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## Preserving Home Rule: The Text, Purpose, and Political Theory of California's Municipal Affairs Clause

Brett A. Stroud

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## I. INTRODUCTION

In California, any city may become a charter city by framing a charter and ratifying it by popular vote.<sup>1</sup> Under the state’s constitution, the ordinances of a charter city supersede conflicting state law concerning “municipal affairs.”<sup>2</sup> In 2012, the California Supreme Court held that “the wage levels of contract workers constructing locally funded public works are . . . ‘municipal affair[s]’” and thus that the state prevailing wage law could not apply to those contracts.<sup>3</sup> While the legal impact of the decision remains uncertain,<sup>4</sup> the California legislature has taken legislative action to render the holding of *Trades Council* irrelevant by fiscally coercing charter cities into abiding by the prevailing wage law.<sup>5</sup> This legislation is now being challenged by a consortium of California charter cities on the grounds that it

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1. CAL. CONST. art. XI, § 3(a).

2. CAL. CONST. art. XI, § 5(a) (“City charters adopted pursuant to this Constitution[.] . . . with respect to municipal affairs[.] shall supersede all laws inconsistent therewith.”); *see also* JOSEPH R. GRODIN, CALVIN R. MASSEY & RICHARD B. CUNNINGHAM, *THE CALIFORNIA STATE CONSTITUTION* 204 (Oxford Univ. Press 2011) (describing this doctrine as “the heart of the concept of home rule, a philosophy of local government autonomy employed in many states as a [limitation on] the powers of a state legislature”) [hereinafter GRODIN ET AL.].

3. *See State Bldg. & Constr. Trades Council of Cal. v. City of Vista*, 54 Cal. 4th 547, 558 (2012). *See generally infra* notes 122–62 and accompanying text (discussing the history of the prevailing wage law and related cases).

4. *See People v. Nguyen*, 222 Cal. App. 4th 1168, 1187 (2014), *petition for review filed* (Feb. 18, 2014) (citing a dissenting opinion from *Trades Council* to support the proposition that close cases must be decided in favor of the legislature); *People v. Godinez*, G047657, 2014 WL 99188 (Cal. Ct. App. Jan. 10, 2014) (unpublished), *petition for review filed* (Feb. 18, 2014) (same); *Stitt v. S.F. Mun. Transp. Agency*, 12-CV-03704, 2013 WL 121259 (N.D. Cal. Jan. 8, 2013) (commenting that *Trades Council* specifically left open the question of whether state minimum wage laws of broad general application could also be superseded by a local enactment that conflicted).

5. *See infra* notes 267–73 and accompanying text (discussing SB7 and its implications for charter cities).

violates the Municipal Affairs Clause.<sup>6</sup>

This Comment argues that the court in *Trades Council* reached the right result, but the rationale of the decision was unpersuasive. The court's current Municipal Affairs Clause doctrine, which embraces a case-by-case analysis, is unworkable as a matter of judicial review and is at odds with the text, history, and political theory of the clause itself. The court has a constitutional duty to enforce the state's constitution as the supreme law of the state, and that duty cannot be faithfully discharged as long as the court's analysis is governed only by broad generalities that purport to "bring a measure of certainty" to a process characterized nonetheless by "mercurial discretion."<sup>7</sup> If the court adopts an interpretation faithful to the state constitution, the result in *Trades Council* must be considered correct and the recent legislation designed to circumvent the state constitution must be found unconstitutional as well.<sup>8</sup>

Part II reviews the history of home rule in California and the origins of the Municipal Affairs Clause.<sup>9</sup> Part III describes the development of the California Supreme Court's analytical framework for applying the clause.<sup>10</sup> Part IV describes the background of the *Trades Council* litigation, the issues considered, and the court's holdings.<sup>11</sup> Part V advocates a new rule consistent with the text, purpose, and political theory of the state constitution.<sup>12</sup> Part VI explains why the California Supreme Court should reconsider its approach to home rule cases and adopt the rule proposed in Part V. Part VII analyzes SB7 under both standards and demonstrates the superiority of the proposed rule.<sup>13</sup>

## II. THE HISTORY OF CONSTITUTIONAL HOME RULE AND THE MUNICIPAL AFFAIRS CLAUSE

The California Supreme Court has acknowledged the importance of

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6. See *League Strongly Supports Important Charter City Home Rule Litigation* (Feb. 21, 2014), LEAGUE OF CALIFORNIA CITIES, available at <http://www.cacities.org/Top/News/News-Articles/2014/February/League-Strongly-Supports-Important-Charter-City-Ho>.

7. Cal. Fed. Sav. & Loan Ass'n v. City of L.A., 54 Cal. 3d 1, 16 (1991).

8. See *infra* notes 249–61 and accompanying text.

9. See *infra* notes 14–108 and accompanying text.

10. See *infra* notes 109–21 and accompanying text.

11. See *infra* notes 122–63 and accompanying text.

12. See *infra* notes 164–248 and accompanying text.

13. See *infra* notes 266–91 and accompanying text.

history—specifically the history of conflict between the state and local governments—for the application of the Municipal Affairs Clause.<sup>14</sup> Indeed, the clause itself is a product and a part of that history, and understanding its historical context is essential to constructing a better analytical framework.

#### A. *Dillon’s Rule and the Right of Local Self-Government*

City and town governments have been a crucial aspect of the American political experience from the time of the first colonial settlements.<sup>15</sup> When Alexis De Tocqueville visited the young nation in the 1830s, he saw in the political life of the New England townships a form of liberty and self-government essential to the American character.<sup>16</sup> But the legal status of cities has been a matter of bitter contention in the United States, and the history of California’s city governments is a chapter in that broader story.

The legal and political conflicts over the status of city government often overlap, and conflicting political theories have produced conflicting legal doctrines.<sup>17</sup> The most widely accepted statement of the legal relationship between cities and state legislatures in America is the maxim known as “Dillon’s rule,”<sup>18</sup> which states that “the power of the legislature over [municipal] corporations is supreme and transcendent: it may erect, change, divide, and even abolish them, at pleasure, as it deems the public good to require.”<sup>19</sup> Judge John Dillon, for whom the rule is named, believed strong legislative control of cities would protect private rights by allocating power to the body most likely to consist of talented, public-spirited individuals.<sup>20</sup>

14. *State Bldg. & Constr. Trades Council of Cal. v. City of Vista*, 54 Cal. 4th 547, 557 (2012).

15. See generally EARNEST S. GRIFFITH, *HISTORY OF AMERICAN CITY GOVERNMENT: THE COLONIAL PERIOD* (Da Capo Press 1972).

16. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 61–63, 68–81 (Henry Reeve trans., 7th ed. 1847).

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

18. It is widely acknowledged that Dillon’s rule is the mainstream of American judicial and academic opinion. See, e.g., Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1115 (1980); 2 MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 4.03, at 9 (3d ed. 1996). As early as 1911, the victory of Dillon’s rule over the alternative theories was secure. See 1 JOHN F. DILLON, *COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS* § 98, at 154–56 (5th ed. 1911).

19. 1 JOHN F. DILLON, *COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS* § 54, at 75 (3d ed., rev. 1881).

20. Frug, *supra* note 18, at 1109–11. This characterization is ironic when applied to the actual,

But despite its confident assertion, Dillon's rule was an innovation in Anglo-American jurisprudence rather than a statement of the obvious or traditional rule. Though it was well established by the time of the founding that the chartered privileges of municipal corporations were secure from royal interference,<sup>21</sup> the relationship between the legislative power and the rights of cities under charters was an open question of law.<sup>22</sup>

Opposition to Dillon's rule was most famously expressed in Justice Thomas Cooley's concurring opinion in *People ex rel. Le Roy v. Hurlbut*, which involved an act of the Michigan legislature organizing a powerful "board of public works" that essentially replaced the existing government of Detroit.<sup>23</sup> Cooley argued that the constitution of his state presupposed the prior and continued existence of local governments and could not reasonably be interpreted as permitting the abolition of that self-government.<sup>24</sup> He concluded that "local government is [a] matter of absolute right; and the state cannot take it away."<sup>25</sup> He did not reject regulation of cities under general laws by the legislature, but he forcefully condemned special legislative interference in the exercise of local power.<sup>26</sup> The legislature's role, in Cooley's view, was simply to provide for the incorporation of local governments and to then allow them to function independently.<sup>27</sup> This legal alternative never gained widespread or sustained acceptance in the courts, but the political opposition to legislative supremacy gave rise to the adoption

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particular experience of state government in California under Dillon's rule, at which time "few men of ability [were] active in political life, and the struggle for office was carried on among men of mediocre talent and often of doubtful integrity. The legislators were of especially low caliber." CARL BRENT SWISHER, MOTIVATION AND POLITICAL TECHNIQUE IN THE CALIFORNIA CONSTITUTIONAL CONVENTION 1878-79, at 9 (1930).

21. See *An Act for Reversing the Judgment in a Quo Warranto against the City of London*, 2 W. & M., c.8 (1689), reprinted in 6 STATUTES OF THE REALM 171.

22. See Frug, *supra* note 18, at 1094.

23. *People ex rel. Le Roy v. Hurlbut*, 24 Mich. 44, 52-53 (1871).

24. See *id.* at 99-103 (Cooley, J., concurring) (citing the "historical fact" that "local governments universally, in this country, were either simultaneous with, or preceded, the more central authority."). Cooley's argument was textual—it is not reasonable exegesis to conclude that fundamental social institutions and values should be discarded simply because they are not mentioned. See *Hurlbut*, 24 Mich. at 98 (Cooley, J., concurring). Indeed, Cooley suggested, if Dillon's rule were publicly asserted—rather than adopted by judicial construction—it "would be somewhat startling to our people." *Id.* at 97.

25. *Hurlbut*, 24 Mich. at 108 (Cooley, J., concurring).

26. See *id.* at 108.

27. See *id.* at 111 ("The right in the state is a right, not to run and operate the machinery of local government, but to provide for and put it in motion.").

of “home rule” amendments in state constitutions—including the Municipal Affairs Clause.<sup>28</sup>

*B. City Government Under the California Constitution of 1849*

California was certainly no exception to the universal American experience that “local governments . . . were either simultaneous with, or preceded, the more central authority.”<sup>29</sup> Los Angeles, for example, was founded as a pueblo in the 1780s, over sixty years prior to the annexation of California by the United States.<sup>30</sup> When the American forces led by Commodore Robert Stockton captured Los Angeles in 1846 and Stockton declared the territory under American control, these governments were permitted to continue operating.<sup>31</sup> After annexation, the number of American settlers rapidly increased as miners came in search of gold.<sup>32</sup> This led to a great expansion of the number of town governments in the state as the miners in the camps established local systems of government for themselves—systems that included majority rule, trial by jury, protection of property rights, and nonviolent means of dispute resolution.<sup>33</sup> Despite this

28. See Lynn A. Baker & Daniel B. Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, 86 DENV. U.L. REV. 1337, 1341–42 (2009).

29. *Hurlbut*, 24 Mich. at 100 (Cooley, J., concurring).

30. See George Butler Griffen, *A Letter of Don Antonio F. Coronel to Father J. Adam on the Founding of the Pueblo of Los Angeles and the Building of the Church of Our Lady of the Angels, With a Translation and Corrections*, 10 ANN. PUBLICATION HIST. SOC’Y S. CAL. 124, 124–26 (1915–16). The most prominent examples of pre-statehood local government in California were the towns, such as Los Angeles, that had once been Spanish missions but were secularized and made into civil governments under Mexican rule. See generally JOHN S. HITTELL, *A HISTORY OF THE CITY OF SAN FRANCISCO AND INCIDENTALLY OF THE STATE OF CALIFORNIA* 71–79 (1878).

31. See JAMES MADISON CUTTS, *THE CONQUEST OF CALIFORNIA AND NEW MEXICO* 124–25 (1847).

32. See HITTELL, *supra* note 30, at 132–33 (stating that in 1849 the number of settlers entering California was equal to three times the territory’s previous population).

33. See generally Richard O. Zerbe, Jr. & C. Leigh Anderson, *Culture and Fairness in the Development of Institutions in the California Gold Fields*, 61 J. ECON. HIST. 114 (2001). Justice Stephen Field of the United States Supreme Court, himself a former California gold miner, described these legal systems as follows:

Wherever they went, [the miners] carried with them that love of order and system and of fair dealing which are the prominent characteristics of our people. In every district which they occupied they framed certain rules for their government . . . [a]nd [their customs] were so framed as to secure to all comers, within practicable limits, absolute equality of right and privilege in working the mines. Nothing but such equality would have been tolerated by

history, it does not appear that the delegates to the first California Constitutional Convention gave much thought to the general structure of city government.<sup>34</sup> The resulting constitution said little on the subject: it exempted municipal corporations from the general rule that corporations must be formed under general laws rather than by special acts,<sup>35</sup> provided that the legislature “shall establish a system of county and town governments,”<sup>36</sup> and imposed on the legislature a duty to restrain municipal taxation.<sup>37</sup> In the absence of more specific textual guidance, the California Supreme Court adopted—or rather, assumed without argument—Dillon’s rule, holding that:

[Cities and counties] are both political and geographical divisions of the State. They are both the subjects of its political dominion. The local governments derive their powers from the paramount political head, which, while it cedes to certain local agents certain powers, does not thereby remit its rightful and ultimate dominion . . . .<sup>38</sup>

Because cities and towns were understood to derive their existence and

the miners, who were emphatically the law-makers, as respects mining, upon the public lands in the State.

Jennison v. Kirk, 98 U.S. 453, 457 (1878). The mining camp was, in the words of Californian philosopher Josiah Royce, “a little republic.” Josiah Royce, *California: From the Conquest in 1846 to the Second Vigilance Committee in San Francisco* 280 (1886).

