

Note

THE REVERSE-COMMANDEERING SYSTEM: A BETTER WAY TO DISTRIBUTE STATE AND LOCAL AUTHORITY

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ABSTRACT—Current regimes for distributing state and local authority have two primary flaws: (1) they unnecessarily restrict local authority by preventing local governments from passing private laws, and (2) they often require local ordinances to be enforced in state courts, thereby depriving local governments of the ability to interpret their own laws and requiring states to pay the judicial costs of local policy preferences. This Note suggests a new means of distributing state and local authority designed to address these two deficiencies: the reverse-commandeering system. The reverse-commandeering system would not distinguish between local authority to pass public and private laws. Instead, the reverse-commandeering system would (1) give local governments the option to create, staff, and fund their own municipal courts and (2) prevent local governments from passing ordinances that could not be enforced in their municipal courts. By doing so, the reverse-commandeering system would allow local governments to realize the benefits of private law and relieve states of the financial burden of the judicial enforcement of local ordinances.

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Nowhere has democracy ever worked well without a great measure of local self-government

—Friedrich A. Hayek[†]

INTRODUCTION

Fayetteville, Arkansas, wants to make it illegal for businesses to discriminate against lesbian, gay, bisexual, and transgender (LGBT) individuals.¹ Arkansas does not.² Should Fayetteville be allowed to do so?

[†] 2 F. A. HAYEK, THE ROAD TO SERFDOM 234 (Bruce Caldwell ed., definitive ed. 2007).

¹ Max Brantley, *Fayetteville Adopts Civil Rights Ordinance 53-47*, ARK. TIMES: ARK. BLOG (Sept. 8, 2015, 8:00 PM), <http://www.arktimes.com/ArkansasBlog/archives/2015/09/08/early-vote-favors->

Should it be allowed to give LGBT individuals a right to bring lawsuits against those who discriminate against them? Should Fayetteville be able to transfer the costs of trying these lawsuits onto the state of Arkansas? This Note presents the current answers to these questions, finds them lacking, and suggests a new system for state and local relations based on the practical and theoretical benefits of robust local democracy as well as basic principles concerning the relationship between the political and judicial branches of a government.

Since its independence, the United States of America has served as an example of the possible benefits of strong local democracies.³ Yet American local governments have always been hindered by unnecessary and illogical constraints on their authority.⁴ Over the last century, however, Americans have increasingly embraced local law and its unique capabilities, and significant impediments on local authority have been removed as local governments have been empowered in important new ways.⁵ But this process of local empowerment has resulted in a lopsided system for distributing state and local authority with two primary problems: (1) in many states, local governments still have too little lawmaking authority, and (2) because local laws are often enforced in state courts, local governments are able to force states to shoulder the judicial costs of their local policy preferences. This Note proposes a new system for organizing state and local authority that addresses both problems: the reverse-commandeering system.

The first problem with current systems for distributing local and state authority—too little local authority—stems from the “private law exception” to local home rule authority. Today, almost all states give local governments “home rule authority”—the power to enact municipal law on local issues subject to preemption by state legislation.⁶ However, many home rule states impose a private law exception which prevents local governments from using their home rule power to create “private law.”⁷

fayetteville-civil-rights-ordinance-68-32 [<https://perma.cc/PC8Y-HYUP>] (discussing the civil rights ordinance passed by Fayetteville in September 2015).

² *Id.*

³ See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 3 (Harvey C. Mansfield & Delba Winthrop eds. & trans., 2000) (1835).

⁴ See *infra* Part I.

⁵ See *id.*

⁶ See *infra* Section I.B.

⁷ See *infra* Section I.C.

Generally, *private law* is defined as law that establishes legal rights and duties between private entities.⁸

The private law exception is problematic for at least four reasons. First, the private law exception makes it more difficult for local governments to accomplish their practical objectives. Private laws can be effective tools for local governments seeking to address local problems or capitalize on local strengths. For example, for local governments like Fayetteville, Arkansas, that want to minimize private discrimination against LGBT individuals, local laws that make it illegal for private employers to discriminate against LGBT individuals would presumably be an effective means of doing so. Second, preventing local governments from passing private laws shuts the door on a potentially vibrant area of local policy experimentation.⁹ Third, the private law exception deprives local governments of a means by which they can differentiate themselves from one another, thereby contracting the array of local political systems that people can choose to join.

The fourth flaw with the private law exception is that it is poorly tailored to addressing two of its supposed goals. Professor Terrance Sandalow and other supporters of the private law exception argue that it is necessary to prevent the disruption to commerce that would result from multiple jurisdictions within a state with their own unique rules.¹⁰ However, states are already able to address the specific situations where they find the existence of different local laws to be problematic by preempting varying local rules through state legislation or by simply passing a statute preventing local governments from legislating on certain topics.¹¹ Unlike the private law exception, this solution gives states the freedom to address the private local laws that they find to be problematic while allowing variation and experimentation where a state considers it to be appropriate. These supporters of the private law exception also argue that it avoids the unfairness that would result from imposing large penalties for violating

⁸ Randy E. Barnett, *Foreword: Four Senses of the Public Law–Private Law Distinction*, 9 HARV. J.L. & PUB. POL’Y 267, 270 (1986).

⁹ See *infra* notes 148–49 and accompanying text.

¹⁰ E.g., Terrance Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643, 678–79 (1964); W. P. Davidson & J. F. Shumaker, Comment, *The Power of Ohio Municipalities to Enact Municipal Law*, 9 OHIO ST. L.J. 152, 153 (1948) [hereinafter, Davidson & Shumaker, *Power of Ohio Municipalities*]; Comment, *Municipal Home Rule Power: Impact on Private Legal Relationships*, 56 IOWA L. REV. 631, 632 (1971) [hereinafter, Comment, *Municipal Home Rule*].

¹¹ See *infra* Section IV.B.1.

hard-to-find local rules.¹² However, states can address any concerns about the accessibility of local ordinances by passing state statutes requiring local governments to make their ordinances more accessible.

Professor Paul Diller does make one legitimate point in favor of the private law exception: because local ordinances are often enforced in state-funded state courts, allowing local governments to pass private laws enables local governments to force the state to pay the judicial costs of advancing a local government's policy preferences.¹³ However, this criticism applies equally to *public* local laws that are enforced in state courts and, therefore, justifies a "local law exception" (i.e., a rule that prevents local governments from passing any laws) as much as it justifies a private law exception.

Recognizing the validity of this criticism, as well as its application to public local laws, the reverse-commandeering system¹⁴ proposes replacing the private law exception with the "reverse-commandeering exception": a state rule that (1) gives local governments the option to create, staff, and fund their own municipal courts and (2) prevents local governments from passing any laws that could not be enforced in their own municipal courts. The result would be that local governments that want to use their legislative authority to further their own policy preferences are required to pay the judicial costs associated with their laws and policies. State courts would remain available to hear cases alleging that municipal ordinances and judicial processes violate state law.

The reverse-commandeering exception would have several important benefits. It would require states to give local governments the option to create municipal courts, which would lead to a stronger relationship between the court and the local community and increased local control of the interpretation of local ordinances.¹⁵ It would also reduce state budgets, an important issue considering the financial concerns of many states, by logically distributing the costs of state and municipal court systems based on the roles of courts of original and appellate jurisdiction.¹⁶ Additionally,

¹² See Gary T. Schwartz, *The Logic of Home Rule and the Private Law Exception*, 20 UCLA L. REV. 671, 720–28 (1973).

¹³ Paul A. Diller, *The City and the Private Right of Action*, 64 STAN. L. REV. 1109, 1153–54 (2012).

¹⁴ The reverse-commandeering system gets its name from Professor Diller's label for the argument that the private law exception is justified because it prevents local governments from "commandeering" states by forcing the state to pay the judicial costs associated with local private laws. See *id.*

¹⁵ See *infra* Section IV.C.

¹⁶ See *infra* Section IV.D.

the reverse-commandeering exception would minimize any confusion over the source of a particular law.¹⁷

Part I introduces the flawed current systems for distributing state and local authority, paying particular attention to Dillon’s Rule, home rule authority, and the private law exception. Part II transitions to a discussion of the judicial enforcement of local ordinances, focusing on the role municipal courts play in different state legal systems. Part III introduces the reverse-commandeering system of state and local relations, and Part IV lays out its advantages over current systems for distributing state and local political and judicial authority.

I. CURRENT SYSTEMS FOR DISTRIBUTING STATE AND LOCAL AUTHORITY

The foundational principle of local–state relations is that, legally speaking, local governments are and always have been merely “creature[s] of the State.”¹⁸ The United States Constitution does not explicitly assign local governments any rights, functions, or responsibilities; states are free to create, destroy, and empower local governments as they see fit.¹⁹ A corollary of this principle is that states can determine the scope of local governments’ authority—a local government is not only a creature of the state, it is also “a delegate of the state, possessing only those powers the state has chosen to confer upon it.”²⁰ This Part discusses the scope of authority that states currently choose to bestow upon local governments.

Section I.A begins with a discussion of Dillon’s Rule, the primary means for determining local authority for most of American history, and its modern-day relevance. Then, Section I.B discusses home rule authority. Lastly, Section I.C considers the private law exception, its justifications, and the various means through which states have imposed it.

A. *Dillon’s Rule*

The story of the evolution of local government authority begins with Dillon’s Rule, a rule of judicial construction derived from the aforementioned principle that local governments only possess the authority delegated to them by the state.²¹ Under Dillon’s Rule, local governments only possess (1) the powers expressly granted them by the states, (2) the

¹⁷ See *infra* Section IV.E.

¹⁸ *City of Worcester v. Worcester Consol. St. Ry. Co.*, 196 U.S. 539, 548–49 (1905).

¹⁹ See Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 7 (1990).

²⁰ *Id.*

²¹ Leslie Bender, Note, *Home Rule, Revisited*, 10 J. LEGIS. 231, 234 (1983).

powers implied in or incident to those expressly granted, and (3) the powers “*essential* to the accomplishment of the declared objects and purposes of the corporation.”²² Dillon’s Rule further provides that, when there is any doubt as to whether a local government possesses a certain power, courts should hold that the local government does not possess that power.²³ Thus, Dillon’s Rule functions as “a standard of delegation, a canon of construction and a rule of limited power” designed to ensure that local governments only exercise those powers that states have actually granted them.²⁴

Dillon’s Rule was originally enunciated by Chief Justice John Dillon of the Iowa Supreme Court in an 1868 case.²⁵ It quickly became the prevailing rule in most states and sustained its popularity through the middle of the twentieth century.²⁶ While legally based on the absence of any explicit constitutional delegation of authority to local governments,²⁷ Dillon’s Rule was also based on a pessimistic conception of the capabilities and importance of local governments.²⁸ Today, most states have abandoned Dillon’s Rule largely because “it failed to recognize local government’s sophistication, its importance in the political process, and the variety and complexity of issues it faces.”²⁹ Only eight states still use Dillon’s Rule as their primary means of determining state and local authority.³⁰ Most states have replaced Dillon’s Rule with some version of home rule.

