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Local Constitutions

Nestor M. Davidson

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Local Constitutions

Nestor M. Davidson*

Municipal charters are the forgotten constitutions of our federal system. Scholars generally understand our democracy to be governed by federal and state constitutions, but there is a third, almost entirely ignored realm of constitutional law and practice that lives at the local-government level, embodied in the charters that govern cities, counties, and towns. Engaging these foundational documents is critical. In an era of political gridlock and national polarization, with cities and other local governments increasingly grappling with policy concerns once considered state, federal, or even international responsibilities, the legal institutions that govern local democracy merit newfound scrutiny.

Although municipal charters serve many of the functions that constitutions perform at other levels of government—delineating public institutions and articulating areas of “higher” law—legal scholars rarely take them seriously as constitutional texts. This Article argues that foregrounding the constitutional nature of municipal charters provides new theoretical insights into local governance and the role that local governments play in our political order. Like the federal Constitution, charters can be an important locus for constitutional meaning and civic identity, rendering fundamental choices about governmental structure, political process, and individual rights more salient and doctrinally significant.

Understanding municipal charters as constitutions, in turn, carries important normative implications. Properly framed, charters can reinforce the contested nature of local governments as democratic polities, rather than administrative arms of the states or quasi-private service providers, at a time when the democratic underpinnings of localism are under strain. Improving charter constitutionalism can also serve to legitimate cities and other local governments by furthering rule-of-law values, such as transparency and stability.

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A newfound appreciation of the conceptual and normative potential of municipal charters, finally, suggests pathways for reforming the law and practice surrounding these instruments. This Article thus proposes pragmatic innovations in how local governments and the states can approach charters, emphasizing the centrality of inclusive process in ratifying and amending charters at what are, ultimately, vital local constitutional moments.

INTRODUCTION.....	841
I. MUNICIPAL CHARTERS IN HISTORY AND CONTEMPORARY PRACTICE.....	847
A. Charters and the Transformation of the Municipal Corporation.....	848
1. <i>Origins in English Legal History</i>	848
2. <i>The Early American Divergence in Municipal Identity</i>	850
3. <i>Charters and the Legacy of Home-Rule Reform</i>	852
B. The Varied Modern Law of Municipal Charters	855
1. <i>Adoption, Modification, and the Form of Charters</i>	856
2. <i>Legal Implications of Charter Adoption</i>	861
C. Themes in Charter Content	864
1. <i>Powers and Boundaries</i>	865
2. <i>Governmental Structure and Administration</i>	865
3. <i>Political Process, Political Rights, and Local Direct Democracy</i>	866
4. <i>Sub-Localism</i>	867
5. <i>Individual Rights</i>	868
6. <i>Other Provisions</i>	869
II. CONSTITUTIONALISM AND “SUBCONSTITUTIONALISM”.....	870
A. Function, Meaning, and Value in Constitutionalism	871
1. <i>What Constitutions Do—Of Constitutional Function</i>	871
a. <i>Structure, Form, and the Allocation of Power</i>	871
b. <i>Framing the Political Process</i>	872
c. <i>Rights and the Fundamentality of Constitutional Law</i>	873
2. <i>What Constitutions Mean—Salience and Civic Identity</i>	875
3. <i>The Contested Value of Constitutions</i>	877
B. “Sub”-Constitutions and “Subconstitutionalism”	879
III. ON THE POSSIBILITIES OF CHARTERS AS LOCAL CONSTITUTIONS	881
A. Charters and Local Governments as Democratic Polities.....	882
1. <i>The Contested Nature of Local Governments</i>	882
2. <i>Democratic Legitimacy, Local Power, and Charters</i>	885
B. Charters as Focal Points for Democratic Deliberation.....	887
1. <i>Constitutional Moments and Community Identity</i>	887
2. <i>Defining “Higher Law” at the Local Level</i>	890
3. <i>Charters in Local Governance and the Rule of Law</i>	892

C.	Normative Concerns with Localism and the Limits of the Constitutional Analogy	893
1.	<i>Reinforcing Local Parochialism or Simply Irrelevant?</i>	894
2.	<i>What Distinguishes Charters in Constitutional Terms</i>	896
IV.	A REFORM AGENDA FOR CHARTERS	898
A.	Avenues for Pragmatic Reform	898
1.	<i>Simple Rules for Complex Instruments</i>	898
2.	<i>The Importance of Local Constitutional Process</i>	900
B.	Coda: A Scholarly Agenda for Local Constitutions	902
	CONCLUSION	904
	APPENDIX	906

Introduction

Among the understudied legal institutions of local governance—and there are many¹—arguably the most overlooked in the literature is the municipal charter. If one can imagine studying federal or state constitutional law without engaging in any depth with the theory and substance of actual federal or state constitutions themselves, that essentially describes the discourse in local-government legal scholarship.²

1. See Nestor M. Davidson, *Localist Administrative Law*, 126 YALE L.J. 564, 574–79 (2017) (highlighting gaps in the literature on local-government legal-institutional structure); see also Richard C. Schragger, *Can Strong Mayors Empower Weak Cities? On the Power of Local Executives in a Federal System*, 115 YALE L.J. 2542, 2546 (2006) (noting the absence of legal scholarship on local executives).

2. There is a modest literature on specific city charters, most notably on the charter of New York City, e.g., John Avlon, *Change the Rules and You Change the Game: That's Why Charter Revisions Matter in New York City*, 58 N.Y.L. SCH. L. REV. 25 (2013–2014); Richard Briffault, *The New York City Charter and the Question of Scale*, 42 N.Y.L. SCH. L. REV. 1059 (1998); Chicago, e.g., MAUREEN A. FLANAGAN, CHARTER REFORM IN CHICAGO (1987) (describing the history—and consequences—of Chicago's failed attempt to adopt its own charter in the Progressive Era); and Los Angeles, about which Dean Chemerinsky has published a pair of delightful essays reflecting on his experience as a “Framer” of the city's 1999 charter revision, Erwin Chemerinsky, *On Being a Framer: The Los Angeles Charter Reform Commission*, 2 GREEN BAG 2D 131 (1999); Erwin Chemerinsky, *Further Reflections of a Framer: The Los Angeles Charter Reform Experience*, 3 GREEN BAG 2D 125 (1999); see also RAPHAEL SONENSHEIN, THE CITY AT STAKE: SECESSION, REFORM, AND THE BATTLE FOR LOS ANGELES (2004) (describing the Los Angeles city charter revision process).

Legal scholars, moreover, at times mention municipal charters in passing in exegeses of local legal identity or in analyses of specific local-government structural features. See, e.g., Schragger, *supra* note 1, at 2547–50 (discussing charters in the context of local executive power); David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2289–2300 (2003) (discussing charters as they pertained to home-rule reform); Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 10, 85, 104 n.458 (1990) [hereinafter Briffault, *Our Localism: Part I*] (noting the role of charters in passing); Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1087, 1092–95, 1098 (1980) (briefly exploring the historical link between charters and municipal identity). None of the extant literature, however, directly engages with charters as such or explores their constitutional dimensions.

This is a significant and unfortunate oversight. The municipal charter has the potential to be as fundamental to our understanding of local government as constitutions are to our conceptions of federal and state governments. In functional terms, charters play critical roles in structuring public institutions, framing political process, and demarcating areas of “higher” law at the local level. Equally important, however, charters can serve as focal points for public meaning and democratic legitimacy in ways that echo other constitutions. Understanding the nature of charters is critical as cities and other local governments increasingly take on responsibility for what were once considered state, federal, or even international policy concerns across a diverse range of domains.³

The varied and complex law of municipal charters—rules on adoption and amendment as well as the legal force that charters carry—and the actual content of these instruments have not been subject to sustained scholarly examination. Charters, however, carry a rich historical pedigree,⁴ and their contemporary practice reveals many nuances.⁵ Familiarly, charters can grant

3. The increasing centrality of cities and other local governments as policy actors—addressing issues as diverse as economic development, environmental regulation, public health, antidiscrimination, firearm safety, immigration, the sharing economy, and new technology, among others—has been well-documented in the scholarly literature. *See, e.g.*, Katrina M. Wyman & Danielle Spiegel-Feld, *The Urban Environmental Renaissance*, 108 CALIF. L. REV. 305 (2020) (exploring the role of cities as environmental lawmakers); Richard C. Schragger, *The Attack on American Cities*, 96 TEXAS L. REV. 1163 (2018) (discussing cities’ attempts to regulate in a wide variety of areas and states’ efforts to preempt those local regulations); Lori Riverstone-Newell, *The Rise of State Preemption Laws in Response to Local Policy Innovation*, 47 PUBLIUS 403 (2017) (same). The importance of cities as policy actors has also been a staple of recent popular discourse. *E.g.*, BRUCE KATZ & JEREMY NOWAK, *THE NEW LOCALISM: HOW CITIES CAN THRIVE IN THE AGE OF POPULISM* (2017); BENJAMIN R. BARBER, *IF MAYORS RULED THE WORLD: DYSFUNCTIONAL NATIONS, RISING CITIES* (2013).

4. *See infra* subpart I(A). For example, the *Carta Civilibus Londonarum*, the City of London’s charter, dating back to the year 1100, served as the model for early American charters. DALE KRANE, PLATON N. RIGOS & MELVIN B. HILL JR., *HOME RULE IN AMERICA: A FIFTY-STATE HANDBOOK* 7 (2001). Historical conflicts with the British monarchy and Parliament over London’s charter, moreover, shaped early understandings of local sovereignty in the United States. *See* Barron, *supra* note 2, at 2277 (“The great seventeenth-century battle over the revocation of London’s city charter . . . remained a live precedent to many early-nineteenth-century Americans.”). In U.S. history, the development of the city charter reflects the corporate roots of municipal law and a parallel history of the transformation of municipal corporations into recognizably public entities. *See* Frug, *supra* note 2, at 1099–1109 (discussing the development of the public–private distinction in American corporate law); James E. Herget, *The Missing Power of Local Governments: A Divergence Between Text and Practice in Our Early State Constitutions*, 62 VA. L. REV. 999, 1005 (1976) (observing that early American law “treated units of local government as corporations”).

5. Among the questions relevant to understanding the law of municipal charters are who are authorized to draft and adopt them, by what process, under what state constitutional or statutory constraints, how they are amended, and perhaps most importantly, what legal implications flow from their adoption. As the Article outlines, there is significant variation across the states on these questions. *See infra* subpart I(B). For example, charters are not legally mandatory in all states; indeed, some states do not allow cities to adopt their own charters and many local governments do

local governments powers and immunities from oversight not shared by non-charter municipalities.⁶ Although this home-rule valence has been the primary focus of the modest extant literature,⁷ charters perform much broader functions. These instruments, for example, structure public institutions and allocate authority within local governments as well as between municipalities and their residents. Municipal charters thus delineate local separation of powers (or its frequent absence), create administrative bodies and channel legislative delegation, and set the terms of local political process. Perhaps surprisingly, some charters also provide local protection for individual rights, many of which have no parallels in state or federal constitutional law.⁸

Shifting from the descriptive to the conceptual, how might we best understand the functional role and meaning of municipal charters in constitutional terms? Although there is much theoretical and normative debate in the literature on constitutionalism,⁹ there is at least a rough consensus that constitutions mark a realm of lawmaking paradigmatically more insulated from the normal political process than ordinary legislation—intentionally harder to adopt and correspondingly harder to amend.¹⁰ That

not have charters. Where a community is not authorized to adopt a charter or is authorized but has chosen not to do so, state law generally defines the structure and authority of that local government. See 2A EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 9:7 (3d ed. 2006) (outlining different kinds of municipal charters in general).

6. See *infra* section I(B)(2).

7. See *supra* note 2. Home rule generally refers to local-government legal authority under state constitutional and statutory law, including the formal power to act as well as immunity from state interference with local policy and governance choices. KRANE ET AL., *supra* note 4, at ix. Home rule, which varies significantly from state to state and even within states for different types of local governments, is often contrasted with a narrower view of local legal authority known as “Dillon’s Rule,” after the influential nineteenth-century Iowa jurist Judge John F. Dillon. Dillon’s Rule asserts that local power must be explicitly delegated from the state and that such delegations should be narrowly construed. See *id.* at 9–10 (describing Dillon’s Rule); Barron, *supra* note 2, at 2278 (same); Briffault, *Our Localism: Part I*, *supra* note 2, at 8 (same).

8. Political rights include voting, ballot access, and local procedural protections in legislative and administrative contexts. See, e.g., *MacMann v. Matthes*, 843 F.3d 770, 775 (8th Cir. 2016) (discussing referenda processes and resident rights under the Columbia City Charter and the Missouri Constitution). On examples of individual rights provisions in municipal charters, including local-level bills of rights, see *infra* text accompanying notes 130–34.

Some charters contain an array of other provisions, often with little clarity as to what distinguishes “charter-worthy” lawmaking from ordinary local ordinances. In this way, municipal charters bear some semblance to many state constitutions, which are notoriously “statute-like” and amended with relatively great frequency. See Bruce E. Cain & Roger G. Noll, *Malleable Constitutions: Reflections on State Constitutional Reform*, 87 TEXAS L. REV. 1517, 1524, 1542 (2009) (commenting on the frequency of state constitutional amendments and observing that state constitutions often “includ[e] policies that would normally be found in statutes”).

9. See *infra* subpart II(A).

10. See Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 663 (2011) (arguing that “the institutional arrangements that place power in the hands of . . . [constitutionally empowered] decisionmakers must themselves be

political insulation, in turn, implies a different role for the judiciary in applying what can be characterized as fundamental law, whether in terms of political structure or individual rights.¹¹ Although local governments are largely ignored in constitutional discourse,¹² charters too can serve this traditional constitutional function of enshrining “higher” law, albeit at the local level.¹³

Foregrounding the constitutional nature of municipal charters carries normative implications. Charter constitutionalism, first, can reinforce the public and democratic nature of local governments at a moment when that identity is increasingly contested.¹⁴ Municipalities have long had an

relatively stable, not subject to revision or subversion by the opponents of constitutionally desirable outcomes”). *But see* Christopher Serkin & Nelson Tebbe, *Is the Constitution Special?*, 101 CORNELL L. REV. 701 (2016) (noting and critiquing the widespread view that constitutional law is distinctive in the link between the process of ratification and democratic legitimacy). In some states, “charters” are understood to include all legislation related to the municipal corporation, whether specified in a single document or not. *See, e.g.*, *Lucas v. Bd. of Cty. Rd. Comm’rs*, 348 N.W.2d 660, 667 (Mich. 1984) (“[T]here is ample authority for the proposition that statutory provisions not mentioned per se in a municipal charter are automatically read into the charter and become a part thereof.”). One consequence of conceiving of charters in constitutional terms would be recognizing the value of narrowing this doctrine to make clear that only what appears in a clearly delineated charter adopted by a polity as such should be considered fundamental. *See infra* subpart III(B).

11. *Cf. People v. Morris*, 13 Wend. 325, 334 (N.Y. Sup. Ct. 1835) (describing local charters as bills of rights).

12. As Ran Hirschl has recently argued:

Cities feature centrally in canonical political theory texts (e.g., Plato’s *Republic*, Machiavelli’s *The Prince*, and Marx and Engels’s *The German Ideology*) as well as in utopian and avant-garde social thought (e.g., Campanella’s *The City of the Sun*, Charles Fourier’s imagined community of *Phalanstère*, the Paris Commune (1871), or Walter Benjamin’s *The Paris Arcades Project*). Novel thinking about urbanization and cities is prevalent throughout the human sciences; Henri Lefebvre’s *Le droit à la ville*, Saskia Sassen’s work on global cities, Paul Krugman’s theorization of megacities as economies of scale, Richard Florida’s ideas about cities as magnets for the creative classes, and Benjamin Barber’s *If Mayors Ruled the World* are merely a few examples of this scholarly richness. By stark contrast, very little of this intellectual flurry has penetrated constitutional law, let alone comparative constitutional law, where the city is virtually nonexistent.

RAN HIRSCHL, *CITY, STATE: CONSTITUTIONALISM AND THE MEGACITY* 9–10 (2020).

13. The literature on the federal Constitution, vast and ever growing, hardly needs a “*see, e.g.*” citation to acknowledge. There is also a rich, burgeoning literature on state constitutions and state constitutional law, however, and here a small sample of the literature bears mention. *See, e.g.*, EMILY ZACKIN, *LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA’S POSITIVE RIGHTS* 2–3 (2013) (rejecting the view that the United States lacks a “positive rights” tradition and urging readers to look instead to state constitutions, which “have long mandated active government intervention in social and economic life”); G. ALAN TARR, *UNDERSTANDING STATE CONSTITUTIONS* 1–3 (1998) (underscoring the importance of state constitutions in American life). This literature is explored in greater depth throughout this Article. *See infra* Part II.

14. *See generally* Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995 (2018) (observing that in recent years, states have frequently and aggressively preempted local-government policies); Erin Adele Scharff, *Hyper Preemption: A Reordering of the State–*

inherently ambiguous legal status—at times viewed as arms of the state¹⁵ or as quasi-private service providers.¹⁶ As states aggressively limit or block local policies, cities are grappling with ways to reinforce their regulatory authority to confront an array of challenges.¹⁷ Although not dispositive, elevating charters as *constitutions* has the potential to reinforce and legitimate the public nature of local governments, helping local governments claim the mantle of democratic polity more forcefully.

A second normative implication of a constitutional understanding of charters is their potential to serve as a focal point for democratic deliberation and civic identity. The literature on constitutionalism underscores ways in which these foundational instruments shape legal cultures.¹⁸ Having a forum and a process to delineate a realm of higher law at the local level—in terms of structure, political process, and rights—not only can signal to courts the distinctive importance of provisions embodied in charters but also can channel a community’s self-determination.¹⁹ It can also reinforce rule-of-law values by rendering governance choices more salient and stable.²⁰ Municipal

Local Relationship?, 106 GEO. L.J. 1469 (2018) (same); Schragger, *supra* note 3 (same). The advent of the coronavirus pandemic has also sharpened conflicts between local governments and states around public health. See, e.g., Lindsay F. Wiley, *Democratizing the Law of Social Distancing*, YALE J. HEALTH POL’Y L. & ETHICS, Dec. 2020, at 50 (discussing preemption of local authority among the structural constraints on pandemic responses); see also Complaint for Declaratory and Injunctive Relief at 9, *Kemp v. Bottoms*, No. 2020CV338387 (Fulton Cty. Super. Ct. July 16, 2020) (asserting in a lawsuit by the Georgia governor against the Atlanta mayor and other local officials that the governor’s pandemic-emergency executive orders preempted the city’s public health measures, including a mandate on mask-wearing).

15. See, e.g., Aaron Saiger, *Local Government as a Choice of Agency Form*, 77 OHIO ST. L.J. 423, 431 (2016) (describing local governments “as ‘agents’ of the state”).

16. See generally Gerald E. Frug, *City Services*, 73 N.Y.U. L. REV. 23 (1998) (discussing local service provision). This quasi-private conception of local governments echoes their shared origins with other corporate forms. Frug, *supra* note 2, at 1095–98; see also HENDRIK HARTOG, PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730–1870, at 2 (1983) (describing municipalities as corporations created “solely for the purpose of providing subordinate administration”). Indeed, it is still common to talk about “municipal incorporation” and label cities by their corporate names.

17. Municipal regulatory identity has traditionally centered around issues such as education and land use. Briffault, *Our Localism: Part I*, *supra* note 2, at 99. But in recent decades, cities are increasingly addressing a much broader array of policy challenges. See *supra* note 3.

18. See HIRSCHL, *supra* note 12, at 16 (“From a normative and poetic standpoint, constitutions, constitutional institutions, and constitutional jurisprudence do more than allocating competences, powers, and rights;” rather, “[t]aken together, they define and signal who we are as a political community, what moral and political ideals we cherish and strive for, and how we wish for others to reflect upon our polity”).