34. The only discussion of the subject appears in REPORT OF THE DEBATES IN THE CONVENTION OF CALIFORNIA, ON THE FORMATION OF THE STATE CONSTITUTION, IN SEPTEMBER AND OCTOBER, 1849, at 126–28, 136 (J. Ross Browne ed. 1850) [hereinafter *FIRST CONVENTION*].

35. CAL. CONST. of 1849, art. IV, § 31.

36. CAL. CONST. of 1849, art. XI, § 4. The mandatory language of this provision—“shall”—supports the proposition that some form of city government was a constitutional minimum. See *People v. Lynch*, 51 Cal. 15, 29–31 (1875) (arguing from the mandatory phrasing of the clause that the legislature is “required [to] organize cities and villages”); see also ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* § 11, at 112 (2012) (stating the rule that “shall” ordinarily denotes a mandatory duty).

37. CAL. CONST. of 1849, art. IV, § 37. One notable commentator has argued on the basis of this clause that “the framers showed a greater distrust of local governments than they did of the state legislature.” John C. Peppin, *Municipal Home Rule in California: I*, 30 CAL. L. REV. 1, 7 (1941) [hereinafter Peppin I] (citing CAL. CONST. of 1849, art. IV, § 37). The California Supreme Court relied on a similar interpretation to support its reasoning in *People ex rel. Blanding v. Burr*, 13 Cal. 343, 355–56 (1859). But legislative power to limit specifically enumerated powers (taxation and assessment powers) is not the same as plenary legislative control.

38. *Pattison v. Bd. of Supervisors*, 13 Cal. 175, 184 (1859).

powers from legislative acts, their decisions were subject to direct legislative intervention.<sup>39</sup> Some of the special legislation passed under the first constitution was comically trivial micromanagement.<sup>40</sup> In some instances, however, the interference was substantial.<sup>41</sup> In *People ex rel. O'Donnell*, an early case, the attorney for the City of San Francisco argued that legislative interference in local affairs was never contemplated by the state constitution.<sup>42</sup> But the Court rejected that argument, and Dillon's rule became the law of the state.<sup>43</sup> The power to alter city charters at will led to a rash of special interest legislation that greatly increased the complexity of city charters and produced uncertainty.<sup>44</sup> The court even permitted the legislature to regulate city conduct on a case-by-case basis.<sup>45</sup> Because the court reasoned that cities were "mere instrumentalities" for the exercise of state power, the power of the legislature over cities was absolutely plenary.<sup>46</sup>

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39. Although some acts passed during this period purported to "authorize" a municipal corporation to undertake some action, the California Supreme Court "early held that laws of this character would in many cases be construed as . . . mandatory." See Peppin I, *supra* note 37, at 17 (citing *Napa Valley R.R. v. Bd. of Supervisors*, 30 Cal. 435 (1866)); see also *id.* at 18–19 nn.46–51 (collecting examples of such statutes "authorizing" action by municipalities).

40. See, e.g., 1875–1876 Cal. Stat. 180 (making it "unlawful for hogs or goats to run at large in the Town of Woodbridge").

41. See, e.g., *People ex rel. O'Donnell v. Bd. of Supervisors*, 11 Cal. 206, 211 (1858) (upholding a special act compelling the city to pay, from a specific fund, a specific claim owed to a specific private citizen based on the general proposition that the cities were subservient to the legislature).

42. 11 Cal. at 207 ("There are no authorities in this case. Like parricide, against which the Romans had no law, because the crime was thought impossible, such an usurpation by the Legislature has never been contemplated or guarded against, and no Supreme Court of any State ever had to pass upon a doctrine so monstrous as that contended for by this . . . bill.").

43. See *id.* at 211. This assertion of state supremacy, unsupported by legal authority, supports the argument that Dillon's rule is not a legal deduction but actually "a political choice . . . derived from the hostility of liberal political thought to the exercise of power by entities intermediate between, and thus threatening the interests of, the state and the individual." Frug, *supra* note 22, at 1059.

44. See 2 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA 1060 (E.B. Willis & P.K. Stockton eds., 1881) [hereinafter SECOND CONVENTION] (Mr. Reynolds) ("Here is a volume of fine print, three hundred and nineteen pages, that comprises the charter of the City of San Francisco, to-day. Originally it was thirty-one pages, but there have been one hundred supplemental Acts passed . . . . Dozens of these Acts have been passed in the interest of a single individual.").

45. See *People ex rel. Blanding v. Burr*, 13 Cal. 343, 348–49 (1859) (upholding a bill compelling a city to issue debt in order to pay certain claims, which were not legally valid, but which the legislature thought just), *overruled in part by People v. Lynch*, 51 Cal. 15 (1875).

46. See *id.* at 350–51 ("The [only] security against the abuse of the power of the Legislature is to be found in the wisdom and sense of justice of its members, and their relation to their constituents.").

The court justified its broad interpretation of legislative power based upon the distinction between the federal constitution, which is one of limited grant, and the state constitutions, which are understood as limiting documents governing an otherwise plenary legislative authority.<sup>47</sup>

In perhaps the most egregious case of the period, the court upheld an act of the legislature compelling the city of Stockton to donate \$300,000 in bonds to the construction of a privately owned railroad and levy a tax to pay the principal and interest on the bonds.<sup>48</sup> The city was to acquire no financial interest whatsoever in the railroad; it was a pure donation.<sup>49</sup> The city issued the bonds but refused to levy the tax, and the railroad company sought a writ of mandamus to compel the levy.<sup>50</sup> In its decision, the court essentially admitted the venality of the legislature, devoting considerable space to an argument that the separation of powers prevented courts from intervening to overturn even such obviously corrupt legislation.<sup>51</sup>

In the early 1870s, the court's acceptance of Dillon's rule faltered.<sup>52</sup> In the landmark case of *Sinton v. Ashbury*, the court announced the first meaningful limitation on the legislature's control of municipal corporations: while the legislature could appropriate city funds for "*municipal purposes*" it could not do so for "purely private purpose[s]."<sup>53</sup> This limit, however, was narrow, and the court continued to apply Dillon's rule in subsequent cases.<sup>54</sup>

47. *Stockton*, 41 Cal. at 161 ("[T]he Legislature is politically omnipotent, except in those particulars in which its power has been limited, qualified, or absolutely withdrawn by the provisions of the Federal or the State Constitution.") (citing *Sharpless v. Mayor of Phila.*, 21 Pa. 147, 160 (1853)).

48. See *Stockton & Visalia R.R. v. Common Council of Stockton*, 41 Cal. 147, 157 (1871).

49. *Id.* at 152.

50. *Id.* at 157.

51. See *id.* at 157–58.

52. *Stockton* was actually the first sign that Dillon's rule was beginning to falter in California. Peppin I, *supra* note 37, at 25–26. Three of the five justices concurred in the decision essentially on stare decisis grounds alone. *Id.*; see also *Stockton*, 41 Cal. at 193–202. Justice Crockett, in his concurrence, argued that the legislative act was valid only because it used public funds for a public purpose. See *Stockton*, 41 Cal. at 194–95 (Crockett, J., concurring). This distinction would later be essential to his decision in *Sinton v. Ashbury*, 41 Cal. 525 (1871).

53. 41 Cal. at 530. The court used the phrase "municipal affairs," which it appeared to equate with things done for "municipal purposes." See *id.* at 529–30. The standard used to define this category is not clear from the opinion, but the court emphasized that "[t]he work . . . was clearly one of great public importance." *Id.* at 530.

54. See, e.g., *City of S.F. v. Canavan*, 42 Cal. 541, 552 (1872) ("[I]t is conceded that the Legislature may create, modify, or abolish [municipal] corporations, and may direct the mode and manner in which they shall exercise their powers, or may limit the extent of their powers . . ."); *Creighton v. Bd. of Supervisors*, 42 Cal. 446 (1871).

Finally, in *People v. Lynch*,<sup>55</sup> the court rejected Dillon's rule in favor of the doctrine expressed by Justice Cooley in *Hurlbut*.<sup>56</sup> In *Lynch*, the City of Sacramento attempted to assess a tax on real property benefitted by a public improvement, but did not do so consistently with the city charter.<sup>57</sup> To remedy this situation and ensure the collection of the tax, the state legislature itself passed an act levying the tax.<sup>58</sup> The majority accepted Cooley's general theory of state constitutions: that there are traditional, implied limitations on legislative power that must be assumed to have been intended by the public in ratification.<sup>59</sup> Further development of these limitations, however, was rendered unnecessary by the adoption of California's second constitution.

### C. Home Rule and the Constitution of 1879

The California Constitution of 1879 was created to remedy the shortcomings of the original constitution.<sup>60</sup> The convention was characterized by deep distrust of the legislature, which "can be observed both in the debates and in the finished document."<sup>61</sup> The new constitution included five provisions that protected city governments from the

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55 51 Cal. 15 (1875).

56. *See id.* at 19 ("The inhabitants of a city cannot be deprived of their right to have such matters as are placed by the charter under the supervision and control of the legislative department of the city government, passed upon by their representatives in the city council. The Legislature cannot, in a special case, deny to the proper city authorities that discretion which they may ordinarily employ with respect to local improvements.").

57. *See id.* at 16–17.

58. *See id.* at 18–19.

59. *See id.* at 29–33 (arguing that the framers viewed local government as essential). Justices Wallace and Rhodes disagreed on the basis of stare decisis. *See id.* at 40–41 (Wallace, J., concurring specially).

60. *See* SWISHER, *supra* note 20, at 4–6, 9 (describing the massive population growth, economic instability, and monopolization that combined to create a class of unemployed and disgruntled men who would form the backbone of the "Workingmen's Party," a major political force in the convention); Noel Sargent, *The California Constitutional Convention of 1878-9*, 6 CAL. L. REV. 1, 4 (1917) (describing the Workingmen's Party, which thrived on anti-Chinese racism, antagonism toward the capitalist class, and the widespread discontentment of unemployed laborers).

61. Sargent, *supra* note 60, at 2. Much suspicion of the legislature derived from the belief that its power was captive to railroad interests. *See, e.g.*, 2 SECOND CONVENTION, *supra* note 44, at 1062 (Mr. Joyce) (responding to the suggestion of legislative approval of charters by asking: "Does he want to have the charter of San Francisco adopted that way, so the railroad company can rob us as they have for years past . . . ?").

legislature, and taken together, are the basis of municipal home rule<sup>62</sup>: the prohibition of special legislation,<sup>63</sup> the prohibition of special incorporation,<sup>64</sup> the grant of a general police power to cities,<sup>65</sup> the requirement that local taxes be levied locally,<sup>66</sup> the prohibition of dividing municipal authority,<sup>67</sup> and the provision for freehold charters.<sup>68</sup> The effect of the first four clauses, taken together, was to prohibit micromanagement by the state legislature and limit it to passing “general laws.”<sup>69</sup>

The subject of freehold charters was the cause of much debate over the nature and role of local government at the second constitutional convention.<sup>70</sup> One faction, which included several delegates from San Francisco and Los Angeles, was deeply skeptical of the legislature and strongly favored local autonomy. Their floor speeches included tales of egregious legislative abuse,<sup>71</sup> angry outbursts against centralized control,<sup>72</sup>

62. Cf. John C. Peppin, *Municipal Home Rule in California: II*, 30 CAL. L. REV. 272, 272–73 (1942) (discussing these five provisions).

63. CAL. CONST. of 1879, art. IV, § 25 (prohibiting special legislation concerning a long list of subjects).

64. *Id.* art. XI, § 6 (“Corporations for municipal purposes shall not be created by special laws . . . [but] by general laws . . .”).

65. *Id.* art. XI, § 11 (“Any county, city, town, or township, may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws.”).

66. *Id.* art. XI, § 12 (“The Legislature shall have no power to impose taxes . . . [for] municipal purposes, but may, by general laws, vest [such power in a local public entity].”).

67. *Id.* art. XI, § 13 (“The Legislature shall not delegate to any special commission [or private party] any power . . . [over] any municipal functions whatever.”).

68. *Id.* art. XI, § 8 (“Any city containing a population of more than one hundred thousand inhabitants may frame a charter for its own government . . .”).

69. 2 SECOND CONVENTION, *supra* note 44, at 750 (Mr. Reynolds) (“arguing that under the new constitution the legislature would “be confined almost entirely to the perfecting of the Codes”).

70. See *id.* at 1040–41; 3 SECOND CONVENTION, *supra* note 46, at 1406–07.

71. See, e.g., 2 SECOND CONVENTION, *supra* note 46, at 1062 (Mr. Howard) (“In the City of Los Angeles about half a dozen fellows, with an axe to grind, got up a charter and sent it up here [to the capitol] for ratification, unbeknown to the people of the city, and they got it adopted too. It proceeded to organize a city government under the pretense of organizing a Board of Public Works.”).