B. Home Rule

In the late nineteenth century, states began to supplant Dillon’s Rule with home rule in an effort to empower local governments.³¹ The first home rule provisions basically made local governments “state[s] within . . . state[s]”: they delegated local governments the entirety of the police power with respect to local affairs and granted local governments immunity from

²² 1 JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 237 (5th ed. 1911).

²³ *Id.*

²⁴ Briffault, *supra* note 19, at 8.

²⁵ Bender, *supra* note 21, at 234 n.21.

²⁶ Briffault, *supra* note 19, at 9.

²⁷ Bender, *supra* note 21, at 234 (discussing the “creature theory” of local government).

²⁸ See Frona M. Powell, *Challenging Authority for Municipal Subdivision Exactions: The Ultra Vires Attack*, 39 DEPAUL L. REV. 635, 651 (1990).

²⁹ *Id.*

³⁰ These eight states are: Alabama, Arkansas, Nevada, New Hampshire, Vermont, Virginia, West Virginia, and Wyoming. Diller, *supra* note 13, at 1129 n.99.

³¹ Bender, *supra* note 21, at 235–37.

state legislative interference.³² Today, however, very few home rule provisions provide local governments with immunity from legislative interference in local affairs³³—generally, ordinances passed under a local government’s home rule authority can be preempted by state legislation.³⁴ Thus, for purposes of this Note, the term “home rule authority” will be used to refer to a local government’s authority to pass local ordinances that can be preempted by state legislation. However, the exact scope of local governments’ home rule authority varies from state to state.³⁵

Home rule was designed to enhance the authority of local governments.³⁶ It was motivated by a belief in local government, a desire “to allow the governmental unit closest to the people to minister to their needs.”³⁷ The transition from Dillon’s Rule to home rule is a positive development when viewed through the lens of the major theoretical justifications for local government. For instance, Charles Tiebout argues that local government autonomy is a positive because it enhances the variety of public-good models available for prospective residents to choose among.³⁸ Robert Nozick makes a similar argument that more local autonomy allows local governments to provide competing “utopias” citizens can choose to join.³⁹ The wisdom that can be taken from Tiebout and Nozick is that robust local authority is beneficial because it provides local governments a means of differentiating themselves from one another, and local differentiation benefits individuals by expanding the array of local political systems that they can choose to join.

Home rule can also be justified on practical grounds. Different localities face different problems that require different solutions, and local governments should be empowered to craft the solutions that best fit their particular problems. As the Supreme Court of Ohio put it, “the problems of the village are essentially different from the problems of the metropolitan center. It was in recognition of these truths that the . . . Ohio Constitution

³² Briffault, *supra* note 19, at 10.

³³ *Id.*

³⁴ Patrick M. Steel, *Obesity Regulation Under Home Rule: An Argument That Regulation by Local Governments Is Superior to Administrative Agencies*, 37 CARDOZO L. REV. 1127, 1147–49 (2016).

³⁵ The variation of home rule authority largely results from variation in the restrictions states impose on local governments’ general home rule authority. See SAMUEL B. STONE, IND. UNIV. PUB. POLICY INST., NO. 10-C27, HOME RULE IN THE MIDWEST 2–3 (2010). For example, Indiana state law prevents local governments from using their home rule authority to levy any taxes, whereas Illinois allows local governments to use their home rule authority to tax but forbids an income tax. *Id.*

³⁶ Briffault, *supra* note 19, at 10.

³⁷ Bender, *supra* note 21, at 237.

³⁸ Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418 (1956).

³⁹ See ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 312 (1974).

grant[ed] to municipalities the exercise of all powers of local self-government.”⁴⁰

Today, forty-one states employ some form of home rule.⁴¹ Most states have implemented home rule through a constitutional amendment.⁴² New Mexico’s is typical;⁴³ it gives municipalities the ability to adopt a home rule charter and provides that “[a] municipality which adopts a [home rule] charter may exercise all legislative powers and perform all functions not expressly denied by general law or charter.”⁴⁴ On the other hand, a small number of states have implemented home rule legislatively by passing legislation that grants local governments a degree of home rule authority.⁴⁵ Indiana, for example, granted its cities home rule authority through the Home Rule Act of 1980, a state statute.⁴⁶

C. *The Private Law Exception to Local Home Rule Authority*

1. *How the Private Law Exception Has Been Implemented*

It is common for states to exclude or exempt certain subject matter from local governments’ home rule authority.⁴⁷ The most expansive such exception has been termed the private law exception. Generally, the private law exception prevents local governments from enacting private law.⁴⁸ However, there is disagreement over what exactly qualifies as private law.⁴⁹

The private law exception arose quickly after the rise of home rule.⁵⁰ By 1916, influential scholar Howard McBain was able to write that it was “universally accepted” that “general subjects [like] crime, domestic relations, wills and administration, mortgages, trusts, contracts, real and personal property, insurance, banking, corporations, and many others . . . are strictly of ‘state concern,’” and consequently are not “appropriate subjects of local control.”⁵¹ McBain’s view “ossified into settled doctrine

⁴⁰ *Dillon v. City of Cleveland*, 158 N.E. 606, 611 (Ohio 1927).

⁴¹ Briffault, *supra* note 19, at 10–11; *see also* Diller, *supra* note 13, at 1129 n.99 (noting that there are only eight states that still follow Dillon’s Rule, plus South Dakota, which is “ambiguous”).

⁴² Bender, *supra* note 21, at 236.

⁴³ Darin M. Dalmat, *Bringing Economic Justice Closer to Home: The Legal Viability of Local Minimum Wage Laws Under Home Rule*, 39 COLUM. J.L. & SOC. PROBS. 93, 106 (2005).

⁴⁴ N.M. CONST. art. X, § 6.

⁴⁵ Bender, *supra* note 21, at 236.

⁴⁶ STONE, *supra* note 35, at 2.

⁴⁷ Schwartz, *supra* note 12, at 683.

⁴⁸ Diller, *supra* note 13, at 1110.

⁴⁹ *See infra* notes 53–62 and accompanying text.

⁵⁰ Diller, *supra* note 13, at 1110.

⁵¹ HOWARD LEE MCBAIN, *THE LAW AND THE PRACTICE OF MUNICIPAL HOME RULE* 673–74 (1916).

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.”⁵²

Although there may have been a general consensus that home rule did not give local governments the authority to make private law, there was not a consensus over exactly what amounted to private law in this context.⁵³ Two primary means of identifying private law developed—a subject-based approach and a complainant-based approach.⁵⁴ The subject-based approach defines private law according to the subject matter of the law in question.⁵⁵ Under the subject-based approach, private laws are those that “define the rights and duties that private individuals and groups owe *to each other*.”⁵⁶ Public laws, on the other hand, regulate the conduct of government officials and the duties that private individuals owe the government.⁵⁷ Harold McBain’s definition of private law, which listed the subjects that qualified as private law, is one example of a subject-based definition of what qualifies as private law.⁵⁸

The primary alternative to the subject-based approach is the complainant-based approach.⁵⁹ The complainant-based approach distinguishes between private and public law based on who is entitled to seek judicial relief for violation of the law.⁶⁰ Under this approach, private laws are laws that can be enforced through complaints brought by private individuals.⁶¹ Public laws, on the other hand, are those that are enforced by complaints brought by public authorities.⁶² This Note argues against both forms of the private law exception and therefore does not distinguish between the subject-based and complainant-based approach.

2. *How the Private Law Exception Has Been Implemented*

States have implemented the private law exception in three ways: by changing their constitutions, via legislation, or through judicial opinions.⁶³

⁵² Diller, *supra* note 13, at 1114. For examples of courts and commentators explicitly endorsing this principle, see *Wagner v. Mayor of Newark*, 132 A.2d 794, 800 (N.J. 1957); Sandalow, *supra* note 10, at 674; Comment, *Municipal Home Rule Power*, *supra* note 10, at 633.

⁵³ Diller, *supra* note 13, at 1114–16.

⁵⁴ *Id.* at 1116.

⁵⁵ Barnett, *supra* note 8, at 270.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ See *supra* note 51 and accompanying text.

⁵⁹ Diller, *supra* note 13, at 1116.

⁶⁰ Barnett, *supra* note 8, at 269.

⁶¹ *Id.*

⁶² *Id.*

⁶³ Schwartz, *supra* note 12, at 683.

First, perhaps the most common means by which states have implemented the private law exception is by amending their state constitutions. Many of these state constitutional provisions are modeled off recommended provisions drafted by the National League of Cities and the National Municipal League.⁶⁴ These model provisions include the following clause qualifying local governments' home rule authority: "This grant of home rule powers shall not include the power to enact private or civil law governing civil relationships except as incident to an exercise of an independent county or city power."⁶⁵

Second, in some states that do not have a constitutional private law exception, state legislatures have passed a statute imposing one. For example, Delaware has not constitutionalized its private law exception, but its state code provides that local governments' home rule authority "does not include the power to enact private or civil law governing civil relationships except as an incident to an exercise of an independent municipal power."⁶⁶

Finally, there are some states where the private law exception is judicially created. Missouri is a good example. Missouri's Constitution gives home rule cities "all powers which the general assembly of the state of Missouri has authority to confer upon any city, provided such powers are consistent with the constitution of this state and are not limited or denied either by the charter so adopted or by statute."⁶⁷ This language does not provide any clear textual basis for a private law exception. However, Missouri courts have consistently and repeatedly enforced a complainant-based private law exception under which "a city has no power, by municipal ordinance, to create a civil liability from one citizen to another, nor to relieve one citizen from that liability by imposing it on another."⁶⁸

3. *Justifications for the Private Law Exception*

Three primary justifications have been offered for the private law exception: preventing the disruption to commerce that would occur from varying local rules, avoiding unfairly punishing violators of hard-to-find local rules, and the structural incoherence of enforcing local laws in state courts.

