enlarge the jurisdiction of the state courts.

the local government to regulate the substantive matter at issue (whether by public or private enforcement), by requiring some sort of administrative process before private claims may proceed to state court, or by requiring that municipal courts be established to handle the matters in the first instance. Many states already use some combination of the latter two methods to reduce the initial workload on state courts imposed by municipally created private causes of action.[282] There is no shortage of methods, therefore, by which the state legislature may ensure that local governments do not overburden the state courts.

CONCLUSION

It bears emphasizing that the arguments made in this Article are not directed solely at courts. Where interpretation of a state's home-rule provision to allow for city-created private rights of action is reasonable under whatever methods of statutory or constitutional interpretation the state's courts usually employ, this Article urges the abandonment of a judicially enforced private law exception. Where such an interpretation is not reasonable—whether because it too clearly contradicts the text or history of the relevant home-rule provision or because the local government in question does not enjoy the power of home rule[283]—or even where the argument is reasonable but is nonetheless rejected by the state's courts, this Article's arguments are more appropriately directed at the legislators and voters with the power to change the state's constitution or statutes. As this Article has shown, private rights of action are an important tool for effectuating municipal policy choices. Prohibiting cities from exercising this power under a categorical exception to municipal authority contradicts home rule's goal of promoting local experimentation with nonuniform policies. Moreover, a complainant-based private law exception weakens the normative force of the community's decision to make certain conduct unlawful by depriving harmed individuals of the chance to pursue their own cases in court. Just as a subject-based private law exception has largely been rendered a dead letter in recent years, so too should its complainant-based sibling be retired.

282. *See* GAINESVILLE, FLA., CODE § 8-51(h)(1) (Municode through 2011 Ordinance No. 110175); MINNEAPOLIS, MINN., MUN. CODE § 141.60(a), (b) (Municode through 2012 Ordinance No. 2012-Or-005).

283. *E.g.*, Youssef v. Anvil Int'l, 595 F. Supp. 2d 547, 557-58 (E.D. Pa. 2009) (invalidating private right of action established by a Lancaster County, Pennsylvania, human rights ordinance in part because the county lacked home rule).

APPENDIX:
SURVEY OF COMPLAINANT-BASED PRIVATE LAW IN HOME-RULE STATES

Skeptical States:

Connecticut: At least one lower court has cited McQuillin's treatise for the proposition that "[a]s a general matter, municipalities do not have the authority to create private rights of action or new civil liability."[284] The Connecticut Supreme Court and the intermediate appellate court have conceded the theoretical possibility of a municipally created cause of action, but only in the specific context of negligence.[285]

Delaware: The statutory home-rule provision contains an express private law exception.[286] In applying this provision, the state courts have permitted local regulation of private law subjects,[287] but have expressed skepticism regarding local authority to create private rights of action.[288]

Illinois: The supreme court and appellate courts have hesitated to read ordinances as establishing private rights of action where other remedies are available,[289] but have stopped short of expressly prohibiting local private rights of

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284. Massey v. Town of Bradford, No. X10NNHCV04048778SCLD, 2006 WL 1000309, at *8 (Conn. Super. Ct. Mar. 28, 2006) (citing 6 MCQUILLIN 1998, *supra* note 98, § 22.01).

285. Dreher v. Joseph, 759 A.2d 114, 117 (Conn. App. Ct. 2000) ("[W]here an ordinance imposes on property owners a duty normally performed by the municipality, there is no private right of action unless plainly expressed in the ordinance."); *see also* Forster v. Town of Bristol, No. CV990494356S, 2001 WL 1132208, at *1 (Conn. Super. Ct. Aug. 14, 2001) ("A private cause of action against an abutting landowner for injuries incurred as a result of a defective sidewalk exists only if a town ordinance specifically allows for one.").

286. DEL. CODE ANN. tit. 22, § 802 (2012) (denying municipalities the "power to enact private or civil law governing civil relationships except as an incident to an exercise of an independent municipal power").

287. Tucker v. Crawford, 315 A.2d 737, 740 (Del. Super. Ct. 1974) (concluding that a local building code infringed on private law by regulating property rights, although upholding the code because infringement was merely incidental to independent power).