72. See, e.g., *id.* at 1060 (Mr. Wellin) (“What reason have these gentlemen to give why we should not manage our own affairs. . . . Do you suppose that we are not intelligent enough—that we do not know our own wants? Do you suppose we cannot send a delegation here to Sacramento that know their business?”); *id.* at 1062 (Mr. Joyce) (“Does he want to have the charter of San Francisco [subject to legislative approval] so the railroad company can rob us as they have for years past?”); 3 SECOND CONVENTION, *supra* note 46, at 1406–07 (Mr. Barbour) (denouncing the idea of subjecting charters to ratification by the legislature as well as the people as “an abandonment of the whole principle of self-government”).

and passionate encomia to the virtues of local self-government.<sup>73</sup> This party advocated for the Freehold Charter Clause, which originally did not provide for any legislative oversight.<sup>74</sup> Another faction was suspicious of local governments, especially that of San Francisco.<sup>75</sup> When this faction found that it did not have the support necessary to strike out the clause entirely, it attempted to limit the clause's operation, subject it to legislative oversight, and make it less politically palatable.<sup>76</sup> Despite such opposition, the clause became part of the final constitution.<sup>77</sup> By subsequent amendments, it was restored more or less to the form of the original proposal.<sup>78</sup>

#### *D. The Municipal Affairs Amendment*

The spirit of the 1879 constitution and the home rule provisions was

73. See, e.g., 2 SECOND CONVENTION, *supra* note 44, at 1062 (Mr. Howard) (“Now, sir, this system of town government in the thirty States, and particularly in New England, has met the commendation of many eminent men, and particularly of De Tocqueville. I know it is a good system of government. I know it secures local rights, local economy, local good government. I have heard, at town meetings in New England, discussions on public affairs relating to township government, that would have done honor either to the Legislature or the Congress of the United States. And it is the proper place for this power to rest, with those who know the local interests, and who are thus able to provide for their own control.”).

74. See *id.* at 1059–60.

75. See, e.g., *id.* at 1062 (Mr. Freeman) (“[W]hen gentlemen here profess the faith which they do profess in local administration of government, they must have had a different experience from what I have read of . . . . It may be that the local township governments of New England have operated as well as the gentleman says, but it is not true that in the great cities of the Union the system has operated well.”); *id.* at 1061 (Mr. Hale) (decrying the clause as “the boldest kind of an attempt at secession”).

76. The first major argument against the home rule provision was that it singled out San Francisco for special treatment. See *id.* at 1062–63. There is some evidence to suggest that the section had been sabotaged in committee with the intent of defeating it on the floor: the very delegates who were attacking the provision for being exclusive had actually pressed for that exclusivity in the committee on local government. See *id.* Mr. Hale and Mr. McCallum, who pressed the complaint that only San Francisco was eligible, were both members of the committee that drafted the section. See *id.* at 1050.

77. CAL. CONST. of 1879, art. XI, § 8.

78. In 1887, smaller cities succeeded in amending the constitution to reduce the population threshold to 10,000, and in 1890 that number was further reduced to 3500. Amanda Meeker, *Local Government: An Overview of the History of Constitutional Provisions Dealing with Local Government*, in CALIFORNIA CONSTITUTION REVISION COMMISSION, CONSTITUTION REVISION: HISTORY AND PERSPECTIVE 90 (1996). The requirement of legislative approval, however, was not removed until 1974—simply to reduce administrative costs (no charter had ever been rejected). *Id.* at 91.

clear to the supreme court from the beginning: “[i]t was manifestly the intention of . . . the [home rule provisions], to emancipate municipal governments from the authority and control formerly exercised over them by the Legislature.”<sup>79</sup> The achievement of that goal was stalled, however, by the clauses stating that charter cities remained subject to all “general laws.”<sup>80</sup> In the case of *Thomason v. Ashworth*,<sup>81</sup> the court reasoned that this language permitted “the legislature . . . to control the charters of all corporations by general laws,” meaning that it could regulate cities as a class.<sup>82</sup> Despite acknowledging the implication of this ruling—that city charters were subject to any revision by the legislature so long as the revision applied to all cities of a class—the court maintained that the constitution allowed the legislature that power.<sup>83</sup> In later cases, the court held that a state law providing for police courts displaced similar courts organized under city charters.<sup>84</sup> The dissenters in *Ashworth* and the police court cases argued that the court’s interpretation would frustrate the entire intent of the new constitution with regard to city charters.<sup>85</sup> The majority, however, was unwavering, and the rules of *Ashworth* and *Henshaw* were ultimately undone not by judicial construction but by constitutional amendment.

In 1896, the people of California amended the Freehold Charter Clause

79. *People v. Hoge*, 55 Cal. 612, 618 (1880).

80. CAL. CONST. of 1879, art. XI, § 8 (providing that charters are to be “subject to the Constitution and laws of [California]” and supersede only “special laws”); *id.* art. XI, § 6 (providing that all charters are to be “subject to and controlled by general laws.”).

81. 73 Cal. 73, 75–76 (1887) (upholding the application against a charter city of a statute governing “the improvement of streets, lanes, alleys, courts, places, and sidewalks, and the construction of sewers within municipalities”).

82. *Id.* at 76–78 (reasoning that such a rule was in keeping with the spirit of the home rule provisions, which was “the inhibition of special or local legislation, and the allowance of general legislation”).

83. *See id.* at 78–79 (“The evils of general legislation are such as spring from the imperfection of all things human and the abuse of power; but the abuse, or liability to abuse, affords no argument against the existence of such power.”).

84. *See, e.g., Ex parte Ah You*, 82 Cal. 339 (1890); *People ex rel Daniels v. Henshaw*, 76 Cal. 436 (1888).

85. *See, e.g., Ashworth*, 73 Cal. at 87 (McKinstry, J., dissenting) (arguing that the Court’s holding would allow that a charter “adopted for San Francisco by San Francisco, can be amended out of existence by statutes passed in the legislature by a majority composed in no part of members representing San Francisco”); *Henshaw*, 76 Cal. at 454 (McKinstry, J., dissenting) (arguing that the police court law had “altered, in a matter of most material concern, the city government[s]” operating under freehold charters); *In re Ah You*, 82 Cal. 339, 344 (1890) (Fox, J., dissenting) (arguing that charters were “made by the constitution itself . . . inviolable at the hands of the legislature”).

to provide that charters would not be subject to general laws concerning “municipal affairs”—the origin of the current Municipal Affairs Clause.<sup>86</sup> The Court’s earliest holdings under the clause were narrow.<sup>87</sup> But a more comprehensive theory of the clause was finally required in *Fragley v. Phelan*, which considered a statute regulating election procedures for the ratification of freehold charters.<sup>88</sup> The court was unanimous in upholding the statute’s application to charter cities but issued three separate opinions that expressed three different views of the Municipal Affairs Clause.<sup>89</sup> Justice Garoutte reasoned that municipal affairs were those matters which pertained solely to the internal affairs of the city.<sup>90</sup> This interpretation of the clause was very broad, encompassing all the internal affairs of a city, but those internal affairs did not include the ratification of a charter.<sup>91</sup> Justice Harrison believed that charter elections could in principal be a municipal affair but disposed of the case on the narrow ground that the San Francisco charter did not contain governing provisions on the subject.<sup>92</sup> Harrison seemed to allow that the exercise of any power granted to a city in its charter was a municipal affair.<sup>93</sup> Justice Temple, writing for himself alone, argued that the purpose of the municipal affairs amendment was clear: the people meant to undo the holdings of *Ashworth* and *Henshaw*.<sup>94</sup> Despite his

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86. See Meeker, *supra* note 78, at 90.

87. See, e.g., Popper v. Broderick, 123 Cal. 456, 460 (1899) (holding that the salary of police and firemen was clearly a municipal affair, but providing no construction of the clause); *People ex rel. Cuff v. City of Oakland*, 123 Cal. 598, 603–04 (1899) (holding unanimously that the procedure for annexing new territory could not be a municipal affair—a contrary rule being absurd, because it would give a city the power to expand its own power).

88. 126 Cal. 383, 385 (1899).

89. See *id.* (Garoutte, J.) (plurality opinion); *id.* at 391 (Harrison, J.) (plurality opinion); *id.* at 400 (Temple, J., concurring).

90. See *id.* at 387 (arguing that the purpose of the amendment was to “prevent existing provisions of charters from being frittered away by general laws” and to “enable municipalities to conduct their own business and control their own affairs, to the fullest possible extent, in their own way”).

91. See *id.* at 387–89 (citing *People ex rel. Le Roy v. Hurlbut*, 24 Mich. 44, 111 (1871) (Cooley, J., concurring)).

92. *Fragley*, 126 Cal. at 395–96 (Harrison, J., concurring) (arguing that the crucial limitation on a city’s power is that it can only do what is authorized by its charter). In a later case, Justice Temple also affirmed this principle. See *Fritz v. City & Cnty. of S.F.*, 132 Cal. 373, 380–81 (1901) (Temple, J., concurring).

93. See *Fragley*, 126 Cal. at 395 (Harrison, J., concurring).

94. See *id.* at 400–01 (Temple, J., concurring). He disagreed with Justice Garoutte in that he believed charter elections to be a municipal affair and disagreed with Justice Harrison in that he

conclusion that the election was a municipal affair governed by the city's charter, he concurred in the application of the statute based upon the legislature's acceptance of the charter ratified in the election, arguing that the very fact the legislature had passed the charter into law was "conclusive evidence that it made the proper investigation and found the requisite facts which would warrant its action"—that is, that it was the charter framed by the city for its own government.<sup>95</sup> None of these opinions was joined by a majority of the court.<sup>96</sup>

Despite this lively debate between three well-reasoned views, the most important early case attempting to construe the Municipal Affairs Clause was *Ex parte Braun*.<sup>97</sup> *Braun* dealt with the issue of whether a charter city could levy a license tax against sellers of liquor for the purpose of raising revenue rather than protecting the public health, safety, and welfare.<sup>98</sup> Rather than describe and resolve the split represented by *Fragley*, the majority vaguely asserted that the wording of the clause was "broad enough to include all powers appropriate for a municipality to possess, and actually conferred upon it by the sovereign power."<sup>99</sup> Justice McFarland begrudgingly concurred in the judgment, insinuating that the amendment was the result of democratic excess and complaining that it "uses the loose, undefinable, wild words 'municipal affairs,' and imposes upon the courts the almost impossible duty of saying what they mean."<sup>100</sup> McFarland despaired of ever establishing a general definition and believed that subsequent cases would be decided on their own facts in an unprincipled fashion.<sup>101</sup> Chief

interpreted the San Francisco charter to address the issue. *Id.* at 400.

95. *See id.* at 403.

96. *See id.* at 385 (Garoutte, J.) (plurality opinion); *id.* at 391 (Harrison, J.) (plurality opinion); *id.* at 400 (Temple, J., concurring).

97. 141 Cal. 204 (1903). *Braun* case is critically important because of its subsequent acceptance and development in *Federal Savings*. *See* Cal. Fed. Sav. & Loan Ass'n. v. City of L.A., 54 Cal. 3d 1, 12 (1991).

98. *See* 141 Cal. at 205–07 (finding that the charter of Los Angeles did provide it with the power to raise revenue by way of license taxes, which conflicted with a statute providing that cities and counties could only levy license taxes under the police power).

99. *Braun*, 141 Cal. at 209 (holding that license taxes for revenue purposes were obviously an appropriate power for a municipality to possess and thus a municipal affair). *See id.*

100. *Id.* at 213–14 (McFarland, J., concurring) ("It is difficult to realize that the people of the state, through their Legislature, have no longer the power to say that a license tax—a tax upon the right to do business, a tax upon capacity—is unjust, unequal, and oppressive, and should not be tolerated anywhere within the state; but we think that such is now the law.")

101. *See id.*

Justice Beatty dissented, arguing that the “sole purpose” of the Municipal Affairs Clause was to overrule the *Ashworth* line of cases.<sup>102</sup> The amendment was not intended to exempt charter cities from laws which applied to all the people of the state, and Beatty would have upheld the statute as a general law.<sup>103</sup>

Subsequent cases did not provide a single, coherent view of the Municipal Affairs Clause in which the court as a whole concurred.<sup>104</sup> As the law developed, the necessity of all powers being laid out in the city’s charter gave rise to “bulky and sometimes complicated charter[s]” and frequent amendments.<sup>105</sup> To mitigate this problem, Professor William Jones recommended an amendment to the constitution to rephrase the Municipal Affairs Clause as an affirmative grant of local power rather than a limitation on state power.<sup>106</sup> That amendment was adopted by the people in 1914,<sup>107</sup> and courts have subsequently held that charter cities receive, by default, the entire power available under the constitution over municipal affairs and charters now serve as documents of limitation.<sup>108</sup> The modern court’s interpretation of the municipal affairs doctrine, while it draws on the language of these early cases, represents a substantial departure from their principles.

### III. THE MODERN INTERPRETATION OF THE MUNICIPAL AFFAIRS CLAUSE

#### A. *The Growth of the Statewide Concern Doctrine*

After *Braun*, the municipal affairs authority of charter cities gradually became subject to “certain limitations of indefinite dimensions.”<sup>109</sup> The key limitation was that if a statute “affect[ed] a municipal affair only incidentally in the accomplishment of a proper objective of state-wide concern” it would

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102. *See id.* at 215–16 (Beatty, C.J., dissenting).

103. *See id.* at 217–19.

104. *See* ARVO VAN ALSTYNE, CALIFORNIA CONSTITUTION REVISION COMMISSION, BACKGROUND STUDY RELATING TO ARTICLE XI: LOCAL GOVERNMENT 238 (1966).

105. William Cary Jones, “*Municipal Affairs*” in *the California Constitution*, 1 CAL. L. REV. 132, 145 (1912).

106. *Id.*

107. Meeker, *supra* note 78, at 90.

108. *See, e.g.*, *W. Coast Adver. Co. v. City & Cnty. of S.F.*, 14 Cal. 2d 516 (1939).