⁶⁴ *Id.* at 696.

⁶⁵ NAT'L MUN. LEAGUE, MODEL STATE CONSTITUTION art. VIII, § 8.02 (6th ed. 1963).

⁶⁶ DEL. CODE ANN. tit. 22, § 802 (West 2017).

⁶⁷ MO. CONST. art. VI, § 19(a).

⁶⁸ *Yellow Freight Sys., Inc. v. Mayor's Comm'n on Human Rights of Springfield*, 791 S.W.2d 382, 384 (Mo. 1990) (quoting *City of Joplin v. Wheeler*, 158 S.W. 924, 928 (Mo. Ct. App. 1913) (citing four other cases applying the rule)).

Perhaps the primary purpose of the private law exception is preventing the disruption to commerce that would occur if each local government had its own unique rules governing private business activities.⁶⁹ The general fear is that a proliferation of different regulatory regimes would make doing business in a state excessively difficult.⁷⁰ One aspect of this fear is a desire to preserve uniformity in the areas of law deemed fundamental enough that uniformity is required for a functioning economy, such as the rule that consideration is required for a contract to be valid.⁷¹ This fear is also based in part on a utilitarian desire to minimize the cost of doing business in the state: states do not want to impose the extra costs associated with requiring businesses to research and comply with a number of different regulatory regimes out of fear that doing so will drive businesses away.⁷²

The second justification for the private law exception is that it avoids the unfairness that would result from imposing large penalties for violating hard-to-find local rules. As Professor Gary Schwartz explains, “because of the poor accessibility of city legal documents, the chances of inadvertent and excusable error in the ascertainment of city law are quite high.”⁷³ While this is obviously true of local public laws as well as local private laws, the consequences of violating private laws can be extreme.⁷⁴ For example, one could imagine a whole system of contracts upholding an important business relationship collapsing because they were discovered to be in violation of an unusual and obscure local ordinance governing contract validity.

Finally, the private law exception addresses the structural incoherence caused by the lack of municipal courts with jurisdiction over violations of municipal ordinances. Because states do not give municipal courts exclusive jurisdiction over violations of local ordinances,⁷⁵ disputes concerning local ordinances are often litigated in state courts.⁷⁶ Professor Diller refers to this as the “reverse-commandeering argument” against the

⁶⁹ See *New Mexicans for Free Enter. v. City of Santa Fe*, 126 P.3d 1149, 1163 (N.M. Ct. App. 2005) (“Commentators and courts have expressed concern about home rule municipalities creating a patchwork quilt of law that would hamper business transactions and unfairly upset parties’ expectations, and we have concluded that this is the primary evil at which the private law exception is aimed.”).

⁷⁰ See Diller, *supra* note 13, at 1126; Sandalow, *supra* note 10, at 678–79.

⁷¹ Sandalow, *supra* note 10, at 678–79.

⁷² Diller, *supra* note 13, at 1126.

⁷³ Schwartz, *supra* note 12, at 753.

⁷⁴ *Id.* at 754.

⁷⁵ See *infra* Section II.A.

⁷⁶ Diller, *supra* note 13, at 1155.

private law exception.⁷⁷ The thrust of this argument is that, by creating private causes of action that will be heard in state courts, local governments are able to externalize the costs of their individual policy goals onto the state court system.⁷⁸ The reverse-commandeering argument takes issue with the fact that it is the state, not the local government, that has to pay the costs associated with providing a court to hear suits brought under those causes of action.⁷⁹ Part II provides some context for this argument by discussing the roles municipal courts play in different states.

II. MUNICIPAL COURTS

Different states have different rules pertaining to their municipal courts. State rules regarding municipal courts can be analyzed according to the view of municipal courts that they embody. On one hand, some state rules seem to embody the state's view that municipal courts are essentially state courts of limited jurisdiction. On the other hand, different rules suggest that a state views its municipal courts as the judicial branches of their respective municipalities. To understand the reverse-commandeering system, which treats municipal courts much more like judicial branches of their municipalities than state courts of limited jurisdiction, one must understand state rules regarding municipal courts and the view of municipal courts that those rules embody. This Part attempts to provide such an understanding by discussing state rules concerning municipal court jurisdiction in Section II.A, the funding of municipal and state courts in Section II.B, the selection of municipal court judges in Section II.C, and state court oversight of municipal courts in Section II.D.

A. *The Jurisdiction of Municipal Courts*

Perhaps no state rule provides as clear a window into how a state views its municipal courts as a state's rule concerning a municipal court's jurisdiction. States fall into four groups based on their municipal courts' jurisdiction: (1) states with no municipal courts, (2) states with municipal courts that function like state courts of limited jurisdiction, (3) states with "hybrid" municipal courts, and (4) states with municipal courts that function like the judicial branches of their municipalities.

⁷⁷ *Id.* at 1154. Professor Diller was the first to call this argument the reverse-commandeering argument, although others have used the term in other contexts. *Id.* at 1154 n.231.

⁷⁸ *Id.* at 1153–54.

⁷⁹ *Id.*

The first group is made up of states that have no municipal courts. Roughly half of states have no municipal courts.⁸⁰ In these states, all judicial matters involving municipal ordinances are handled in state courts.⁸¹

The second group of states includes the five states that limit their municipal courts' jurisdiction to certain cases brought under state laws and prevent municipal courts from hearing cases brought under municipal law.⁸² In these states, municipal courts have jurisdiction over a certain subset of issues arising under state law and consequently function very much like state courts of limited jurisdiction. For example, in Ohio, a statute gives municipal courts original jurisdiction over thirteen types of actions governed by state law, ranging from "any civil action . . . of which judges of county courts have jurisdiction" to any "proceeding brought . . . by the owner of a dog that has been designated as a nuisance dog, dangerous dog, or vicious dog"⁸³ as long as "the amount claimed by any party . . . does not exceed fifteen thousand dollars."⁸⁴ Other states, like Massachusetts and Pennsylvania, have created municipal courts of this nature but only in their biggest cities.⁸⁵

Third, in ten hybrid states, municipal courts have jurisdiction over certain cases brought under state law as well as violations of all municipal ordinances.⁸⁶ For example, in Arizona, municipal courts have jurisdiction over "all cases arising under the ordinances of the city or town" as well as "violations of laws of the state committed within the limits of the city or town."⁸⁷ In these states, municipal courts serve as forums for enforcing state laws, as well as the ordinances passed by individual municipalities; they function both as state courts of limited jurisdiction and as the judicial branches of their municipalities.

⁸⁰ See Nat'l Ctr. for State Courts, *Limited Jurisdiction Courts*, JUDICIAL SELECTION IN THE STATES, http://www.judicialselection.us/judicial_selection/methods/limited_jurisdiction_courts.cfm?state= [https://perma.cc/5R53-HKUA].

⁸¹ See *id.*

⁸² These five states are: Massachusetts, Montana, New York, Ohio, and Pennsylvania. See *id.*

⁸³ OHIO REV. CODE ANN. § 1901.18(A) (West 2017).

⁸⁴ *Id.* § 1901.17.

⁸⁵ See MASS. GEN. LAWS ch. 218, § 54 (West 2017) (giving the Boston municipal court jurisdiction over certain civil actions); 42 PA. STAT. AND CONS. STAT. ANN. § 1123 (West 2016) (establishing the Philadelphia Municipal Court's jurisdiction); 42 PA. STAT. AND CONS. STAT. ANN. § 1143 (West 2016) (setting forth the jurisdiction of the Pittsburgh Magistrates Court).

⁸⁶ These ten states are Arizona, Indiana, Kansas, Louisiana, Michigan, New Jersey, New Mexico, Oregon, South Carolina, and Texas. See Nat'l Ctr. for State Courts, *supra* note 80.

⁸⁷ ARIZ. REV. STAT. ANN. § 22-402(B) (West 2016).

Finally, about eleven states limit the jurisdiction of their municipal courts to violations of municipal ordinances.⁸⁸ In these states, municipal courts do not have jurisdiction over cases brought under statutes passed by the state legislature. In North Dakota, for example, a municipal court only has jurisdiction “to hear, try, and determine offenses against the ordinances of the city.”⁸⁹ These eleven states treat their municipal court more like the judicial branches of their municipalities than state courts of limited jurisdiction.

Oftentimes, these states limit municipal courts' jurisdiction over certain cases brought under municipal ordinances. For instance, in Oklahoma, municipal courts “are limited in jurisdiction to criminal and traffic proceedings arising out of infractions of the provisions of ordinances of cities and towns”⁹⁰—they do not have jurisdiction over any civil cases brought under municipal ordinances.⁹¹ Where this is the case, it is more difficult to say that the state conceives of the municipal court as the judicial branch of the municipality because its judicial powers are not coextensive with its municipalities' legislative authority.

Moreover, some states give their municipal courts *exclusive* jurisdiction over certain violations of municipal ordinances. In states that do so, municipal courts are the only courts that have jurisdiction over certain violations of municipal ordinances—state courts cannot hear these cases. Wisconsin, for example, gives its municipal courts “exclusive jurisdiction over an action in which a municipality seeks to impose forfeitures for violations of municipal ordinances of the municipality that operates the court,” with certain exceptions.⁹² Recall that when states do not give municipal courts exclusive jurisdiction over alleged violations of municipal ordinances, cases alleging violations of those municipal ordinances can be tried in state courts. This is relevant because state courts

⁸⁸ These eleven states are: Alabama, Colorado, Mississippi, Nevada, North Dakota, Oklahoma, Tennessee, Washington, West Virginia, Wisconsin, and Wyoming. *See* Nat'l Ctr. for State Courts, *supra* note 80.

⁸⁹ N.D. CENT. CODE § 40-18-01(1) (2017).

⁹⁰ OKLA. CONST. art. VII, § 1; *see also* N.D. CENT. CODE § 40-18-01(3) (2017) (stating that North Dakota municipal courts do not have jurisdiction to hear violations of certain ordinances pertaining to driving under the influence).

⁹¹ It is currently unclear whether Oklahoma local governments have the authority to pass ordinances creating civil causes of action. *See* Diller, *supra* note 13, at 1169. What is clear from the plain language of the Oklahoma Constitution is that if Oklahoma local governments do have the authority to create civil causes of action, Oklahoma municipal courts do not have the authority to preside over cases brought under such ordinances. *See* OKLA. CONST. art. VII, § 1 (limiting the jurisdiction of Oklahoma's municipal courts to criminal and traffic proceedings).