288. NVF Co. v. Garrett Snuff Mills, Inc., No. CIV.A. 96C-01-230-JE, 2002 WL 130536, at *4 (Del. Super. Ct. Jan. 30, 2002) ("If the county cannot foreclose a private right of action, it also cannot create one."); *see also* Weldin Farms, Inc. v. Glassman, 414 A.2d 500, 506 (Del. 1980) (citing statutory private law exception in concluding that state legislature did not intend to give county authority to limit private cause of action based on state law). *But see* Medico v. Nesci, No. 56 CIV.A.1973, 1973 WL 157171, at *1 (Del. Super. Ct. Dec. 13, 1973) (holding that statutory private law exception had no effect on Wilmington's pre-enactment charter authority).

289. *E.g.*, Abbasi v. Paraskevoulakos, 718 N.E.2d 181, 187 (Ill. 1999); *see also id.* at 190 (Harrison, J., dissenting) (reading the Chicago ordinance in question as creating an *express* cause of action, whereas the majority had refused to read it as creating an implied cause of action). The Illinois Supreme Court has also noted that the drafters of the Illinois Constitution's home-rule provision intended to prohibit cities from exercising authority over

action.[290] Although some cities have relied on their home-rule authority to establish HRCs[291] that enforce local antidiscrimination ordinances,[292] it is unclear whether these ordinances allow for private rights of action.[293]

Indiana: The statutory home-rule provision states that cities may not "prescribe the law governing civil actions between private persons" and contains no "independent power exception."[294] Nonetheless, the Indiana appellate court has recognized an "independent power exception" on its own, which might temper the application of the statutory private law exception.[295] Indiana courts have looked skeptically on locally created private rights of action, although they have not ruled out their potential validity in all cases.[296] In addition, Indiana law mentions eliminating discrimination only on the grounds of "race, religion, color, sex, disability, national origin," and "ancestry" in delegating authority to cities to establish HRCs.[297] Despite this limited charge, Indianapolis[298] has banned discrimination on the basis of the additional categories of gender identi-

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"such matters as divorce, real property law, trusts, contracts, etc.," which should be regulated by the state only. City of Evanston v. Create, Inc., 421 N.E.2d 196, 202 (Ill. 1981) (quoting the report of the Local Government Committee to the delegates of the sixth Illinois constitutional convention). Despite this seemingly subject-based private law exception, Illinois courts have upheld various local intrusions on private law subjects. *E.g.*, *id.* at 196-98 (upholding local ordinance mandating substantive provisions in residential leases).

290. *But see Abbasi*, 718 N.E.2d at 190 (Harrison, J., dissenting) (arguing that cities clearly have authority to create private rights of action).

291. As noted earlier, "HRC" is shorthand for a local agency (often called a "human rights commission" or "human relations commission") that enforces or adjudicates a city's antidiscrimination law. *See supra* text accompanying note 173.

292. *Compare* CHI., ILL., MUN. CODE § 2-160-030 (2011) (prohibiting discrimination on basis of, inter alia, gender identity, parental status, and source of income), *with* 775 ILL. COMP. STAT. ANN. 5/1-103(Q) (West 2012) (defining discrimination not to include those categories but including additional category of "order of protection status").

293. *Compare* CHI., ILL., MUN. CODE §§ 2-160-090, 2-160-120 (calling for agency investigation of claims and public fines), *with* COMM'N ON HUMAN RELATIONS, CITY OF CHI., FACT SHEET: CHICAGO'S DISCRIMINATION ORDINANCES (2011), *available at* http://www.cityofchicago.org/content/dam/city/depts/cchr/AsianCouncilFlyers/English.pdf (noting that prevailing complainants may receive out-of-pocket damages, emotional distress damages, attorney's fees and costs, and punitive damages).

294. IND. CODE ANN. § 36-1-3-8(a)(2) (West 2011).

295. Burgin v. Tolle, 500 N.E.2d 763, 767 (Ind. Ct. App. 1986) ("A municipal ordinance will not be invalid merely because it affects private relationships, if it does so as an incident to the exercise of another independent municipal power.").

296. *Id.*; *see also* Chandley Enters., Inc. v. City of Evansville, 563 N.E.2d 672, 675-76 (Ind. Ct. App. 1990).

297. *See* IND. CODE ANN. § 22-9-1-2; *id.* § 22-9-1-12.1 (authorizing creation of local civil rights commissions with investigative and enforcement authority).