19. See *infra* subpart II(B).

20. It is certainly fair to raise concerns about the entrenchment of structural and policy choices that can arise from an instrument that embodies the counter-majoritarian nature of constitutional law. See Christopher Serkin, *Public Entrenchment Through Private Law: Binding Local Governments*, 78 U. CHI. L. REV. 879, 887–88 (2011) (defining *entrenchment* as an action that “limits the policy choices available to future governments”). In refining and sharpening local

charters should thus be understood less as public analogues to the corporate charters with which they share common origins²¹ and much more as loci for public meaning.

There are limits, of course, to the analogy between municipal charters, on one hand, and state constitutions and the federal Constitution (as well as other national constitutions) on the other. Charters are creations of state law even if they have independent legal significance within local governments.²² As such, the scope of charters is materially defined by law external to the polities that adopt them, and charter law is often subject to state override.²³ Charters are also nonmandatory—it is possible (and not entirely uncommon) for municipalities not to adopt their own charters or for states not to authorize such adoption.²⁴ But all these distinctions are contingent and worth interrogating.

In that light, then, this Article's conceptual and normative frame suggests pathways for the pragmatic reform of charter law and practice. Despite significant institutional variety at the local level, taking charters seriously as constitutions suggests a few simple rules cities should consider when adopting or amending these texts.²⁵ Charters should be clearly identifiable, as such, to focus their salience; relatively parsimonious to mark their content as distinctive; and concerned with recognizably fundamental questions across structure, political process, and rights.²⁶ Procedurally,

governance, charters could also exacerbate the risk of parochialism and exclusion at the local level, a perennial concern in debates about local legal empowerment. But there are targeted ways to address these concerns, and there are clear benefits to transparent local constitutionalism. *See infra* subpart III(C).

21. Frug, *supra* note 2, at 1095–98; Herget, *supra* note 4, at 1004–06.

22. Alan Tarr has noted:

[I]n most federal systems, the federal constitution is an “incomplete” framework document in that it does not prescribe all constitutional processes and arrangements. Rather, it leaves “space” in the federal system’s constitutional architecture to be filled by the constitutions of its sub-national units, even while it sets parameters within which those units are permitted to act.

G. Alan Tarr, *Explaining Sub-National Constitutional Space*, 115 PENN ST. L. REV. 1133, 1133 (2011). Much the same can be said for the relationship between state law and the local constitutionalism embodied in municipal charters, although there are notable differences in what might be considered the *sub-sub-national* constitutional space. *See infra* section III(C)(2).

23. State constitutions are, of course, subordinate to federal law under the Supremacy Clause, U.S. CONST. art. VI, cl. 2, so this is a difference of degree rather than of kind.

24. The fact that many local governments do not have self-adopted charters itself presents a puzzle. Why would a local government, given a choice, not adopt a charter and announce itself as an independent public governing body? The reasons are hard to discern definitively, but the cost of maintaining the structures that come with charters may outweigh any benefits that flow from additional authority and customization. For further discussion, see *infra* subpart III(A).

25. *See infra* subpart IV(A).

26. Moreover, not only should local governments that have adopted charters attend more fully to them, elevating and clarifying their role as fundamental law, but local governments that have not adopted charters should do so, to the extent they are authorized.

charter adoption and amendment should be inclusive, grounded in expertise, and infrequent, reflecting the gravity of the constitutional moment at issue.²⁷

This Article, in sum, seeks to make four contributions to the literature and proceeds accordingly. Part I provides an empirical analysis of the patterns of adoption, function, and content of contemporary municipal charters—a grounding absent from current scholarship. From this, Part II provides a new conceptual framework for understanding the roles that charters can play in local governance: guiding local deliberations about governmental structure, marking community identity, and enshrining fundamental values. This conceptual framework then yields normative claims, elaborated in Part III, grounded in the democratic legitimating potential of constitutionalism in local governance. And the Article concludes in Part IV by building on these foundations to outline potential reforms to charter practice.

This is, no doubt, great weight to put on a single legal instrument.²⁸ However, if we are to take local democracy seriously—and we should, now more than ever, when cities are leading so much of the national policy discourse in the face of significant legal headwinds—then legal scholars must attend to the institutional structures of the level of governance closest to the governed.²⁹ In that task, the too-often-neglected local constitution, the municipal charter, is a vital core.

I. Municipal Charters in History and Contemporary Practice

Understanding municipal charters as constitutions requires an empirical foundation. This Part thus begins with a review of the historical development of charters in Anglo-American law. It then turns to the ways in which state and local law address charters today, focusing on charter authorization as well as the legal consequences of charter adoption. This Part, finally, rounds

27. See *infra* subpart IV(A).

28. On the necessity of modesty regarding claims about the value of constitutions, Walton Hamilton's entry on constitutionalism for the *Encyclopedia of the Social Sciences* is an apt reminder: "Constitutionalism is the name given to the trust which men repose in the power of words engrossed on parchment to keep a government in order." Gerhard Caspar, *Constitutionalism* 3 (U. Chi. L. Sch., Occasional Paper No. 22, 1987) (quoting Hamilton).

29. This Article at times uses *city* as a synecdoche for all local governments, but charters exist in municipalities of all sizes and counties as well. This Article should thus be read with sensitivity to scalar differences. For example, arguments from democratic legitimacy may play out differently in small towns, moderate-sized suburbs, and large global cities. Cf. Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 346–56 (1990) (exploring the "triangular relationship" among a city, its suburbs, and the state government). But there are sufficient unifying aspects to the role that charters play in all of these local governments to warrant isolating and elevating this particular aspect of local constitutionalism. The Article, moreover, focuses on local governments of general jurisdiction, bracketing other local bodies that do not play the same democratic role in governance. See generally George W. Liebmann, *The New American Local Government*, 34 URB. LAW. 93 (2002) (examining special districts and similar local entities).

out this groundwork discussion with a sampling of common provisions in contemporary charters to illustrate what these instruments actually contain.

A. *Charters and the Transformation of the Municipal Corporation*

Charters have been inextricably linked to the development of local-government law since at least the Norman Conquest. As this subpart outlines, the municipal charter was a critical element in the transformation of communities in England into genuine polities, and it likewise played a central role in the vicissitudes of local legal identity in the United States from the Founding through successive waves of home-rule reform.

1. *Origins in English Legal History.*—The *Magna Carta*, or Great Charter, has taken on the role of a foundational constitutional moment in Anglo-American legal history,³⁰ but in English history, municipal charters were also fundamental in establishing political rights and the allocation of authority in the long path out of feudalism. In 1066, William the Conqueror confirmed the special status of London granted under the Saxon kings, promising not to disturb the city’s ancient liberties,³¹ and in 1100, King Henry I formally recognized the city’s status in the *Carta Civilibus Londonarum*—the municipal charter of the City of London.³²

The *Carta Civilibus Londonarum* contained the seeds of local self-government, granting citizens the right to elect their sheriff, power to hold their own courts (while exempting them from all other courts), and protection

30. See Jill Lapore, *The Rule of History: Magna Carta, the Bill of Rights, and the Hold of Time*, NEW YORKER, Apr. 20, 2015 (highlighting the importance of the *Magna Carta* in American legal and political culture); see also MAGNA CARTA AND ITS MODERN LEGACY (Robert Hazell & James Melton eds., 2015) (collecting essays on the *Magna Carta*’s lasting influence).

31. The charter of 1066, which is still held in the London Metropolitan Archives (ref. COL/CH /01/001/A), was brief and to the point:

William the King greets William the Bishop and Gosfrith the Port Reeve, and all the burghers of London, both French and English, cordially. And I will have you know that I desire you to be worthy of all the laws that you were worthy of in King Edward’s day. And I will that every child be his father’s heir after his father’s death. And I will suffer no man to do you injury. God have you in His Holy Keeping.

WILLIAM BENNETT MUNRO, MUNICIPAL GOVERNMENT AND ADMINISTRATION 47 n.1 (1923). The Port Reeve or Portwarden was, at the time, the official charged with authority over the town (“port” in this sense meaning a place of trade, not a seaport)—essentially a proto-mayor. The official website of the City of London formerly noted, only slightly grandiosely, that “[t]hese few lines may have laid the foundation for the parliamentary democracy we have today and created a model for cantonal governance that the British Empire made global.” CITY OF LONDON, THE LONDON CHARTER OF LIBERTIES, <https://www.cityoflondon.gov.uk/things-to-do/london-metropolitan-archives/the-collections/Pages/london-charter-of-liberties.aspx> (webpage no longer available).

32. MUNRO, *supra* note 31, at 47; see also KRANE ET AL., *supra* note 4, at 7. When William the Conqueror took England in 1066, proto-local governments were in place. The Saxon *tun*, or township, run by the *tything*, an elected representative system of government, became the Norman *vill*, or village. JOHN J. CLARKE, A HISTORY OF LOCAL GOVERNMENT OF THE UNITED KINGDOM 8, 10 (1955).

from certain general duties and special exactions.³³ Among the concessions forced on King John in the *Magna Carta* in 1215 were a reaffirmation of London's rights and an expansion of royal protection for "liberties and free customs" to all townships.³⁴ During this period, municipal charters in England slowly began to protect local political communities and express the structural elements of their governance.³⁵

A critical turning point in the development of municipal charters in English legal history came with the attack by King Charles II on London's charter in the late seventeenth century.³⁶ The short version of this complicated history is that Charles was concerned that Parliament would bar his brother James, the Duke of York, from ascending to the throne because of James's Catholicism, and one way to influence the vote was to control the representatives to Parliament elected by the governing bodies of the boroughs. In 1682, Charles drew on a long-standing proceeding, the *quo warranto*—an action seeking forfeiture of a charter for violations of the document—alleging (successfully) that London had the temerity to impose tolls on goods coming to market in the city and to petition the King to summon Parliament.³⁷ The resulting forfeiture of London's charter paved the way for the surrender of many other borough charters under the threat of *quo warranto* proceedings in the reigns of Charles and James II.³⁸

33. MUNRO, *supra* note 31, at 47. In this regard, London's *Carta* tellingly addressed not only government structure, but it was also understood as a model of a grant of rights and liberties to the city's citizens. London was granted a new charter in 1191, extending local franchise to include the right to elect a mayor. English boroughs developed legal authority primarily around their roles as centers of trade, and the legal structures that governed English local-government law reflected this. See JON C. TEAFORD, *THE MUNICIPAL REVOLUTION IN AMERICA: ORIGINS OF MODERN URBAN GOVERNMENT 1650–1825*, at 6–15 (1975) (discussing the role of merchants in early English urban governance and the primacy of trade as a municipal regulatory focus).

34. MUNRO, *supra* note 31, at 48 n.1.

35. Charters—municipal and otherwise—had long been an instrument of royal prerogative, but concerns of local self-governance edged into their intersection for borough charters. For example, King Richard I, in the era before the *Magna Carta*, sold charters to fund crusades, exchanging revenue for a certain, albeit limited, modicum of local independence, such as courts free of royal jurisdiction. *Id.* at 48.

36. See generally JENNIFER LEVIN, *THE CHARTER CONTROVERSY IN THE CITY OF LONDON, 1660–1688, AND ITS CONSEQUENCES* (1969) (recounting the history of the attack on London's charter by Charles II).

37. JOHN SHORTT, *INFORMATIONS (CRIMINAL AND QUO WARRANTO), MANDAMUS, AND PROHIBITION* 147 (1888); see also LEVIN, *supra* note 36, at 49 (describing the judgment for forfeiture for an "illegal by-law" setting a toll and a "libellous Petition").

38. London technically surrendered its charter before judgment demanding its forfeiture could be enforced, seeking to preserve the legal fiction that it had not dissolved as a corporate body and thus could have its ancient liberties eventually returned by the sovereign. LEVIN, *supra* note 36, at 50–52. After the 1683 *quo warranto* decision, London was governed by a Royal Commission. The King appointed all officers—the lord mayor, sheriffs, and sixteen justices of the peace, among other city officials. *Id.* at 55.

In 1688, however, the Glorious Revolution ended James's reign, and the succeeding reign of William and Mary was marked by reversal of the London forfeiture as well as restoration of other municipal charters.³⁹ This established the principle that a municipal charter, once granted, could not be revoked by the crown,⁴⁰ although local governments in England—like cities today in most states—remained subject to legislative oversight.⁴¹

2. *The Early American Divergence in Municipal Identity.*—London's charter—and late seventeenth-century conflicts over its revocation and restoration—helped shape the colonial understanding of the nature of local governments,⁴² with the charter serving as the model for a number of early American charters.⁴³ At the time of the Founding, the basic concept of charters was relatively similar for colonies, cities, and companies;⁴⁴ although in substance, colonial local-government charters were tailored to their functions.⁴⁵ Indeed, Mary Bilder and Nikolas Bowie have argued persuasively that conflicts over charters—corporate, municipal, and colonial—were deeply influential in the development of a distinctive U.S. constitutional culture, including the institution of judicial review.⁴⁶

39. Frug, *supra* note 2, at 1094.

40. See SHORTT, *supra* note 37, at 147 (“The judgment against the corporation of the City of London was reversed as illegal and arbitrary . . . and it was declared . . . and enacted . . . that the mayor and commonalty and citizens should forever after continue a body corporate and without any seizure or forejudger of their franchises, liberties, or privileges on pretence of any forfeiture or misdemeanor.”).

41. See Frug, *supra* note 2, at 1094 (noting that after the Glorious Revolution, Parliament still had “absolute power to dissolve corporations,” including municipalities).

42. As David Barron has noted, the “great seventeenth-century battle over the revocation of London's city charter,” echoed as “a live precedent to many early-nineteenth-century Americans.” Barron, *supra* note 2, at 2277.

43. KRANE ET AL., *supra* note 4, at 7; see also TEAFORD, *supra* note 33, at 3 (noting the transplantation of Elizabethan municipal corporate form to “urban centers flanking the Hudson, the Delaware, and the James”).

44. HARTOG, *supra* note 16, at 185 (“One reason why there was no ‘law’ of municipal corporations [in early America] was because chartered cities were already part of an undifferentiated ‘law’ of corporations.”).

45. New York's 1686 charter, for instance, provided for a Common Council comprised of, for instance, aldermen who were elected by popular vote and a mayor. MUNRO, *supra* note 31, at 86, 88. The city's Common Council had the power to pass ordinances, provided they were not contrary to laws of England. *Id.* at 86–87.

46. See generally MARY SARAH BILDER, *THE TRANSATLANTIC CONSTITUTION: COLONIAL LEGAL CULTURE AND THE EMPIRE* (2004) (discussing colonial America's transatlantic legal culture); Nikolas Bowie, *Why the Constitution Was Written Down*, 71 STAN. L. REV. 1397 (2019) (exploring the foundations of U.S.-written constitutionalism in *quo warranto* litigation over the Massachusetts Bay Colony's charter); Mary Sarah Bilder, *Charter Constitutionalism: The Myth of Edward Coke and the Virginia Charter*, 94 N.C. L. REV. 1545 (2016) (examining early written constitutionalism in the American colonies, especially in letters patent); Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 YALE L.J. 502 (2006) (arguing that the institution of judicial review originated in English corporate law).

As Gerald Frug has extensively explored, however, the early post-Revolutionary American history of local-government law is a story of divergence between municipal corporations and private corporations, a divergence that continues to echo in the nature of the charters of each institution.⁴⁷ Private charters, and private corporations in general, eventually gained immunity from legislative revocation through a property-rights frame vindicated in the Supreme Court's *Trustees of Dartmouth College v. Woodward*⁴⁸ case.⁴⁹ At the same time, municipalities (and their charters) came to be understood as subordinate to the states as a legal matter, reversing what had been the understanding in at least some of the colonies about the local-state relationship.⁵⁰ As this formal subordination ripened in the nineteenth century to become the prevailing view of local legal identity, known as Dillon's Rule, courts drew on rules of construction for corporate charters in narrowly interpreting state delegations of authority to cities.⁵¹ As

47. Frug, *supra* note 2, at 1099–1109; *see also* HARTOG, *supra* note 16, at 3–4 (discussing the corporate origins of early American cities and the public-private divergence in corporate identity). James Herget notes that despite a prevailing understanding of the importance of written constitutionalism at the time of the Revolution, “the original state constitutions did not allocate any governmental power to local governments.” Herget, *supra* note 4, at 1002.

48. 17 U.S. (4 Wheat.) 518 (1819).

49. *See* Frug, *supra* note 2, at 1102–03 (discussing the development of the public-private distinction in corporate law and *Trustees of Dartmouth College*); *see also* JAMES WILLARD HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES, 1780–1970*, at 60 (1970) (discussing the accretive nature of the divergence between private and public corporations).

50. *See generally* Amasa M. Eaton, *The Right to Local Self-Government*, 13 HARV. L. REV. 441 (1900) (discussing colonial understandings of local government). The right to local self-government is often associated—in contrast to Dillon's Rule—with Thomas Cooley, who argued famously that the “right in the state is a right, not to run and operate the machinery of local government, but to provide for it and put it in motion.” *People ex rel. LeRoy v. Hurlbut*, 24 Mich. 44, 111 (Mich. 1871); *see also* David J. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 515–21 (1999) (explicating Cooley's approach to local governments). An important shift in local-government law in the immediate post-Revolutionary era was transfer of the power to charter from the executive (formerly a royal prerogative) to the legislative branch in the states. Charter issuance—and amendment—became ordinary state legislation. MUNRO, *supra* note 31, at 91.

51. 1 JOHN F. DILLON, *COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS* 448–50 (5th ed. 1911); *see also* HARTOG, *supra* note 16, at 183 n.14 (commenting on the Rule's corporate origin); Briffault, *Our Localism: Part I*, *supra* note 2, at 9 n.18 (discussing this history).

with the state wresting control of other instruments of local governance, states in the pre-home-rule-reform era enjoyed significant control over municipal charters.⁵²

3. *Charters and the Legacy of Home-Rule Reform.*—Much of the history of the development of local legal identity in the first century of U.S. history involved the subjugation of municipalities and their governing structures in state law and an understanding of local authority as inherently constrained—with the charter reflecting that transformation. The next critical turning point in the development of the charter arrived with the first wave of home-rule reform, starting after the Civil War and fueled by the rapid urbanization the country experienced in that era.⁵³ When Progressive Era reformers sought to claim urban power in restructuring state–local relations, they looked to the charter as the instrument to protect local legal identity. Many first-wave home-rule constitutional provisions were designed, accordingly, to link the scope of local legal autonomy to charter adoption.

The home-rule movement of the late nineteenth century had its first success in Missouri in 1875, with a state constitutional amendment that authorized cities with populations over 100,000 to adopt a charter,⁵⁴ which St. Louis (the only city of that size in the state at the time) subsequently did.⁵⁵ Missouri constrained and channeled local discretion to adopt and modify the charter, creating a Board of Freeholders made up of property owners in the city to draft the charter and restricting local power to amend the charter to two-year intervals, and only then by a supermajority.⁵⁶ But the innovation of local adoption was a major milestone in the development of charters in the United States nonetheless, echoing fights over the power of charter grants in English history.

52. See Richard Briffault, *Voting Rights, Home Rule, and Metropolitan Governance: The Secession of Staten Island as a Case Study in the Dilemmas of Local Self-Determination*, 92 COLUM. L. REV. 775, 805 (1992) (describing the nineteenth-century pre-home-rule movement practice of “rural-dominated state legislatures” adopting evocatively named “ripper bills” that took core local governance functions, such as the appointment of local officials, out of the hands of cities).

53. On the history of home-rule reform, see generally Barron, *supra* note 2.

54. MO. CONST. of 1875, art. IX, § 16.

55. As David Barron has noted:

Under the Missouri Constitution, the charter would set forth the city’s powers and the form that its government would take. The charter also would define the scope of city power in important respects and, in this way, would take the place of a general municipal incorporation act or state legislation directed at St. Louis in particular. In addition, the state constitutional conferral of home rule would provide the city with some immunity from state legislative preemption, at least over what courts took to terming matters of “local” concern. Finally, home rule would confer some measure of local initiatory power that could be exercised independent of an express and specific state statutory delegation.

Barron, *supra* note 2, at 2290.

56. *Id.* at 2297–98.