⁹² WIS. STAT. ANN. § 755.045(1) (West 2017).

are almost exclusively financed using state, not municipal, funds.⁹³ Thus, when states do not give municipal courts exclusive jurisdiction over alleged violations of municipal ordinances, the costs of judicially enforcing those ordinances is paid by the state.

Colorado has a unique system for determining the jurisdiction of municipal courts. The Colorado Constitution gives home rule municipalities the authority to determine the jurisdiction of their municipal courts.⁹⁴ Colorado laws then require each local government to “create a municipal court to hear and try all alleged violations of ordinance provisions of such city or town.”⁹⁵ The Colorado Supreme Court has held that home rule cities’ authority to determine the jurisdiction of their municipal courts includes the authority to grant their municipal courts exclusive jurisdiction over ordinance violations.⁹⁶ Thus, in Colorado, home rule municipalities must establish municipal courts with jurisdiction over violations of municipal ordinances, and can choose whether or not to make the municipal court’s jurisdiction over those cases exclusive.

B. *Funding Municipal and State Courts*

State rules on the funding of municipal and state courts also can be analyzed in terms of the underlying view of municipal courts that they seem to embody. However, there is little variation among these state rules (unlike with state rules on municipal court jurisdiction); states generally require municipalities to fund their own municipal courts. In fact, the National Center for State Courts limits its definition of municipal courts to those “funded largely by a local unit of government.”⁹⁷ In New Jersey, for example, “municipal courts are established and funded by their respective municipalities.”⁹⁸ New Jersey has specific statutes requiring municipalities to provide municipal court facilities,⁹⁹ pay municipal judges’ salaries,¹⁰⁰ and

⁹³ See *infra* notes 105–08 and accompanying text.

⁹⁴ *Town of Frisco v. Baum*, 90 P.3d 845, 847 (Colo. 2004) (basing this conclusion largely on Article XX, Section 6 of the Colorado Constitution, which grants home rule cities the power to control “[t]he creation of municipal courts [and] the definition and regulation of the[ir] jurisdiction”).

⁹⁵ COLO. REV. STAT. § 13-10-104 (2016).

⁹⁶ *Frisco*, 90 P.3d at 849–50 (stating that “[w]hen a municipality exercises jurisdiction to address local and municipal matters in its municipal court, the [state] court will consequently be denied original jurisdiction over those matters,” and holding that Frisco’s creation of a municipal court with exclusive jurisdiction over claims arising from municipal ordinances was constitutional).

⁹⁷ Nat’l Ctr. for State Courts, *Municipal Courts Resource Guide*, JUDICIAL SELECTION IN THE STATES, <http://www.ncsc.org/Topics/Special-Jurisdiction/Municipal-Courts/Resource-Guide.aspx> [<https://perma.cc/UV5Z-PY73>].

⁹⁸ *In re Raphael*, 230 B.R. 657, 667 (Bankr. D.N.J. 1999), *rev’d on other grounds*, 238 B.R. 69 (D.N.J. 1999).

⁹⁹ N.J. STAT. ANN. § 2B:12-15 (West 2017).

pay municipal court personnel.¹⁰¹ New Jersey is not unusual in this regard;¹⁰² state funding of municipal courts is very rare and has actually been described as an “anachronism.”¹⁰³ Washington, however, does have a program under which state funds pay a portion of municipal court salaries.¹⁰⁴

When they require municipalities to fund their own municipal courts, states treat municipal courts like judicial branches of their municipalities (and therefore the municipality’s financial burden), not state courts of limited jurisdiction (which one would expect to be funded by the state). A cynical explanation for the relative uniformity in this area of law as compared to state laws concerning municipal court jurisdiction might suggest that the uniformity stems from a state’s financial incentives: as far as funding is concerned, states save money by treating municipal courts like judicial branches of their municipality, but as far as jurisdiction is concerned, states can save money by treating municipal courts like limited jurisdiction state courts and requiring that they expend their (municipally supplied) resources on enforcing state laws.

State courts, on the other hand, are generally funded by states, not local governments. According to a National Center for State Courts survey, almost all state courts expenses are divided among states and counties, which are sometimes required to fund various aspects of trial-level courts located within their county borders.¹⁰⁵ Municipal governments are almost never required to contribute to state court funding.¹⁰⁶ Florida, for example,

¹⁰⁰ *Id.* § 2B:12-7.

¹⁰¹ *Id.* § 2B:12-10.

¹⁰² See, e.g., John M. Greacen & Robert J. Klein, *Statewide Planning for Court Security*, 576 ANNALS AM. ACAD. POL. & SOC. SCI. 109, 110 n.2 (2001) (stating that New Mexico’s municipal courts are funded by municipalities); Comm’n on Justice, Efficiency, & Accountability, *Funding Our Courts: Finding a Balance*, WASH. CTS., https://www.courts.wa.gov/committee/?fa=committee.display&item_id=253&committee_id=99 [<https://perma.cc/2SBJ-MD5M>] (“[Washington’s m]unicipal courts are funded exclusively by cities.”); *How Courts Work*, CIV. L. SELF-HELP CTR., <http://www.civillawselfhelpcenter.org/self-help/getting-started/court-basics/55-how-courts-work> [<https://perma.cc/ZTB6-LZ3U>] (“Each of [Nevada’s] municipal courts is funded by the city in which it is located . . .”).

¹⁰³ *Anthony v. Michigan*, 35 F. Supp. 2d 989, 993 (E.D. Mich. 1999) (stating that Michigan’s Recorder’s Court was an anomaly because it “was the only municipal court that was funded by the state”).

¹⁰⁴ See WASH. REV. CODE ANN. § 2.56.030(22) (West 2016).

¹⁰⁵ See Nat’l Ctr. for State Courts, *Budgets and Funding*, JUDICIAL SELECTION IN THE STATES, http://www.ncsc.org/Information-and-Resources/Budget-Resource-Center/Budget_Funding.aspx [<https://perma.cc/56CJ-ZVP2>].

¹⁰⁶ See *id.* (failing to mention local governments as a source of state court funding). However, at least one state does require a city to contribute to the funding of at least one state district court. See ARK. CODE ANN. § 16-17-108 (2016) (requiring the City of Lewisville to contribute a portion of the salary of the Lafayette County District Court Judge).

provides in its Constitution that “[a]ll justices and judges shall be compensated only by state salaries” and no municipality is required to contribute any funding to the state court system.¹⁰⁷

C. Selection of Municipal Judges and State Court Judges

States are free to determine the means through which municipal judges are selected.¹⁰⁸ However, almost all states allow municipalities to select the judges for their municipal courts.¹⁰⁹ In this way, states seem to treat municipal courts more like the judicial branches of their municipalities (which one would expect to be staffed by the municipality) than like state courts of limited jurisdiction (which one would expect to be staffed by state-appointed judges). Massachusetts is the only state that retains the power to appoint municipal judges.¹¹⁰ There, municipal judges are appointed by the governor with the consent of the Governor’s Council.¹¹¹

States also have the power to appoint state court judges and choose to do so through a number of different means, including elections and appointments.¹¹² Notably, no state delegates the authority to appoint any state judges to a municipality; state judges are either appointed by state officials, or elected by electorates that are not correlated with any specific city (i.e., by district, county, or circuit).¹¹³ The result is that states currently retain the power to select state judges but not the power to select municipal judges, with the exception of Massachusetts.

¹⁰⁷ FLA. CONST. art. V, § 14(a).

¹⁰⁸ See Nat’l Ctr. for State Courts, *supra* note 80 (describing methods of judicial selection state by state).

¹⁰⁹ *Id.* In some states, municipalities elect their judges; in other states municipal judges are appointed by the municipality; and still in others, they are selected through a municipal appointment and confirmation process. *Id.* Examples of states in which municipal judges are appointed by the municipal legislature include Alabama, Arizona, and Colorado. *Id.* Michigan, Montana, Nevada, New Mexico, and North Dakota are states in which municipal judges are elected. *Id.* In Wyoming, mayors appoint municipal judges with the consent of municipal legislatures. *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² See Nat’l Ctr. for State Courts, *Selection of Judges*, JUDICIAL SELECTION IN THE STATES, http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state= [<https://perma.cc/9E46-ZECK>].

¹¹³ See *id.*

D. State Court Appellate Review

States have the authority to determine which municipal court decisions, if any, may be appealed and to which court.¹¹⁴ Such rules can again be analyzed in terms of the view of municipal courts that they seem to represent. Almost all states that allow for municipal courts have enacted legislation that provides some form of state court appellate review of certain municipal court decisions.¹¹⁵ For example, a Kansas statute gives defendants “the right to appeal to the district court of the county from any judgment of a municipal court which adjudges the defendant guilty of a violation of the ordinances of any municipality of Kansas or any findings of contempt.”¹¹⁶

States differ on exactly which municipal court decisions can be appealed. Some states, like Kansas, only allow defendants to appeal adverse decisions.¹¹⁷ Others, like Montana, allow any party to appeal.¹¹⁸ States also differ on the scope of appellate review of municipal court decisions. In Montana, for example, “[t]he appeal is confined to review of the record and questions of law.”¹¹⁹ In North Dakota, on the other hand, appeal results in a whole new trial.¹²⁰

By providing for state court appellate review of municipal decisions concerning municipal law, states seem to be treating municipal courts more like state courts of limited jurisdiction (from which appeal to a higher state court is to be expected) than the judicial branches of their municipalities (which could be entrusted with the interpretation and enforcement of their own municipal laws). In this way, state laws concerning the appellate review of municipal court decisions are theoretically similar to current state laws giving municipal courts jurisdiction over cases brought under state law but are markedly different from state laws requiring municipalities to staff and fund their own municipal courts, which treat municipal courts more like judicial branches of their municipalities. It is important to keep in mind the current state of the law in these areas, as well as the view of

¹¹⁴ See 9A MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 27:84, Westlaw (database updated Mar. 2017) (noting that there is no common law right to appeal municipal court decisions and that such a right only exists when authorized by law).

¹¹⁵ *Id.* § 27:84 n.3 (citing cases from thirty-five states acknowledging some form of appellate review of decisions by municipal courts).

¹¹⁶ KAN. STAT. ANN. § 22-3609(a) (West 2017).

¹¹⁷ *Id.*

¹¹⁸ MONT. CODE ANN. § 3-6-110(1) (West 2017) (“A party may appeal to district court from a municipal court judgment or order.”).