109. VAN ALSTYNE, *supra* note 104, at 237.

preempt a charter provision.<sup>110</sup> The courts initially used the phrase “matter of statewide concern” as the opposite of the term “municipal affair.”<sup>111</sup> But later the court held that an issue might be a municipal affair in the general sense yet not “exclusively of municipal concern” and thus “not a municipal affair *within the meaning of . . . the Constitution.*”<sup>112</sup> When the Constitution Revision Commission evaluated the local government provisions in the 1960s, Professor Arvo Van Alstyne suggested that such cases continued to be decided in “pragmatic, policy-oriented” ways and that the doctrine should be “recognized for what it is—an effort by the court in a particular case to allocate the governmental powers under consideration in the most sensible and appropriate fashion.”<sup>113</sup>

#### B. *The Federal Savings Analysis*

Eventually, in *California Federal Savings and Loan Association v. City of Los Angeles*, the court took Professor Van Alstyne’s suggestion.<sup>114</sup> In *Federal Savings*, the City of Los Angeles sought to apply its annual business license tax to the California Federal Savings and Loan Association despite a statute in the California Revenue Code declaring the state income tax on such corporations exclusive of all other taxes, including license taxes levied by charter cities.<sup>115</sup> The court held that, while the tax did concern a municipal affair, “aspects of local taxation may under some circumstances

110. *Wilson v. Walters*, 19 Cal. 2d 111, 119 (1941) (citing *Dep’t of Water & Power of L.A. v. Inyo Chem. Co.*, 16 Cal. 2d 744, 753–54 (1940)). This limitation purports to derive from *Pasadena v. Charleville*. See *Inyo Chem.*, 16 Cal. 2d at 753–54 (citing *City of Pasadena v. Charleville*, 215 Cal. 384 (1932)).

111. See, e.g., *Douglass v. City of L.A.*, 5 Cal. 2d 123, 128 (1935) (holding that the safety of public roads is a matter of statewide concern); *Charleville*, 215 Cal. at 398 (1932) (holding that the employment of aliens on public works is a matter of statewide concern); *Sandstoe v. Atchison, Topeka & Santa Fe Ry. Co.*, 28 Cal. App. 2d 215, 221 (1938) (holding that the tort liability of local public agencies is a matter of statewide concern); *Armas v. City of Oakland*, 135 Cal. App. 411, 421 (1933) (holding that the “organization, operation, and control of municipal fire and police departments” is a municipal affair).

112. *L.A. Ry. Corp. v. City of L.A.*, 16 Cal. 2d 779, 783 (1940) (emphasis added); see also *In re Hubbard*, 62 Cal.2d 119 (1964), *overruled in part by Bishop v. City of San Jose*, 1 Cal. 3d 56 (1969).

113. VAN ALSTYNE, *supra* note 104, at 239, 241.

114. See *Cal. Fed. Sav. & Loan Ass’n v. City of L.A.*, 54 Cal. 3d 1, 17 (1991) (citing VAN ALSTYNE, *supra* note 104, at 239).

115. See *Federal Savings*, 54 Cal. 3d at 6. The analogy with *Braun* is clear: in both cases a statute purported to immunize individuals against some forms of local taxation. Compare *id.*, with *Ex parte Braun*, 141 Cal. 204, 205–06 (1903).

acquire a ‘supramunicipal’ dimension, transforming an otherwise intramural affair into a matter of statewide concern warranting legislative attention.”<sup>116</sup> Noting the extensive regulatory regime governing savings and loan associations, the legislature’s purpose in passing the law, and the history of Los Angeles’ license tax, the court reaffirmed its decision in *Braun* that local taxation was unquestionably a municipal affair.<sup>117</sup> Despite this characterization, the court held that a matter so crucial to the statewide economy could be subject to legislative control despite being a municipal affair.<sup>118</sup> The case law on the Municipal Affairs Clause had, in the court’s view, come to embody a “dialectical” approach that resisted the categorical separation of government into municipal affairs and statewide concerns.<sup>119</sup> The court stated that in Municipal Affairs Clause cases its role is to balance the city’s interests and those of the state on a case by case basis.<sup>120</sup> But this procedure, though characterized by a “sometimes mercurial discretion” is to be constrained by a “decisional procedure” with three essential steps: (1) determine that a subject constitutes a “municipal affair”; (2) determine the existence of an actual conflict between the state law and the charter city law, and; (3) determine whether the state law at issue is necessary to address a matter of statewide concern.<sup>121</sup>

#### IV. THE PREVAILING WAGE LAW AND *TRADES COUNCIL*

##### *A. Legal Background*

The California Labor Code requires that all public works contracts provide for the payment of the local prevailing wage.<sup>122</sup> Wage support

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116. *Federal Savings*, 54 Cal. 3d at 7.

117. *See id.* at 7–12 (discussing 1979 Cal. Stat. 4220).

118. *Id.* at 12–13 (distinguishing *Braun* as “only one side of the coin” and holding that the court must sometimes choose between conflicting state and local laws which “both stem from concerns rooted in their respective spheres of government”).

119. *Id.* at 13. The court did not overrule *Braun*, because the statewide concern analysis was an addition to the case law which came after *Braun* and made the two cases distinguishable. *See id.* at 14.

120. *See id.* at 15–16.

121. *Id.* at 15–18 (stating that a thing which constitutes a matter of statewide concern ceases, “pro tanto,” to be a municipal affair, and that these two phrases “represent, Janus-like, ultimate legal conclusions rather than factual descriptions”).

122. CAL. LAB. CODE § 1771 (West 2013) (“Except for public works projects of one thousand

programs for employees working on public works projects have been a part of California law since at least 1897,<sup>123</sup> but the legislature first adopted a modern prevailing wage law, known as the Public Wage Rate Act, during the Great Depression.<sup>124</sup> Shortly after the statute was passed, the court held in *City of Pasadena v. Charleville* that it could not be applied to charter city when it contracted to improve a city-owned, city-operated facility using only the city's money.<sup>125</sup> Because the wage rate on such projects was a municipal affair, the court reasoned that the state law could not control, creating a case-specific exemption for charter cities.<sup>126</sup> Decades after *Charleville* was decided, however, a split of authority developed in the court of appeal, and that holding was called into question.<sup>127</sup>

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dollars (\$1,000) or less, not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed, and not less than the general prevailing rate of per diem wages for holiday and overtime work fixed as provided in this chapter, shall be paid to all workers employed on public works.”). The law also provides minimum standards for the employment of apprentices, LAB. § 1777.5(d), and procedures for determining the prevailing wage and administering the law, §§ 1770–1781.

123. See 1897 Cal. Stat. 90 (setting the minimum wage per diem at \$2).

124. See 1931 Cal. Stat. 910. In the same year, Congress passed the Davis-Bacon Act, the federal prevailing wage law. Pub. L. No. 71-798, 46 Stat. 1494 (1931) (codified as amended at 40 U.S.C. §§ 3141–3148 (2012)). The original law was incorporated into the Labor Code when it was created, see 1937 Cal. Stat. 241–46, and was subsequently amended to assign the determination of the prevailing wage to the Department of Industrial Relations rather than the public agency awarding the contract, see 1976 Cal. Stat. 587.

125. 215 Cal. 384, 389–392 (1932), *overruled in part by Purdy & Fitzpatrick v. State*, 71 Cal. 2d 566 (1969).

126. See *id.* at 393. The court emphasized the oppositional nature of the categories, noting that no previous case had found state law controlling against a charter provision without finding that the provision did not concern municipal affairs. See *id.* (citing *Esberg v. Badaracco*, 202 Cal. 110, 116 (1927) (school taxes); *Ex parte Daniels*, 183 Cal. 636, 641 (1920) (speed limits)).

127. Compare *Vial v. City of San Diego*, 122 Cal. App. 3d 346, 348 (1981) (upholding a local resolution that conflicted with the prevailing wage law where the resolution “exclude[d] state and federally funded projects and those ‘considered to be of State concern’”), with *Div. of Labor Standards Enforcement v. Ericsson Info. Sys., Inc.*, 221 Cal. App. 3d 114, 123–24 (1990) (applying the prevailing wage law to the University of California, which possess analogous home rule powers, under the theory that it addressed a matter of statewide concern). The court in *Ericsson* argued that *Vial* was distinguishable because of the indiscriminate nature of the University's policy compared with that of San Diego. See *id.* at 124. A highly regarded practice guide, however, regarded the application of the prevailing wage law to charter cities as “in a state of flux” after these decisions. See LEAGUE OF CALIFORNIA CITIES, THE CALIFORNIA MUNICIPAL LAW HANDBOOK §§ 7.84 (2011). The supreme court itself acknowledged, by reserving the issue, that the continued application of the municipal affairs doctrine to the prevailing wage law was an open question. See *City of Long Beach v. Dep't of Indus. Relations*, 34 Cal. 4th 942, 947 (2004).

*B. Facts and Procedural Background*

The people of Vista, a mid-sized city in San Diego County, approved a 0.5% sales tax increase for the purpose of constructing and renovating a number of public buildings.<sup>128</sup> In order to reduce costs associated with these projects, the city—on the advice of the city attorney—took steps to become a charter city, planning to avoid the payment of prevailing wages.<sup>129</sup> The charter was ratified by the people and the city passed an ordinance providing that no city contract would require the payment of the prevailing wage unless: (1) the terms of a state or federal grant required it, (2) the contract did not involve a municipal affair, or (3) the city council separately authorized the payment of the prevailing wage.<sup>130</sup> The city then entered into several construction contracts that did not comply with the state’s prevailing wage act.<sup>131</sup> The State Building and Construction Trades Council, a large construction industry union, sought to compel compliance with the act by writ of mandate.<sup>132</sup> In support of its argument for the application of the law to charter cities, the union submitted a declaration by its president “asserting the regional nature of the construction industry and describing apprenticeship training in that industry.”<sup>133</sup> The trial court denied the writ.<sup>134</sup> The court of appeal affirmed in a divided decision, and the union appealed to the supreme court.<sup>135</sup>

*C. Holdings and Dissents*

## 1. The Nature of the Analysis

The court held that the city charter provision superseded the state law with regard to the contracts at issue, applying the *Federal Savings* analysis, the general terms of which the dissenters did not object to:

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128. State Bldg. & Constr. Trades Council of Cal., AFL-CIO v. City of Vista, 54 Cal. 4th 547, 552 (2012).

129. *Id.*

130. *See id.* at 553.

131. *See id.*

132. *See id.*

133. *Id.*

134. *See id.* at 554.

135. *See id.*

First, a court must determine whether the city ordinance at issue regulates an activity that can be characterized as a ‘municipal affair.’ Second, the court ‘must satisfy itself that the case presents an actual conflict between [local and state law].’ Third, the court must decide whether the state law addresses a matter of ‘statewide concern.’ Finally, the court must determine whether the law is ‘reasonably related to . . . resolution’ of that concern and ‘narrowly tailored’ to avoid unnecessary interference in local governance. ‘If . . . the court is persuaded that the subject of the state statute is one of statewide concern and that the statute is reasonably related to its resolution [and not unduly broad in its sweep], then the conflicting charter city measure ceases to be a “municipal affair” pro tanto . . . .’<sup>136</sup>

The opinions of the court, however, reflected a conflict about the nature of this analysis. The majority emphasized that the analysis is a question of law, finding that the court of appeal erred in emphasizing the factual record and the Union’s failure to prove the statewide economic impact of the prevailing wage law.<sup>137</sup> Justice Liu, in dissent, criticized the majority for emphasizing this point so strongly, sarcastically noting that despite its insistence that the issue is a matter of law, “no clear legal principle emerges” from the majority opinion.<sup>138</sup> The court also divided concerning the factors used to weigh state and local interests. The majority found that the economic argument for a statewide response was unpersuasive given that the law only applied to public agencies and was not a general minimum wage law of the kind the legislature could rightly enact.<sup>139</sup> Justice Liu objected to this argument, arguing that while a law of more general application would have an even

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136. See *id.* at 556 (alteration in original) (citations omitted); see *id.* at 566, 567 (Werdegar, J., dissenting); *id.* at 579–80 (Liu, J., dissenting). The court cited *Federal Savings* for the proposition that state laws must be narrowly tailored to meet the statewide concerns implicated, but *Federal Savings* itself does not actually say it is a requirement. See Cal. Fed. Sav. & Loan Ass’n v. City of L.A., 54 Cal. 3d 1, 24 (1991). However, shortly after the decision in *Federal Savings*, the court construed *Federal Savings* as requiring narrow tailoring. See, e.g., *Johnson v. Bradley*, 4 Cal. 4th 389, 403 (1992).

137. See *Trades Council*, 54 Cal. 4th at 555–58 (insisting that, despite the relevance of history, the question always remains how the state constitution allocates power between the state and the charter city).

138. *Id.* at 579 (Liu, J., dissenting). Liu accused the majority of employing the distinction cynically to minimize the statewide concern. See *id.* at 583.

139. See *id.* at 564–65 (majority opinion).

better claim to touching a matter of statewide concern the legislature should not be precluded from using market mechanisms to achieve its goal by leveraging “the substantial role that public works projects play” in the market.<sup>140</sup> The majority also distinguished between procedural requirements and substantive requirements—the latter of which, being more intrusive, would less likely be found to be a matter of statewide concern.<sup>141</sup> Because the prevailing wage law governed the substance rather than the procedure of public works contracts, it was more suspect under this rule.<sup>142</sup> Justice Liu disagreed with this assessment of the relevant precedent, arguing that while procedural regulation was subject to more permissive scrutiny it could not therefore be concluded that substantive regulation received especially strict scrutiny.<sup>143</sup> The majority also rejected the argument that, while charter cities had plenary authority to determine the wages of their public employees, the wages paid by their private contractors were a matter of statewide concern, finding that the distinction was “irrelevant.”<sup>144</sup> Justice Werdegarg objected that the distinction was deeply relevant, because the contractor’s employees are not even city employees and thus are very far removed from core municipal affairs.<sup>145</sup> These differences in analysis reflect different understandings of the logic of the *Federal Savings* rule and illustrate the need for a more coherent standard.