298. Technically, the municipal governing unit is the Consolidated City of Indianapolis and Marion County. INDIANAPOLIS-MARION CNTY., IND., REV. CODE § 102-3 (Municode through 2011 Ordinance No. 61).

ty, sexual orientation, and veteran status,[299] and provides for private remedies such as damages for complainants.[300]

Louisiana: The state constitution declares that "[n]o local governmental subdivision shall . . . except as provided by law, enact an ordinance governing private or civil relationships."[301] Despite this seemingly strong language, Louisiana courts have generally shied away from invoking this constitutional limitation directly, preferring to rest their decisions on other grounds.[302] Further, New Orleans has relied on its home-rule authority to create an HRC that protects more groups than state law does,[303] although the city's antidiscrimination ordinance does not provide for a direct private right of action.[304]

Maryland: The state's highest court (the Maryland Court of Appeals) invalidated a home-rule county's antidiscrimination ordinance that provided for a private right of action in part because "the creation of new causes of action in the courts has traditionally been done either by the General Assembly or by this Court under its authority to modify the common law."[305] The court considered the creation of a private right of action in the employment context to be beyond

299. *Compare* IND. CODE ANN. § 22-9-1-3 (banning discrimination in sale or acquisition of real estate, employment, education, public accommodations, and extension of credit on basis of race, religion, color, sex, disability, national origin, or ancestry), *with* INDIANAPOLIS-MARION CNTY., IND., REV. CODE ch. 581 (banning discrimination in employment, housing, education, and public accommodations on the basis of state categories as well as sexual orientation, gender identity, and veteran status).

300. Although Indianapolis's ordinance does not expressly provide complainants with a private right of action, and is careful to note that the city's Equal Opportunity Advisory Board—rather than the private complainant—has the authority to seek enforcement of hearing decisions in state court, INDIANAPOLIS-MARION CNTY., IND., REV. CODE § 581.415(a), the ordinance does allow private litigants to seek judicially enforceable redress for discrimination by private actors, *id.* § 581.414(d)(1).

301. LA. CONST. art. VI, § 9(A).

302. *E.g.*, New Orleans Campaign for a Living Wage v. City of New Orleans, 825 So. 2d 1098 (La. 2002) (invalidating New Orleans minimum wage on grounds other than private law exception). *But see id.* at 1111 (Weimer, J., concurring) (applying the constitutional provision to decide the case).

303. NEW ORLEANS, LA., CODE § 86-3(a) (Municode through 2012 Ordinance No. 24724) (citing LA. CONST. art. VI, § 6, as authority for HRC). *Compare id.* § 86-22 (prohibiting discrimination in employment on the basis of, inter alia, sexual orientation and gender identification), *with* LA. REV. STAT. ANN. § 23:332(A)(2) (2011) (not including such categories in employment discrimination statute).

304. *See* NEW ORLEANS, LA., CODE §§ 86-9 to -21.

305. McCrory Corp. v. Fowler, 570 A.2d 834, 838 (Md. 1990). *But see* Beretta U.S.A. Corp. v. Santos, 712 A.2d 69, 84-85 (Md. Ct. Spec. App. 1998) ("[A] county agency may be vested with the authority to award damages for pecuniary loss resulting from discrimination, when such damages are reasonably quantifiable and relate to identifiable, actual losses.").

the scope of a county's power over local legislation.[306] The state legislature later responded to this decision by authorizing private rights of action to be brought based on certain named counties' antidiscrimination ordinances.[307]

Missouri: The supreme court has flatly announced that "a city has no power, by municipal ordinance, to create a civil liability from one citizen to another."[308] Without acknowledging any inconsistency therewith, lower courts have held that a violation of a local ordinance constitutes negligence per se.[309] Also, cities have effectively created private rights of action for discrimination on bases not protected by state law.[310]

New Jersey: The courts have avoided directly deciding whether municipalities may create private rights of action,[311] but have held that where there is common law immunity for property owners, only the legislature, and not cities, may abrogate this immunity,[312] thereby indicating that cities have less power to change common law rights than the state.