¹¹⁹ *Id.*

¹²⁰ *City of Grand Forks v. Lamb*, 697 N.W.2d 362, 364 (N.D. 2005) (citing N.D. CENT. CODE § 40-18-19 (2016); N.D. R. CRIM. P. 37(j)).

municipal courts which they seem to represent, when considering the reverse-commandeering system proposed by this Note.

III. THE REVERSE-COMMANDEERING SYSTEM

This Note suggests an alternative to the current state systems for delegating political and judicial authority to local governments: the reverse-commandeering system. This system is designed to address the two primary problems with current systems for distributing state and local authority. The first problem is that the private law exception to home rule authority prevents local governments from passing private laws, thereby depriving local governments of a powerful means of accomplishing their policy objectives and differentiating themselves from one another. The second problem is that, in many states, municipal ordinances are enforced in state-funded courts with the result that the entire state pays the costs associated with a municipality's policy preferences.

There are four aspects of the reverse-commandeering system: (1) local governments with home rule authority; (2) municipal courts staffed and funded by local governments with exclusive jurisdiction over the violation of local ordinances; (3) state courts with the ability to hear allegations that local ordinances or judicial processes violate state law; and (4) the reverse-commandeering exception, a state law preventing a local government from passing ordinances that it cannot enforce in its municipal court.

Under this reverse-commandeering system, local governments have the authority to pass all types of local legislation as long as they can enforce that legislation in their municipal courts. States can craft specific limits on local legislation by passing state legislation that preempts local ordinances or explicitly forbids local governments from legislating on certain topics. Additionally, state courts retain the ability to declare local ordinances or court proceedings invalid under state law.

This Part begins with four short sections that briefly set forth each core aspect of the reverse-commandeering system and discuss how that aspect could be implemented. It concludes with a discussion of the reverse-commandeering system as a whole that is meant to give readers a better sense of how the parts of the system come together into a cohesive system of state and local political and judicial authority.

A. Home Rule Authority

In the reverse-commandeering system, local governments have home rule authority—the authority to pass local laws. The reverse-commandeering system is based on a belief that local governments can

effectively address local problems¹²¹ and recognizes that local governments must have the power to initiate local legislation to do so. Local governments are not, however, given immunity from state interference: local ordinances passed under a local government’s home rule authority can be proscribed or preempted by state legislation. Furthermore, home rule only gives local governments the ability to pass “local” laws—they cannot pass laws that address a purely statewide concern.¹²² In this way, the reverse-commandeering system preserves states’ ability to supervise their local governments, and acknowledges that local governments are creatures of the state with geographically confined authority.

Forty-one states currently give at least some of their local governments home rule authority.¹²³ In these states, the first aspect of the reverse-commandeering system, home rule, is already in place. In the nine states that currently do not give their local governments home rule authority, implementing the reverse-commandeering system would require enacting a positive law giving local governments home rule authority. This law could take the form of a piece of state legislation or an amendment to the state constitution. Passing an amendment to a state constitution is the preferable approach, as such amendments are typically more difficult to overturn and, consequently, less subject to revision than state legislation.¹²⁴ Furthermore, placing provisions in state constitutions establishing local government authority and the relationship between state governments and their subunits accords with one of the primary historical roles of constitutions: defining the structural relationship between branches and levels of government.¹²⁵

¹²¹ See *infra* Section IV.B.1.

¹²² See *Webb v. City of Black Hawk*, 295 P.3d 480, 486 (Colo. 2013) (stating that home rule does not give a local government the ability to regulate “in matters of statewide concern”). It should be noted that defining what qualifies as “local” has proven challenging, and different states have developed different tests. See, e.g., *New Orleans Campaign for a Living Wage v. City of New Orleans*, 825 So. 2d 1098, 1103 (La. 2002); *Marshal House, Inc. v. Rent Review & Grievance Bd. of Brookline*, 260 N.E.2d 200, 205 (Mass. 1970); *New Mexicans for Free Enter. v. City of Santa Fe*, 126 P.3d 1149, 1158 (N.M. Ct. App. 2005) (all providing different standards for determining when a home rule city can enact an ordinance under its power to regulate “local” affairs).

¹²³ See Briffault, *supra* note 19, at 10–11.

¹²⁴ John Dinan, *Policy Provisions in State Constitutions: The Standards and Practice of State Constitution-Making in the Post-Baker v. Carr Era*, 60 WAYNE L. REV. 155, 197 (2014) (“At the least, state constitution-makers have concluded, entrenching policy commitments in state constitutions and thereby erecting a higher barrier to reversing them can make it more difficult for popular majorities to engage in backsliding, even if it cannot ultimately prevent them from doing so through a subsequent amendment.”).

¹²⁵ PAUL G. KAUPER, CITIZENS RESEARCH COUNCIL OF MICH., RESEARCH PAPER NO. 2, THE STATE CONSTITUTION: ITS NATURE AND PURPOSE 2 (1961) (tracing the principle that “the fundamental structure and organization of government . . . should be incorporated in a written document recognized

B. Municipal Courts

The reverse-commandeering system also requires states to allow municipalities to create, staff, and fund their own municipal courts. Note that municipalities would not be required to create municipal courts; they would merely have the option to do so. As discussed above, municipal courts are usually paid for by municipalities, and states usually pay the costs of state courts.¹²⁶ Thus, requiring municipalities to fund municipal courts will generally not involve any changes to state laws, although in rare instances, state laws allowing for state funding of municipal courts might have to be repealed and replaced. Municipalities also have the power to select municipal judges in every state except Massachusetts,¹²⁷ so only Massachusetts would have to take any action to implement that aspect of the reverse-commandeering system.

In the reverse-commandeering system, municipal courts have exclusive original jurisdiction over all cases alleging only violations of municipal ordinances. Thus, every case involving only alleged violations of municipal ordinances would be brought before the court of the municipality that issued the ordinances.¹²⁸ Municipal courts do not, however, have jurisdiction over alleged violations of state laws. Those cases are sent to state courts.

Currently about half the states have no municipal courts.¹²⁹ For these states to implement this aspect of the reverse-commandeering system, they would have to pass a law or an amendment that (1) gives municipalities the ability to create and fund their own municipal courts and (2) gives those municipal courts exclusive jurisdiction over cases only alleging violations of municipal ordinances. Of the states that do have municipal courts, none currently give their municipal courts exclusive jurisdiction over all violations of municipal ordinances.¹³⁰ Thus, implementing the reverse-

to have . . . the quality of a fundamental law superior to ordinary laws and enactments" to England and colonial America).

¹²⁶ See *supra* Section II.C.

¹²⁷ See *supra* Section II.D.

¹²⁸ This Note does not take a definitive position on the allocation of jurisdiction over cases alleging violations of both municipal ordinances and violations of other (state or federal) laws. In the reverse-commandeering system, states would be able to make this decision based on their individual preferences.

¹²⁹ Nat'l Ctr. for State Courts, *supra* note 80.

¹³⁰ See *supra* Section II.A. Colorado comes closest by requiring cities to establish municipal courts with jurisdiction over cases alleging violations of municipal ordinances and giving cities the option to make the municipal courts' jurisdiction over those cases exclusive. Thus, Colorado would have a relatively easy time implementing this aspect of the reverse-commandeering system: it would merely have to (1) make it optional (rather than mandatory) for cities to create municipal courts and (2) insist

commandeering system would require states that currently have municipal courts to amend their provisions governing municipal court jurisdiction.

C. State Court Supervision of Local Governments and Their Courts

In the reverse-commandeering system, state court supervision of municipalities and their courts is restricted to ensuring municipal actions comply with state laws. Currently, state courts review municipal court interpretations of municipal laws in the same manner a government's appellate courts review the decisions of the government's trial courts. In some states, appellate courts review municipal court decisions de novo;¹³¹ in other states, appellate courts give some deference to municipal court decisions.¹³² Under the reverse-commandeering system, the role of a state court reviewing a municipal court decision is more akin to the role of a federal court reviewing a state court judgment.¹³³ The state appellate court is not responsible for correcting or revising the municipal court's interpretation of a municipal ordinance; its role is simply to determine (1) whether the local ordinance, as interpreted by the state, violates any state laws and (2) whether the municipal court proceeding conformed with all state procedural requirements.¹³⁴

States currently have the authority to determine which municipal court decisions may be appealed and to which court, and they codify their decisions on these matters in state statutes.¹³⁵ In states that already have municipal courts, implementing the form of state judicial review prescribed by the reverse-commandeering would merely require revising the state

that municipal courts have exclusive jurisdiction over cases alleging violations of municipal ordinances (rather than giving cities the option to make that jurisdiction exclusive).

¹³¹ *E.g.*, *State v. Allen*, 563 A.2d 1169, 1170 (N.J. Super. Ct. Law. Div. 1989) (“[T]he trial of the appeal [from a municipal court] shall be heard de novo on the record [except in certain circumstances where the appellate court] may either reverse and remand for a new trial or conduct a plenary trial de novo without a jury.”).

¹³² *E.g.*, *Roberts-Manchester Pub. Co. v. Wise*, 140 Ill. App. 443, 444 (1908) (announcing that state appellate courts reviewing the judgments of municipal courts ask whether “the judgment is contrary to the law and the evidence, or . . . resulted from substantial errors”).

¹³³ Federal judicial review of state court decisions is limited to questions of federal law (i.e., federal courts do not review state decisions on matters of state law) and only occurs via review of habeas corpus petitions and the United States Supreme Court's power of direct review. Margery I. Miller, *A Different View of Habeas: Interpreting AEDPA's "Adjudicated on the Merits" Clause When Habeas Corpus Is Understood as an Appellate Function of the Federal Courts*, 72 *FORDHAM L. REV.* 2593, 2598 (2004).

¹³⁴ *See Elmendorf v. Taylor*, 23 U.S. (10 Wheat.) 152, 159 (1825) (confirming that federal courts defer to state court interpretation of state laws); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 380 (1816) (announcing that the United States Supreme Court can review the decisions of state courts to ensure that they comply with federal law).

¹³⁵ *See supra* Section II.A.

statutes determining the scope of judicial review of municipal decisions. States without municipal courts would have to pass laws implementing judicial review of their newly created municipal courts with this scope.