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140. *Id.* at 588–89 (Liu, J., dissenting).

141. *See id.* at 563–64 (majority opinion).

142. *Id.*

143. *See id.* at 589 (Liu, J., dissenting) (citing *People v. City of Seal Beach*, 36 Cal.3d 591, 601 (1984)).

144. *Id.* at 564 (majority opinion) (dismissing the argument because the Union’s economic rationale would apply whether the employees were public or private). Justice Werdegarg argued that precedent demanded greater leniency in finding a statewide concern when the issue was fair labor standards. *See id.* at 572–73 (citing *Seal Beach*, 36 Cal. 3d at 599 (upholding a meet and confer requirement applied to city police departments); *Prof'l Fire Fighters, Inc. v. City of L.A.*, 60 Cal. 2d 276, 294–95 (1963) (upholding a labor relations law applied to city fire departments)). She argued broadly that the state constitution gave the legislature “specific constitutional authority to address labor issues on a statewide scale.” *Id.* at 571–73 (citing CAL. CONST. art. XIV, § 1 (2013) (“The Legislature may provide for minimum wages and for the general welfare of employees and for those purposes may confer on a commission legislative, executive, and judicial powers.”)).

145. *See id.* at 572–73, 576–77 (Werdegarg, J., dissenting) (citing *Seal Beach*, 36 Cal.3d at 591 (upholding a meet and confer requirement applied to city police departments); *Prof'l Fire Fighters, Inc. v. City of L.A.*, 60 Cal.2d 276 (1963) (upholding a labor relations law applied to city fire departments)) (arguing that precedent demanded greater leniency in finding a statewide concern when the issue was fair labor standards).

2. The Precedential Value of *City of Pasadena v. Charleville*

In determining that the wage rates in the contracts were municipal affairs, the court relied on the authority of *City of Pasadena v. Charleville*.<sup>146</sup> The court emphasized two specific features the Vista ordinance shared with the ordinance in *Charleville*: it concerned only city facilities and excluded contracts that received state or federal funding or were otherwise matters of statewide concern.<sup>147</sup> The dissent argued that *Charleville* should be overruled and that its legal and factual bases had been eroded by time.<sup>148</sup> Both Justices Werdegar and Liu interpreted *Charleville* as relying on the theory of *Adkins v. Children's Hospital*.<sup>149</sup> That case, and by extension *Charleville*, represented to the dissent “a thoroughly discredited conception of constitutional limitations on economic legislation.”<sup>150</sup>

This argument contains two fundamental mistakes: the failure to recognize that the citation of *Adkins* in *Charleville* was dicta, and a misapprehension of the issue in *Trades Council*. In *Charleville*, the court cited *Adkins* for the proposition that a prevailing wage law of general application would present “constitutional questions,” explaining why the legislature applied the law only to public works projects.<sup>151</sup> But the reason *why* the legislature wrote the law in that way was irrelevant to the holding and rationale of the case. The *Charleville* court made its decision solely on the basis that the wages paid on public works constituted a “municipal affair.”<sup>152</sup> Furthermore, the law at issue in *Trades Council* was not a minimum wage law, which the state has specific constitutional authority to enact.<sup>153</sup> It governs only the wages to be required by public agencies through

146. *City of Pasadena v. Charleville*, 215 Cal. 384 (1932); *see id.* at 558–59 (majority opinion).

147. *See id.* at 559–61 (rejecting the argument that the increased integration of regional economies in the decades since *Charleville* had made the subject a matter of a statewide concern and *Charleville* should be abandoned).

148. *See id.* at 570–71 (Werdegar, J., dissenting); *id.* at 586 (Liu, J., dissenting). They contended that the logic of that case “has been overtaken by history” and it should be “consign[ed] . . . to the dustbin.” *Id.* at 570–71 (Werdegar, J., dissenting).

149. 261 U.S. 525 (1923), *overruled in part by* *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (cited in *City of Pasadena v. Charleville*, 215 Cal. 384, 390 (1932)).

150. *Trades Council*, 54 Cal. 4th at 586 (Liu, J., dissenting).

151. 215 Cal. at 390.

152. *Id.* at 389. *Charleville* applied the California Constitution’s Municipal Affairs Clause, unlike *Adkins*—which was an interpretation of the Federal Due Process Clause. *See Adkins*, 261 U.S. at 568 (Holmes, J., dissenting).

153. *See* CAL. CONST. art. XIV, § 1 (2013). Justice Werdegar gamely argued that this clause

their contracting process.<sup>154</sup> Such legislation is not within the state's constitutional power, however laudable its intention, and *Adkins* has nothing to do with that conclusion. However, the use of *Charleville* obviated the need for the court to determine whether wages paid under public works contracts constituted a municipal affair. Therefore, the court only discussed whether a statewide concern existed sufficient to allow state regulation in spite of that conclusion.<sup>155</sup> But this analysis, described in terms of balancing between competing interests, obscures the true purpose of the municipal affairs doctrine. While the court characterized the state interest as merely abstract, the true rationale was that city funds should be used as the city pleases:

[T]he question presented is whether the state can require a charter city to exercise its purchasing power in the construction market in a way that supports regional wages and subsidizes vocational training, while increasing the charter city's costs. No one would doubt that the state could use *its own* resources to support wages and vocational training in the state's construction industry, but can the state achieve these ends by interfering in the fiscal policies of charter cities? Autonomy with regard to the expenditure of public funds lies at the heart of what it means to be an independent governmental entity.<sup>156</sup>

This argument has merit, but the court should provide a general construction of the clause that relies on such arguments rather than an unguided balancing of interests.

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grants the legislature "specific constitutional authority to address labor issues on a statewide scale." *Trades Council*, 54 Cal. 4th at 573 (Werdegar, J., dissenting). This argument is unavailing, because the state did not address the issue on a statewide scale, but by commandeering the purchasing power of local public agencies. *See id.* at 564–65 (majority opinion).

154. *See Trades Council*, 54 Cal. 4th at 564–65. Justice Liu admitted in his dissent that the legislature chose not to regulate under a general law but to use the purchasing power and market impact of state and local public agencies to effect its policy goal. *Id.* at 588–89 (Liu, J., dissenting).

155. *Id.* at 556 (majority opinion).

156. *Id.* at 561–62 (majority opinion) (citing *Johnson v. Bradley*, 4 Cal. 4th at 407 (1992) (“[W]e can think of nothing that is of greater municipal concern than how a city's tax dollars will be spent; nor anything which could be of less interest to taxpayers of other jurisdictions.”)).

### 3. The Role of Legislative Findings

The most contentious issue in *Trades Council* was the degree of deference courts should give to a legislative finding that a subject constitutes a “matter of statewide concern.”<sup>157</sup> The court acknowledged that the legislature had determined public works wage rates to be a statewide concern,<sup>158</sup> but relied on a variety of cases to support the proposition that such a finding was not determinative.<sup>159</sup> However, the court continued to acknowledge the rule that it must accord “great weight” to such a determination by the legislature.<sup>160</sup> The dissenting justices differed with the majority about the degree of deference the legislature should be given, and would have upheld the law on the theory that the case was close and that doubts must be resolved in favor of the legislature because of the severity of a constitutional ruling.<sup>161</sup> The majority did not question the principle of deference itself; it only limited its deference on the principle that courts should be “especially’ hesitant” to defer to the legislature “when . . . the issue involves the division of power between local government and that same Legislature.”<sup>162</sup> Clearly, such hesitation is well justified. But in light of the fact that all cases under the Municipal Affairs Clause concern the division of power between local government and the legislature, what justification remains for any deference at all?

These ambiguities demonstrate the need for a settled rule that may be consistently applied by courts without resort to inherently political judgments about which “interest” is less “abstract,” which necessarily becomes a judgment about which policy is more important—a political rather than a justiciable question.<sup>163</sup>

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157. See *Trades Council*, 54 Cal. 4th at 561; *id.* at 566–67, 572 (Werdegar, J., dissenting); *id.* at 582–83 (Liu, J., dissenting).

158. See *id.* at 565 (citing 2003 Cal. Stat. 6247; 2002 Cal. Stat. 5541; 2002 Cal. Stat. 5455).

159. See *id.*

160. *Id.* (citing *Baggett v. Gates*, 32 Cal. 3d 128, 136 (1982)).

161. See *id.* at 578 (Werdegar, J., dissenting) (“[D]oubt . . . must be resolved in favor of the legislative authority of the state.” (internal quotation marks omitted)); *id.* at 579 (Liu, J., dissenting) (“[T]he court moves incautiously in an area where it becomes us to exercise more than the usual caution.” (internal quotation marks omitted)).

162. *Id.* at 565 (majority opinion) (quoting *Cnty. of Riverside v. Superior Court*, 30 Cal. 4th 278, 286 (2003)).

163. *Cal. Fed. Sav. & Loan Ass’n v. City of L.A.*, 54 Cal. 3d 1, 23–24 (1991)

## V. THE CONSTRUCTION AND APPLICATION OF A SETTLED RULE

The court has approvingly cited Justice McFarland's exasperated complaint that the constitution "uses the loose, indefinable, wild words, 'municipal affairs,' and imposes upon the courts the almost impossible duty of saying what they mean."<sup>164</sup> Indeed, the court seems to have completely abandoned the attempt to articulate a principled definition of "municipal affairs."<sup>165</sup> This cannot stand. In light of the judiciary's function within our system of government, the court should adopt a settled rule for the application of the Municipal Affairs Clause. That rule should be faithful to the text and the structure of the state constitution and grounded in the history and political theory of the clause.

### *A. Legislative Findings and the Role of the Courts*

The majority in *Trades Council*, while accepting that the court should give "great weight" to legislative findings of a statewide concern, insisted that such deference was limited and that the court remained the final arbiter of the issue.<sup>166</sup> Even this falls short of the court's constitutional duty. The history of constitutional home rule makes clear that the primary motivation for dividing the state's sovereignty was distrust of the legislature.<sup>167</sup> And while the legislature represents the will of the people of California, the constitution does as well.<sup>168</sup> While "[i]t is not a light thing to set aside an act of the legislature,"<sup>169</sup> the court has a duty to uphold the constitution.<sup>170</sup> The

164. *Ex parte Braun*, 141 Cal. 204, 214 (1903) (McFarland, J. concurring) (quoted in Cal. Fed. Sav. & Loan Ass'n v. City of L.A., 54 Cal.3d 1, 15-16 (1991)).

165. *See, e.g., Trades Council*, 54 Cal. 4th at 558-59 (relying solely on precedent to determine that wage rates in public works contracts are a municipal affair without articulating any standard other than the *Federal Savings* analysis for making that determination in cases of first impression).

166. 54 Cal. 4th at 558.

167. *See supra* notes 60-78 and accompanying text.

168. Even more direct expressions of the people's will—such as ballot initiatives—are subject to constitutional scrutiny because "the people have made statutes . . . subordinate to the Constitution, and have empowered the courts of this state in the exercise of the judicial power to interpret the state's fundamental charter." *People's Advocate v. Superior Court (California Legislature)*, 181 Cal. App. 3d 316, 322 (1986).

169. *Fragley v. Phelan*, 126 Cal. 383, 390 (1899).

170. *See People v. Lynch*, 51 Cal. 15, 25-26 (1875) ("The courts cannot shirk the responsibility of deciding such questions, when presented. It is as much their duty to consider the Constitution, in ascertaining what is the law, as to consider the statute. This duty must be performed, whatever the consequences. The judicial department is the proper power in the Government to determine whether

court, under the constitution, has “ample power” to police the use of legislative authority and “preserve the core meaning of municipal home rule,” and it is obliged to do so.<sup>171</sup> The court should clearly affirm that the legislature has no place in determining the extent of its own constitutional power and adopt a clear, readily applicable construction of the Municipal Affairs Clause. The formulation of that construction must begin with the text.

*B. The Text of the Clause: “All” Means “All”*

Legal interpretation begins with the text of the instrument to be construed.<sup>172</sup> The term “municipal affairs” is “notoriously ambiguous”,<sup>173</sup> but even an ambiguous phrase must be given a meaning which the that will bear.<sup>174</sup> This precludes the court’s understanding—finally articulated in *Federal Savings* but nascent in the cases following *Braun*—that a subject may constitute a municipal affair but still be subject to state preemption if it also constitutes a matter of statewide concern.<sup>175</sup> This simply cannot be the meaning of the text, because the text clearly states that with respect to municipal affairs, charter provisions “shall supersede *all* laws inconsistent therewith.”<sup>176</sup> At the time the clause was added, the word “municipal,” as a legal term of art, denoted simply “that which belongs to a corporation or a city . . . includ[ing] the rules or laws by which a particular district, community, or nation is governed.”<sup>177</sup> The word “affairs” is a word of much “wide[r] import,” and is even broader than simply “business.”<sup>178</sup> This text will bear a number of different meanings. It could bear a meaning as narrow as a municipal version of the corporate internal affairs doctrine.<sup>179</sup> It could also bear a meaning as broad as “all powers appropriate for a municipality to

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a statute be or be not constitutional.” (citations omitted) (internal quotation marks omitted)).

171. Cal. Fed. Sav. & Loan Ass’n v. City of L.A., 54 Cal. 3d 1, 15 (1991).

172. SCALIA & GARNER, *supra* note 36, at 16.

173. Baker & Rodriguez, *supra* note 28, at 1344.

174. SCALIA & GARNER, *supra* note 36, at 31 (“A fundamental rule of textual interpretation is that neither a word nor a sentence may be given a meaning that it cannot bear.”).

175. See *supra* notes 111–21 and accompanying text.

176. CAL. CONST. art. XI, §5(a) (2013) (emphasis added). It does not say “all laws inconsistent therewith which do not reach matters of statewide concern.”