North Carolina: The supreme court invalidated a county antidiscrimination ordinance that created two new bases for illegal discrimination and was en-

306. *McCrory*, 570 A.2d at 838. The court also made veiled reference to a subject-based private law exception, raising the prospect that a county might change the consideration or parol evidence rules of contract law if the court ruled the other way. *Id.*

307. MD. CODE ANN., STATE GOV'T §§ 20-1202 to -1203 (LexisNexis 2011); Pope-Payton v. Realty Mgmt. Servs., Inc., 815 A.2d 919, 923 (Md. Ct. Spec. App. 2003) (recognizing statute superseding *McCrory*).

308. Yellow Freight Sys., Inc. v. Mayor's Comm'n on Human Rights of Springfield, 791 S.W.2d 382, 384 (Mo. 1990).

309. *E.g.*, Jensen v. Feely, 691 S.W.2d 926, 928 (Mo. Ct. App. 1985) (finding that breach of a local ordinance "is actionable as negligence *per se*").

310. Missouri authorizes some cities to create HRCs "to eliminate and prevent discrimination in employment, housing, and public accommodation." MO. ANN. STAT. §§ 213.020, 213.135 (West 2011) (authorizing local civil rights commissions so long as commissions were created before August 13, 1986). The authorizing law defines "discrimination" narrowly to include only the categories recognized by state law (which are the same as those recognized by federal law). MO. ANN. STAT. § 213.010 (defining "[d]iscrimination" as "any unfair treatment based on race, color, religion, national origin, ancestry, sex, age as it relates to employment, disability, or familial status as it relates to housing"). However, cities like Kansas City and St. Louis have banned discrimination on additional bases like sexual orientation, gender identity, and familial status (in the employment context). *See, e.g.*, KAN. CITY, MO., CODE §§ 38-132(a)(1), 38-133(a)(1) (Municode through 2011 Ordinance No. 110805); ST. LOUIS, MO., CODE § 3.44.080(B), (C) (Municode through 2010 Ordinance No. 68642). These cities have also allowed private actions to proceed on these bases in certain instances. *See, e.g.*, KAN. CITY, MO., CODE § 38-33 (recognizing the right of an individual to bring a civil action for violation of local antidiscrimination law, at least in the housing context).

311. *See, e.g.*, Stewart v. 104 Wallace St., Inc., 432 A.2d 881, 887 n.4 (N.J. 1981).

312. *E.g.*, Jenkins v. Cheong, No. L-4826-06, 2008 WL 1744405, at *2 (N.J. Super. Ct. App. Div. Apr. 17, 2008) (citing Yanhko v. Fane, 362 A.2d 1 (N.J. 1976), *overruled by Stewart*, 432 A.2d 881).

forceable by a private cause of action.[313] Although the court's decision rested on a unique special-legislation clause in the state constitution,[314] its analysis was informed by a concern that local private rights of action might "lead to a balkanization of the state's employment discrimination laws."[315]

Ambiguous States:

Alaska: No case law of significance.

Arizona: Violation of a local ordinance can amount to negligence per se.[316]

Georgia: No case law of significance on local private rights of action, but there is a private law exception in the home-rule provisions.[317]

Idaho: No case law of significance.

Iowa: No case law of significance.

Kansas: Violation of a local ordinance can amount to negligence per se.[318]

Kentucky: No case law of significance.

Massachusetts: No case law of significance on local private rights of action, but there is a private law exception in the state home-rule provision and courts have interpreted it as subject-based.[319]

Michigan: In *McNeil v. Charlevoix County*, the Michigan Supreme Court considered a multicounty health department's regulation that prohibited employers from taking adverse action against an employee who complained about

313. Williams v. Blue Cross Blue Shield of N.C., 581 S.E.2d 415, 420, 427, 431 (N.C. 2003).

314. The formal ratio decidendi in *Williams* was that the local ordinance was invalid because it was passed pursuant to authority specifically delegated by a state law, which violated the North Carolina Constitution's ban on local laws "[r]egulating labor [or] trade." *Id.* at 425-26 (citing N.C. CONST. art. II, § 24(1)(j)).

315. *Id.* at 428; *see also id.* at 427-28 (noting ordinance's difference from state law and the lack of evidence that Orange County had employment practices that "differ in any significant way from" those in the rest of the state).

316. *See* Hall v. Mertz, 480 P.2d 361, 363 (Ariz. Ct. App. 1971).