In the reverse-commandeering system, state courts with appellate jurisdiction over municipal court decisions, as well as all other state courts, are funded by the state and not by local governments. Currently, most states do not require local governments to contribute to funding state courts, even those located within their borders,¹³⁶ so in most states, implementing the reverse-commandeering system would not require any change in state court funding. In the few states that do require local governments to contribute money to state courts, the laws imposing that requirement would have to be changed to avoid duplicative or unreasonable cost impositions on local governments.

D. The Reverse-Commandeering Exception

The most innovative aspect of the reverse-commandeering system is the reverse-commandeering exception. Like the private law exception,¹³⁷ the reverse-commandeering exception is a legal rule that prevents local governments from using their home rule authority to pass certain ordinances—it creates an exception to local governments' home rule powers. Under the reverse-commandeering exception, local governments may not pass ordinances that cannot be enforced in their municipal courts. Put more formally, a local government may only pass an ordinance if a case alleging only a violation of that ordinance would be within the exclusive jurisdiction of that local government's municipal court.

In states with the private law exception, implementing the reverse-commandeering system requires replacing the private law exception with the reverse-commandeering exception. In states where the private law exception is written into the state constitution, implementing the reverse-commandeering system would require an amendment rewriting the relevant provision of the state constitution. In states where the private law exception comes from a state statute, the reverse-commandeering exception could also be implemented by a legislative decision to revise the state statute, but an amendment would be ideal.

An amendment is also the ideal means of implementing the reverse-commandeering system in states where the private law exception is the product of a judicial decision. Perhaps more easily, in such states, the state judiciary could implement this aspect of the reverse-commandeering

¹³⁶ See *supra* Section II.C.

¹³⁷ See *supra* Section I.C.

system by overturning the opinion that implemented the private-law exception and replacing it with the reverse-commandeering exception. While the specific content of the overruling opinion will necessarily be tailored to the content of the original opinion, judges should be able to justify their reversal by focusing on developments in the last century that solidified the status of local home rule authority and popular criticisms of the private law exception.

E. The Reverse-Commandeering System: How Its Elements Work Together

The previous four subsections discussed the four core elements of the reverse-commandeering system: (1) local governments with home rule authority, (2) municipal courts with exclusive jurisdiction over violations of local ordinances, (3) state courts with jurisdiction over cases alleging that municipal ordinances or judicial processes violate state laws, and (4) the reverse-commandeering exception. Combined, these elements create a system in which a local government can pass local laws, cases involving violations of those laws go before the local government's municipal court, and state courts retain the ability to declare municipal laws and proceedings invalid because they violate state law. States are also able to limit the kinds of ordinances that local governments could pass by enacting state legislation that preempts local ordinances or explicitly forbids local governments from legislating on certain topics. Local governments are required to fund the municipal courts, and states are required to fund the state courts that review local ordinances for compliance with state law.

IV. THE ADVANTAGES OF THE REVERSE-COMMANDEERING SYSTEM

This Part discusses the advantages of the reverse-commandeering system over the current systems of allocating state and local political and judicial authority. Each section is dedicated to a particular advantage of the system. Section IV.A first recaps the benefits of home rule. Then, Section IV.B discusses the advantages the reverse-commandeering system has over the private law exception, including the ways the reverse-commandeering system better serves the purposes ascribed to the private law exception. Section IV.C explains the advantages of municipal courts with exclusive jurisdiction over municipal ordinances, and Section IV.D discusses the benefits of restricting state court supervision of municipalities to determining whether municipal actions violate state law. Lastly, Section IV.E concludes by arguing that the reverse-commandeering system minimizes confusion over whether a law was passed by a state legislature or a municipality.

A. The Benefits of Home Rule

Because the reverse-commandeering system gives local governments home rule authority, states that employ the reverse-commandeering system will be able to realize all the benefits of home rule. First, home rule is good for cities. Each city is different, with its own peculiar characteristics, strengths, and challenges. Home rule gives cities the ability to fashion a set of local rules that capitalize on their particular advantages and address their particular problems.¹³⁸ Whereas state legislatures pass laws that apply throughout the whole state,¹³⁹ home rule allows cities to impose city-specific policies that might not work well across a whole state.

Home rule also offers other benefits. It allows different cities to develop different sets of laws and city programs, which benefits everyone who can move to a new city by providing them with a wider variety of choices of local legal and political systems.¹⁴⁰ Home rule, and the differentiation in local laws that comes with it, also benefits the larger political community because the innovative laws and programs developed by cities can be used as models for state, and even federal, programs.¹⁴¹

B. Advantages over the Private Law Exception

This Section presents the advantages the reverse-commandeering system has over systems that employ the private law exception. Section IV.B.1 lays out the advantages that directly result from allowing cities to pass private laws, specifically that doing so provides cities with a powerful means of addressing city-specific problems and differentiating themselves from other cities, thereby opening up a potentially vibrant arena of local policy experimentation. Section IV.B.2 then argues that the reverse-commandeering system is also a more logical means of furthering the supposed goals of the private law exception, including ensuring uniformity in local laws on topics where uniformity is required, addressing the unfairness of heavy punishments for hard-to-find local rules, and preventing cities from burdening states with the judicial costs of their policy preferences.

¹³⁸ See Darwin Farrar, *In Defense of Home Rule: California's Preemption of Local Firearms Regulation*, 7 STAN. L. & POL'Y REV. 51, 55 (1996) (specifically arguing that different cities have different issues with gun violence that require different local solutions).

¹³⁹ See Harry Hubbard, *Special Legislation for Municipalities*, 18 HARV. L. REV. 588, 588 (1905) (noting that as early as 1905 most states prohibited state legislatures from passing laws that specifically stated that they only apply in or to one city).

¹⁴⁰ See *supra* notes 38–39 and accompanying text. This statement simplifies and combines points made by Charles Tiebout and Robert Nozick discussed in Section II.B.

¹⁴¹ Joshua A. Douglas, *Local Democracy on the Ballot*, 111 NW. U. L. REV. 173, 174 (2017) (discussing how local election law reforms may eventually be adopted by states).

1. The Benefits of Private Local Laws

The primary advantage the reverse-commandeering system has over systems that utilize a private law exception is simply that the reverse-commandeering system allows local governments to enact private laws. All the justifications for local home rule apply just as strongly to a local government's ability to pass private laws as they do to a local government's ability to pass public laws.

If home rule is a positive because it enhances citizen choice by allowing cities to pass laws that shape their communities and differentiate themselves from other cities, then private city laws are a positive because they increase cities' ability to shape their communities and differentiate themselves from other cities. For example, people and businesses may or may not want to live in a city that requires private employers to pay a higher-than-average minimum wage or a city that requires private employers to provide health insurance to their employees. Giving cities the ability to pass these sorts of private laws creates a situation where people and businesses can make that choice. A few examples of the areas where cities could shape their communities and differentiate themselves from other cities by passing a private law include discrimination (in different areas, like employment and housing, as well as against different groups, like LGBT individuals), affordable housing, minimum wage, and the environment. The breadth of these areas makes it clear exactly how much differentiation could result from providing cities with the ability to pass private laws.

Additionally, cities can use private laws, as well as public laws, to craft local solutions to local problems. If, for example, racial bias in employment is a problem in a city, allowing the city to pass a public law criminalizing racially biased hiring may help address the problem. An ordinance allowing those injured by racially biased hiring to bring a lawsuit against the companies that did not hire them because of their race might also have an impact. Giving cities both tools can only increase their ability to address the problem.

Fayetteville's recent ordinance prohibiting private discrimination against LGBT individuals shows the possible benefits of "private" local ordinances. Arkansas state law does not include LGBT individuals among those protected from discrimination from nonpublic entities.¹⁴² In September 2015, Fayetteville, Arkansas, passed an ordinance protecting

¹⁴² See Ellen Lampe, *AR Supreme Court Abolishes Fayetteville's LGBT Protections*, ARKANSASMATTERS.COM (Feb. 23, 2017, 5:26 PM), <http://www.arkansasmatters.com/news/local-news/ar-supreme-court-abolishes-fayettevilles-lgbt-protections/661781919> [https://perma.cc/6TRS-J3UB].

LGBT individuals from private discrimination.¹⁴³ Allowing Fayetteville to prohibit private discrimination against LGBT individuals would increase Fayetteville's practical ability to combat private discrimination against LGBT individuals. Further, allowing Fayetteville to prohibit private anti-LGBT discrimination would give Fayetteville the ability to differentiate itself from the other cities in Arkansas that do not have similar ordinances.¹⁴⁴ This would result in increased choice for the people of Arkansas¹⁴⁵; they would be able to choose to live in a city that prohibits discrimination against LGBT individuals or one that does not.¹⁴⁶

Allowing cities to pass private laws would also open up a whole new forum for local experimentation. One of the virtues of the United States federal system is that it allows states to experiment with policies before they are accepted at the national level.¹⁴⁷ As Justice Louis Brandeis stated, states can serve as laboratories of democracy because their size and independence allow them to test drive policies without risk to the rest of the country.¹⁴⁸ Cities can serve the same role within states; if permitted, cities can adopt innovative local policies without much risk to the rest of the state.¹⁴⁹ The private law exception has prevented local governments from experimenting with private laws, hindering states' ability to preview the impact of private laws passed at the state level. Removing it will only lead to more local experimentation and better informed decisionmaking at the state level.

¹⁴³ Fayetteville, Ark., Ordinance 5781 (June 16, 2016). The ordinance was entitled, "An Ordinance To Ensure Uniform Nondiscrimination Protections Within The City of Fayetteville For Groups Already Protected To Varying Degrees Throughout State Law." *Id.*

¹⁴⁴ Only three other cities in Arkansas have ordinances that prohibit discrimination against LGBT individuals: Eureka Springs, Hot Springs, and Texarkana. *Two Notices Filed to Appeal Judge's Ruling Upholding Fayetteville Anti-Discrimination Ordinance*, NWAHOME PAGE.COM, <http://www.nwahomepage.com/news/two-notices-filed-to-appeal-judges-ruling-upholding-fayetteville-anti-discrimination-ordinance/414717537> [<https://perma.cc/ZP2C-NGAD>].

¹⁴⁵ Fayetteville's antidiscrimination ordinance was struck down by the Arkansas Supreme Court on the grounds that it violated an Arkansas state statute prohibiting local governments from outlawing discrimination that is not prohibited by state law. *See infra* note 158 and accompanying text.