177. HENRY CAMPBELL BLACK, A LAW DICTIONARY 798 (1910).

178. *Fragley v. Phelan*, 126 Cal. 383, 394–95 (1899) (Harrison, J., concurring).

179. See *id.* at 385 (plurality opinion)

possess and actually conferred upon it by the sovereign power.”<sup>180</sup> But grammar itself forbids construing “*all* laws inconsistent therewith”<sup>181</sup> to mean all laws not touching matters of statewide concern.

But the term “municipal affairs” predates the 1896 amendment adding the clause to the constitution, and its use in case law is instructive.<sup>182</sup> In 1871, when California still applied Dillon’s Rule, the court used the phrase to describe the range of purposes for which the legislature may use city funds.<sup>183</sup> In 1875, when the court held there was a right to local self-government, it used the term similarly, equating it with “matters of purely local concern.”<sup>184</sup> After the passage of the 1879 Constitution, the term continued to be used.<sup>185</sup> It was used in one case to mean anything pertaining to the corporate structure or governance of the city.<sup>186</sup> Whatever may be concluded from these instances, this much is clear: the term is, as Justice Harrison wrote, one of “wide import” and seems to embrace nearly everything a city does that is of public importance.<sup>187</sup> But the early case law definitions are not the only—or even the best—resources available to the court.

180. *Ex parte Braun*, 141 Cal. 204, 209 (1903).

181. CAL. CONST. art. XI, §5(a) (2013) (emphasis added).

182. *See* SCALIA & GARNER, *supra* note 36, §54, at 322 (“If a statute uses words or phrases that have already received authoritative construction by the jurisdiction’s court of last resort . . . they are to be understood according to that construction.”). After the passage of the municipal affairs amendment, the court appealed to *Sinton*, an 1871 case, as authority for the proposition that the opening of streets was a municipal affair under the meaning of the clause. *See* *Byrne v. Drain*, 127 Cal. 663, 667 (1900) (citing *Sinton v. Ashbury*, 41 Cal. 525 (1871)). This citation suggests that the court recognized the case law usage of the phrase prior to the amendment as a legitimate source of interpretive guidance. *See id.*

183. *See Sinton*, 41 Cal. at 530 (1871) (Crockett, J.) (“I am not aware that any case has gone so far as to hold that the Legislature may devote the funds of a municipal corporation to purposes confessedly private and having no relation to municipal affairs.”).

184. *People v. Lynch*, 51 Cal. 15, 31 (1875).

185. *See* *People ex rel. Daniels v. Henshaw*, 76 Cal. 436, 448 (1888) (McKinstry, J., dissenting) (citing an unpublished superior court opinion describing a law as “distinctly municipal in character, spending its whole force upon the government, civil and criminal, of the city of Oakland and the regulation of its internal municipal affairs.”). *See also* *Dunn v. Long Beach Land & Water Co.*, 114 Cal. 605, 610 (1896); *Woodward v. Fruitvale Sanitary Dist.*, 99 Cal. 554, 562 (1893).

186. *See Henshaw*, 76 Cal. at 448–50 (McKinstry, J., dissenting).

187. *Fragley v. Phelan*, 126 Cal. 383, 394–95 (Harrison, J., concurring).

C. *The Purpose of the Clause: Local Laws and General Laws*

When constitutional text is not clear, the interpreter should have recourse to the structural purpose of the provision in question.<sup>188</sup> The case law interpreting the amendment itself prior to Justice McFarland's surrender of the interpretive enterprise in *Ex parte Braun* provides useful insights into the structural purpose of the amendment.<sup>189</sup> After the amendment, the court clearly stated what it took to be the intent of the amendment: "[I]t had been believed by the legislature and by the people that it would be wiser to relieve charter cities from the operation of general laws affecting municipal affairs, lest otherwise there would be danger of the charter provisions being entirely 'frittered away.'"<sup>190</sup> Among the early theories proposed concerning what the people intended when they passed the Municipal Affairs Clause, there was broad agreement that they intended to correct something that had gone wrong in the interpretation of the Constitution of 1879 itself.<sup>191</sup> For that reason, the court continued to hold that the purpose of the "municipal affairs" language was to further restrict the legislature from interfering in matters that concern cities "under the guise of laws general in form."<sup>192</sup> In *Fragley v. Phelan*, the justices articulated two cogent constructions of the Municipal Affairs Clause based upon the political context and intent of the amendment—neither of which was discussed by Justice McFarland in *Braun* or the court in *Federal Savings*.<sup>193</sup>

The first theory, advanced by Justices Garoutte and Harrison, was that the phrase is of "wide import" and encompasses all of the matters which are

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188. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §405 ("Where the words admit of two senses, each of which is conformable to common usage, that sense is to be adopted, which, without departing from the literal import of the words, best harmonizes with the nature and objects, the scope and design of the instrument.").

189. See *supra* notes 79–108 and accompanying text.

190. *Morton v. Broderick*, 118 Cal. 474, 486–87 (1897) (internal citations omitted).

191. *Fragley*, 126 Cal. at 387 (Garoutte, J.) (plurality opinion) (arguing that the people wished to protect charters from being "frittered away" by laws general in form but not in substance); *id.* at 395 (Harrison, J., concurring) (arguing that municipal affairs included all things embraced in a charter, basically accepting Justice Garoutte's view of the people's purpose); *id.* at 400–01 (Temple, J., concurring) (arguing that the people intended to undo *Ashworth* and *Henshaw*, which had frustrated the original purpose of freehold charters).

192. *Popper v. Broderick*, 123 Cal. 456, 461 (1899).

193. See *Fragley v. Phelan*, 126 Cal. 383 (1899); *Ex parte Braun*, 141 Cal. 204 (1903); *Cal. Fed. Sav. & Loan Ass'n v. City of L.A.*, 54 Cal. 3d 1 (1991).

committed to the city's control.<sup>194</sup> On this view, the municipal affairs of a city comprise all of the things provided for in its charter.<sup>195</sup> This view is based on the notion that a charter is a negotiated settlement between the city and the state legislature, and that the legislature by approving the charter has “part[ed] with a portion of its sovereignty” and granted it to the city.<sup>196</sup> This theory has some appeal because it is simple to apply: if a power is in the charter—a document that a court can read—it pertains to a municipal affair. However, whatever viability this theory once had was eliminated with subsequent amendments that rephrased the clause in terms of a general grant of power to cities rather than a limit on the legislature and removed the legislature from the ratification process.<sup>197</sup> Because of the 1914 amendment, the text of city charters no longer provides greater interpretive guidance than the phrase “municipal affairs” itself.<sup>198</sup> Additionally, the later amendments that removed the legislature from the process make it difficult to speak of the legislature as having “part[ed] with a portion of its sovereignty.”<sup>199</sup>

The other view presented in *Fragley* is that of Justice Temple, who believed the people intended only to undo the holdings of *Ashworth* and *Henshaw*.<sup>200</sup> This view is immediately attractive because it, like the modern case law, does not rely solely upon the words themselves, which “convey[] no definite meaning to [the] mind.”<sup>201</sup> Instead, it provides a definite, ascertainable meaning for the clause based upon its context: “the author of the amendment had in mind the contention of the justices who dissented from the established doctrine.”<sup>202</sup> The doctrine of those dissenters is clear from their opinions.<sup>203</sup> It is rooted in the common law distinction between

194. *Fragley*, 126 Cal. at 394–95 (Harrison, J.).

195. *See id.* at 395 (Harrison, J., concurring).

196. *Id.* at 389 (Garoutte, J.) (plurality opinion); *see id.* at 395–96 (Harrison, J., concurring).

197. *See Meeker*, *supra* note 78, at 91.

198. *See, e.g.*, Charter of the City of Vista §§ 100–101, 300 (specifically declaring the city exempt from public contracting statutes except as approved by the City Council and enumerating no other powers).

199. *Fragley*, 126 Cal. at 389 (Garoutte, J.) (plurality opinion).

200. *See id.* at 400–01 (Temple, J., concurring).

201. *Id.* at 402; *compare id.*, with *Cal. Fed. Sav. & Loan Ass'n v. City of L.A.*, 54 Cal.3d 1, 16 (1991).

202. *Fragley*, 126 Cal. at 401 (Temple, J., concurring); *cf. Hans v. Louisiana*, 134 U.S. 1, 12 (1890) (also reasoning that a constitutional amendment passed in reaction to a particular case should be construed in light of the dissenting opinions in that case).

203. *See id.* The primary dissenters from the doctrine of *Ashworth* were Justices McKinstry and Fox. *See Thomason v. Ashworth*, 73 Cal. 73, 87 (1887) (McKinstry, J., dissenting); *People ex rel.*

general laws or general customs and local laws or particular customs—the former operating on “all persons and in all places” within the territory of the state and the latter applying only in particular places.<sup>204</sup> According to Justice McKinstry, the entire structure of the constitution of 1879 was designed to favor local power on questions of local custom and law.<sup>205</sup> Under this view, a state law may only be applied within a charter city if it is capable of being applied throughout the entire territory of the state, which would include laws relating to the general rights and duties of citizens, the administration of the courts, and all other laws that apply beyond as well as within the boundaries of cities.<sup>206</sup> Furthermore, under this construction, the state is empowered to take action through general laws, but that action does not preclude municipal action through local laws pertaining to the very same matter, provided the two are not contradictory.<sup>207</sup> While cases would arise under this rule requiring elaboration of the local–general distinction, such elaboration could be guided by reference to the political theory of the clause.

#### *D. The Theory of the Clause: Localism and Federalism*

In addition to being textually permissible and historically plausible, the court’s interpretation of the Municipal Affairs Clause should preserve the core political commitments of constitutional home rule.<sup>208</sup> Previous scholarship has tended to see constitutional home rule as an innovation in state government rather than a foundational political principle like federalism.<sup>209</sup> This common assumption, however, is not historically

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Daniels v. Henshaw, 76 Cal. 436, 454 (1888) (McKinstry, J., dissenting); *Ex parte Ah You*, 82 Cal. 339, 344 (1890) (Fox, J., dissenting); *Davies v. City of L.A.*, 86 Cal. 37, 54 (1890) (Fox, J., concurring in the judgment).

204. *Davies*, 86 Cal. at 54 (Fox, J., dissenting).

205. *Ashworth*, 73 Cal. at 91–92.

206. *See id.* at 92.

207. *See People ex rel. Lawlor v. Williamson*, 135 Cal. 415, 416–20 (1902) (holding that a writ of quo warranto sought by the San Francisco board of public health, established by the legislature, would not issue against the new San Francisco board of public health, created by the city’s charter, and that insofar as the two boards did not have conflicting powers, the state and the city could both maintain boards of health).

208. *See Cal. Fed. Sav. & Loan Ass’n v. City of L.A.*, 54 Cal. 3d 1, 15 (1991).

209. *Baker & Rodriguez*, *supra* note 28, at 1342 (“[Judicially enforceable home rule] was extraordinary . . . in the further sense that courts would be acting to protect the autonomy of local governments that were historically understood to be mere creatures of the state government. On these terms, imperium in imperio home rule was even more remarkable than constitutional

justified. In fact, Dillon's rule itself was an innovation, though its proponents asserted it as though it were the "historically understood" rule.<sup>210</sup> Federalism and home rule are, in fact, analogous. The essence of federalism is that powers are divided between the state and national governments based not solely on the territory covered but also on the subjects that may be regulated.<sup>211</sup> The system is fundamentally "anti-hierarchical, based on covenant[al] principles that see the proper political organization as a matrix with larger and smaller arenas but not higher and lower."<sup>212</sup> And it is eminently practical—power is made to reside where it will be needed while preserving the authority of other entities in the system.<sup>213</sup> The foundation of this covenantal, federal system is the pre-existence of the state governments; while the people of the entire United States are collectively sovereign,<sup>214</sup> the Constitution was written in the context of preexisting states, which—while forming an indissoluble union—did not part with their independent existence when the national government was created.<sup>215</sup> Despite the mistaken opinions

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federalism. After all, the latter was built upon the circumstances of the states existing as independent sovereigns that joined together to form the nation, the United States.”).

210. *Id.*; see also *supra*, notes 18–21, 43 and accompanying text.

211. The national government is given power over a specific range of subjects, see U.S. CONST. art. I, § 8, and the remainder is vested in “the [s]tates respectively, or . . . the people,” U.S. CONST. amend. X.

212. Daniel J. Elazar, *The United States and the European Union: Models for Their Epochs*, in *THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION* 31, 42 (Kalypso Nicolaïdis & Robert Howse eds., 2001). In this way, the American system is different from other systems of decentralized government:

Historically, [the European tradition of] subsidiarity has assumed that there is a centre of power that rules over an organic or quasi-organic polity . . . . [Whereas] the American federal tradition has assumed that there is not, and should not be, a single centre of power. The States are not peripheries, and local governments are not extremities; they are constituent elements of what James Madison called a “compound republic.”

John Kincaid, *Devolution in the United States: Rhetoric and Reality*, in *THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION* 144, 155 (Kalypso Nicolaïdis & Robert Howse, eds. 2001).

213. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 581 (1985) (O'Connor, J., dissenting) (“[T]he Framers of our Constitution intended Congress to have sufficient power to address national problems. . . . [T]hey also envisioned a republic whose vitality was assured by the diffusion of power not only among the branches of the Federal Government, but also between the Federal Government and the States.”).

214. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 839–40 (1995) (Kennedy, J., concurring).