First-wave home-rule advocates focused on charters as an instrument of local power in part because, as David Barron has argued, they shared a significant concern for structural reform within cities.⁵⁷ An influential good-government group of the time, the National Municipal League,⁵⁸ developed a model city charter first to promote the idea of the strong-mayor form of government and then, beginning in 1915, to emphasize a more technocratic council–manager structure as an ideal type of municipal reform.⁵⁹ Regardless of the specific details of structure, however, early reformers were united in their focus on channeling home rule through the adoption of charters with the recognition that enhanced self-government was inextricably linked to that process.⁶⁰

57. *Id.* At the time, municipal charters were generally seen as inflexible, distributing power so incoherently that neither a city council, a mayor, nor a state legislature could be held accountable for governance failures. See CLIFFORD WHEELER PATTON, *THE BATTLE FOR MUNICIPAL REFORM: MOBILIZATION AND ATTACK, 1875–1900*, at 59 (1940) (describing several such failures). Corruption was also an abiding concern at both the state and the local level for Progressive Era advocates. *Id.* at 61. An important impetus for linking home rule to charter reform was therefore simultaneously a desire to protect local governments from unreasonable state interference and to transform the actual governance structure of local governments. See ERNEST S. GRIFFITH, *A HISTORY OF AMERICAN CITY GOVERNMENT: THE PROGRESSIVE YEARS AND THEIR AFTERMATH, 1900–1920*, at 28 (1974) (discussing the scope of municipal reform in the Progressive Era).

58. On the National Municipal League and the origins of its Model City Charter, see FRANK MANN STEWART, *A HALF CENTURY OF MUNICIPAL REFORM: THE HISTORY OF THE NATIONAL MUNICIPAL LEAGUE* 98–101 (1950). To get a sense of the level of attention the first model city charter garnered, among the attendees at the Municipal League of Philadelphia and the City Club of New York’s “First National Conference for Good City Government” in January 1894 were “Theodore Roosevelt, then a member of the U.S. Civil Service Commission; Charles W. Eliot, president of Harvard University; Marshall Field, a prominent Chicago businessman; and future cabinet members Charles Francis Adams and Charles J. Bonaparte.” H. George Frederickson, Curtis Wood & Brett Logan, *How American City Governments Have Changed: The Evolution of the Model City Charter*, 90 NAT’L CIVIC REV. 3, 4 (2003).

59. See Schragger, *supra* note 1, at 2547–48 (noting the early endorsement by the National Municipal League in its first Model City Charter in 1901 of a strong-mayor form, citing NAT’L MUN. LEAGUE, *A MUNICIPAL PROGRAM* (1901), and the League’s ensuing about-face in the 1915 second edition of its model). For more on the continuing impact of the Model City Charter, see *infra* subpart I(C).

60. As Howard Lee McBain, a widely influential political scientist and Progressive Era reformer, summarized the relationship between the charter and home rule:

[I]t is of high importance in the interest of legal certainty that the power to adopt and amend the municipal charter should be granted *to the end that* the powers of self-government may be realized; or, to put it conversely, that the powers of self-government should be clearly made dependent for their realization upon the exercise of the charter-making power.

HOWARD LEE MCBAIN, *THE LAW AND THE PRACTICE OF MUNICIPAL HOME RULE* 668–69 (1916).

Taking this brief history of charter development from the post-Progressive Era through today, successive waves of home-rule reform and revision have continued to look to the charter as a focal point. In 1953, another major civic organization, the American Municipal Association (AMA) (which later became the National League of Cities),⁶¹ published *Model Constitutional Provisions for Municipal Home Rule*.⁶² Jefferson Fordham, then Dean of the University of Pennsylvania Law School and the era's leading scholar of local-government law, was the principal drafter of the AMA's Model. The Fordham Model, as it came to be known, proposed a number of changes over then-prevailing home-rule approaches, notably decoupling the first-wave reformers' linkage between the adoption of charters and the grant of home rule.⁶³ The Fordham Model proved highly influential, shaping nearly all state constitutional reform of local government after 1953.⁶⁴

* * *

61. In 1964, the AMA renamed itself the National League of Cities, and today it is the largest association of municipal officials.

62. JEFFERSON B. FORDHAM, AM. MUN. ASS'N, MODEL CONSTITUTIONAL PROVISIONS FOR MUNICIPAL HOME RULE (1953).

63. Dean Fordham described the linkage as the "McBain" conception of home rule, referencing Howard Lee McBain, who had supplied much of the intellectual heft to earlier conceptions of home rule. The Fordham Model, by contrast, proposed a significant shift from earlier conceptions about the actual effect of charter adoption. To Fordham, the earlier model had treated the charter as "an instrument of grant," which is to say the tool through which a local government obtained home-rule powers. The Fordham Model, by contrast, shifted its understanding of charters to an instrument of limitation given that the Fordham Model provided "direct constitutional devolution of substantive home rule powers dependent upon the adoption of a home rule charter." FORDHAM, *supra* note 62, at 19–20; *cf.* MCBAIN, *supra* note 60, at 668–69 (conceptualizing charters as power-granting texts).

64. U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL REL., MEASURING LOCAL DISCRETIONARY AUTHORITY 6 (1981). The AMA's successor organization, the National League of Cities, recently promulgated a new model constitutional approach to home rule that conspicuously brackets the interplay between charters and home rule. *See* NAT'L LEAGUE OF CITIES, PRINCIPLES OF HOME RULE FOR THE 21ST CENTURY 30–31 (2020) (noting that the model constitutional article leaves open the question of the link between charters and home rule).

In short, a legal instrument with roots in royal grants of authority and indistinguishable from other types of charters has long served basic constitutive functions in local governance, imbued increasingly, albeit unevenly, with constitutional meaning as the legal identity of cities has developed. Today, the modern law of charters reflects many aspects of this historical development, leaving a legacy of tremendous variation across states, as we shall now see.

B. The Varied Modern Law of Municipal Charters

Turning to the role that charters play today, it is appropriate to begin with the basic law of charters, which derives primarily from state constitutional and statutory provisions.⁶⁵ There is law that flows from charters—ordering structure and political process,⁶⁶ as well as influencing the state–local legal relationship—but there is also the predicate law that governs charters. As this subpart outlines, this body of law attends to whether and how state law authorizes adoption, the process through which local governments adopt and modify charters, and what forms of charters are allowed.

65. As discussed below, *see infra* text accompanying notes 99–105, there is a state jurisprudence of charter law that fleshes out the details of the constitutional and statutory law of charters that bears mention as well, although this discussion—for the sake of parsimony—will focus on the primary constitutional and statutory sources of that jurisprudence.

It bears noting as well that there are no meaningful direct federal constitutional constraints on charter law. As is often noted, the federal Constitution nowhere mentions local governments. *See* Richard Briffault, *Home Rule for the Twenty-First Century*, 36 URB. LAW. 253, 257 (2004) (“Our federal constitution is entirely silent with respect to local governments. It makes no reference to local government at all. From a constitutional perspective, American federalism is a two-tier system, not the three-tier system we actually experience in our governance.”). And the Republican Guarantee Clause, U.S. CONST. art. IV, § 4—setting aside questions of justiciability—has not been interpreted to set the terms for how state law structures local governance. *See, e.g., State ex rel. Porterie v. Smith*, 166 So. 72, 82 (La. 1935).

That said, individual rights, such as equal protection and the principle of one-person, one-vote, can meaningfully shape local charters. Most famously, the U.S. Supreme Court’s decision finding the part of the New York City Charter that apportioned the city’s Board of Estimate unconstitutional in *Board of Estimate v. Morris*, 489 U.S. 688 (1989), provided the impetus for the city’s subsequent sweeping charter reform. Anthony W. Crowell, *Revisionists’ History: A Foreword*, 58 N.Y.L. SCH. L. REV. 11, 14 (2013).

66. *See infra* subpart I(C).

1. Adoption, Modification, and the Form of Charters.—Unlike the federal government and the states, there is no legal necessity for local governments to have charters. Some states do not provide legal authority for charters, and in many states, charters may be adopted by local governments but need not be. Where there is no locally adopted charter, state law ordinarily fulfills the function of articulating the structure of local governance and related constitutive tasks.

To be precise, while forty-four states authorize cities to adopt (or allow states to grant) municipal charters,⁶⁷ five states—Alabama,⁶⁸ Idaho,⁶⁹

67. ALASKA CONST. art. X, § 9; ARIZ. CONST. art. XIII, § 2; ARK. CODE ANN. § 14-42-307 (2019); CAL. CONST. art. XI, § 3(a); COLO. CONST. art. XX, § 6; CONN. GEN. STAT. § 7-148 (2019); DEL. CODE ANN. tit. 22, § 802 (2019); FLA. STAT. § 166.021 (2018); GA. CONST. art. IX, § II, para. II; IOWA CONST. art. III, § 38A; KAN. CONST. art. 12, § 5; LA. CONST. art. VI, § 5; ME. CONST. art. VIII, pt. 2, § I; MD. CONST. art. XI-E, § 3; MASS. GEN. LAWS ch. 43B, § 13 (2017); MICH. CONST. art. VII, § 22; MINN. CONST. art. XII, § 4; MISS. CODE ANN. § 21-3-1 (2019); MO. CONST. art. VI, § 19; MONT. CONST. art. XI §§ 5, 6; NEB. CONST. art. XI, § 5; NEV. CONST. art. 8, § 8; N.H. CONST. pt. I, art. 39; N.J. STAT. ANN. §§ 40:69A-1–40:69A-210 (West 2019); N.M. CONST. art. X, § 6; N.Y. CONST. art. IX, § 2; N.C. CONST. art. VII, § 1; N.D. CENT. CODE §§ 40-05.1-02, 40-05.1-06 (2019); OHIO CONST. art. XVIII, § 7; OKLA. CONST. art. XVIII, § 3(a); OR. CONST. art. XI, §§ 2, 2a; PA. CONST. art. IX, § 2; R.I. CONST. art. XIII, § 2; S.C. CONST. art. VIII, § 11; S.D. CONST. art. IX, § 2; TENN. CONST. art. XI, § 9; TEX. CONST. art. XI, § 5; UTAH CONST. art. XI, § 5; VT. STAT. ANN. tit. 17, § 2645 (2019); VA. CODE ANN. §§ 15.2-1100, 15.2-1102 (2019); WASH. CONST. art. XI, § 10; W. VA. CONST. art. VI, § 39a; WIS. CONST. art. XI, § 3; WYO. CONST. art. 13, § 1. For more information on North Carolina’s state granted rather than locally adopted charters, see, for example, *How NC Cities Work*, N.C. LEAGUE OF MUNICIPALITIES, <https://www.nclm.org/advocacy/how-nc-cities-work> [<https://perma.cc/K3PF-8VJS>]; *North Carolina Constitution, Statutes & Ordinances Research*, UNIV. OF N.C. KATHRINE R. EVERETT L. LIBR., <https://guides.lib.unc.edu/ncstatutes/ordinances> [<https://perma.cc/5UXU-5JD3>]; and *Forms of North Carolina City Government*, UNIV. OF N.C. SCH. OF GOV’T, <https://www.sog.unc.edu/resources/faq-collections/modifying-citys-charter-summary-questions-and-answers> [<https://perma.cc/T9SP-CSVU>].

68. Alabama does not allow municipal charter cities. *See generally* ALA. CONST. art. IV, § 94 (prohibiting the state legislature from authorizing certain municipal actions). Two of Alabama’s sixty-seven counties are subject to home rule (the rest are general law), *see* ALA. CONST. amend. 783, § 1 (allowing for home rule in Baldwin County); ALA. CONST. amend. 707, § 1 (allowing for home rule in Shelby County), while all 460 of Alabama’s municipalities are general law. *See generally* ALA. CONST. art. IV, §§ 89, 104 (prohibiting the state legislature from exempting municipal corporations from the legislature’s general laws and from enacting “special” or “local” legislation concerning specific municipalities); *see also* U.S. DEP’T OF COM., U.S. CENSUS BUREAU, ALABAMA: 2010 CENSUS OF POPULATION AND HOUSING, at III-3 (2012) (stating that Alabama contains sixty-seven counties and 460 “incorporated places”).

69. While Idaho allows charter adoption for counties, IDAHO CODE § 31-5801 (2019), it does not explicitly allow municipal charter adoption for cities. *See* IDAHO CODE § 50-301 (2019) (outlining the powers of cities). Of Idaho’s 200 municipalities, 199 are general law municipalities; one—Bellevue—is a charter city, retaining a charter granted to it by the Territorial Legislature before the Idaho Constitution was adopted. LAWRENCE DENNEY, SEC’Y OF STATE, IDAHO BLUE BOOK 2017–2018, at 268 (J. Harvey ed., 24th ed. 2017). Despite the authorization, however, all forty-four of Idaho’s counties are general law. *Id.*

Illinois,⁷⁰ Indiana,⁷¹ and Kentucky⁷²—do not.⁷³ Hawaii, interestingly, has four local governments (Honolulu, Hawaii, Maui, and Kauai), all administered as counties and all of which are charter/home-rule jurisdictions.⁷⁴ And some states that allow charter cities have minimum population requirements for adoption.⁷⁵

Despite widespread authorization to adopt municipal charters in state law, many municipalities choose not to do so, particularly in smaller communities. For example, in twenty-eight states, fewer than half of the municipalities have adopted charters.⁷⁶ Indeed, in only five states have

70. Illinois allows for home rule but does not authorize charter cities. ILL. CONST. art. VII, § 6. General home-rule power is allowed for any city with over 25,000 people, but charters are not required for home rule; and cities are not authorized to adopt their own charters. *Id.* Of Illinois's 1,298 municipalities, 217 have home rule. Home Rule Municipalities, ILL. MUN. LEAGUE (July 20, 2019), <https://www.iml.org/homerule-municipalities> [<https://perma.cc/7RJK-KS7C>]; *see also* ILL. MUN. LEAGUE, A CANDIDATE'S GUIDE TO MUNICIPAL GOVERNMENT 1 (2020), <https://www.iml.org/file.cfm?key=14434> [<https://perma.cc/U52Y-WULK>] (identifying 1,298 municipalities in Illinois).

71. All of Indiana's counties and municipalities are general law. IND. CONST. art. IV, § 23.

72. Kentucky, however, does allow municipal charters for consolidated governments, of which there is one—Lexington-Fayette—out of 120 counties governed by a charter. LEG. RES. COMM'N, INFORMATIONAL BULL. NO. 145, KY. MUN. STATUTORY LAW 2, 152 (2018). All of Kentucky's municipalities are general law. *Id.* at 39, 41.

73. While states like Idaho, Iowa, New Hampshire, and Oklahoma allow for the adoption of county charters, none of their counties have done so. And while all municipalities in Florida, Georgia, Maryland, and Virginia have charters, not all of the counties in these states are governed under a charter even though each allows for charter counties. *E.g.*, *Charter County Information*, FLA. ASS'N OF COUNTIES, <https://www.fl-counties.com/charter-county-information> [<https://perma.cc/FZL7-5PDA>]; *County Government Structure*, MD. ASS'N OF COUNTIES, <https://www.mdcounties.org/DocumentCenter/View/2967/2-Co-Government-Structure-updated-October-2018> [<https://perma.cc/ZE2J-SNUR>].

74. HAW. CONST. art. VIII, §§ 1–2; HAW. REV. STAT. §§ 50-1, 50-2 (2019). Hawaii's fifth county, Kalawao, is a former leper colony and continues to be “under the jurisdiction and control of the [state] department of health.” HAW. REV. STAT. § 326-34(b) (2019).

75. Delaware requires a minimum population of 1,000 people. DEL. CODE ANN. tit. 22, § 802 (2019). Three states—Colorado, Oklahoma, and West Virginia—require at least 2,000 people. COLO. CONST. art. XX, § 6; OKLA. CONST. art. XVIII, § 3(a); W. VA. CONST. art. VI, § 39a. Arizona requires 3,500 people. ARIZ. CONST. art. XIII, § 2. Three states—Missouri, Nebraska, and Texas—set their threshold at 5,000 people. MO. CONST. art. VI, § 19; NEB. CONST. art. XI, § 2; TEX. CONST. art. XI, § 5. Alaska allows charters only in first-class (general law) cities with at least 400 permanent residents. ALASKA CONST. art. X, § 9; ALASKA STAT. § 29.05.011 (2019).

76. For example, only 10 of Alaska's 149 municipalities have adopted charters, LOCAL BOUNDARY COMM'N, ALASKA DEP'T OF COMMERCE, CMTY. & ECON. DEV., LOCAL GOVERNMENT IN ALASKA 3, 8 (2015); *2017 Census of Governments – Organization*, U.S. CENSUS BUREAU tbl.2, https://www2.census.gov/programs-surveys/gus/tables/2017/cog2017_cg1700org02.zip [<https://perma.cc/ZJ3T-L3BR>]; 20 of 91 municipalities in Arizona, *Arizona City and Town Data*, LEAGUE ARIZ. CITIES & TOWNS, <https://www.azleague.org/199/Arizona-City-Town-Data> [<https://perma.cc/K3CA-HWM6>]; 121 of 482 in California, *Learn About Cities*, LEAGUE OF CAL. CITIES, <https://www.cacities.org/Resources/Learn-About-Cities> [<https://perma.cc/FS6R-43F8>]; 101 of 271 in Colorado, SAM MAMET, COLO. MUN. LEAGUE, OVERVIEW OF COLORADO MUNICIPAL HOME RULE 4 (2018), <https://www.cml.org/home/publications-news>

charters been adopted in *more* than half the municipalities.⁷⁷ In addition, two states—Arkansas and South Carolina—allow for the adoption of a municipal

/resource-detail/Bullet-Point-Overview-of-Home-Rule [https://perma.cc/UC4W-WJFD]; *Active Colorado Municipalities*, COLO. DEP'T OF LOCAL AFFAIRS, https://dola.colorado.gov/lgis/municipalities.jsf [https://perma.cc/W4BQ-URXN]; 30 of 304 in Louisiana, HOUSE LEGIS. SERV., LA. HOUSE OF REPRESENTATIVES, STATE AND LOCAL GOVERNMENT IN LOUISIANA: AN OVERVIEW 3A-4 (11th rev. 2011); 47 of 488 in Maine, *Ordinances & Home Rule*, ME. MUN. ASS'N, https://www.memun.org/Training-Resources/Local-Government/Ordinances-Home-Rule [https://perma.cc/KM4F-FDVN]; 107 of 853 in Minnesota, LEAGUE OF MINN. CITIES, HANDBOOK FOR MINNESOTA CITIES ch. 4, § I, at 3 (2020); 20 of 298 in Mississippi, MISS. STATE UNIV., MUNICIPAL GOVERNMENT IN MISSISSIPPI 8, 364–71 (6th ed. 2017); in Missouri, 37 of 944 municipalities are home-rule charter cities, while six operate under a state granted special legislative charter, *Manual for Missouri Municipal Clerks* at 5, MISSOURI CITY CLERKS AND FINANCE OFFICERS ASS'N, MANUAL FOR MISSOURI MUNICIPAL CLERKS 5 (2017); 33 of 129 in Montana, LOCAL GOV'T CTR., MONT. STATE UNIV., MONTANA MUNICIPAL OFFICIALS HANDBOOK 10 (Kenneth L. Weaver ed., 3rd ed. 2020); 134 of 565 municipalities in New Jersey operate under Optional Municipal Charter Law statutes, and 11 operate under state granted special charter, CTR. FOR GOV'T SERVS., RUTGERS UNIV., FORMS OF MUNICIPAL GOVERNMENT IN NEW JERSEY 2 (2011), https://cgs.rutgers.edu/sites/cgs.rutgers.edu/files/documents/resources/rc_munichart_formsgovt_2011.pdf [https://perma.cc/Q3WT-GYE3]; 12 of 105 in New Mexico, N.M. MUN. LEAGUE, FORMS OF MUNICIPAL GOVERNMENT IN NEW MEXICO 1 (2016), https://nmml.org/wp-content/uploads/2016-Forms-of-Municipal-Government-update.pdf [https://perma.cc/8TTA-5NMX]; N.M. LEGISLATURE, LEGISLATIVE HANDBOOK: HOME RULE MUNICIPALITIES 1 (2020), https://www.nmlegis.gov/Publications/handbook/home_rule_municipalities_20.pdf [https://perma.cc/7NYV-2AHY]; 62 of 1,530 in New York, DIV. OF LOCAL GOV'T SERV'S, N.Y. DEP'T OF STATE, LOCAL GOVERNMENT HANDBOOK 59 (7th ed. 2018); 264 of 931 municipalities in Ohio, OHIO MUN. LEAGUE, APPENDIX A: OHIO MUNICIPALITIES WITH CHARTERS, http://www.omloho.org/DocumentCenter/View/116/Cities-and-Villages-with-Charters-PDF [https://perma.cc/KKY2-MEA8]; 65 of 2,559 in Pennsylvania, GOVERNOR'S CTR. FOR LOCAL GOV'T SERVS., PA. DEP'T OF CMTY. & ECON. DEV., HOME RULE IN PENNSYLVANIA 32 (11th ed. 2020); 10 of 309 in South Dakota, *Overview of Municipal Government in SD*, S.D. MUN. LEAGUE, https://www.sdmunicipalleague.org [https://perma.cc/6DE4-YARQ]; 351 of 1,218 in Texas, TEX. MUN. LEAGUE, TEXAS HOME RULE CHARTERS (Kelly McBride & Scott Houston eds., 2d ed. 2010), https://www.tml.org/189/Texas-Home-Rule-Charters—Second-Edition [https://perma.cc/6R8B-CZ8Z]; only 1 of 250 in Utah, TOOELE CITY, UTAH, AMENDED TOOELE CITY CHARTER, pmbl. (2006); 81 of 279 in Vermont, *Municipal Action Paper No. 1: Fostering Freedom for Municipalities to Thrive: Self-Governance in 2018*, VT. LEAGUE OF CITIES & TOWNS, https://www.vlct.org/resource/municipal-action-paper-no-1-fostering-freedom-municipalities-thrive-self-governance-2018 [https://perma.cc/D9NT-JJ5F]; 11 of 281 in Washington, *City and Town Forms of Government*, MUN. RESEARCH & SERVS. CTR., http://mrsc.org/Home/Explore-Topics/Legal/General-Government/City-and-Town-Forms-of-Government.aspx [https://perma.cc/GE74-B6G3]; and only 1 out of Wisconsin's 601 municipalities is governed under a self-adopted charter, although all cities and villages have home-rule authority, Claire Silverman, *Municipal Home Rule in Wisconsin*, MUN., June 2016, at 16, 16; *2017 Census of Governments – Organization*, U.S. CENSUS BUREAU tbl.2, https://www2.census.gov/programs-surveys/gus/tables/2017/cog2017_cg1700org02.zip [https://perma.cc/ZJ3T-L3BR] (providing data for the total municipalities in these states).