317. *See supra* notes 47, 85, 114.

318. *See* Schlobohm v. United Parcel Serv., Inc., 804 P.2d 978, 980-81 (Kan. 1991) (explaining that violation of an ordinance amounts to negligence per se if the ordinance is designed to protect specific individuals rather than the public at large).

319. *See supra* notes 47, 114, and accompanying text.

the employer's noncompliance with workplace smoking restrictions.[320] The health department regulation was enforceable by a private right of action in state court.[321] A group of businesses potentially subject to the regulation challenged its validity in state court, alleging, inter alia, that the health agency lacked authority to create a private right of action and that the regulation infringed on the common law doctrine of at-will employment.[322] Over a spirited dissent, the court upheld the regulation, in part because it was adopted pursuant to authority delegated to local health departments by the statewide Clean Indoor Air Act.[323] Whether *McNeil* augurs general authority for local governments to create private rights of action without specific authorization from the state is unclear, as prior case law that was not formally overruled in *McNeil* points in the opposite direction.[324]

Minnesota: No case law directly on point, although there is dicta to the effect that an ordinance may create private rights of action.[325]

Mississippi: No case law of significance.

Montana: No case law of significance.

Nebraska: Violation of a local ordinance can amount to negligence per se.[326]

North Dakota: Violation of a local ordinance may be evidence of negligence.[327]

Ohio: Violation of a local ordinance can amount to negligence per se.[328]

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320. 772 N.W.2d 18, 20-21 (Mich. 2009). The agency in question—the Northwest Michigan Community Health Agency—was the consolidated health authority for four counties; each county's governing body approved the regulation challenged in the case. *Id.*

321. *Id.* at 20.

322. *Id.* at 20-21.

323. *Id.* at 22 (citing MICH. COMP. LAWS ANN. § 333.12613(2) (West 2012)).

324. *Id.* at 26-27 (citing Mack v. City of Detroit, 649 N.W.2d 47 (Mich. 2002)); *see also supra* note 36 and accompanying text (discussing *Mack* and how it addressed a different legal question).

325. City of Worthington v. New Vision Co-op., No. A09-286, 2009 WL 5089248, at *3 (Minn. Ct. App. Dec. 29, 2009) (noting that the city ordinance creates a private right of action but deciding a separate question). For more on HRCs in Minnesota, see note 116 above.

326. *See* Stark v. Turner, 47 N.W.2d 569, 573 (Neb. 1951) ("The violation of any . . . valid municipal regulation . . . will sustain a private action for negligence . . . ." (quoting Fimple v. Archer Ballroom Co., 35 N.W.2d 680, 681 (Neb. 1949))).

327. *See* Keyes v. Amundson, 391 N.W.2d 602, 608 (N.D. 1986).

Oklahoma: No case law of significance.

Pennsylvania: State courts routinely hear appeals from local HRCs, before which complainants allege discrimination in employment, housing, or public accommodations.[329] Many HRCs enforce discrimination ordinances that protect more classes of people from discrimination than state law, thereby effectively providing private rights of action that are not recognized by state (or federal) law.[330] In creating these private rights of action, however, cities act pursuant to specific delegated authority from the Pennsylvania legislature rather than in reliance on their home-rule powers alone, although it appears that cities read this delegated authority expansively.[331]

Outside of the antidiscrimination context, the authority of Pennsylvania home-rule municipalities to create private rights of action is less certain. In a recent case of significance, *Building Owners & Managers Ass'n of Pittsburgh v. City of Pittsburgh*, a group of businesses challenged a Pittsburgh ordinance requiring janitorial firms to retain their employees for at least 180 days after an ownership change unless there is cause to terminate employment.[332] Aggrieved employees could enforce the 180-day retention requirement by private right of action.[333] In response to plaintiffs' allegation that the private right of action provision violated the clause of the state constitution creating a "unified judicial system,"[334] the city and union defending the ordinance conceded the provision's illegality.[335] Although it is not clear why the city and union made such a

328. *See* Evans v. Cashen, No. L-93-350, 1994 WL 573801, at *3 (Ohio Ct. App. Oct. 14, 1994) (recognizing that an action for negligence per se may arise when an ordinance imposes a specific duty on the alleged wrongdoer).