215. See *Texas v. White*, 74 U.S. 700, 724–25 (1868) (“[T]he perpetuity and indissolubility of the Union, by no means implies the loss of distinct and individual existence, or of the right of self-government by the States. . . . The Constitution, in all its provisions, looks to an indestructible

of those courts that view cities as always and everywhere creatures of the state, the same relationship of preexistence and indissolubility exists between the states and the cities within their territory.<sup>216</sup> In California, the court has explicitly recognized this pre-existing tradition of local government<sup>217</sup> and the resulting relationship between the sovereign people, the state, and cities:

It is of course true that [municipal affairs] . . . may at all times be controlled by the sovereign power. But it does not follow that the legislative department of the state may so control it. . . . The state constitution is . . . the highest expression of the will of the people of the state, and so far as it speaks, represents the state. So, where . . . power is given in the constitutional method by special charter, and not by direct legislative enactment, it can be withdrawn only by amendment to the charter in the manner provided by the constitution.<sup>218</sup>

The implications of divided sovereignty are not always obvious, even in the context of federalism.<sup>219</sup> However, the American legal tradition is replete with examples of courts parsing the meaning of federalism and its legal implications. Because the political theory of home rule is analogous to that of federalism, several of these legal doctrines are useful in illuminating the Municipal Affairs Clause.

The municipal affairs doctrine is clearly analogous to the “traditional state functions” doctrine of *National League of Cities v. Usery*.<sup>220</sup> The terms

Union, composed of indestructible States.”).

216. *People ex rel. Le Roy v. Hurlbut*, 24 Mich. 44, 98 (1871) (“[T]he [state] constitution has been adopted in view of a system of local government, well understood and tolerably uniform in character, existing from the very earliest settlement of the country, never for a moment suspended or displaced, and the continued existence of which is assumed; and . . . the liberties of the people have generally been supposed to spring from, and be dependent upon that system.”).

217. *See People v. Lynch*, 51 Cal. 15, 29–31 (1875).

218. *Ex parte Braun*, 141 Cal. 204, 211 (1903).

219. One commentator has quipped that “[t]alking about federalism feels a bit like joining the proverbial blind men trying to describe an elephant.” Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1485 (1994). For an entertaining version of the story to which Kramer refers, see John Godfrey Saxe, *The Blind Men and the Elephant*, in THE OXFORD ILLUSTRATED BOOK OF AMERICAN CHILDREN’S POEMS 24–25 (Donald Hall ed., 1999).

220. 426 U.S. 833 (1976), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

“municipal affairs” and “traditional governmental functions” both rely for their meaning on the nature of the entity whose independence is being protected—a thing is a “municipal affair” if it is properly handled by a municipality,<sup>221</sup> and a thing is a “traditional governmental function” if it is handled traditionally by the states.<sup>222</sup> In *National League*, the United States Supreme Court held that the federal Fair Labor Standards Act could not be applied to state governments.<sup>223</sup> The Court based its decision on what it took to be an established principle that the “power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to tax or to regulate commerce” has limits.<sup>224</sup> These limits include the principle that the states’ “integrity” and ability to function as separate governments must be respected.<sup>225</sup> The Court held that, under the Tenth Amendment, states retained the “freedom to structure integral operations in areas of traditional governmental functions” absent a particularly compelling federal interest.<sup>226</sup> This legal doctrine, designed to protect state autonomy within the federal system, has been abrogated, and the Court has left the protection of traditional state functions to the national legislative process.<sup>227</sup> The notion of “traditional state functions” proved too nebulous for the courts to properly enforce,<sup>228</sup> and more importantly—though it supposedly derived from the Tenth Amendment—the doctrine did not have a textual basis.<sup>229</sup> The municipal affairs doctrine, however, is explicitly present in the text of the

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221. *Ex parte Braun*, 141 Cal. 204, 209 (1903)

222. *National League*, 426 U.S. at 851–52 (listing examples).

223. *Id.* at 855.

224. *Id.* at 842.

225. *Id.* at 843.

226. *Id.* at 852, 856 (Blackmun, J., concurring) (stating that the Court “adopts a balancing approach, and does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential”).

227. George A. Bermann, *The Role of Law in the Functioning of Federal Systems*, in *THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION* 191, 202 (Kalypso Nicolaïdis & Robert Howse eds., 2001); see *Garcia*, 469 U.S. at 551–52.

228. See *Garcia*, 469 U.S. at 531.

229. See U.S. CONST. amend. X; *Garcia*, 469 U.S. at 547–49. Even acknowledging this textual ambiguity, Justice O’Connor dissented in a stirring opinion that chastised the Court for “retreat[ing] rather than reconcil[ing] the Constitution’s dual concerns for federalism and an effective commerce power.” *Id.* at 581 (O’Connor, J., dissenting). Likewise, Justice Powell accused the Court of “reduc[ing] the Tenth Amendment to meaningless rhetoric.” *Id.* at 560 (Powell, J., dissenting).

state constitution.<sup>230</sup> Whether or not Justice Cooley was correct that the framers of state constitutions never intended to give up local control of local affairs, it is clear, in California at least, that the people intended to take such power back.<sup>231</sup> Furthermore, the common law distinction favored by the *Ashworth* and *Henshaw* dissenters is much more workable than the *National League* doctrine. The rule is abstract and based on the territorial reach of legislation rather than ad hoc divisions of labor based on competing interests, which means it will not become obsolete as governmental practices at the state and local level develop. If the California Supreme Court were to adopt such a rule, a doctrine similar to that of *National League*, based on ascertainable historical facts about state and local government, should be employed to clarify the distinction.

Another useful doctrinal analogy between home rule and federalism is the rule that, while Congress often is possessed of the constitutional authority to regulate a matter that is within the competence of a state, it may not simply commandeer the machinery of the state government to do so.<sup>232</sup> It may set up its own enforcement regime or it may provide incentives for the states to comply, but it may not compel the states to act.<sup>233</sup> While the non-commandeering doctrine is not directly stated in the text of the constitution, it is plausible as a legal doctrine because of the intuition that a government without control of its own internal processes and officers is not a separate government at all.<sup>234</sup> Commandeering is an apt description for the kind of legislative control exercised over California's city governments under Dillon's rule, and the California Supreme Court made clear that this commandeering was based on a political theory—that cities were not legitimate, separate institutions of government but merely arms of the

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230. CAL. CONST. art. XI, § 5(a).

231. *People v. Hoge*, 55 Cal. 612, 618 (1880) (“It was manifestly the intention of [the people] to emancipate municipal governments from the authority and control formerly exercised over them by the Legislature, and this is the more apparent in view of the fact that the charter framed by . . . the vote of the people, cannot be amended by the Legislature.”).

232. *See New York v. United States*, 505 U.S. 144, 153–54, 161 (1992) (striking down a federal statute that compelled the individual states to either pass legislation which complied with minimum federal standards or be subject to sanctions which included a “take title” provision—vesting title to nuclear waste, and all the liability that it implied, in the state).

233. *Id.* at 188. This constitutional prohibition applies to the executive as well as the legislative functions of the state. *See Printz v. United States*, 521 U.S. 898, 925 (1997).

234. *See Printz*, 521 U.S. at 928.

state.<sup>235</sup> The people of California, however, rejected that political theory when they affirmed that a city “may frame a charter *for its own government*” which “shall become the organic law thereof.”<sup>236</sup> Just as the people of a state have the right to operate their own government and have the integrity of that government respected by the nation, the people of a city have the right to operate their own government and have the integrity of that government respected by the state.<sup>237</sup>

But the federal government is not without recourse to set policy at the state level in pursuit of federal interests. The Supreme Court has acknowledged Congress’s broad authority to place conditions on the use of funds it provides under its power to tax and spend for the general welfare.<sup>238</sup> This power to set conditions permits the federal government to influence state policy so long as it does not “dragoon[.]” the states with punitive and coercive conditions.<sup>239</sup> Just as the no-commandeering doctrine does not leave the federal government without a role in setting state policy, the analogous principle of home rule does not leave the statewide government without a role in setting local policy. The California Supreme Court has made clear that the state has an interest, sufficient to render a charter city subject to general laws, in deciding how state money is spent.<sup>240</sup> The authority of the state to dictate local policy in charter cities, however, depends upon an implicit bargain in which the charter city agrees to exercise its authority over municipal affairs in a particular way and the state agrees in turn to provide the necessary funds.<sup>241</sup> If the state does not provide the

235. See *Pattison v. Bd. of Supervisors*, 13 Cal. 175, 184 (1859) (“[Cities and counties] are both political and geographical divisions of the State. They are both the subjects of its political dominion. The local governments derive their powers from the paramount political head, which, while it cedes to certain local agents certain powers, does not thereby remit its rightful and ultimate dominion . . . .”).

236. CAL. CONST. of 1879, art. XI, § 8 (emphasis added).

237. See *People v. Lynch*, 51 Cal. 15 (1875).

238. U.S. CONST. art I, § 8, cl. 1 (“The Congress shall have Power To lay and collect Taxes . . . and provide for . . . [the] general Welfare of the United States . . . .”); see, e.g., *South Dakota v. Dole*, 483 U.S. 203 (1987).

239. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2574 (2012).

240. See *State Bldg. & Constr. Trades Council of Cal. v. City of Vista*, 54 Cal. 4th 547, 562 (2012).

241. The United States Supreme Court, in some of its recent cases on the subject, has expressed this theory of funding conditions set by Congress. See, e.g., *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)) (holding, based on the contractual theory, that Congress must provide unambiguous

funds, the city has the prerogative of deciding how it will use its own money.<sup>242</sup>

These doctrines, derived from the nature our federalist system, are applicable by analogy to the law of municipal home rule. Just as the United States Supreme Court once held that the independent sovereignty of the states prevented Congress from regulating them “*as states*,”<sup>243</sup> the California Constitution’s protection of cities as independent entities should be construed to “inhibit[] . . . any legislation which would directly affect cities and towns *as municipal corporations*.”<sup>244</sup> The state legislature must legislate by “general laws” rather than “laws general in form,” which serve only to nullify the political choices embodied in city charters.<sup>245</sup> Just as the United States Supreme Court continues to hold that the states may not be commandeered by Congress to achieve its ends through them, it should also be taken as a clear implication of the independent existence of cities under the California Constitution that they may not be commandeered by the legislature and compelled to fulfill its purposes for it.<sup>246</sup> And finally, just as the United States Supreme Court has held that Congress’s power to regulate the states through spending conditions is limited,<sup>247</sup> the California Supreme Court should limit the state’s power to regulate cities through spending conditions by requiring a direct connection between the funds being granted or denied and the condition being exacted.<sup>248</sup> The court should employ these doctrines, along with the common law distinction between local and general laws, which taken together provide a coherent doctrine of municipal home rule.

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notice of the conditions imposed); *Barnes v. Gorman*, 536 U.S. 181, 185–87 (2002).

242. See *Trades Council*, 54 Cal. 4th at 559. The same general principle, that state regulation should be accompanied by state money if it is to be imposed on local governments, is embodied in the state constitution’s subvention requirement. See CAL. CONST. art. XIII B, § 6.

243. *Nat’l League of Cities v. Usery*, 426 U.S. 833, 842 (1976) (emphasis added), *overruled in part* by *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

244. *Fragley v. Phelan*, 126 Cal. 383, 402 (1899) (Temple, J., concurring) (emphasis added).

245. CAL. CONST. art. XI, § 5(a); *Popper v. Broderick*, 123 Cal. 456, 461 (1899).

246. Compare *New York v. United States*, 505 U.S. 144, 161 (1992), with *Trades Council*, 54 Cal. 4th 547, 561–62.

247. See *supra* notes 234–39 and accompanying text.

248. Cf. *South Dakota v. Dole*, 483 U.S. 203, 213 (1987) (O’Connor, J., dissenting).

## VI. THE CASE FOR CLARITY

A. *Principle: The Separation of Powers and Political Accountability*

Replacing the *Federal Savings* analysis with the rule suggested here would confine the legislature to its constitutionally intended role and give the courts a firm basis for restraint of the “mercurial discretion” that has unfortunately characterized home rule doctrine.<sup>249</sup> The design of the state constitution, as understood by its drafters, calls for the legislature to play a limited role, especially in local issues.<sup>250</sup> Many of the drafters even understood the restriction of legislative involvement in local issues to be the entire purpose of the convention.<sup>251</sup> They envisioned a legislature which devoted itself to “the perfecting of the Codes” and the decision of general questions about the rights and obligations of citizens, leaving matters of local concern and city government in the hands of cities.<sup>252</sup> The distinction between general laws and local laws would encourage that division of labor, and the democratic accountability it strengthens, by requiring the legislature to act through its own broad regulatory power rather than politically insulating itself by commandeering the apparatus of local government. Furthermore, by applying this distinction even-handedly, the courts could relieve themselves of the obligation to “adjust[] the conflict” between state and local governments “on [each case’s] own facts” without guidance from the constitution and confine itself to applying workable legal standards.<sup>253</sup>

B. *Practicality: Cooperative Localism*

In June of 1978, the people of California enacted the Jarvis-Gann initiative constitutional amendment, commonly known as Proposition 13, in response to excessive local property taxes that steadily rose due to inflationary pressures on the real estate market.<sup>254</sup> When the legality of the initiative was tested in the supreme court, a school district unsuccessfully asserted that it was unconstitutional as a fundamental change to the “basic

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249. Cal. Fed. Sav. & Loan Ass’n v. City of L.A., 54 Cal. 3d 1, 16 (1991).

250. See 2 SECOND CONVENTION, *supra* note 44, at 750 (Mr. Reynolds).

251. See, e.g., 3 *id.* at 1406–07 (Mr. Hager).

252. 2 *id.* at 750 (Mr. Reynolds).

253. *Federal Savings*, 54 Cal. 3d at 15–16.