77. For example, 109 of 173 in Connecticut, *Connecticut Charters and Ordinances by Town*, ST. OF CONN. JUD. BRANCH L. LIBR. SERVS., https://www.jud.ct.gov/lawlib/ordinances.htm [https://perma.cc/3BHM-SPYB]; 55 of 57 in Delaware, *Delaware's Town Charters*, ST. OF DEL., http://charters.delaware.gov [https://perma.cc/YXD9-6RF7]; 13 of 19 in Nevada, *City Charters of Nevada*, LEGIS. COUNSEL BUREAU, NEV. LEGIS., https://www.leg.state.nv.us/CityCharters [https://perma.cc/CQ5J-A2E4]; and 229 out of 345 in Tennessee are governed under a state-granted private-

charter, but none of their municipalities has done so.⁷⁸ Conversely, in Florida, Georgia, Maryland, North Carolina, and Virginia, all municipalities have charters.⁷⁹

The process for adopting and amending a municipal charter varies from state to state with distinct nuances. Typically, even where state constitutions confer the right to adopt and amend home-rule charters, state statutes set forth the specific procedures and requirements for doing so, with many states providing specific options. Generally, states may allow municipalities to propose charter adoption or amendment by electing a charter commission.⁸⁰ The charter commission is responsible for preparing a draft of the proposed charter or charter amendments—or in some cases, studying whether a charter should be adopted at all.⁸¹ If a majority vote approves a commission-

act charter, a home-rule charter, or a metropolitan/consolidated charter, *Charters*, MUN. TECH. ADVISORY SERV., UNIV. OF TENN., http://www.mtas.tennessee.edu/cities_bychartertype_files [<https://perma.cc/33CC-22YX>].

78. See MUN. ASS'N OF S.C., FORMS AND POWERS OF MUNICIPAL GOVERNMENT: AN ELECTED OFFICIAL'S GUIDE 2 (2017) (noting that even though South Carolina's constitution permits municipal charters, the state legislature has never passed implementation legislation); *Cities in Arkansas*, BALLOTPEdia, https://ballotpedia.org/Cities_in_Arkansas#cite_note-Types-1 [<https://perma.cc/72HT-4UYH>].

79. FLA. LEAGUE OF CITIES, THE FLORIDA MUNICIPAL OFFICIALS' MANUAL 7 (2013); *Georgia's City Governments*, NEW GA. ENCYCLOPEDIA (Oct. 31, 2018), <https://www.georgiaencyclopedia.org/articles/counties-cities-neighborhoods/georgias-city-governments> [<https://perma.cc/FSR6-YA4E>]; *Municipal Charters*, MD. MUN. LEAGUE, <https://www.md-municipal.org/190/Municipal-Charters> [<https://perma.cc/4WFU-XFRJ>]; *How NC Cities Work*, N.C. LEAGUE OF MUN., <https://www.nclm.org/advocacy/how-nc-cities-work> [<https://perma.cc/RQH2-S55K>]; *Charters*, VA. LAW LIBR., <https://law.lis.virginia.gov/charters/> [<https://perma.cc/ANP3-MT74>]; VA. CODE ANN. § 15.2-204 (West 2020) (“Cities and towns shall have . . . uniform charter powers. Such powers do not need to be set out or incorporated by reference in a city or town charter.”).

80. See, e.g., CAL. GOV'T CODE § 34451 (Deering 2020) (“The charter may be proposed by a charter commission . . .”); see also CAL. GOV'T CODE § 34455 (Deering 2020) (“The charter commissioners shall propose a charter and may propose amendments to a charter . . . The charter so prepared shall be signed by a majority of the charter commissioners and shall be filed in the office of the clerk of the governing body of the city or city and county.”).

81. Questions include whether a charter commission should be elected, and if elected, the candidates to serve on any such commission must be submitted to voters in many states. E.g., CAL. GOV'T CODE § 34453 (Deering 2020). In California, if a majority of voters supports electing a charter commission, “the 15 candidates for the office of charter commissioner receiving the highest number of votes shall forthwith organize as a charter commission.” *Id.* But if the election question does not receive a majority, “no charter commission shall be deemed to have been elected.” *Id.* Other states have similar procedures. See, e.g., CAL. CONST. art. XVIII, § 8 (“The legislative authority of any city or village may by a two-thirds vote of its members, and upon petition of ten per centum of the electors shall forthwith, provide by ordinance for the submission to the electors, of the question, ‘Shall a commission be chosen to frame a charter.’”); TENN. CONST. art. XI, § 9 (“Any municipality may by ordinance submit to its qualified voters in a general or special election the question: ‘Shall this municipality adopt home rule?’”).

States also differ in their process for electing or nominating members of charter commissions. For example, in California, the governing body of a city may call an election for choosing the charter

proposed charter in a subsequent election, the charter becomes effective.⁸² The commission may also periodically submit amendments to a charter to voters.⁸³

Alternatively, states may allow the local legislative or governing body, in its own discretion, to put the question of charter adoption or amendment before the electorate.⁸⁴ Furthermore, states may allow local voters to petition for the adoption or amendment of a charter, requiring a certain percentage of qualified electors to sign the petition.⁸⁵

commissioners, either by a majority vote or on presentation of a petition signed by at least 15% of the registered voters of the city. CAL. GOV'T CODE § 34452(a) (Deering 2020). Other states do things quite differently. *See, e.g.*, ME. STAT. tit. 30-A, § 2102(2) (2019) (“On the written petition of a number of voters equal to at least 20% of the number of votes cast in the municipality at the last gubernatorial election, but in no case less than 10, the municipal officers, by order, shall provide for the establishment of a charter commission” to revise or prepare a new municipal charter); N.M. CONST. art. X, § 6(C) (“In the absence of law, the governing body of a municipality may appoint a charter commission upon its own initiative or shall appoint a charter commission upon the filing of a petition containing the signatures of at least five percent of the registered qualified electors of the municipality.”). *But see* MINN. STAT. § 410.05.01 (2019) (“When the district court of the judicial district in which a city is situated, deems it for the best interest of the city so to do, the court, acting through its chief judge, may appoint a charter commission to frame and amend a charter.”).

82. *See, e.g.*, ALASKA CONST. art. X, § 9 (“All charters, or parts or amendments of charters, shall be submitted to the qualified voters of the borough or city, and shall become effective if approved by a majority of those who vote on the specific question.”); CAL. GOV'T CODE § 34459 (Deering 2020) (“If the voters vote in favor of the charter proposal, amendment, or repeal, it shall be deemed to be ratified, but shall not take effect until accepted and filed by the Secretary of State pursuant to Section 34460.”); LA. CONST. art. VI, § 5 (“A home rule charter shall be adopted, amended, or repealed when approved by a majority of the electors voting thereon at an election held for that purpose.”); N.D. CENT. CODE § 40-05.1-05 (2019) (“If a majority of the qualified voters voting on the charter at the election vote in favor of the home rule charter, the charter is ratified and is the organic law of the city, and extends to all its local and city matters.”).

83. *See, e.g.*, CAL. GOV'T CODE § 34462(b) (Deering 2020) (“A charter commission may submit portions of the proposed or amended charter to the voters periodically.”).

84. *See, e.g.*, ARIZ. CONST. art. XIII, § 2 (“The charter so ratified may be amended by amendments proposed and submitted by the legislative authority of the city”); CAL. GOV'T CODE § 34458 (Deering 2020) (“[T]he governing board of a city or city and county, on its own motion” may propose, amend, or repeal or cause to be proposed, amended, or repealed “a charter, and may submit the proposal for the adoption, amendment, or repeal thereof, to the voters at the next established statewide general election”); COLO. REV. STAT. § 31-2-204(1)(b) (2018) (“Proceedings to adopt a home rule charter for a municipality may be initiated . . . [b]y the adoption of an ordinance by the governing body of the municipality, without the prior submission of a petition therefor.”). States may require a public hearing on the matter of charter proposal and on the content of the proposed charter prior to approving the submission to voters of a proposal to adopt a charter. *E.g.*, CAL. GOV'T CODE § 34458(b) (Deering 2020). In California, at least two public hearings must be held. *Id.*

85. *See, e.g.*, COLO. CONST. art. XX, § 9(1) (“[T]he registered electors of each city and county, city, and town of the state are hereby vested with the power to adopt, amend, and repeal a home rule charter.”); COLO. REV. STAT. § 31-2-210(1)(a)(III) (2020) (“A petition to submit an amendment at the next regular election must be signed by at least five percent of the registered electors of the municipality registered on the date of filing the statement of intent”); IOWA CODE § 372.9(1)(b) (2020) (“Eligible electors of the city equal in number to at least twenty-five percent of the persons

When communities adopt charters, state law generally provides great flexibility as to form and content. Some states provide a set of options from which local governments can choose, with varying approaches to basic structural issues, such as executive form.⁸⁶ If a local community does not directly adopt a charter, charters are generally derived from state legislation and can be created by a special state act or through general state incorporation laws.⁸⁷

2. Legal Implications of Charter Adoption.—What flows from adopting a charter, as a legal matter? This question involves two distinct valences of charters. The first reflects questions of local legal authority in what might be described as the home-rule or vertical dimensions of charter adoption.⁸⁸ The second involves the horizontal interplay between “charter law” and ordinary local legislation or executive action, paralleling the role that constitutional law plays at the state and federal level.

As to questions of local authority, there is a relatively large Venn-diagram overlap between home rule and charter adoption, but the overlap is not complete.⁸⁹ Many states tie home rule to charter adoption,⁹⁰ reflecting the

who voted at the last regular city election petitioning the council to appoint a charter commission to prepare a proposed charter.”); N.Y. MUN. HOME RULE LAW § 36(3) (McKinney 2020) (“Qualified electors . . . in [a] number equal to at least fifteen per centum of the total number of votes cast for governor at the last gubernatorial election in such city, or forty-five thousand, whichever is less,” can file a petition to submit “to the electors of such city of a proposed local law for the creation of a commission to draft a new or revised city charter for such city . . .”).

The charter commission is given a time frame for submitting a draft to the legislative body, which in turn provides for publication of the charter and submission to the electors in an election. *See, e.g.*, CAL. GOV’T CODE § 34457 (Deering 2020) (“After the charter prepared by the charter commission has been filed . . . the proposed charter shall be submitted to the voters of the city or city and county at the next established statewide general election . . .”); IOWA CODE § 372.9(3) (2020) (“The proposed home rule charter must be submitted at a special election . . . However, the date of the last publication must be not less than thirty nor more than sixty days before the election.”); N.M. CONST. art. X, § 6(C) (“The proposed charter shall be submitted to the registered qualified electors of the municipality within one year after the appointment of the charter commission.”).

86. 2A MCQUILLIN, *supra* note 5, § 9:7.

87. *Id.* § 9:7 n.2 (noting examples from Massachusetts, New Jersey, and New York).

88. This could perhaps more broadly be thought of as the local-government authority aspect of charters, as not all states that have locally adopted charters have home rule, as will be explored later.

89. The basic interplay between varieties of home rule and state approaches to charter authorization is mapped out in the Appendix to this Article.

90. California, for example, distinguishes between “charter cities,” which have significantly more home rule authority, and “general law cities”—a distinction that carries through on issues such as preemption (charter cities prevail over the state on questions of “municipal affairs”), *see* CAL. CONST. art. XI, § 5 (“City charters adopted pursuant to this Constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith.”); form of government (charter cities can choose any form of local-government structure), *see* CAL. CONST. art. XI, § 5(b) (empowering charter cities to organize their own governments); CAL. GOV’T CODE

approach of Progressive Era home-rule reformers.⁹¹ Some states, however, disaggregate charter adoption and local-government power, as second-wave home-rule reform proposed.⁹² Virginia, for example, authorizes local governments to adopt charters,⁹³ but it is a “Dillon’s Rule” state, which is to say a state in which local-government authority is derived from explicit state legislative grants.⁹⁴ Illinois, by contrast, does not authorize local governments to adopt their own charters (with Chicago famously still retaining its nineteenth-century charter),⁹⁵ but has a relatively strong form of state constitutionally derived home rule.⁹⁶ This reflects the debate between the McBain view of charters as a grant of local power versus the Fordham view of charters as a limitation on local power that simmered in the background of home-rule reform over the course of the twentieth century.⁹⁷

§ 34450 (Deering 2020) (same), whereas general law cities are limited to a prescribed state form, *see* CAL. CONST. art. XI, § 2(a) (stating that for general law cities, the legislature shall “prescribe uniform procedure for city formation and provide for city powers”); elections, *see* CAL. ELEC. CODE §§ 10101–10103 (Deering 2020) (differentiating charter cities and general law cities); legislative process, *see* *Brougher v. Bd. of Pub. Works*, 271 P. 487, 493 (Cal. 1928) (noting that charter cities enjoy police powers under the state constitution); and other areas of local authority.

91. *See supra* section I(A)(3).

92. *See supra* note 63 and accompanying text (explaining the debate between McBain and Fordham about the nature of charters in home rule). The conceptual debate about charters as a source or a limitation on local power echoes similar divides in state and federal constitutional law. Traditionally, states have been understood as having plenary police power, and state constitutions are generally interpreted as limitations on that plenary authority rather than grants of authority. G. Alan Tarr, *State Constitutional Design and State Constitutional Interpretation*, 72 MONT. L. REV. 7, 12–13 (2011). By contrast, the federal government is at least nominally a government, like many local governments, of limited and enumerated powers. *See, e.g., United States v. Comstock*, 560 U.S. 126, 133 (2010) (recognizing that acts of Congress must be based on one or more of the enumerated powers given in the Constitution).

93. VA. CODE ANN. § 15.2-201 (2020).

94. *See, e.g., City of Richmond v. Confrere Club of Richmond*, 387 S.E.2d 471, 473 (Va. 1990) (“In determining the legislative powers of local governing bodies, Virginia follows the Dillon Rule of strict construction.”). As the Supreme Court of Virginia explained, the “Dillon Rule provides that municipal corporations possess and can exercise only those powers expressly granted by the General Assembly, those necessarily or fairly implied therefrom, and those that are essential and indispensable.” *Id.* (citations omitted). Moreover, “[i]f there is any reasonable doubt whether legislative power exists, that doubt must be resolved against the local governing body.” *Id.* For more discussion of home rule and Dillon’s Rule, *see supra* note 7.

95. FLANAGAN, *supra* note 2, *passim*.

96. *See* Robert Kratovil & John T. Ziegweid, *Illinois Municipal Home Rule and Urban Land—A Test Run of the New Constitution*, 22 DE PAUL L. REV. 359, 362 (1972) (“The new [Illinois] constitution provides explicitly for home rule without mention of the need for a charter . . .”). Illinois is not alone in this regard. *See, e.g.,* George D. Vaubel, *Municipal Home Rule in Ohio (1976-1995)*, 22 OHIO N.U. L. REV. 143, 148–49 (1995) (“Charters are not the source of municipal Home Rule [in Ohio]. Rather, charter provisions serve as limits upon power, e.g., that of the legislative authority of a municipality . . .”). Constitutional home rule simply means local legal authority that derives directly from state constitutional law, rather than from state statutes.

97. *See supra* note 63 and accompanying text.

As to the separate question of the legal effect within a local government of adopting a charter, the analogy between charters and other constitutions mostly holds, although not in all cases. Peter Strauss has articulated the reasonable intuition that a hierarchical relationship among constitutions, ordinary legislation, and regulations must be essentially fractal, operating more or less the same at the federal, state, and local levels.⁹⁸ And in practice, charter law mostly trumps other municipal law, tracking Strauss's intuition about charters.

Thus, it is possible to find many cases that treat charter law as “supreme within its field”⁹⁹ or that reflect the proposition that the charter “bears the same general relation to its ordinances that the Constitution of the state bears to its statutes.”¹⁰⁰ To pick one example, in *State ex rel. Devine v. Hoermle*,¹⁰¹ the Ohio Supreme Court held that a municipal ordinance authorizing the mayor of Columbus to fill a vacancy on the city council violated the city charter's provisions reserving that power to the council itself.¹⁰² Similar cases are quite common.¹⁰³

In some instances, however, charter provisions and ordinary legislation, at least in jurisdictions with state-granted charters, are treated as legally

98. See Peter L. Strauss, *From Expertise to Politics: The Transformation of American Rulemaking*, 31 WAKE FOREST L. REV. 745, 746 (1996) (“Institutionally, at [national, state, and local] levels, one can also describe a hierarchy that I suspect must be quite general in complex political societies.”). Strauss explains the functioning of that hierarchical relationship:

At the apex, one places the constitutional document—the charter, in the case of municipalities; then ordinary legislation produced by a representative legislature; then “regulations” adopted by governmental organs other than the legislature—“subordinate legislation,” as it is often called; and, even less formally, declarations of policy or interpretation, or documents offering guidance for compliance with the foregoing.

Id.

99. *Granger v. City of Minneapolis*, 233 N.W. 821, 822 (Minn. 1930).

100. *Johnson v. Arnold*, 169 S.E. 505, 506 (Ga. 1933).

101. 156 N.E.2d 131 (Ohio 1959).

102. *Id.* at 133.