329. *E.g.*, City of Pittsburgh Comm'n on Human Relations v. DeFelice, 782 A.2d 586 (Pa. Commw. Ct. 2001).

330. *Compare* PHILA., PA., CODE § 9-1103 (2011) (prohibiting sexual orientation discrimination in employment), *with* Pennsylvania Human Relations Act, 43 PA. CONS. STAT. ANN. § 955 (West 2011) (lacking similar protected class).

331. Pennsylvania law states only that cities may establish HRCs with "powers and duties similar to those now exercised by the Pennsylvania Human Relations Commission." 43 PA. CONS. STAT. ANN. § 962.1(d). Nonetheless, Pennsylvania cities have established HRCs that prevent discrimination on more bases than state law recognizes. At least one Pennsylvania court has upheld this expansive authority on the basis of home rule rather than a generous reading of the statutory authority to create HRCs. Hartman v. City of Allentown, 880 A.2d 737 (Pa. Commw. Ct. 2005) (upholding city's addition of sexual orientation to local antidiscrimination statute based on city's home-rule powers).

332. 985 A.2d 711, 712 (Pa. 2009) (citing PITTSBURGH, PA., CODE §§ 769.01-.07 (Municode through 2011 Ordinance No. 9-2011)).

333. PITTSBURGH, PA., CODE § 769.04.

334. Complaint at 12, Bldg. Owners & Managers Ass'n of Pittsburgh v. City of Pittsburgh, No. GD05-032096, (Pa. Ct. C. P. Dec. 7, 2005), 2007 WL 5552194 (citing PA. CONST. art. V, § 1).

335. Bldg. Owners & Managers Ass'n of Pittsburgh v. City of Pittsburgh, 985 A.2d 711, 713 & n.5 (Pa. 2009).

sweeping concession, they may have feared that this provision exceeded Pittsburgh's home-rule authority.[336]

Rhode Island: Violation of a local ordinance may be evidence of negligence, but not negligence per se.[337]

South Carolina: No case law of significance.

South Dakota: No case law of significance, but there is a private law exception in the state home-rule provision.[338]

Tennessee: Violation of a local ordinance can amount to negligence per se.[339]

Texas: No case law of significance.

Utah: No case law of significance.

Wisconsin: Violation of a local ordinance can amount to negligence per se.[340]

Permissive States

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336. The author's attempts to contact the lawyers defending the ordinance regarding this matter were unsuccessful.

337. *See* Brey v. Rosenfeld, 48 A.2d 177, 179 (R.I. 1946), *aff'd on reh'g*, 50 A.2d 911 (R.I. 1947). Interestingly, the Rhode Island courts have not addressed the validity of local private rights of action since the state's adoption of home rule in 1951. It is possible, therefore, that the Rhode Island courts would take a different approach today given that their pre-1951 opinions may have been influenced by Dillon's Rule. *Id.* ("[M]unicipalities have no power to attach civil liability to the violation of their ordinances, unless they are expressly empowered to do so by the legislature."). *But see* Elmer E. Cornwell, *Rhode Island*, *in* KRANE ET AL., *supra* note 74, at 368 (asserting that "Dillon's Rule . . . still governs in almost all questions of governmental power" in Rhode Island).

338. *See supra* note 47 and accompanying text. Indeed, as noted earlier, one might question whether South Dakota is really a "home rule" state at all. *See supra* note 99.

339. *See* Smith v. Owen, 841 S.W.2d 828, 831 (Tenn. Ct. App. 1992) (holding that an action for negligence per se may arise when an ordinance imposes a specific duty on alleged wrongdoer). It should be noted that Tennessee is a relatively weak home-rule state. *See* DON DARDEN, THE UNIV. OF TENN. MUN. TECHNICAL ADVISORY SERV., HOME RULE CHARTERS IN TENNESSEE 6 (2005) (on file with author) (noting that only thirteen cities have opted for home rule since the state afforded the option in 1953). It could reasonably be grouped with the Dillon's Rule states cited above. *See supra* note 99 and accompanying text.

340. *See* Muwonge *ex rel.* Antwaun A. v. Heritage Mut. Ins. Co., 596 N.W.2d 456, 466 (Wis. 1999) (laying out factors for when violation of ordinance constitutes negligence per se).