¹⁴⁶ While most people do not cite the laws of a city as the primary reason they moved there, D'VERA COHN & RICH MORIN, PEW RESEARCH CENTER, AMERICAN MOBILITY : WHO MOVES? WHO STAYS PUT? WHERE'S HOME? 13, <http://assets.pewresearch.org/wp-content/uploads/sites/3/2011/04/American-Mobility-Report-updated-12-29-08.pdf> [<https://perma.cc/JRZ4-UZKF>], evidence suggests that the protections a city provides to LGBT individuals factors into LGBT individuals' decisions on whether to move to that city, *see* Samantha Allen, *Why LGBT Individuals Are Moving to Red States*, DAILY BEAST (Mar. 9, 2016, 12:01 AM), <http://www.thedailybeast.com/why-lgbt-people-are-moving-to-red-states> [<https://perma.cc/5BNQ-HEES>].

¹⁴⁷ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

¹⁴⁸ *Id.*

¹⁴⁹ *Legislative Notes: Introduction*, 19 STAN. L. & POL'Y REV. 359, 359 (2008).

2. *The Ways in Which the Reverse-Commandeering System More Logically Addresses the Goals of the Private Law Exception*

This subpart argues that the reverse-commandeering system more logically addresses the three major goals of the private law exception. Section IV.B.2.a argues that the need for uniformity in local law can be adequately addressed through state legislatures' ability to preempt local laws and prevent local governments from legislating on certain topics. Next, Section IV.B.2.b argues that any concerns about the accessibility of local laws are more logically addressed by state laws designed to ensure a certain level of accessibility, not the private law exception. Finally, Section IV.B.2.c notes that the private law exception does not completely stop local governments from commandeering state judicial resources, as it allows local governments to pass public laws that are enforced in state courts, whereas the reverse-commandeering system does completely stop reverse commandeering by giving municipal courts exclusive jurisdiction over cases involving local ordinances.

a. *The Need for Uniformity in Local Law*

A common justification for the private law exception is that it prevents the disruption to commerce that would occur if each local government had its own unique rules governing private business activities.¹⁵⁰ The thrust of this argument is that maintaining uniformity in certain areas of private law is required for a functioning state economy.¹⁵¹ This may well be true for certain private laws, like the rule requiring consideration for a valid contract. However, it is likely not true for other types of private laws, such as local laws requiring private employers to pay a minimum wage; studies have shown that state and local economies do not come crashing down when local governments can impose their own minimum wages.¹⁵²

The reverse-commandeering system acknowledges that statewide uniformity in all areas of the private law is not necessary for a state economy to thrive but that uniformity may be necessary in certain areas. Thus, the reverse-commandeering system eliminates the private law exception, which prevents local governments from passing laws on private law topics for which uniformity is not required. This leaves states free to make their own informed judgments on which private law topics require

¹⁵⁰ See *supra* note 70 and accompanying text.

¹⁵¹ Diller, *supra* note 13, at 1123.

¹⁵² NAT'L EMP'T LAW PROJECT, CITY MINIMUM WAGE LAWS: RECENT TRENDS AND ECONOMIC EVIDENCE 6–7 (2016) (summarizing a number of studies that have shown that city minimum wage laws “have boosted earnings without slowing job growth or causing business relocations”).

statewide uniformity and to address those issues specifically through state legislation that would either preempt or explicitly forbid local ordinances on those issues. These state statutes would be enforced in state courts. The reverse-commandeering system therefore extends local home rule, and its accompanying benefits, into the private law sphere without depriving states of their ability to address local ordinances that are harmful to statewide economies.

For example, while Fayetteville's antidiscrimination ordinance was being debated, Arkansas passed a statute that prevented local governments from "prohibit[ing] discrimination on a basis not contained in state law"¹⁵³ in order "to improve intrastate commerce by ensuring that businesses, organizations, and employers doing business in the state are subject to uniform nondiscrimination laws."¹⁵⁴ In February 2017, the Arkansas Supreme Court struck down Fayetteville's antidiscrimination ordinance because it violated this state statute by expanding protection against discrimination to LGBT individuals.¹⁵⁵ While one may or may not agree that the Arkansas statute is wise and just (or that its actual purpose is to improve the state economy), it is an excellent example of a state addressing concerns about statewide uniformity through specific pieces of legislation rather than through a general private law exception.

b. Concerns About Large Penalties for Hard-to-Find Local Rules

Supporters of the private law exception also argue that it prevents the unfairness of imposing large penalties for violating local ordinances that can be difficult to locate. However, any concerns that states have about the accessibility of local ordinances are more logically addressed by rules requiring local governments to make their codes easily accessible. States could, for example, require local governments to make their ordinances available on their city websites.

States could also address their concerns about the potential of large penalties for violating local ordinances by passing statutes that prevent local governments from enacting ordinances that, if violated, could result in a company or individual being liable for more than a certain amount of money. Such a statute may not be advisable, as it would prevent local governments from passing most private laws (as private laws often carry the potential of significant damages if violated) and, consequently, effectively function like a private law exception. However, the reverse-

¹⁵³ ARK. CODE ANN. § 14-1-403 (2016).

¹⁵⁴ *Id.* § 14-1-402.

¹⁵⁵ *Protect Fayetteville v. City of Fayetteville*, 510 S.W.3d 258, 263 (Ark. 2017).

commandeering system allows state legislatures to weigh the benefits of local private law against concerns about excessive damage awards and to balance them as they see fit. Perhaps a better solution would be to pass a state statute that caps the amount of damages that can be awarded based on a violation of a local ordinance at a number acceptable to the state. This solution would allow for the realization of some of the benefits of local governments with the authority to pass private laws and also address state concerns about large penalties.

c. Preventing Reverse Commandeering

Another argument against giving local governments the ability to enact private law is based on the fact that, in most states, cases alleging violations of those laws would be heard by state courts that are funded by the state, not by the local government that passed the law.¹⁵⁶ This allows local governments to “reverse commandeer” state judicial resources to further their own policy preferences.¹⁵⁷ The private law exception, the argument goes, prevents such reverse commandeering by preventing local governments from passing private laws that would have to be enforced in lawsuits brought in state courts.¹⁵⁸

However, the private law exception only partially addresses this concern because it only prevents cities from passing private laws—local governments remain free to pass public laws that are enforced in state courts. The reverse-commandeering system, on the other hand, directly addresses local commandeering of state judicial resources by requiring local governments that wish to exercise their (public or private) lawmaking authority to establish and fund municipal courts with jurisdiction over alleged violations of their local ordinances. Under this system, local governments would be shouldering the costs of the judicial enforcement of their ordinances, not the states. Thus, the reverse-commandeering system simultaneously expands local legislative authority (by allowing local governments to pass private laws) and decreases state expenses associated with local legislation (by requiring local legislation be enforced in locally funded municipal courts).

This does not mean that cases involving local ordinances would never come before state courts; state courts would still have jurisdiction over cases alleging that local ordinances and judicial processes violated state law.¹⁵⁹ However, state courts would not be able to revise local

¹⁵⁶ Diller, *supra* note 13, at 1154.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *See supra* Section III.C.

interpretations of local laws. Thus, these state courts would be furthering the states' interests in ensuring the primacy of state law and protecting the substantive and procedural rights guaranteed by the state. Consequently, it is appropriate for the state to pay the costs associated with this form of state appellate oversight. The reverse-commandeering system, therefore, eliminates any concerns about the commandeering of state or local judicial resources by requiring local governments to bear the costs of the judicial enforcement and interpretation of their ordinances and requiring states to pay the costs of furthering their interests served by the form of appellate oversight available under the system.

One trade-off involved with adopting the reverse-commandeering system is that a local government's ability to pass legislation is conditioned on its willingness and ability to fund municipal courts. Consequently, poor local governments will not be able to pass legislation if they cannot afford to fund their municipal courts. However, this trade-off is justified by the benefits that come with city-funded municipal courts with exclusive jurisdiction over cases involving local ordinances, particularly (1) the benefits of municipal courts discussed in Section IV.C and (2) the fact that enforcing local laws in state-funded courts violates the basic principle against taxation without representation by forcing state residents to pay the costs associated with laws passed by local legislative bodies in which they are not represented. Furthermore, states and cities have means of minimizing the reverse-commandeering system's negative impact on poor cities. States could implement programs designed to help poor local governments fund their courts, and cities could revise their taxation schemes. When doing so, cities should weigh the benefits of municipal courts and municipal legislation versus the detriment to their residents that would result from the taxes necessary to fund them. This decision provides yet another opportunity for differentiation among cities, and, consequently, a further expansion of the variety of political communities available to state residents.

C. The Advantage of Municipal Courts

Municipal courts do more than just contribute to a logical allocation of the costs of judicial enforcement of municipal ordinances. Municipal courts with exclusive jurisdiction over cases alleging violations of municipal ordinances also give the people of a municipality an appropriate amount of control over the judicial enforcement of local ordinances. The idea that cases involving violations of a law made by a government's legislature should be heard by the courts of that government is hardly revolutionary. As Alexander Hamilton stated in *Federalist No. 80*, "[i]f there are such

things as political axioms, the propriety of the judicial power of a government being coextensive with its legislative, may be ranked among the number.”¹⁶⁰ The creation of municipal courts with exclusive jurisdiction over violations of municipal ordinances applies to municipal governments the principle that a government’s judicial power should be equal to its legislative power.¹⁶¹ Members of a political community that come together to determine the laws that will govern them should also be able to collectively control the judicial enforcement of those laws—there is no good reason that this general principle should not be applied to local governments.

It may be suggested that this jurisdictional principle should not apply to local governments because they are not sovereigns but are merely political subdivisions of the state.¹⁶² This Note does not argue that local governments have any legal right to municipal courts. Rather, this Note argues that the current momentum towards robust local political authority (in the form of home rule) should be accompanied by an equally strong movement towards robust local judicial authority (in the form of municipal courts with exclusive jurisdiction over violations of municipal ordinances), as the practical and theoretical arguments for the former also support the latter.¹⁶³

Practically, if one accepts the assertion that home rule is a positive because it enables local governments to pass local ordinances that capitalize on their unique advantages and address their particular problems, one should welcome the possibility of city courts enforcing those city-specific ordinances.¹⁶⁴ The basic principle is that, if a local legislature is in the best position to create city laws, the local courts are in the best position to enforce and interpret them. Just as local legislatures can be expected to be more informed about local issues than state legislatures, local judges can be expected to be more informed about local issues than state judges.¹⁶⁵ This increased familiarity should better position local judges to enforce and

¹⁶⁰ THE FEDERALIST NO. 80 (Alexander Hamilton).