103. See, e.g., *City & Cty. of San Francisco v. Patterson*, 202 Cal. App. 3d 95, 102 (Cal. Ct. App. 1988) (“It is well established that the charter of a municipality is its constitution [And] ‘an ordinance can no more change or limit the effect of a charter than a statute can modify or supersede a provision of the state Constitution.’” (citations omitted)); *St. Croix v. Superior Court*, 175 Cal. Rptr. 3d 202, 210 (Cal. Ct. App. 2014) (“[A]n ordinance must conform to, be subordinate to, not conflict with, and not exceed the [city’s] charter, and can no more change or limit the effect of the charter than a legislative act can modify or supersede a provision of the constitution of the state.” (citations omitted)).

In the run-of-the-mill of cases involving potential conflicts between charters and ordinary municipal legislation, courts must first determine whether there is, in fact, a conflict. Then, courts can find ways to reconcile charters with subsequent local legislation. See, e.g., *Gorney v. City of Madison Heights*, 535 N.W.2d 263, 266–67 (Mich. App. 1995) (finding no conflict between charter provision mandating all legislation to be adopted by “ordinance” and the adoption of a “resolution” authorizing the imposition of property taxes, given separate provision in the charter referencing resolution authority).

equivalent.¹⁰⁴ These latter cases underscore a residual ambiguity about the legal standing of charters as fundamental law, and of course, not all local governments even have the authority to adopt charters.¹⁰⁵

C. *Themes in Charter Content*

As with so much of local-government law, the landscape of the contemporary use of charters is remarkably varied across states and even within states. As a leading treatise has noted, municipal “charters present the widest variation both in form and substance and preclude practical classification.”¹⁰⁶ In terms of the content of charters, what is generally true of the process of creating constitutions everywhere is no less true of local constitutionalism, namely that what “primarily determines the content of constitutions are the intensely local political considerations ‘on the ground’ when the constitution is drafted.”¹⁰⁷

Notwithstanding the challenge of local variation, this subpart provides an overview of the content of charters culled from a sample of cities across the country of varying sizes. And since 1901, the National Civic League (NCL) (and its predecessor, the National Municipal League)¹⁰⁸ has published eight editions of its widely adopted Model City Charter, setting baseline terms for many local governments and framing some common elements.¹⁰⁹ Themes that emerge from an examination of on-the-ground practice and the current edition of the Model City Charter include the following.

104. *See, e.g., In re Opinion of the Justices*, 276 A.2d 736, 739 (Del. 1971) (“A municipal charter consists of the creative Act of incorporation, together with all those laws in force which relate to the incorporation, whether in defining the powers of the municipal corporation or in regulating the mode of the exercise thereof.” (citing *Trailway Oil Co. v. City of Mobile*, 122 So.2d 757 (Ala. 1960); *City of St. Petersburg v. English*, 45 So. 483 (Fla. 1907); *Tommasi v. Bolger*, 100 N.Y.S. 367 (App. Div. 1906); *Fitzgerald v. City of Cleveland*, 103 N.E. 512 (Ohio 1913))). There is some older caselaw that treats all local law pertaining to governmental structure, or even *all* local law, as constituting the “charter.” For example, in *Fitzgerald v. City of Cleveland*, the court noted that the “provision of a charter which is passed within the limits of the constitutional grant of authority to the city is as much the law as a statute passed by the General Assembly.” 103 N.E. 512, 516 (Ohio 1913). However, the case was decided before Ohio adopted modern constitutional home rule, and similar modern cases are rare.

105. *See supra* section I(B)(1).

106. 2A MCQUILLIN, *supra* note 5, § 9:3.

107. Mark Tushnet, *Some Skepticism About Normative Constitutional Advice*, 49 WM. & MARY L. REV. 1473, 1474 (2008).

108. *See supra* section I(B)(3).

109. NAT'L CIVIC LEAGUE, MODEL CITY CHARTER: DEFINING GOOD GOVERNMENT IN A NEW MILLENNIUM (8th ed., 2d prt. 2011) [hereinafter MODEL CITY CHARTER].

1. *Powers and Boundaries.*—Some charters explicitly reinforce the breadth of local power,¹¹⁰ although many have the effect in state law of claiming home-rule power simply through adoption without stating as much in the document.¹¹¹ Charters also delineate political boundaries at times, both in terms of the external borders of a local government¹¹² and in terms of internal municipal boundaries, such as wards, council districts, and the like.¹¹³

2. *Governmental Structure and Administration.*—If there is one fairly universal leitmotif in charters, it is, not surprisingly, an articulation of governmental structure and the internal allocation of authority. Thus, most charters lay out the composition of the local legislature, address whether there is a mayor, and if so, what powers the mayor has.¹¹⁴ The process for recalling specific officials, often hotly contested at the local level,¹¹⁵ can also be specified.¹¹⁶

Charters often explain the structure of the local “administrative city-state,”¹¹⁷ laying out details on specific agencies, departments, boards, and similar administrative structures.¹¹⁸ Honolulu’s charter, for example, runs to about 140 pages, roughly half of which covers the administrative apparatus

110. *Id.* art. I, § 1.01 (“Powers of the City”) (“The city shall have all powers possible for a city to have under the constitution and laws of this state as fully and completely as though they were specifically enumerated in the charter.”).

111. *See supra* section I(B)(1) and *infra* Appendix.

112. *See, e.g.*, CHARTER OF BURLINGTON, VT. art. I, § 1 (setting forth the metes and bounds of the city of Burlington, based on markers such as “the east shore of Lake Champlain, at the northwest corner of one-hundred-acre lot number one hundred and sixty-three” and “Colchester Avenue, easterly of the Mary Fletcher Hospital . . . to the center of Winooski River,” among others).

113. *E.g.*, CHARTER OF ATLANTA, GA., ORD. NO. 2001-13 app. I (Council Districts).

114. The NCL’s Model City Charter provides modular options for strong mayor, weak mayor, and its traditional council–manager form. *See* MODEL CITY CHARTER, *supra* note 109, at 56–61 (articulating pros and cons to each approach and mapping changes to the Model needed to adopt each).

115. *See, e.g.*, Jeff B. Flinn, *Windcrest Voters to Decide on Recall Procedures in May*, MY SAN ANTONIO (Feb. 26, 2019, 12:00 AM), <https://www.mysanantonio.com/news/local/communities/northeast/article/Windcrest-voters-to-decide-on-recall-procedures-13644219.php> [https://perma.cc/J8SJ-VE2G]. The National Civic League did not include a recall mechanism in the seventh edition of its Model City Charter but changed its position to provide for recall in the current eighth edition. *See* Christopher T. Gates & Robert Loper, *Reviewing the Model City Charter: The Making of the Eighth Edition*, PUB. MGMT., April 2003, at 4, 6–7.

116. MODEL CITY CHARTER, *supra* note 109, § 6.04.

117. Davidson, *supra* note 1, at 570.

118. The NCL’s Model City Charter is relatively parsimonious when it comes to the structure of local administration, empowering the city council to “establish city departments, offices, or agencies in addition to those created by this charter.” MODEL CITY CHARTER, *supra* note 109, § 4.01. The Model City Charter specifically references only a small handful of such institutions. *See, e.g., id.* § 4.03 (“Legal Officer”); *id.* § 4.04 (“Land Use, Development, and Environmental Planning”); *id.* § 7.01(b) (“Board of Ethics”).

of the city.¹¹⁹ And interestingly, although courts are generally thought of as the province of the states and the federal government, some cities actually have a local judiciary enumerated in their charters.¹²⁰

At one more level of granularity down in terms of governance, charters often address personnel and civil service as part of the structural local constitution.¹²¹ Ethics rules can be part of this as well.¹²² And in the realm of governmental structure, many charters also address important aspects of local fiscal governance. These provisions can include an elaboration of taxing powers and process, bonding authority, and rules on contracting, among others.¹²³

3. Political Process, Political Rights, and Local Direct Democracy.—Charters often specify local political rights and processes.¹²⁴ These

119. CHARTER OF HONOLULU, HAW. art. IV–VIII (addressing, inter alia, seventeen executive departments, the Board of Water Supply, and the Prosecuting Attorney).

120. *See, e.g.*, CHARTER OF PHOENIX, ARIZ. ch. VIII (establishing the city court system as a “separate and independent branch of the [city] government”); CHARTER OF JUNCTION CITY, OR. § 26 (authorizing the city council to create the office of municipal judge). For more on how these local courts operate, evolve, and differ from nonlocal courts, see generally Annie Decker, *A Theory of Local Common Law*, 35 CARDOZO L. REV. 1939, 1956–66 (2014); Ethan J. Leib, *Localist Statutory Interpretation*, 161 U. PA. L. REV. 897, 902, 907 (2013); and Justin Weinstein-Tull, *The Structures of Local Courts*, 106 VA. L. REV. 1031 (2020). For an exploration of local courts’ criminal jurisdiction, see generally Alexandra Natapoff, *Criminal Municipal Courts*, 134 HARV. L. REV. 964 (2021).

121. MODEL CITY CHARTER, *supra* note 109, § 4.02.

122. *Id.* § 7.02. Some charters, like Dearborn, Michigan’s charter, require city governments to be explicitly nonpartisan. CHARTER OF DEARBORN, MI. § 12.6 (“All City elections shall be nonpartisan.”).

123. MODEL CITY CHARTER, *supra* note 109, art. V (“Financial Management”).

124. Charters, tellingly, often have preambles that articulate notions of democracy and assert local sovereignty, whatever the formal legal status of a given community might be. For example, the St. Augustine, Florida Charter states:

We the people of the City of St. Augustine Beach, Florida, under the constitution and laws of the United States of America and the State of Florida, in order to provide the benefits of local government responsive to the will and values of our citizens, do hereby adopt this Charter to define the powers and structure of our government. By this action, we secure the benefits of home rule and affirm the values of representative democracy, professional management, strong political leadership, citizen participation, and regional cooperation. We believe in an open, responsive government that abides by the highest ethical standards, operates as a careful steward of the human, fiscal, and natural resources of our city; that allows for fair and equitable participation of all persons in the affairs of the city; that provides for transparency, accountability, and ethics in governance; that fosters fiscal responsibility; and that meets the needs of a healthy, progressive city.

CHARTER OF ST. AUGUSTINE BEACH, FLA. pmbl. Similarly, the Charter of Honolulu, Hawaii states:

We, the people of the City and County of Honolulu, accepting responsibility to seek to achieve in our time that righteousness by which the life of our land is preserved and to encourage and enable our people to participate in their governance, do hereby adopt this Charter of the City and County of Honolulu.

CHARTER OF HONOLULU, HAW. pmbl.

provisions can address election methods, resident voting rights, campaign finance issues, and other process questions.¹²⁵ Among the more controversial aspects of charters, moreover, are local initiative-and-referendum powers.¹²⁶

4. *Sub-Localism*.—Charters often specify ways in which a city delegates authority to neighborhood-level and other sub-local institutions.¹²⁷ Examples of this sub-localism include the process for selecting and the powers of community boards, neighborhood advisory committees, and similar

125. See, e.g., CHARTER OF AUGUSTA-RICHMOND CTY., GA. § 1-28 (defining the bounds of ten commission districts); CHARTER OF SAN FRANCISCO, CAL. § 13.111 (establishing the eligibility for noncitizen parents or caregivers to vote for the board of education); CHARTER OF BURLINGTON, VT. § 3-7 (requiring prospective voters to take the Freeman’s Oath to establish eligibility); CHARTER OF TUCSON, ARIZ. ch. XVI subch. B (“Voluntary Expenditure Limitation”); CHARTER OF MULTNOMAH CTY., OR. § 11.60 (“Campaign Finance”); see also David Garrick, *New Proposal for Publicly Financed Elections in San Diego Aiming for 2020 Ballot*, SAN DIEGO UNION-TRIB. (Mar. 6, 2019, 12:30 PM), <https://www.sandiegouniontribune.com/news/politics/sd-me-election-public-finance-20190305-story.html> [<https://perma.cc/K4K3-KPL2>] (noting that advocates are aiming to amend San Diego’s city charter through a 2020 ballot initiative to provide for public financing of local elections).

Reflecting this, New York City Mayor Bill de Blasio outlined an ambitious plan of electoral reform at the start of his second term, focusing on public funding of campaigns and ballot access, notably situating this agenda in proposals to amend the city’s charter. See William Neuman, *Mayor Wants City Charter Revision to Tackle Campaign Finance*, N.Y. TIMES (Feb. 12, 2018), <https://www.nytimes.com/2018/02/12/nyregion/de-blasio-charter-revision-campaign-contributions.html> [<https://perma.cc/6XTD-KQ4B>]. Mayor de Blasio went on to establish a mayoral city charter revision commission that proposed and passed campaign finance reform (and two other proposals addressing public engagement and community boards). Noah Manskar, *NYC Charter Amendments Win Approval from Voters*, PATCH (Nov. 6, 2018, 10:43 PM), <https://patch.com/new-york/new-york-city/nyc-charter-amendments-win-approval-voters> [<https://perma.cc/6TUX-MWFU>]. The New York City Council later launched its own revision commission with a mandate to examine the entire charter. CHARTER REVISION COMMISSION 2019, <http://www.charter2019.nyc/> [<https://perma.cc/R96Q-Z4RH>]; see *About*, CHARTER REVISION COMMISSION 2019, <https://www.charter2019.nyc/background> [<https://perma.cc/U5Z4-VGZN>] (“The New York City Charter is the City’s constitution.”).

126. MODEL CITY CHARTER, *supra* note 109, § 6.04. In many jurisdictions, charters provide the only practical avenue for local direct democracy, which means that matters that are not really “fundamental” end up in charters simply because there is no other way for community members to circumvent resistance by local elected officials to alternative policy priorities.

127. For discussion of the increasing importance of sub-local institutions in urban governance, see, for example, Richard Briffault, *The Rise of Sublocal Structures in Urban Governance*, 82 MINN. L. REV. 503 (1997); Stephen R. Miller, *Legal Neighborhoods*, 37 HARV. ENVTL. L. REV. 105 (2013); Nadav Shoked, *The New Local*, 100 VA. L. REV. 1323 (2014); Kenneth A. Stahl, *Neighborhood Empowerment and the Future of the City*, 161 U. PA. L. REV. 939 (2013).

bodies.¹²⁸ Charters can also address sub-local institutions, such as wards, boroughs, and the like.¹²⁹

5. *Individual Rights*.—Some municipal charters, perhaps surprisingly, address individual rights, although this does not appear to be overly common. Anchorage’s charter, for example, has a bill of rights that includes rights to “opportunities in housing, public accommodations, employment, and education without regard to race, religion, sex, color, national origin, marital status, or physical disability.”¹³⁰ Atlanta’s charter is another example with a local bill of rights, addressing, among other things, religion and conscience, speech, search and seizure, nondiscrimination, and environmental protection.¹³¹

Reflecting a growing awareness of cities as rights-protecting public bodies,¹³² the National Civic League, in the most recent edition of its Model

128. See, e.g., CHARTER OF L.A., CAL. art. IX (establishing the Department of Neighborhood Empowerment and the certification and powers of Neighborhood Councils); CHARTER OF DETROIT, MICH. art. 9, ch. 1 (“Community Advisory Councils”). Scholars have noted the increasingly important interplay between city-wide governance and neighborhood-level structures. See, e.g., Erwin Chemerinsky & Sam Kleiner, *Federalism from the Neighborhood Up: Los Angeles’s Neighborhood Councils, Minority Representation, and Democratic Legitimacy*, 32 YALE L. & POL’Y REV. 569 (2014) (summarizing 1999 reform of the Los Angeles City Charter, which centered around decentralizing power to neighborhood councils); Matthew J. Parlow, *Civic Republicanism, Public Choice Theory, and Neighborhood Councils: A New Model for Civic Engagement*, 79 U. COLO. L. REV. 137 (2008) (suggesting that “local government substructures” could combat the capture of local government by special interests).

129. See, e.g., CHARTER OF SUFFOLK, VA. § 3.02 (dividing the city into seven boroughs); CHARTER OF NEW YORK, N.Y. § 2 (continuing the existing five boroughs).

130. CHARTER OF ANCHORAGE, ALASKA art. II, § 7. Interestingly, the Anchorage Bill of Rights contains some fairly specific and, it is fair to say, unfamiliar rights, such as “immunity from official actions of the assembly taken after 12:00 midnight and before 7:00 a.m., actual time,” and the right “to be heard at public hearings prior to adoption of proposed six-year plans of the school system,” among others. *Id.* §§ 5, 10.

131. Atlanta, Ga., Ordinance 2001-13, § 1 (Feb. 13, 2001) (“Bill of Rights”); see also Nushrat Rahman, *Bill of Rights for Detroiters Could Be First Change to City Charter in 8 Years*, DETROIT FREE PRESS (July 29, 2020, 2:56 PM), <https://www.freep.com/story/news/local/2020/07/29/detroit-bill-of-rights-city-council/5531860002/> [<https://perma.cc/ZKY6-KURX>] (reporting on a proposal to add “eight core values” to Detroit’s charter: “the right to water and sanitation, the right to environmental health, the right to safety, to right to live free from discrimination, the right to recreation, the right to access and mobility, the right to housing[,] and the right to ‘the fulfillment of basic needs’ like food and utilities”).

132. Scholars have explored the role of cities in protecting individual (federal) rights. See, e.g., David J. Barron, *The Promise of Cooley’s City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 515–21 (1999) (exploring the role of “a strong system of local self-governance” in protecting “constitutional freedom”); Richard C. Schragger, *Cities as Constitutional Actors: The Case of Same-Sex Marriage*, 21 J.L. & POL. 147, 167–68 (2005) (discussing the role of cities in vindicating individual constitutional rights). Other scholars have highlighted the role of local governments advancing civil rights law more generally. See, e.g., Olatunde C.A. Johnson, *The Local Turn: Innovation and Diffusion in Civil Rights Law*, 79 L. & CONTEMP. PROBS. 115 (2016) (identifying cities as civil rights innovators, for example, in protecting antidiscrimination rights).

City Charter, added new model preamble language addressing “diversity and inclusiveness.”¹³³ As the NCL notes, the organization did so “to underscore the right of every individual to equal opportunities and establish policies to prohibit discrimination based on race, color, religion, national origin, gender, age, sexual orientation, gender expression, marital status, military status or physical or mental disability.”¹³⁴

6. *Other Provisions.*—Finally, beyond those general categories, many charters—particularly those in jurisdictions that do not draw a sufficiently clear distinction between what is and is not “charter-worthy”¹³⁵—contain an odd assortment of other provisions.¹³⁶ As is the case with many state constitutions, particularly in states that have the initiative power for constitutional amendments,¹³⁷ charters may simply provide an alternative procedural focus for legal change where more straightforward legislative routes do not appear feasible. With that hydraulic function, charters can become, unfortunately, the object and recipient of legal provisions that are not in any reasonable sense “constitutional.”

* * *

133. MODEL CITY CHARTER, *supra* note 109, at i. Indeed, the NCL tied the fact of offering model preamble language at all to a constitutional vision of charters. *Id.* at iii. (“One of the changes made in the *Eighth Edition* is the inclusion of a preamble, which emphasizes that the charter is the constitution of the municipality adopted by its citizens.”).

134. *Id.* at i. The NCL Model, however, does not offer any substantive rights-based protections in the model charter itself.

135. *See infra* section III(B)(3) for discussion of this distinction.

136. The San Francisco City Charter, for example, contains provisions that specify in detail performance measures for the Muni, the city’s public transit agency. *See* CHARTER OF S.F., CAL. § 8A.103(c) (mandating a minimum on-time performance of 85% and a service delivery minimum of 98.5% of scheduled service hours, among other standards); *see also* CHARTER OF NEW ORLEANS, LA. art. IX, ch. 5 (“Minimum Wage”); CHARTER OF NEW YORK, N.Y. § 460 (“Gun-free school safety zones”).