California: The intermediate appellate and trial courts have assumed that an ordinance can create a private cause of action,[341] a position that seems well grounded in state law.[342]

Colorado: The supreme court has assumed that an ordinance can create a private cause of action just like a state statute.[343]

Florida: The intermediate appellate court has held that a city created a private right of action, without extensive discussion of the city's authority to do so.[344]

Hawaii: The supreme court has assumed that an ordinance can create a private cause of action just like a state statute.[345]

Maine: The supreme court has adjudicated a local private right of action without questioning municipal authority to create it.[346]

New Mexico: Despite a private law exception in the state's constitutional home-rule provision,[347] the intermediate appellate court upheld Santa Fe's creation of a private cause of action to enforce its minimum wage ordinance under the "independent power exception."[348]

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341. *See, e.g.*, Castillo v. Friedman, 243 Cal. Rptr. 206, 210 (App. Dep't Super. Ct. 1987).

342. *See, e.g.*, Huntingdon Life Scis., Inc. v. Stop Huntingdon Animal Cruelty USA, Inc., 29 Cal. Rptr. 3d 521, 549 (Ct. App. 2005) (citing state statute, CAL. GOV'T CODE § 36900(a) (West 2012), which allows for violation of a city ordinance to be redressed by civil action).

343. *See* Gerrity Oil & Gas Corp. v. Magness, 946 P.2d 913, 923 (Colo. 1997).

344. *See* Del Rio v. City of Hialeah, 904 So. 2d 484, 487 (Fla. Dist. Ct. App. 2005) (finding city intended to create private cause of action by ordinance).

345. *See* Pono v. Molokai Ranch, Ltd., 194 P.3d 1126, 1148 (Haw. Ct. App. 2008) (applying the same test to both statutes and ordinances for determining whether a private cause of action exists), *abrogated on other grounds by* Cnty. of Hawaii v. Ala Loop Homeowners, 235 P.3d 1103 (Haw. 2010).

346. *See* Clarke v. Olsten Certified Healthcare Corp., 714 A.2d 823, 824-25 & n.1 (Me. 1998) (applying Portland's ordinance banning discrimination on the basis of sexual orientation, which created a private right of action in state court).

347. N.M. CONST. art. X, § 6 (stating home-rule power does not include "the power to enact private or civil laws governing civil relationships except as incident to the exercise of an independent municipal power").

348. *See* New Mexicans for Free Enter. v. City of Santa Fe, 126 P.3d 1149, 1156, 1160 (N.M. Ct. App. 2005) (citing SANTA FE, N.M., CITY CODE § 28-1.8 (2011)).

New York: The intermediate appellate court (in particular, the First Appellate Division) has repeatedly made clear that the grant of home rule to cities is "broad enough to include the creation of a private cause of action."[349]

Oregon: The intermediate appellate court upheld a local private cause of action for sexual orientation discrimination when state law did not prohibit discrimination on that basis.[350] Although five of the court's ten judges joined the lead opinion, which recognized broad authority on the part of cities to create private rights of action under Oregon's home-rule provision,[351] four other judges concurred on a narrower basis,[352] and one judge dissented forcefully.[353]

Washington: The intermediate appellate court has adjudicated a local private right of action without questioning municipal authority to create it.[354]

349. *See* Bracker v. Cohen, 612 N.Y.S.2d 113, 114 (App. Div. 1994); *see also* Priore v. N.Y. Yankees, 761 N.Y.S.2d 608, 613 (App. Div. 2003) (rejecting preemption challenge to local private right of action for discrimination).

350. Sims v. Besaw's Café, 997 P.2d 201 (Or. Ct. App. 2000) (en banc) (upholding PORTLAND, OR., MUN. CODE § 23.01.050B (2012)). Oregon's discrimination law has since been changed to include sexual orientation as a protected class. *See* 2007 Or. Laws ch. 100.

351. *Sims*, 997 P.2d at 203.

352. *Id.* at 216 (Linder, J., concurring) ("I depart from the lead opinion's holding that cities have general or abstract authority to enlarge the common-law duties and liabilities of private persons.").

353. *Id.* at 216 (Edmonds, J., dissenting).

354. Deo v. King Broad. Co., No. 52626-0-I, 2004 WL 1598862, at *3-4 (Wash. Ct. App. July 19, 2004).