¹⁶¹ See *Elmendorf v. Taylor*, 23 U.S. (10 Wheat.) 152, 159 (1825) (acknowledging “the principle, supposed to be universally recognised, that the judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government”).

¹⁶² See *City of Worcester v. Worcester Consol. St. Ry. Co.*, 196 U.S. 539, 548–49 (1905) (laying down the rule that cities are merely creatures of the state).

¹⁶³ See Ethan J. Leib, *Localist Statutory Interpretation*, 161 U. PA. L. REV. 897, 917 (2013) (“Although most ‘pro-localism’ theorists have focused their attention on ways local legislatures and agencies can promote local goods within state and federal structures, local *judges* may advance this goal as well.”).

¹⁶⁴ *Id.*

¹⁶⁵ Everard Digby, *Our Australian Letter*, 118 LAW TIMES 81, 83 (1904) (“Local conditions, local expressions, local life, and the local meanings of words can alone be understood by local judges.”).

interpret local ordinances, as they will do so with a special understanding of the interactions between those ordinances and the reality of everyday life in the city.¹⁶⁶ Thus, just as state courts are thought to be more competent than federal courts at interpreting state law,¹⁶⁷ local courts can be expected to be more competent than state courts at interpreting local law.

Furthermore, judges on the municipal courts that make up part of the reverse-commandeering system can be expected to gain experience with cases involving local ordinances as those cases will make up all of their dockets. In states where violations of municipal ordinances are adjudicated in state courts, on the other hand, state court judges handle cases involving ordinances from multiple municipalities as well as cases involving violations of state (and some federal¹⁶⁸) laws. Thus, the reverse-commandeering system will enable municipal courts to develop an expertise with municipal law that state courts currently do not have, as a larger percentage of their cases will involve violations of the laws of their municipality. This supports municipal court jurisdiction over municipal violations just as the fact that federal issues make up a larger percentage of federal than state dockets supports federal court jurisdiction over cases involving federal questions.¹⁶⁹

Municipal court jurisdiction over local ordinances also has the advantage of giving local residents an appropriate measure of structural and practical control over the interpretation of local laws. Imagine a situation where a city is unhappy with the way one of its ordinances has been interpreted by a state court judge. Because states get to determine who becomes a state court judge,¹⁷⁰ the state, by putting the judge who made the interpretation in power, has effectively caused the local ordinance to come to mean something other than what the city intended it to mean.¹⁷¹

¹⁶⁶ *Id.*

¹⁶⁷ Ernest A. Young, *A General Defense of Erie Railroad Co. v. Tompkins*, 10 J.L. ECON. & POL'Y 17, 55 (2013) (arguing that state courts are the appropriate interpreters of state law because "state courts have superior experience and expertise concerning state law").

¹⁶⁸ Congress has the power to provide that only federal courts have jurisdictions of cases brought under a law or that both state and federal courts have jurisdiction. Often, it elects to give both state and federal courts jurisdiction. FED. JUDICIAL CTR., FEDERAL COURTS & WHAT THEY DO 5–6 (2006), <https://www.fjc.gov/sites/default/files/2012/FCtsWh06.pdf> [<https://perma.cc/AR2J-E9MV>].

¹⁶⁹ See Martin H. Redish, *Judicial Parity, Litigant Choice, and Democratic Theory: A Comment on Federal Jurisdiction and Constitutional Rights*, 36 UCLA L. REV. 329, 333 (1988) (arguing for federal court jurisdiction over federal question cases because, based on the percentage of their dockets made up of federal cases, "federal courts will have a greater expertise in federal substantive law than will state courts").

¹⁷⁰ See *supra* Section II.B.

¹⁷¹ As discussed in Section II.C, no states elect state judges via citywide elections; state judicial elections are always done according to a geographic unit created by the state like a circuit, county, or district. See *supra* note 114 and accompanying text. Practically, concerns about city oversight of local

Furthermore, the city may not have the power to react by replacing the state judge. In the reverse-commandeering system, on the other hand, cities will have the power to determine who their judges will be and to provide a means for their replacement. This will give cities more control over the interpretation of city laws, and is more in line with the concept that the political community that makes the law should be the political community that establishes a mechanism for its judicial enforcement.¹⁷²

Increased local control over the interpretation of local ordinances is also in line with the theoretical justifications for home rule. As scholars such as Tiebout and Nozick explain, the existence of a variety of strong, distinct local governments enhance society and democratic choice by providing people with a wider range of choices of local political communities.¹⁷³ According to these theories, home rule is a positive development because it gives cities more power to pass a wider range of laws that differentiate themselves from other cities.¹⁷⁴ Municipal courts with jurisdiction over violations of local ordinances increase local control over the interpretation of local laws, which also fosters differentiation among cities.¹⁷⁵ They also add another dimension to the choice between cities: rather than choosing among cities with different ordinances that will all be subject to the same judicial system, people are given the opportunity to choose among cities with different ordinances as well as different courts responsible for enforcing those ordinances in the first instance.¹⁷⁶ Thus, implementing the reverse-commandeering system and its role for municipal courts would be a positive development because it would lead to more differentiation among the local political and judicial communities that people can choose to join.

D. The Advantages of Limited State Court Review of Municipal Actions

By limiting the scope of state appellate jurisdiction over municipal court decisions to determining whether the local ordinance (as interpreted by the municipal court) violates state law, and whether the municipal court proceeding conformed with all state procedural requirements, the reverse-commandeering system adequately balances the state's interests in

state judges is lessened in proportion to the overlap between city voters and the electorate responsible for electing a judge and the city. Theoretically, however, inconsistencies persist when the state, not the city, has ultimate authority to select judges with the power to definitively interpret local ordinances.

¹⁷² See *supra* notes 163–66 and accompanying text.

¹⁷³ See *supra* notes 38–39 and accompanying text.

¹⁷⁴ *Id.*

¹⁷⁵ Leib, *supra* note 163, at 927.

¹⁷⁶ See *id.*

appellate review and local governments' interests in interpreting their own ordinances.

As discussed, allowing municipal courts to interpret local ordinances has significant practical and theoretical benefits. Practically speaking, if state courts were given the ability to overrule municipal court interpretations of local ordinances, the advantages of municipal courts interpreting them in the first instance would be lost because state courts could simply substitute their interpretations for that of the municipal court. Such a system would certainly not conform to "the principle, supposed to be universally recognised, that the judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government."¹⁷⁷

However, state courts need to be able to review municipal ordinances and municipal court proceedings to ensure that they do not violate state laws. Otherwise, local governments would be able to violate state laws without fear of consequence. The state's interests in this situation are very similar to the United States' interest in ensuring that state laws and judicial proceedings conform to the requirements imposed by the United States Constitution and other federal laws.¹⁷⁸ The scope of state court appellate review of municipal court decisions provided by the reverse-commandeering system allows the state to validate its interest in ensuring local governments are not violating state laws and allows local governments to validate their interest in having their ordinances interpreted by their own municipal courts.

One advantage of appellate review that could potentially be lost in the reverse-commandeering system is a litigant's ability to have his or her legal argument reevaluated upon appeal. Because state courts will not be able to overrule municipal courts in matters of municipal laws, litigants will not be able to reassert their arguments on municipal law on appeal. However, local governments keen on vindicating this interest have the option of creating (and staffing and funding) municipal appellate courts that can hear appeals of municipal court decisions on local law. In this way, local governments can vindicate this interest without sacrificing their ability to render authoritative interpretations of municipal law.

¹⁷⁷ *Elmendorf v. Taylor*, 23 U.S. (10 Wheat.) 152, 159 (1825).

¹⁷⁸ See THE FEDERALIST, *supra* note 160 ("The States, by the plan of the convention, are prohibited from doing a variety of things No man of sense will believe, that such prohibitions would be scrupulously regarded, without some effectual power in the government to restrain or correct the infractions of them. This power must either be a direct negative on the State laws, or an authority in the federal courts to overrule such as might be in manifest contravention of the articles of Union. . . . The latter appears to have been thought by the convention preferable to the former, and, I presume, will be most agreeable to the States.").

E. Minimizing Confusion over the Source of the Law

One more justification for the reverse-commandeering system is worth mentioning, if only because it would be odd to lay out the reverse-“commandeering” system without mentioning the United States Supreme Court’s doctrine on “commandeering.” Put simply, the Court’s commandeering cases have established that Congress cannot compel states to regulate.¹⁷⁹ This is because “where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.”¹⁸⁰

A similar accountability concern is present when state courts are given original jurisdiction over local laws and vice versa: the people involved in the court proceedings may direct any disapproval they harbor about the law being enforced against the government associated with the court enforcing it, rather than the government that passed the law. In each instance, the confusion results in the proper lawmaker not being held accountable. The reverse-commandeering system addresses this concern by giving municipal courts exclusive jurisdiction over violations of local ordinances and preventing municipal courts from hearing violations of state laws. Thus, under the reverse-commandeering system, litigants will know that the government associated with the court with original jurisdiction over their case is also the government that passed the law being enforced.¹⁸¹

CONCLUSION

The positive developments of the last century that have empowered local governments in their courts have set the stage for further modification of the distribution of local and state authority. States should revise their current constitutions and statutes to give local governments the ability pass public and private law and to ensure that local ordinances are enforced in municipal courts staffed and funded by local governments. Giving local governments the ability to pass private law will help them fashion more effective local solutions for local problems. It will also contribute to robust, differentiated cities, thereby expanding the variety of communities in which people can choose to live. Giving municipal courts jurisdiction over

¹⁷⁹ *New York v. United States*, 505 U.S. 144, 166 (1992) (“[E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts.”) (citations omitted).

¹⁸⁰ *Id.* at 169.

¹⁸¹ This may not be true in all cases depending on how states decide to handle cases involving parties from different cities, and cases involving both state and local claims. However, confusion will still be minimized in most instances.

violations of local ordinances is another positive step towards local self-determination because it gives local courts the opportunity to interpret local law. Requiring municipal courts be city funded and city staffed and giving state courts the ability to ensure municipal actions comply with state law appropriately distributes the costs of the judicial system by requiring local governments to fund the courts that advance their interests and states to fund the courts that advance states' interest. Any concerns about statewide uniformity in certain areas of the law or the excessively high penalties in municipal courts can be addressed by state legislation. The result will be a system in which local governments are better able to meet the needs of their constituents as well as the people of the state in which they are located.