One particularly high-profile recent example is the February 2019 addition by voters in Toledo, Ohio, to their city charter of a “Lake Erie Bill of Rights” (LEBOR). LEBOR provides among other things, that city residents may bring suit against a government or business that interferes with the right of “the Lake Erie Ecosystem to exist, flourish and naturally evolve.” TOLEDO MUN. CODE ch. XVII, § 254(a); *see also* Julia Conley, *In ‘Historic Vote,’ Ohio City Residents Grant Lake Erie Legal Rights of a Person*, ECOWATCH (Feb. 28, 2019, 8:51 AM), <https://www.ecowatch.com/lake-erie-bill-of-rights-2630261411.html> [<https://perma.cc/2B62-RCQN>] (reporting that 61% of voters voted in favor of LEBOR). However, LEBOR was challenged in federal district court the day after passage, and the court subsequently held LEBOR void for vagueness under the Fourteenth Amendment’s Due Process Clause. *Drewes Farm P’ship v. City of Toledo*, 441 F. Supp. 3d 551, 556 (N.D. Ohio 2020); Briana Malaska, *Local Farmer Files Lawsuit Against Lake Erie Bill of Rights*, WNWO (Feb. 27, 2019), <https://nbc24.com/news/local/local-farmer-files-lawsuit-against-lake-erie-bill-of-rights> [<https://perma.cc/S87S-DYC5>].

137. *See generally* Cain & Noll, *supra* note 8 (expounding on and analyzing the various processes states have available to amend or revise their constitutions).

From the history and empirical landscape laid out above, it is clear that municipal charters speak as constitutional documents to multiple audiences within and outside local governments. Charters primarily constitute the structure and functions of local government and can address important legal determinants of the rights of members of a community. But charters also delineate essential aspects of the state–local relationship and signal to courts about particularly fundamental local issues. In short, charters play a distinctly constitutional role in local governance, but that role is well worth unpacking in detail.¹³⁸ To do so, it is important to pause first and reflect on relevant elements of the conceptual landscape of constitutionalism, a task to which we now turn.

II. Constitutionalism and “Subconstitutionalism”

Constitutionalism has deep roots in the American tradition. When Chief Justice Marshall famously wrote in *McCulloch v. Maryland*¹³⁹ that “[w]e must never forget, that it is *a constitution* we are expounding,”¹⁴⁰ he reflected the common understanding that there is some fundamental meaning—something jurisprudentially and culturally distinctive—about the nature of a constitution. But what exactly is that distinctive meaning? And how might that meaning differ for constitutions below the national level?

Building on Part I’s exploration of charter history and contemporary practice, this Part takes a step back to lay the predicate for a more conceptual question: what *should* a charter be? To answer that question, this Part draws on the literature of constitutionalism to articulate a framework through which to evaluate the pragmatic and normative purposes a local constitution might serve. That framework focuses on constitutional function, constitutional meaning, and the contested values of constitutionalism itself.¹⁴¹ It then turns

138. The varied communicative aspects of charters—speaking, as they do, to multiple audiences—is not unique to these local “constitutions,” even if the relationships and specific provisions involved are distinctive. State constitutions set the foundations of state government and define the rights of state citizens but also delineate important aspects of local-government power, structure, and function. The federal Constitution, similarly, not only governs the national government but carries a rule allocating power between the states and the federal government—the Supremacy Clause, U.S. CONST. art. VI, cl. 2—and has several other clauses directly relevant to the states. The Republican Guaranty Clause, for example, addresses the form of state government and provides the states with the right to call upon the protection of the federal government against “domestic Violence.” U.S. CONST. art. IV, § 4. And of course, through incorporation into the Fourteenth Amendment or directly, the individual rights provisions of the federal Constitution constrain state (and local) government. U.S. CONST. amend. XIV, § 1.

139. 17 U.S. (4 Wheat.) 316 (1819).

140. *Id.* at 407.

141. The central tenets of the discourse on constitutionalism, a literature that focuses on constitutional function and meaning, are admittedly disputed, and this Part in no way attempts a comprehensive review. Rather, it seeks to highlight certain themes in that literature that are of particular relevance to understanding the constitutional dimensions of municipal charters, recognizing that in so doing, the discussion inevitably flattens or oversimplifies many debates.

to conceptions of “subconstitutionalism,” highlighting what is distinctive about constitutions of subordinate levels of government.

A. *Function, Meaning, and Value in Constitutionalism*

1. *What Constitutions Do—Of Constitutional Function.*—To begin with a functional perspective, constitutions paradigmatically play three essential roles, whatever other responsibilities legal systems might imbue them with: delineating institutional structure, channeling political process, and constraining the state through individual rights.¹⁴² These aspects of constitutionalism have many layers, but there is value in briefly isolating the core of each.¹⁴³

a. *Structure, Form, and the Allocation of Power.*—At the most basic level, constitutions do what their name suggests: They *constitute* government. In this regard, constitutions—at any level of government—function similarly to the way that foundational documents constitute a variety of other institutions

142. Some constitutions contain positive rights, which is to say affirmative obligations on the state legally cognizable to some degree in individual-rights terms. Our federal Constitution is paradigmatically understood to contain no explicit affirmative rights, although nominally negative rights have been interpreted to mandate affirmative steps by the government. The Sixth Amendment right to the assistance of counsel recognized in *Gideon v. Wainwright*, 372 U.S. 335 (1963), is perhaps the best-known example, although a variety of individual “negative” rights require positive state action. STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES* 54 (1999); cf. Brandon L. Garrett, *Wealth, Equal Protection, and Due Process*, 61 WM. & MARY L. REV. 397 (2019) (exploring ways in which federal procedural rights and inequality intersect).

State constitutions, by contrast, contain numerous explicit positive rights, including in education, labor, social welfare, and the environment. ZACKIN, *supra* note 13, *passim*; JOHN J. DINAN, *THE AMERICAN STATE CONSTITUTIONAL TRADITION* 187 (2006); Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1135 (1999). Internationally, the modern trend is for constitutions to recognize a variety of socioeconomic rights. See Cass R. Sunstein, *Social and Economic Rights? Lessons from South Africa*, 11 CONST. F. 123, 123 (2001) (commenting on the international trend toward socioeconomic rights).

143. A functional view of constitutionalism focuses on the consequences of constitutional law, but the literature on constitutionalism also recognizes the interplay between form, process, and fundamentality in constitutional law. See, e.g., Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 DUKE L.J. 364, 366 (1995). As Elster explains,

If we want to distinguish the constitution from other legal texts, three criteria offer themselves. First, many countries have a set of laws collectively referred to as ‘the constitution.’ Second, some laws may be deemed ‘constitutional’ because they regulate matters that are in some sense more fundamental than others. And third, the constitution may be distinguished from ordinary legislation by more stringent amendment procedures.

Id.

and organizations, public and private.¹⁴⁴ Constitutions thus articulate the specific powers of and constraints on individual offices and officers, structuring the terms of institutional competition and cooperation within government. This is the familiar realm of separation of powers or functions, which also includes the overlap between and among the roles of specifically delineated institutions and officers.¹⁴⁵

Constitutions also paradigmatically address vertical allocation of power: federalism or localism, as the case may be. This can include explicit or implicit delegations of authority (upward to other levels in the constitutional hierarchy as well as downward),¹⁴⁶ rules of decision in cases of conflict between levels of government,¹⁴⁷ and other aspects of intergovernmental relations. Relatedly, many constitutions, even if they do not explicitly articulate a source of authority, often allude to powers reserved or not included.¹⁴⁸

b. Framing the Political Process.—Mark Tushnet has argued that even more critical to constitutionalism than the basic governmental structuring

144. See generally David Ciepley, *Is the U.S. Government a Corporation? The Corporate Origins of Modern Constitutionalism*, 111 AM. POL. SCI. REV. 418 (2017) (conceptualizing the federal Constitution as a corporate charter); Eric Enlow, *The Corporate Conception of the State and the Origins of Limited Constitutional Government*, 6 WASH. U. J.L. & POL'Y 1 (2001) (tracing the corporate conception of the state in European and American legal history).

145. The federal Constitution is relatively quiet on matters of administration, alluding to various officers but leaving the structuring of the administrative state to Congress. See E. Garrett West, Note, *Congressional Power over Office Creation*, 128 YALE L.J. 166, 169 (2018) (noting that the federal Constitution “anticipated, but did not establish, a host of . . . personnel and positions—including ‘Heads of Departments,’ ‘Ambassadors,’ ‘Judges of the supreme Court,’ a ‘Chief Justice,’ and ‘principal Officer[s].’” (alteration in original)). State constitutions, by contrast, tend to say more about the structure and specific functions of the elements of the executive branch. See generally Miriam Seifter, *Understanding State Agency Independence*, 117 MICH. L. REV. 1537 (2019) (discussing state constitutional institutional variety).

146. The Tenth Amendment to the federal Constitution is an example of a provision that recognizes a reservation of power to the states and to the people, although without much clarity. See U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”); see also Kathryn Abrams, Note, *On Reading and Using the Tenth Amendment*, 93 YALE L.J. 723 (1984) (conversing interpretive methods in the Tenth Amendment context).

147. As is the case with the Supremacy Clause, which states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

See U.S. CONST. art. VI, cl. 2.

148. Theoretically, some constitutions, like the federal Constitution, are understood as grants of power from “the People” or from constituent components, such as the states in a confederation, while other constitutions, like our state constitutions, are understood as limitations on powers otherwise plenary in a given sovereignty.

function—and individual rights—is the way that constitutions frame the political process.¹⁴⁹ Tushnet persuasively asserts that rights are often contingent on political consensus, evolving over time, and that the most important legal outcomes actually result from political choices rather than Supreme Court interpretations of fundamental law.¹⁵⁰ In this view, what matters most about constitutional law are the choice set and constraints a given constitution places on citizen engagement, elections, and other active aspects of governance beyond allocating authority and protecting individual rights. This is an important corrective to the centrality of rights and structure in our constitutional discourse, and one need not agree with Tushnet's prioritization to acknowledge the critical interplay between constitutions and political process, democratic or otherwise.¹⁵¹

c. Rights and the Fundamentality of Constitutional Law.—Finally and more conceptually, a third critical function for constitutional law, as distinct from ordinary state action, is to delineate an area of “higher” or more fundamental lawmaking that is relatively insulated from ordinary politics.¹⁵² Individual rights are the paradigm of lawmaking that constrains state action. Rights are placed outside normal political choice, legitimating democracy by providing a legal mechanism to constrain its worst potential impulses.

The Framers of the federal Constitution, before the adoption of the Bill of Rights, placed great emphasis on the interplay between structure and individual liberty, recognizing that institutional friction was as much an imperative of constitutional law as empowerment and direct constraints on state action through individual rights.¹⁵³ Modern constitutionalism, however, tends to privilege a form of judicial review that empowers courts to rule on

149. See MARK TUSHNET, *WHY THE CONSTITUTION MATTERS* 1 (2010) (“The Constitution matters because it provides a structure for our politics.”).

150. *Id.* at 1, 16.

151. Cf. CASS R. SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* 6 (2001) (“[T]he central goal of a constitution is to create the preconditions for a well-functioning democratic order, one in which citizens are genuinely able to govern themselves.”).

152. 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 6–7 (1991).

153. See THE FEDERALIST NO. 84 (Alexander Hamilton) (arguing that the federal Constitution's structure and aims, as well as its foundation on popular consent, made it unnecessary to have a federal bill of rights); see also Aziz Z. Huq, *Standing for the Structural Constitution*, 99 VA. L. REV. 1435, 1449–50 (2013) (observing that the Framers, including James Madison, Alexander Hamilton, and James Wilson, originally thought “institutional design” would do more “to keep government in check rather than mere individual entitlements”); Daryl J. Levinson, *Rights and Votes*, 121 YALE L.J. 1286, 1293 (2012) (“Convinced that direct protection of constitutionally enumerated rights would be futile, the Federalist Framers, led by James Madison, attempted to secure rights *indirectly*, by creating a structure of government that would empower vulnerable groups to protect their interests through the political process.”).

the interplay between constitutional law (structural and rights-based) and “ordinary” actions taken by the state, whether legislative or executive.¹⁵⁴

This judicial role places the courts in the practical position of having the final word as a formal matter (barring constitutional amendment) on the most contentious issues of structure and rights, although views of constitutional meaning develop over time in a dialectic between courts and the political branches. In the short run, legislatures can override any statutory or regulatory interpretation, but what the courts say on questions of constitutional law—whatever theoretical possibilities exist for interbranch interpretation or popular constitutionalism¹⁵⁵—tends to control in our legal culture. Eventually, however, even the most basic understanding of constitutional doctrine can change through political and popular pressure.¹⁵⁶

The institutional force of constitutional judicial review can recognize and legitimate the realm of higher law, which is harder to establish and harder to amend—outside (and indeed, explicitly constraining) ordinary politics. For all these reasons, the product of constitutional lawmaking is understood to be worthier of judicial respect.¹⁵⁷ Not that this function for constitutional law and the role of the courts in policing its boundaries are without critics. A staple of the constitutionalism literature is concern about the antidemocratic tendency of a body of law distanced from ordinary politics, especially coupled with enforcement by a generally undemocratic branch empowered to override popular preferences.¹⁵⁸ As we will see shortly,¹⁵⁹ counter-majoritarian challenges to judicial review in the constitutional context are one species of a broader critique of strong constitutionalism.

154. *See supra* note 98.

155. *See generally* LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004) (maintaining that the federal Constitution is best understood as a “people’s charter,” to be interpreted by ordinary citizens and their representatives rather than judges); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS*, at x (1999) (“Constitutional theory must make sense of how people deal with the Constitution away from the courts if it is to provide an accurate account of our constitutional practice.”).

156. *See, e.g.*, 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 266–94 (1998) (explaining how new popular understandings and pivotal elections have transformed constitutional doctrine at key moments in America’s legal and political history).

157. This recognition undergirds the reluctance of courts to decide constitutional questions when nonconstitutional avenues of decision are available. *See, e.g.*, *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (“The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.”).

158. The literature on what Alexander Bickel famously coined as the counter-majoritarian difficulty is vast, including, as Bickel himself suggested, majoritarian views of the role of constitutional judicial review in a democratic polity. *See generally* ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962) (expressing deep concern about the undemocratic nature of judicial review and judicial finality).

159. *See infra* section II(A)(3).

2. *What Constitutions Mean—Salience and Civic Identity.*—As important as the various core functions outlined above are for constitutions, these foundational documents often play a broader role in an expressive sense.¹⁶⁰ Constitutions not only have direct legal consequences but can also reflect a civic community's deep identity.¹⁶¹ As such, constitutions have the potential to signal that identity to internal and external audiences, shaping political and popular culture in ways that “ordinary” law rarely does.¹⁶²

When a newly democratic South Africa chose in 1996 to include positive rights in its constitution, the nation was not simply dryly allocating authority between the legislature and the judiciary; it was self-consciously enshrining a rejection of the prior apartheid regime in the country's basic law.¹⁶³ A similar story can be told about Germany's view of the constitutional balance between free speech and rejection of Nazism after World War II¹⁶⁴ or the provincial autonomy impulses behind Canada's Notwithstanding Clause,¹⁶⁵ among other international examples.¹⁶⁶

160. This is especially true in the comparative context with respect to constitutional preambles. See, e.g., Tom Ginsburg, Nick Foti & Daniel Rockmore, “*We the Peoples*”: *The Global Origins of Constitutional Preambles*, 46 GEO. WASH. INT'L L. REV. 305, 306 (2014). As Ginsburg, Foti, and Rockmore explain:

Preambles often speak in the name of a distinct people, either real or fictional, who are both the creators and subjects of the constitutional order. Frequently, preambles recount key historical events such as the national struggle for independence. In this sense, they constitute autobiographical narratives, legitimating specific local actions, historical moments, and organizations. Call this the *national expression thesis*: constitutions, particularly preambles, reflect local needs, idioms, and aspirations.

Id. (footnotes omitted).

161. See generally GARY JEFFREY JACOBSON, CONSTITUTIONAL IDENTITY (2010) (exploring the role that constitutions play in defining, framing, and constructing a community's identity—past, present, and future); *id.* at xiii (“[C]onstitutions may be variously described in terms of the mix of universal and particular [i.e., local] attributes that define their identities.”).

162. See Ginsburg et al., *supra* note 160, at 309 (noting that “constitutions are about more than creating enforceable law; they are also supposed to express the fundamental values and aspirations of the people and bind them together as a nation”); see also GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 349–54 (1998) (analyzing conceptions of popular sovereignty in early American discourse and how they influenced constitutional formation).

163. See Sunstein, *Social and Economic Rights*, *supra* note 142, at 125 (describing how South Africa's decision to include socioeconomic rights in its new constitution was motivated by the country's desire to overcome its legacy of apartheid—“to eliminate apartheid ‘root and branch’”).

164. See George Rutherglen, *Theories of Free Speech*, 7 OXFORD J. LEGAL STUD. 115, 116–18 (1987) (observing that postwar West Germany imposed certain limitations on free expression to protect racial and ethnic minorities and to forestall Nazis and Communists).

165. See Calvin R. Massey, *The Locus of Sovereignty: Judicial Review, Legislative Supremacy, and Federalism in the Constitutional Traditions of Canada and the United States*, 1990 DUKE L.J. 1229, 1266–72 (discussing the links between Canada's dual cultural history—English and French—and the Notwithstanding Clause's provision of provincial autonomy within the Canadian federal system).

166. Post-Cold War constitution drafting provides numerous examples of new democracies expressly seeking to involve their citizens in the process to foster civic participation. See, e.g.,

In this way, constitutions influence political cultures and provide a focal point for a community's most profound deliberations.¹⁶⁷ Of course, there are vital and deeply contested norms at play in moments of statutory change—as debates over and the aftermath of society-changing statutes, such as the civil rights laws of the 1960s and the Affordable Care Act, well evince.¹⁶⁸ But a constitution marks out a realm of lawmaking that in the distinctively American culture of constitutionalism—and in many systems internationally—has a deeper meaning.¹⁶⁹

And echoing Tushnet, not only do constitutions shape and constrain the doctrinal boundaries of political debate—whether through structure, speech rights, or otherwise—but constitutional text, constitutional law, and constitutional process also influence the range and terms of issues subject to political debate. The national discourse over reproductive freedom during the past half-century would have looked completely different had the Supreme Court not ruled the way it did in *Roe v. Wade*.¹⁷⁰ And perennial debates about federalism—as well as, increasingly, localism—bespeak a political culture in

Michael G. Breen, *Nepal, Federalism and Participatory Constitution-Making: Deliberative Democracy and Divided Societies*, 26 *ASIAN J. POL. SCI.* 410, 410 (2018) (describing how Nepal's elected Constituent Assembly, while drafting a new national constitution, instituted a participatory and deliberative process aimed at achieving consensus among political actors and the public); Rangita de Silva de Alwis, Anware Mnasri & Estee Ward, *Women and the Making of the Tunisian Constitution*, 35 *BERKELEY J. INT'L L.* 90, 114–16 (2017) (discussing transparency and engagement, particularly by women, in the making of Tunisia's constitution).

167. Cf. Jacob T. Levy, *Not so Novus an Ordo: Constitutions Without Social Contracts*, 37 *POL. THEORY* 191, 192 (2009) (“Real constitutional orders appropriate, incorporate, and channel the histories and divisions of the societies they govern.”).

168. See WILLIAM N. ESKRIDGE JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* 7 (2010) (“Some of the nation's entrenched governance structures and normative commitments are derived directly from the Constitution, but most are found in *superstatutes* enacted by Congress, executive-legislative partnerships, and consensus of state legislatures.”); William N. Eskridge Jr. & John Ferrejohn, *Super-Statutes*, 50 *DUKE L.J.* 1215, 1215, 1231 (2001) (defining a category of statutes that establish new normative or institutional frameworks that over time “stick” in public culture to broader legal effect); e.g., Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 86 (1960); Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (1963); Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965); Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286 (1965); Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (1967); Fair Housing Act of 1968, Pub. L. No. 90-284, §§ 802–819, 82 Stat. 73, 81–89 (1968); Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

169. What some see as exceptionalism in our constitutional culture is not always normatively embraced, with some scholars raising concerns about the invocations of constitutional norms acting as trumps to subvert political discourse. See, e.g., Serkin & Tebbe, *supra* note 10, at 775 (“All too often, the Constitution functions as a blunt weapon in ordinary politics.”).