254. See generally GRODIN ET AL., *supra* note 2, at 259.

governmental plan” of the constitution, which had to be initiated by the legislature.<sup>255</sup> While the court rejected the district’s argument,<sup>256</sup> a major change in California government did result from Proposition 13: state funding of local government increased to substitute for the funds lost as a result of the limitations.<sup>257</sup>

In light of this fiscal reality, the direct impact of *Trades Council* on the state and local power relationship will be minimal, because the holding of the case only applies to projects funded entirely out of local revenues.<sup>258</sup> But the indirect impact of reviving the original, textual meaning of the Municipal Affairs Clause would be to preserve the possibility of local independence. Some scholars of cooperative federalism have argued that the states are able to participate in the creation of policy despite the growth of the federal government primarily because they are capable of withdrawing their support and making implementation more difficult.<sup>259</sup> This kind of give and take, which Professor Heather Gerken calls “uncooperative federalism,” has enabled the states to resist and modify federal policy delegated to them for enforcement.<sup>260</sup> The ability of a peripheral government to resist central authority, according to Gerken, derives partly from the impracticality of the central authority micromanaging the enforcement.<sup>261</sup> But an additional source of potential influence derives from the split nature of the state official’s loyalties and the dual sources of his power.<sup>262</sup> The state official is answerable to the state electorate as well as the federal government, and he may draw upon the political and monetary resources of the state to support his resistance to federal power.<sup>263</sup> Both of these sources of power would be nullified, however, if the federal government was capable of commandeering

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255. *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 22 Cal. 3d 208, 224 (1978).

256. *See id.*

257. Barry Winograd, *San Jose Revisited: A Proposal for Negotiated Modification of Public Sector Bargaining Agreements Rejected Under Chapter 9 of the Bankruptcy Code*, 37 HASTINGS L.J. 231, 303 (1985) (“Revenues lost after Proposition 13 [were] replaced largely by surplus funds from the state treasury, and the actual shortfalls were much less than were anticipated . . .”).

258. *See* 54 Cal.4th at 559.

259. Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1270–84 (2009).

260. *Id.* at 1271–84.

261. *See id.* at 1266–67.

262. *See id.* at 1270–71.

263. *See id.*

the machinery of the state government to achieve its purposes in strict detail.<sup>264</sup> The state official would have no resources to employ that the central authority could not simply take from him or compel him to use in the way it sees fit.<sup>265</sup> The same fate would befall cities if the courts do not sustain their right to withhold their cooperation from state programs like the prevailing wage law for their own reasons.

## VII. TRADES COUNCIL AND SB7

The California Supreme Court, applying the *Federal Savings* analysis, found that the Public Wage Rate Act could not be enforced against a charter city.<sup>266</sup> What remains unclear is whether it would find SB7 unconstitutional under that analysis. However, if the court adopted the rule proposed in this Comment, derived from the text, purpose, and theory of the clause itself, both cases would be clear. The court should hold that the Public Wage Rate Act could not be enforced against a charter city because it would be an unconstitutional commandeering of the city government's contracting authority. And it should hold that SB7 is unconstitutional because it is a coercive and punitive funding condition intended to dragoon charter cities into compliance.

### A. *The Legislative Overreach of SB7*

On October 13, 2013, Governor Brown approved Senate Bill 7, a legislative response to the holding in *Trades Council*.<sup>267</sup> The statute was passed specifically in response to that case<sup>268</sup> and provides that “[a] charter city shall not receive or use state funding or financial assistance for a construction project if the city has a charter provision or ordinance that authorizes a contractor to not comply with the provisions of this article on any public works contract.”<sup>269</sup> The statute also repeats the economic justifications for the prevailing wage law, citing the enhancement of wages and training opportunities to support the construction industry and maintain

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264. *See id.*

265. *See id.*

266. *See supra*, notes 136–45 and accompanying text.

267. 2013 Cal. Stat. 794 (SB7), *codified at* CAL. LAB. CODE §1782 (2014).

268. *See id.* at §1(f).

269. CAL. LAB. CODE §1782(a).

middle-class jobs.<sup>270</sup> It asserts that some charter cities do comply with the prevailing wage law and that those cities provide a state-wide benefit that justifies providing funding to them only and not to cities that do not.<sup>271</sup> This is referred to as a “financial incentive”<sup>272</sup> and asserted to be a minor and justifiable burden. The League of California Cities disagrees. When the governor signed the bill, the League issued a press release declaring that the important issue is not the value of the prevailing wage law but “whether the legislation undermines the constitutional powers that California voters more than 100 years ago conferred on charter cities and their voters alone.”<sup>273</sup> That is the issue, and the resolution of that issue may turn on how the court articulates the applicable law.

*B. Analyzing SB7 Under Federal Savings*

The first issue in applying the *Federal Savings* analysis to the statute is whether it “can be characterized as” a municipal affair.<sup>274</sup> Because it purports only to determine which cities the state wishes to provide funds to, the state may argue that no municipal affair is involved. Just as the use of municipal funds is a municipal affair, the use of state funds is a matter of statewide concern.<sup>275</sup> However, to assert that this statute is merely about legislative funding priorities is pure chicanery. The only way it affects the state’s spending priorities is to make the implicit judgment that coercing charter cities into foregoing their constitutional authority is a higher priority than distributing public works funding according to actual infrastructural needs. For this reason, the court should find, even under the *Federal Savings* analysis, that the statute concerns a municipal affair. It is clearly intended to overturn *Trades Council*’s holding by statute, and to allow it to do so would be to subordinate the state constitution to the legislature.

But the legislature does not always broadcast its intent to undo a

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270. 2013 Cal. Stat. 794, §1(a)–(d).

271. *Id.* at §1(g)–(j).

272. *Id.* at §1(j).

273. Press Release, League of California Cities, Statement on Governor Brown's Signing of SB 7 (Steinberg) (Oct. 14, 2013), available at <http://www.cacities.org/Top/News/Press-Releases/2013/October/League-of-California-Cities%E2%80%99-Statement-on-Governor> [hereinafter Press Release].

274. *State Bldg. & Constr. Trades Council of Cal. v. City of Vista*, 54 Cal. 4th 547, 557 (2012).

275. *Id.* at 561–62.

constitutional decision as it has done in this case.<sup>276</sup> Applying the rule proposed in this Comment, the court could protect constitutional home rule even in a less clear case.

### C. Analyzing the Public Wage Rate Act Under the Proposed Rule

If the court had applied the proposed rule in deciding *Trades Council*, the result would have been the same. The application of the Public Wage Rate Act to charter cities would be unconstitutional for two reasons. First, the prevailing wage law, as applied, would constitute a local law. At first glance, it may appear that the act is a general law, because it concerns contractual obligations—a valid subject of general legislation.<sup>277</sup> But the act does not in fact concern the law of contracts, it concerns government contracts *qua* government contracts—the ways in which government contracts differ from private contracts.<sup>278</sup> The rationale of such legislation is not to enable bargaining between market participants, but to restrain public market participants so that “government contractors [are] not . . . allowed to circumvent locally prevailing labor market conditions by importing cheap labor from other areas.”<sup>279</sup> The case is distinguishable from the statute upheld in *Ex parte Braun*, because while that law established the right of all persons within the state to be free of taxation upon their occupation, the Prevailing Wage Act directs the actions of public agencies only and has no general application to all the people of the state.<sup>280</sup> As applied to state agencies, it is clearly a general law, applicable beyond the territory of any city. But as applied to charter cities, it is merely a law “general in form”<sup>281</sup> that concerns the internal affairs of the city and thus falls within the

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276. 2013 Cal. Stat. 794, §1(f).

277. See *Thomason v. Ashworth*, 73 Cal. 73, 92 (1887) (McKinstry, J., dissenting) (listing among the proper subjects of general legislation “the mode of contracting”).

278. See CAL. LAB. CODE § 1720 (West 2013).

279. *Indep. Roofing Contractors of Cal., Inc. v. Dep’t of Indus. Relations*, 23 Cal. App. 4th 345, 356 (1994) (quoted in *State Bldg. & Constr. Trades Council of Cal. v. City of Vista*, 54 Cal. 4th 547, 555 (2012)).

280. Compare *Ex parte Braun*, 141 Cal. 204, 219 (1903) (Beatty, C.J., dissenting), with *Trades Council*, 54 Cal. 4th at 589 (Liu, J., dissenting). On this same theory, the court could have reached the result it did in *Federal Savings*, because in that case the law merely established the rights of private parties to be free of taxation in excess of the state income tax. See *Cal. Fed. Sav. & Loan Ass’n v. City of L.A.*, 54 Cal. 3d 1, 6–7 (1991).

281. *Popper v. Broderick*, 123 Cal. 456, 461 (1899).

narrowest proposed definition of municipal affairs.<sup>282</sup>

The act is also unconstitutional under the rule against commandeering. Even the *Trades Council* dissenters admitted what in substance the prevailing wage law does:

[T]he Legislature has chosen to influence [construction industry] wages through the market-based approach of *directing the purchasing power of public entities* to support union-level wages. . . . [This] represents a legislative judgment that direct regulation of private labor markets is not necessary to accomplish the statute's goals given the substantial role that public works projects play in influencing private sector construction workers' wages and in supporting apprenticeship programs.<sup>283</sup>

This is the real issue regarding the Prevailing Wage Act. While the state may choose to use its own money to achieve its economic policy goals rather than enact burdensome regulation on the private sector, it may not choose to use the resources of *another government* to achieve those goals.<sup>284</sup> Freedom from this kind of commandeering is “the heart of what it means to be an independent governmental entity.”<sup>285</sup> As the League of California Cities has argued,<sup>286</sup> the state asserts this very principle when defending its own independence, as demonstrated by its recent complaint against the United States Department of Labor.<sup>287</sup> In its complaint, the state accuses the federal government of presenting “California with a Hobson’s choice—change its pension reform legislation or forgo more than \$1 billion of federal transit funds,” which “undermine[s] the independent fiscal and legislative sovereignty of California . . . .”<sup>288</sup> In that case, the state correctly ascertains the issue: “Only California elected officials may spend California's money.”<sup>289</sup> The same principle applies to charter cities.

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282. See *Fragley v. Phelan*, 126 Cal. 383, 387 (1899) (Garoutte, J.) (plurality opinion).

283. 54 Cal. 4th at 587–89 (Liu, J., dissenting) (emphasis added).

284. See *id.* at 562 (majority opinion).

285. *Id.*

286. See Press Release, *supra* note 273.

287. Complaint, *California v. United States Department of Labor* (13-CV-02069), 2013 WL 5548885 (E.D. Cal. Oct. 4, 2013).

288. *Id.* at ¶94.

289. *Id.* at ¶97.

*D. Analyzing SB7 Under the Proposed Rule*

Because the holding of *Trades Council* applies only to projects funded entirely without state support, the legislature is fully capable of achieving its substantive goal by working cooperatively with local governments and providing the funds necessary to pay the higher wage rates.<sup>290</sup> But SB7, the recently passed legislation designed to enforce the prevailing wage law against charter cities, opts instead for fiscal coercion— withholding revenue from taxes paid by all taxpayers unless the city capitulates to terms the state could not have forced on them by statute. Applying the restriction on funding conditions set by Congress, the Supreme Court recently found a similar provision unconstitutional.<sup>291</sup> The California Supreme Court, in defending a similar constitutional doctrine, should reach a similar result. For the state to legitimately place conditions on funds, those conditions should actually relate to the use of the funds.

## VIII. CONCLUSION

While it protected the home rule autonomy of the City of Vista in *Trades Council*, the California Supreme Court continues to interpret the Municipal Affairs Clause in a case-by-case fashion that undermines certainty and the rule of law.<sup>292</sup> Justice MacFarland’s prophecy in *Ex parte Braun* has proven self-fulfilling, and the court since *Federal Savings* has not attempted to ground its analysis in the clause itself.<sup>293</sup> Instead, it gives deference to the legislature and decides each case on its own facts.<sup>294</sup> But the history of California’s constitution demonstrates that it was skepticism of the

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290. *See id.*

291. Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2607 (2012) (“Nothing in our opinion precludes Congress from offering funds under the Affordable Care Act to expand the availability of health care, and requiring that States accepting such funds comply with the conditions on their use. What Congress is not free to do is to penalize States that choose not to participate in that new program by taking away their existing Medicaid funding.”)

292. *See supra* notes 124–65 and accompanying text.

293. Cal. Fed. Sav. & Loan Ass’n v. City of L.A., 54 Cal. 3d 1, 16 (1991) (“The idea that the content of ‘municipal affairs’ is indefinite in its essentials is one that has taken root in our cases on the subject.”); *Ex parte Braun*, 141 Cal. 204, 214 (1903) (McFarland, J., concurring) (“[N]o doubt, in the future each case involving the question will be decided on its own facts, without an attempt at generalization.”).

294. *See State Bldg. & Constr. Trades Council of Cal., AFL-CIO v. City of Vista*, 54 Cal. 4th 547, 557–58 (2012).

legislature and the desire for settled, clear, and expansive protection of local self-government that motivated the creation of the Constitution of 1879 and the Municipal Affairs Amendment in 1896.<sup>295</sup> The court once attempted to interpret the clause based upon the people's intent, and it may do so again.<sup>296</sup> Guided by the text, purpose, and political theory of the Municipal Affairs Clause, the court has the obligation to preserve California's system of divided sovereignty and ensure that the people's right to local self-government is preserved by the constitution they have framed for its preservation.<sup>297</sup>

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295. *See supra* notes 60–110 and accompanying text.

296. *See supra* notes 79–110 and accompanying text.

297. *See supra* notes 167–253 and accompanying text.

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