170. 410 U.S. 113 (1973).

which the structural constitution empowers certain communities and distributes not just governmental authority but also voice.¹⁷¹

3. *The Contested Value of Constitutions.*—Finally, beyond constitutional function and constitutional meaning is a larger debate about the values of constitutionalism. This discourse on normative constitutionalism has many strands, but two particularly bear mention. The first strand recognizes that the very process of constitutional formation and reformation that brings constitutional law outside the realm of ordinary politics—as well as the basic institution of constitutional judicial review—is fundamentally counter-majoritarian.¹⁷² This is not a problem for constitutions in nondemocratic legal systems. But in legal systems founded on any version of popular sovereignty, placing a realm of law outside democratic control sits in tension with that popular foundation and, at a minimum, requires justification. The general, quite reasonable response often resorts to the normative legitimating value of rights-based protections *against* majority rule for groups unable to compete fairly in the political process,¹⁷³ as well as the seeming fundamentality of the values being enforced.¹⁷⁴ But friction from the nature of constitutional law and judicial review in any democratic system that purports to privilege popular sovereignty remains.

A related debate in the literature focuses more pragmatically on the tension between the stability afforded by strong constitutionalism and the flexibility that more frequent amendment and more “living constitutionalist” judicial interpretation can bring. In some ways, this is a debate about the value of pre-commitment, contrasting the benefits for governance from notice and stability of public expectations with the risks of ossification and democratic illegitimacy of entrenchment in the sense that present public decisions, including constitutional-structural ones, limit future democratic choices.¹⁷⁵ Part of this debate reflects the particular difficulty in many

171. Cf. Heather K. Gerken, *The Supreme Court, 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 20–21 (2010) (arguing for the potential of federalism to shape cultural and political identity through diffusing power).

172. Much of the literature on the counter-majoritarian difficulty focuses on judicial review, but concern with reconciling constitutional supremacy with popular democracy pertains to constitutional law more generally.

173. See generally *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (calling for heightened judicial scrutiny when, inter alia, there might be “prejudice against discrete and insular minorities”); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980) (elaborating a “representation-reinforcing theory of judicial review,” which aims to reconcile democracy with the need to protect minority rights when the political process fails).

174. See generally BICKEL, *supra* note 158 (grappling with the issue of identifying rights that are truly fundamental and consequently deserving of special judicial protection).

175. Compare Ozan O. Varol, *Temporary Constitutions*, 102 CALIF. L. REV. 409, 411 (2014) (“A constitution represents a powerful acknowledgement by a society of its own weaknesses and its

systems of updating constitutional texts to reflect governing reality and the corresponding tendency of some versions of constitutional judicial review to valorize original understanding.

A variation on the debate about flexibility and entrenchment plays out in terms of written versus unwritten constitutionalism.¹⁷⁶ Although the history is complex,¹⁷⁷ it is generally well accepted that the early American embrace of the written constitution marked a significant innovation in the development of constitutionalism.¹⁷⁸ In the literature on comparative constitutional law, scholars regularly note that most countries have written constitutions while others, the United Kingdom being a familiar example, adhere to unwritten constitutional conventions.¹⁷⁹ And it has long been recognized that at least some of what is conventionally associated with constitutional law stands apart from the actual text of any given constitution, imbued by practice and tradition at times wholly divorced from the text.¹⁸⁰

There are functional advantages to having clearly delineated constitutional texts grounded in rule-of-law values. Written constitutions, notwithstanding all the perennial debates over interpretation and indeterminacy, bring relatively greater clarity to fundamental governmental choices, foster stability in a legal system, and signal the realm of higher law over “ordinary” state action, not only to the judiciary and other legal actors but also to ordinary citizens and others subject to a given constitutional

ability to fall prey to pernicious majoritarian impulses. Constitutions therefore bind the hands of future political majorities to ensure that short-term political passions do not trump society’s long-term interests.”), *with* Serkin, *supra* note 20, at 886–88 (raising concern about entrenchment, particularly at the local level, as an “intertemporal[.]” shift in democratic power—with the present undermining future democratic choices). *See generally* Levinson, *supra* note 10 (exploring the interplay between intertemporal stability and constitutional design).

176. Although it is common to refer to the dichotomy between written and unwritten constitutions in comparative terms, some scholars argue that the more appropriate distinction is between codified and uncoded constitutions. *See, e.g.*, ADAM TOMKINS, PUBLIC LAW 7 (2003) (noting that “notwithstanding its allegedly unwritten nature, much (indeed, nearly all) of the [English] constitution *is* written, somewhere” and asserting that “[t]he unhappily misleading phrase, ‘written constitution’ really means ‘codified constitution’”); *see also* Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 410 (2007) (“The Magna Carta, the Bill of Rights of 1689, the Parliament Acts of 1911 and 1949, the European Communities Act of 1972, the Human Rights Act of 1998—these all form parts of the English constitution, and they are all written down.” (footnotes omitted)). For present purposes, the critical point is the distinction between a clearly delineated single document identified as a constitution and other forms of constitutional ordering.

177. *See supra* section I(A)(2).

178. *See* Bowie, *supra* note 46, at 1400–01 (describing Americans’ “enthusiasm” for written constitutionalism).

179. *E.g.*, Elster, *supra* note 143, at 365.

180. *See* Young, *supra* note 176, at 410 (“[T]he American ‘constitution’ consists of a much wider range of legal materials than the document ratified in 1789 and its subsequent amendments.”); K. N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 12 (1934) (contending that constitutional practice works to “legitimize the words” in the written document).

regime. Some commentators argue that unwritten constitutions foster more gradual—and by dint of their ease of modification, more democratic—political change,¹⁸¹ although the distinct international trend clearly favors written constitutionalism.¹⁸² The debate thus recapitulates the larger question of constitutional stability and popular sovereignty—with the ascendancy of written constitutions internationally giving some sense of how that debate has most often been resolved in the modern context.¹⁸³

B. “Sub”-Constitutions and “Subconstitutionalism”

If the literature on constitutionalism usefully highlights common functions that illuminate the value and potential of municipal charters, a distinctive vein in constitutional law scholarship offers insights into “subconstitutions,” which is to say constitutions of subnational political institutions in federal systems that devolve power.¹⁸⁴

181. Lord Woolf is one such commentator, stating:

Constitutions have to evolve to meet the needs of their citizens. A virtue of our being one of the three developed nations that does not have a written constitution, is that our constitution has always been capable of evolving as the needs of society change. The evolution can be incremental in a way which would be difficult if we had a written constitution.

See, e.g., Lord Woolf, *The Rule of Law and a Change in the Constitution*, 63 CAMBRIDGE L.J. 317, 318 (2004); *see also* Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 857 (1978) (“The [British] constitution came to be seen less as a body of principles limiting governmental power, and more as a set of institutions headed by a Parliament that possessed ultimate authority to change customary arrangements by legislation.”).

182. *See generally* Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1 (1998) (exploring dynamics of change in constitutionalism).

183. That written constitutionalism has become the predominant norm globally does not mean that any given feature of American constitutional structure has been—or should be—replicated internationally. *See generally* Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633 (2000) (discussing and urging caution about the diffusion of U.S. structural models).

184. *See* Jonathan L. Marshfield, *Models of Subnational Constitutionalism*, 115 PENN ST. L. REV. 1151, 1153 (2011) [hereinafter Marshfield, *Models of Subnational Constitutionalism*] (defining subnational constitutionalism as “rules (both formal and informal) that protect and define the authority of subnational units within a federal system to exercise some degree of independence in structuring and/or limiting the political power reserved to them by the federation”); Tarr, *supra* note 22 (exploring “sub-national constitutional space”); Robert F. Williams & G. Alan Tarr, *Subnational Constitutional Space: A View From the States, Provinces, Regions, Länder, and Cantons*, in FEDERALISM, SUBNATIONAL CONSTITUTIONS, AND MINORITY RIGHTS 3, 3–24 (G. Alan Tarr, Robert F. Williams & Josef Marko eds., 2004) (encouraging scholars to study federalism not only from the vantage point of a nation’s central government but also from the perspective of its component, subnational units); *see also* Cheryl Saunders, *The Relationship Between National and Subnational Constitutions*, in SUBNATIONAL CONSTITUTIONAL GOVERNANCE 23, 23–36 (Gretchen Carpenter ed., 1999) (exploring national–subnational constitutional arrangements from a comparative constitutional standpoint). Although the literature on subconstitutionalism in domestic legal literature is relatively sparse, there is a growing discourse on subnational issues in international and comparative constitutional scholarship. *E.g., Re-*

One essential insight of the literature on subnational constitutionalism is that national constitutionalism inherently constrains the “range of discretion,” or “space,” allowed to subnational institutions.¹⁸⁵ That means, as Jonathan Marshfield puts it, that “subnational constitutions are by definition substantively contingent.”¹⁸⁶ Whatever scope constitutions have, then, for defining structure and imparting civic meaning is constrained by their relationship with constitutional law at higher levels of government.¹⁸⁷

Marshfield has also noted that in the dialectic between higher- and lower-level constitutionalism, a system of subconstitutional law provides a forum for public deliberation when national constitutions tend to be more entrenched.¹⁸⁸ That subconstitutions tend to be more amenable to change—more open to public engagement—reflects the varying incentives for (and risks pertaining to) stability at the national level and constitutional innovation at lower levels of government.¹⁸⁹

Tom Ginsburg and Eric Posner, moreover, have argued that subconstitutions are likely to be weaker institutionally because the cost of constraining public institutions declines in the shadow of what they call the “superconstitution.”¹⁹⁰ In their view, if the government is understood as an agent of the people and if constitutions are understood as a method of control by the public—reasonable, if incomplete, assumptions—then higher-level constitutions can reduce the risks that lower-level governments will diverge from the preferences of their communities. As a result, there will be less pressure directly to constrain lower-level governments, and subconstitutions will tend paradigmatically not to impose such constraints.¹⁹¹

One need not agree with Ginsburg and Posner’s particular agency-cost framing to appreciate their point that in contemplating the value of—and

Exploring Subnational Constitutionalism, 6 PERSP. FEDERALISM (SPECIAL ISSUE), no. 2 (2014); see also Jonathan L. Marshfield, *Dimensions of Constitutional Change*, 43 RUTGERS L.J. 593, 593 (2013) [hereinafter Marshfield, *Dimensions of Constitutional Change*] (reviewing CONSTITUTIONAL DYNAMICS IN FEDERAL SYSTEMS – SUBNATIONAL PERSPECTIVES (Michael Burgess & G. Alan Tarr eds., 2012)) (“Although comparative constitutional law has grown wildly as a field of study in recent decades, attention is almost always placed on national constitutional law with little mention of subnational issues.”).

185. Williams & Tarr, *supra* note 184, at 5.

186. Marshfield, *Models of Subnational Constitutionalism*, *supra* note 184, at 1159.

187. This pertains as well to higher-level, nonconstitutional law as to constitutional law. If a state passes a statute that defines the scope of municipal charters, as many have, see *supra* section I(B)(2), those statutory provisions take precedent over local law in the absence of state constitutional protection for home rule, see *infra* section III(C)(2).

188. See Marshfield, *Models of Subnational Constitutionalism*, *supra* note 184, at 1183 (observing that in federations *with* static and difficult-to-amend national constitutions and *without* subnational constitutionalism, public deliberation suffers).

189. *Id.* at 1183–84.

190. Tom Ginsburg & Eric A. Posner, *Subconstitutionalism*, 62 STAN. L. REV. 1583, 1584 (2010).

191. *Id.* at 1585–86.

constraints on—constitutions at a lower level of governance, it is important to focus on the interplay between lower- and higher-level legal institutions. The choice set facing a local civic community is meaningfully different than that facing a national community by virtue of higher-level constitutionalism defining important baseline structural constraints and individual rights. This insight, at a sufficiently high level of generality, is equally applicable to the relationship between state law (which would include both constitutional and statutory law, an important addition in this context) and the local “subconstitutions” that charters represent.¹⁹²

* * *

The literature on constitutionalism and subconstitutionalism underscores how the specifics of public institutional structure, political process, and individual rights in any legal system influence the meaning attached to a given constitution and how constitutions can then feed back into that political culture beyond any formal legal impact the document itself might have. That is why constitutions cast shadows in many legal systems far beyond their technical, doctrinal terms, serving as focal points for collective meaning—for better or worse. And subconstitutions play this role in dialogue with the constitutional law of the larger systems in which they operate. The functional as well as dialogic expressive potential of constitutions can resonate at the local level if municipal charters are taken seriously as constitutions, as we shall now see.

III. On the Possibilities of Charters as Local Constitutions

Shifting from the conceptual to the normative and coming back to charters themselves, this Part argues that elevating the role of these instruments as local constitutions would potentially be beneficial on several levels. The argument focuses on two aspects of constitutionalism as they might unfold at the local level. The first involves constitutions as bulwarks of legitimacy at a moment when the nature of local governments as democratic polities is increasingly strained. This potential role for charters is not predicated on the terms of any particular constitutional *text* but rather reflects the function charters can play in shaping the relationship between local governments and external legal actors, such as states and the courts.

The second, more inward-focused aspect of constitutionalism relevant here involves the ability of charters to focus democratic deliberation, discerning what is most critical to community identity and hence worthy of being enshrined in a foundational text. This can be true not only of the common core of structure and political process but also of the other aspects

192. See also Tarr, *supra* note 22, at 1133 (arguing that a “federal system’s constitutional architecture [leaves ‘space’] to be filled by the constitutions of its sub-national units, even while it sets parameters within which those units are permitted to act”).

of higher law, including rights and community values. Charters, in this sense, can improve governance and bolster the rule of law by rendering choices about the structure of local governance more salient and by more generally advancing values such as transparency and stability.

These are admittedly quite aspirational goals for municipal charters, and one must be quite careful of overly investing in the constitutional potential of these often-humble documents. These goals must also be read against a backdrop of concern about the valence of empowering local governments, with their tendency toward parochialism and exclusion, a concern that has long been a staple of the local-government legal discourse.¹⁹³ Charters will not solve the dilemma of localism any more than any other legal instrument but do have a role to play. Ultimately, then, there is value in coalescing a normative vision for these texts as local constitutions even if actual practice often falls short.¹⁹⁴

A. *Charters and Local Governments as Democratic Polities*

The first potential that charters hold as local constitutions is their ability to reinforce and legitimate the democratic nature of local governments at a time when states are reining in the regulatory role that cities are increasingly taking on. As this subpart argues, charters can do so by reinforcing the public, democratic, and empowered nature of local governments in opposition to an understanding of cities as primarily subordinate administrative arms of the state or quasi-private service providers. This assertion of local democratic legitimacy, in turn, can communicate to states, courts, and other audiences, reinforcing the power of cities as polities with independent democratic authority.¹⁹⁵

1. The Contested Nature of Local Governments.—At core, the discourse and jurisprudence on local legal identity are deeply ambiguous on how exactly local governments should be understood. Although by no means mutually exclusive in practice, three basic conceptions of the nature of local governments tend to predominate.

The first conception sees cities and other local governments primarily as arms of the state, or administrative units on which states draw to help manage a geographically delineated area.¹⁹⁶ In this view, states have plenary

193. See Nestor M. Davidson, *The Dilemma of Localism in an Era of Polarization*, 128 YALE L.J. 954, 975–78 (2019) (surveying the discourse).

194. Subpart IV(A), below, will consider some avenues of law reform to align this Article's normative constitutional argument more closely with practice, where there is misalignment.

195. Cf. Marshfield, *Models of Subnational Constitutionalism*, *supra* note 184, at 1169 (“Perhaps the most intuitive justification for subnational constitutionalism is that it can allow for consolidated subnational communities to achieve a degree of political self-determination.”).

196. Saiger, *supra* note 15, at 431.

authority over local governments and the work of local-government officials in ways that are not meaningfully distinct from the authority that state legislative bodies and executive officers have over any state administrative entity.¹⁹⁷ If Wisconsin wants to alter the nature of the state's Department of Transportation, to pick one example, that would not be materially different from the state involuntarily consolidating two suburbs into one jurisdiction or changing the powers of Milwaukee's mayor.

This conception of local administrative subordination to the plenary authority of the state tends to prevail when questions of federal statutory and constitutional law intersect with the doctrine of state-local relations. The leading federal case articulating this view is *Hunter v. City of Pittsburgh*,¹⁹⁸ a case still cited with some frequency.¹⁹⁹ *Hunter* involved a Pennsylvania law that allowed annexation of the City of Allegheny to the City of Pittsburgh against the wishes of Allegheny's voters. In the course of rejecting a federal Contract Clause challenge to the merger,²⁰⁰ the U.S. Supreme Court articulated what Richard Briffault has noted is "usually treated as the purest statement of the black-letter position"²⁰¹ on local legal identity:

Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. . . . The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State. . . . The State, therefore, at its pleasure may modify or withdraw all such powers . . . expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done . . . with or without the consent of the citizens, or even against their protest.²⁰²

In this perspective, local democracy and local political identity are entirely subordinate to the state.²⁰³

197. *Id.*

198. 207 U.S. 161 (1907).

199. *See, e.g., Int'l Union of Operating Eng'rs Local 399 v. Vill. of Lincolnshire*, 905 F.3d 995, 1008 (7th Cir. 2018), *vacated*, 139 S. Ct. 2692 (2019) (rejecting an argument that state plenary power over subdivisions of the state under *Hunter* immunizes local regulation from federal preemption).

200. U.S. CONST. art. I, § 10, cl. 1.

201. Briffault, *Our Localism: Part I*, *supra* note 2, at 85.

202. *Hunter*, 207 U.S. at 178–79.

203. As Richard Briffault has noted, despite its continuing influence in federal doctrine, *Hunter* captures neither the reality of home rule, which empowers local governments as a matter of state constitutional law in many jurisdictions, nor subsequent recognition by the Supreme Court in the voting rights, equal protection, and other contexts of the potential of local governments to be understood as independent democratic polities for some federal constitutional purposes. *See*

The second, not entirely unrelated understanding of the nature of local legal identity is a view of cities as essentially forms of quasi-private corporations whose primary purpose is to provide local services. This proprietary view generally emphasizes the functional nature of local governments, focusing on the provision of infrastructure, public safety, education, and other services as the heart of the proper local-government role.²⁰⁴ This understanding also reflects the common early roots of local-government bodies and private corporations in the United States.²⁰⁵

There is a third, perhaps most contested view of the nature of local governments in the United States that foregrounds localities as democratic polities. This view acknowledges the reality that local governments—at least those of general jurisdiction, as opposed to school districts, utility districts, and other narrow forms of local public entities²⁰⁶—constitute real communities imbued with real representational rights and obligations. Local governments have long been seen as “schoolhouses” of democracy, in Tocqueville’s memorable imagery,²⁰⁷ and many of the values associated with devolution and decentralization turn on the accountability and responsiveness that a functioning local democracy promises.²⁰⁸

As to the arm-of-the-state and proprietary conceptions of local government, a historical counter-tradition emphasizes the inherent sovereignty of local governments, however obscured that tradition has become in modern practice.²⁰⁹ The truth of the legal nature of local power lies closer to the way David Barron has described home rule: a mottled mix

Briffault, *Our Localism: Part I*, *supra* note 2, at 86–91 (discussing *Avery v. Midland County*, 390 U.S. 474 (1968), and *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), as two counterexamples to the *Hunter* arm-of-the-state subsidiary legal identity conception of local governments).

204. This minimalist vision of local governments as service providers is often associated in its purest form with the “Lakewood Plan,” after the City of Lakewood, California, where local governments pared down to the barest services, most of which they contracted for. *See generally* GARY J. MILLER, *CITIES BY CONTRACT: THE POLITICS OF MUNICIPAL INCORPORATION* (1981) (discussing Lakewood Plan cities); Michelle Wilde Anderson, *The New Minimal Cities*, 123 *YALE L.J.* 1118, 1182 (2014) (same).

205. *Cf.* Frug, *supra* note 2, at 1099–1109 (describing the conception of cities as corporations and that conception’s effect on the distribution of power between states and cities).

206. *See generally* Liebmann, *supra* note 29 (examining local-government entities, such as school districts and utility districts).

207. ALEXIS DE TOCQUEVILLE, *1 DEMOCRACY IN AMERICA* 68 (Arthur Goldhammer ed. & trans., The Library of America 2004) (1835).

208. *See* Roderick M. Hills, Jr., *Romancing the Town: Why We (Still) Need a Democratic Defense of City Power*, 113 *HARV. L. REV.* 2009, 2025–27 (2000) (reviewing GERALD E. FRUG, *CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS* (1999)) (describing the value of decentralization and smallness as promoting participation in public life).

209. *See* Carol M. Rose, *The Ancient Constitution vs. The Federalist Empire: Anti-Federalism from the Attack on “Monarchism” to Modern Localism*, 84 *NW. U. L. REV.* 74, 94–99 (1989) (discussing the historical tradition of inherent local sovereignty). Modern courts and commentators tend not to think about local legal identity in terms of sovereignty, but it is a historical tradition that echoed in the conflict over London’s charter. *See supra* section I(A)(1).

of specific grants of power and constraints from the state rather than some abstraction of local authority.²¹⁰ But at a deeper level, the fundamental identity of local governments remains contested.

2. *Democratic Legitimacy, Local Power, and Charters.*—Given this ongoing ambiguity, taking charters seriously as constitutional documents can reinforce the public identity of local governments *as governments*. When local governments adopt a charter, as first-wave Progressive Era home-rule reformers understood, that act stakes a claim to an identity as a quintessentially public body and not just—or even primarily—an arm of the state or a quasi-private service-providing entity.

The adoption of a charter is, of course, not dispositive in state law with respect to any given question of local legal identity, and charters remain subject to state override as to many issues in most jurisdictions.²¹¹ But if understood as a genuine local constitutional text, a charter can embody the public identity of the jurisdiction that adopts it, explicitly asserting that the community and its governing body are a legitimate democratic polity. From preambles that declare the democratic nature of a community,²¹² to the choices about the allocation of authority that are made in charters,²¹³ to rights and other fundamental values reflected in charters,²¹⁴ the constitutional dimensions of a founding text reinforce that the governing body of a community is, first and foremost, a *government*.²¹⁵

Why does it matter that we treat local governments as governments and that local governments intentionally assert this aspect of their identity through the mantle of constitutional legitimacy? The body of state-and-local government law is currently facing an inflection point in our polarized political environment, with cities asserting regulatory ambition and states increasingly acting to curtail those expressions of local democracy.²¹⁶ From workplace regulation to antidiscrimination law to environmental protection to responding to emerging technology and many other policy areas, cities are acting, and state preemption is materially narrowing the public, regulatory

210. Barron, *supra* note 2, at 2290–91, 2301.

211. *See supra* section I(B)(2).

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

213. *See supra* text accompanying notes 114–23.

214. *See supra* text accompanying notes 130–34.

215. As Stephen Elkin has argued (and elaborated), there is an intellectual tradition that runs from Tocqueville through John Stuart Mill to John Dewey that views local political institutions as a normative site for the development of “a desirable political way of life.” STEPHEN L. ELKIN, *CITY AND REGIME IN THE AMERICAN REPUBLIC I* (1987). In this sense, the charter is another form of Elkin’s exemplary constitutive institutions—one that is particularly apt at the task of “join[ing] ends and means in a commitment to be a certain sort of people.” *Id.* at 191.

216. *See generally* Briffault, *supra* note 14 (discussing states’ recent efforts to preempt local governments); Scharff, *supra* note 14 (same); Schragger, *supra* note 3 (same).

identity of local governments in many states.²¹⁷ And states are also increasingly introducing punitive measures that not only weaponize state oversight, opening new avenues of liability for local governments and threatening local fiscal authority, but also target individual local officials for sanction, including potential criminal liability, in disputes with states.²¹⁸ Against that backdrop, it is critical that cities reinforce their “publicness” in the sense of being genuine polities.

Recent litigation between the City of Charlottesville and the Commonwealth of Virginia over the city’s efforts to respond to the friction caused by Civil War monuments in the community provides one telling contemporary example of the jurisprudential risks of treating local governments as administrative arms of the state or quasi-private entities. A Virginia statute bars local governments in the state from interfering with Civil War monuments. When five Charlottesville city council members voted to remove statues of Robert E. Lee and Stonewall Jackson from the city’s Emancipation Park and Justice Park, respectively, they found themselves facing individual liability under state law. In a ruling that is currently on appeal, the trial court held that these legislators could face that liability—were not shielded by statutory or common-law legislative immunity—because they were acting *ultra vires* and hence (in the court’s mistaken view) not as “legislators.”²¹⁹ That is not how law normally treats the legislative processes of a legitimate democracy.²²⁰

A clear charter in a state legal system that valorized the document as a local constitution would not necessarily solve the challenge posed by cases like the Charlottesville monuments litigation; it might, in fact, be entirely orthogonal to the home-rule identity crisis at the heart of that conflict. But as an instrument reinforcing the mantle of governmentality, a charter viewed the right way could add conceptual heft to claims about the value of local democracy. Will adopting or elevating the role of a charter work a fundamental, substantive change in the underlying identity of a local government? Of course not. Having a “constitution” does not a local sovereign make, any more than having a charter with separation of management functions and voting rights for shareholders convert a corporation into a public entity. But that does not mean the instrument is not

217. See Riverstone-Newell, *supra* note 3, at 404 (“In the past few years . . . a growing number of state officials have sponsored and supported preemption legislation with the intent to weaken local authority and to thwart local progressive policies.”).

218. See Briffault, *supra* note 14, at 2002–05 (describing “punitive preemption”).

219. Letter Ruling on Immunity and Revisiting Damages Issue at 4–5, *Payne v. City of Charlottesville*, No. 17-145 (Va. Cir. Ct. June 13, 2018).

220. A coalition of city officials in Florida is currently suing the state over a similar statute that punishes local officials for attempting to pass local legislation on gun safety. *City of Weston v. DeSantis*, No. 2018-CA-0699 (Fla. Cir. Ct. July 26, 2019).

available to be reimagined as a local embodiment of our constitutional culture and an integral instrument of local democracy.

B. Charters as Focal Points for Democratic Deliberation

If we conceive of charters in the specific constitutional sense of the embodiment of the public nature of a local government, that conception can foster a related purpose for charters as a locus for democratic deliberation in local communities.²²¹ Like many national constitutions, particularly modern ones,²²² a charter can be a focal point for a city's civic identity. The process of charter adoption and amendment provides what might be considered local "constitutional moments," where the opportunity exists to transcend ordinary local politics and foster deliberation about fundamental local governance choices, local identity, and local values. If that process succeeds, it can appropriately demarcate an area of higher law at the local level, worthy of greater deference by states and courts, and it can potentially reinforce local participatory values.²²³

1. Constitutional Moments and Community Identity.—Charters as constitutional texts provide a distinctive forum through which to focus public meaning, channeling community identity through discourse about what is sufficiently fundamental to be included and what values in a community should be reflected. Obviously, much of what goes into most charters is technical—rarely does the heart flutter over the question of whether the mayor or the city council gets to remove a police chief or over the public hearings necessary for approving higher bond limitations. That said, choices about structure can matter (even if we have relatively little data about the connection between specific structures and policy outcomes). There is a good argument, moreover, that at moments of local constitutional change, communities should also consider enshrining provisions—not just rights against the local government but also private rights, like local antidiscrimination law—that reflect a community's deepest values.

Much of this promise turns on the distinctiveness of constitutional process, recognizing the value of crafting and, gingerly, modifying a foundational text through a process that is democratic and inclusive.²²⁴ If

221. Cf. John J. Worley, *Deliberative Constitutionalism*, 2009 BYU L. REV. 431 (arguing for a reconciliation between constitutionalism and deliberative democracy).

222. See *supra* subpart II(B).

223. Cf. Zachary Elkins, Tom Ginsburg & Justin Blount, *The Citizen as Founder: Public Participation in Constitutional Approval*, 81 TEMP. L. REV. 361, 369–70 (2008) (discussing the proposition that public participation in constitutional making "conceivably inculcates democratic skills, habits, and values such as trust, tolerance, and efficacy—attributes that may be good in themselves but that may also trickle up to provide system-level benefits").

224. For pragmatic suggestions about how to approach charter process, see *infra* section IV(A)(2).

adoption and (ideally relatively infrequent) amendment²²⁵ are understood in this light as “constitutional moments”—and the process used is elevated above the ordinary give-and-take of local politics—then the resulting lawmaking can be more legitimate, inclusive, and reflective of community identity than ordinary legislation (or local executive/administrative activity).²²⁶

Indeed, a potential hallmark of charter adoption and amendment in political process terms is that they are citywide rather than subject to more particular local political forces. That fact may provide some insulation from the more dysfunctional aspects of local politics, such as aldermanic privilege and the like.²²⁷ In the absence of local party competition, the insulation that the charter process provides can be a useful counterbalance to normal politics, with a citywide focus that tempers the possibility of particular groups to logroll or exclude.²²⁸

These constitutional moments, then, can be used to clarify and enshrine local identity, underscoring the value of localism for decentralization and fostering interjurisdictional mobility.²²⁹ This identity, captured in a central foundational text, can speak to multiple audiences, not only in a doctrinal sense, such as claiming home rule or judicial deference,²³⁰ but also in the sense of creating a forum for constitutional identity.

And why is it important to have constitutionally deliberative discourse at the local level? Constitutional identity matters because community identity

225. Cf. Theodore C. Sorensen, *The American Constitution: Basic Charter or First Draft?*, 40 ARIZ. L. REV. 709, 713 (1998) (“The more you amend the Constitution, the more it seems like ordinary legislation [and] the less it looks like a fundamental charter of government.” (alteration in original) (quoting THEODORE C. SORENSON, WHY I AM A DEMOCRAT 144–45 (1996))).

226. Cf. Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CALIF. L. REV. 837 (1983) (exploring local governance as a deliberative forum).

227. I thank David Schleicher for this insight.

228. This vision of insulated politics is, perhaps, an ideal possibility for charter lawmaking that might not always be realized in practice. In a recent wave of charter revision in New York City, for example, the New York City Council launched a Charter Revision Commission, gave it a broad mandate to examine the entire charter (for the first time since 1989), and then advocated for charter changes that would shift power from the mayor to the city council. See generally COREY JOHNSON, FERNANDO CABRERA & BRAD LANDER, REPORT TO THE 2019 NEW YORK CITY CHARTER REVISION COMMISSION (2019), <http://council.nyc.gov/wp-content/uploads/2019/02/NYC-Council-Report-to-the-2019-Charter-Revision-Commission.pdf> [<https://perma.cc/9CNF-A7AN>] (proposing council advise and consent for appointment of the corporation counsel, police commissioner, chair of the City Planning Commission, chief administrative law judge, and executive directors of the Campaign Finance Board and the Conflicts of Interest Board, as well as independent budgeting for the comptroller and public advocate and non-negotiable budgets for the borough presidents and community boards).

229. As much as this aspect of localism—and mobility to reinforce it—can foster community and responsive governance, it is important to acknowledge countervailing concerns, as discussed below. See *infra* section III(C)(1).

230. Although, as we will see, those are important consequences as well to a constitutionally deliberative process. See *infra* section III(B)(2).

matters. Clearer identity can reinforce local responsiveness and the values of interlocal mobility, advancing the central value of decentralization that sounds in pluralism and diversity. Indeed, Yishai Blank has persuasively argued that there is expressive value in local governance—that, as he puts it, “cities speak” and in so doing advance democratic governance, experimentation, minority voice, and other core values of localism.²³¹ Heather Gerken has likewise insightfully argued for the value of distributing voice through local official channels and that “federalism all the way down” serves to reinforce democracy and temper concentrations of power.²³² Institutional pluralists generally tout the distribution of authority in a democracy for giving voice to multiple communities,²³³ and that is true. But Blank’s and Gerken’s arguments that democratic local polities play a particularly distinctive role in this pluralist project can be bolstered by local governments providing a focal point for public meaning. Again, charters are not strictly necessary to do so, but given our constitutional culture, they have great potential to advance that identity-formation-and-communication project.²³⁴

There is a distinctively American brand of constitutionalism that venerates the document itself in a kind of civic religion, for better or worse.²³⁵ One need not be nearly as hagiographic as popular literature can seem at times to recognize the role of the federal Constitution as a focal point for civic discourse. On the other hand, that is not how state constitutions tend to function in our political system; indeed, most people seem unaware that states even have separate constitutions.²³⁶ It is hard to imagine a scene in the popular culture of anyone invoking a state constitution in the way the federal

231. See Yishai Blank, *City Speech*, 54 HARV. C.R.-C.L. L. REV. 365, 367, 370 (2019) (arguing for constitutional protection for city speech, for reasons sounding in localism as well as reasons central to First Amendment values).

232. See generally Gerken, *supra* note 171.

233. E.g., Martha Minow, *The Constitution and the Subgroup Question*, 71 IND. L.J. 1 (1995).

234. There is an empirical question that any claim for legal reinforcement of community identity must acknowledge, namely which polity do people actually identify with? The answer is no doubt idiosyncratic—some people may indeed see themselves as tightly associated with Oakland, others with a less distinct Bay Area, and others primarily as Northern Californians, or even just Californians. And surely many people claim more visceral allegiance to neighborhoods than they do to a city or a suburb. To be clear, then, the argument for channeling community identity through the mechanism of local constitutional process takes the link between political jurisdiction and that identity as a starting point, recognizing the inherent limitations in the link.

235. See *supra* subpart II(B). See generally SANFORD LEVINSON, CONSTITUTIONAL FAITH 3–53 (1988) (reflecting on the Constitution’s role in “American civil religion”).

236. See JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 1 (2018) (noting the absence of public discourse about state constitutionalism).

Constitution recurs in everything from *Miranda* warnings to the regular stream of movies about foundational federal constitutional moments.²³⁷

People, however, actually seem to care to a surprising degree about their charters compared to their state constitutions.²³⁸ Perhaps, this bimodal approach—federal and local attention versus state inattention—actually makes logical sense. As important as states are, practically, there is an argument that many people tend to associate their political identity with their nation and their local government.²³⁹

Given this centrifugal national–local identity, municipal charters can focus communities at moments of salient change on structure and on what aspects of a local community deserve to be enshrined in a fundamental legal text. This is not an exercise that should be undertaken lightly nor often—hence the constitutional dimension of the exercise—but an opportunity for reflection and distinctive community dialogue that should not be lost.

2. *Defining “Higher Law” at the Local Level.*—Recognizing the distinctive legitimacy of constitutional process underscores the potential of that process to identify “higher law” at the local level. Once identified, “charter law” can signal both to the states (about what deserves greatest recognition in conflicts over state preemption) and to courts (about what local lawmaking should be, subject to greatest deference).

If the charter process can identify a realm of “higher” lawmaking, it is fair to ask what *is* or at least *should* be considered sufficiently fundamental at the local level to merit inclusion in a charter through that process. There is no simple answer, although some judicial decisions have grappled with the

237. *E.g.*, ON THE BASIS OF SEX (Focus Features 2018); LOVING (Focus Features 2016); DEFENDING GIDEON (The Constitution Project 2013).

238. A recent smattering of headlines—and charters are a staple of local coverage across the country—captures the actual salience of charters fairly well: Pat Bradley, *Burlington Groups Plan Petition to Change City Charter*, WAMC (Jan. 13, 2020), <https://www.wamc.org/post/burlington-groups-plan-petition-change-city-charter> [https://perma.cc/DXE5-5LRG]; Bill Forry, *Editorial: Let’s Review City Charter*, DORCHESTER REPORTER (Jan. 15, 2020), <https://www.dotnews.com/columns/2020/editorial-lets-review-city-charter> [https://perma.cc/9M9E-YMED]; Sarah Rahal, *Fearing Being Left in the Dark, Detroiters Swarm Charter Commission Meetings*, DETROIT NEWS (Jan. 26, 2019, 7:42 PM), <https://www.detroitnews.com/story/news/local/detroit-city/2019/01/26/detroiters-swarm-charter-commission-meetings/2670215002/> [https://perma.cc/RSW3-7FZM]; *Philadelphia City Council Approves Ballot Question Eliminating Gender-Specific Language from City Charter*, CBS PHILLY (Feb. 14, 2019, 10:11 PM), <https://philadelphia.cbslocal.com/2019/02/14/philadelphia-city-council-approves-ballot-question-eliminating-gender-specific-language-from-city-charter/> [https://perma.cc/Q5NZ-NPTS].

239. *Cf.* Scharff, *supra* note 14, at 1488 (discussing ways in which the current political climate nationalizes certain issues and also pushes the salience of political identity down to the local level). *But see* Ernest A. Young, *The Volk of New Jersey? State Identity, Distinctiveness, and Political Culture in the American Federal System* 17 (Feb. 24, 2015) (unpublished manuscript), https://scholarship.law.duke.edu/faculty_scholarship/3431 [https://perma.cc/CWE9-MUV7] (arguing for the continuing relevance of state-level political identity).

question.²⁴⁰ The tradition of unwritten constitutionalism makes the positive argument for what *should* constitute a local “constitution” more challenging but still necessary. Some criteria for identifying what is “constitutional” about charters are obvious. That the local government or the state treats the body of law as more “fundamental” than ordinary legislation, for example, clearly evinces constitutional status. More pragmatically, however, charter law should primarily address structure and authority, basic elements of political process, and constraints on local governments through individual rights, although this last focus is less a general feature of charters than of other constitutions.²⁴¹

Constitutionally deliberate discourse, however, does not have to be limited to questions of structural and political choice, as critical as those areas of governance are. There are broader signals about community identity that might be understood as “charter-worthy,” whether granting rights particularly important to a given community or reinforcing some other particularly salient aspect of local values. If a community, for example, wants to signal that it is recognizing the value of immigrants, it might choose to enshrine provisions, such as municipal identification or even voting rights for non-citizens, in its charter.²⁴² A community might choose that institutional path less for any difference in legal outcome, in the event those local laws are challenged (although they might be worthy of greater deference), but more because in our culture, a constitutional commitment to a set of values carries distinctive meaning.²⁴³

What is most important, ultimately, is that there be an explicit dialogue within a community about the dividing line of fundamentality and that the resulting demarcation be respected within the local government, the states, and the courts. Once that area of fundamental law is demarcated, it can have doctrinal consequences along the two main dimensions in which charters operate: vertically and internally. As to the first dimension, marking a legal issue as charter-worthy should have a doctrinal-signaling effect to states, not

240. *See, e.g.*, *Cheeks v. Cedlair Corp.*, 415 A.2d 255, 261–62 (Md. 1980) (rejecting an attempted amendment to the Baltimore City Charter that would have established rent control as “essentially legislative in character” and therefore not sufficiently fundamental to constitute proper charter material).

241. Municipal charters, perhaps more so than other constitutions, rely on institutional structure to protect individual rights, recognizing that local governments are inherently more constrained in their range of policy discretion than other levels of government, given the limits of even the strongest version of home rule.

242. *See* Jennifer Butwin, *Putting Students First: Why Noncitizen Parents Should Be Allowed to Vote in School Board Elections*, 87 *FORDHAM L. REV. ONLINE* 49, 52 (2019) (observing that at least twelve U.S. municipalities have enfranchised noncitizens for at least some local elections, including Chicago, San Francisco, and ten municipalities in Maryland).

243. Local governments can enshrine values that are parochial and exclusionary as easily as they can values that are inclusive, and it is legitimate to question whether charters should facilitate that kind of local pluralism. This question is explored in detail below. *See infra* section III(C)(1).

just in the broad sense of validating home rule but more specifically distinguishing what is most fundamental about local law. This valence for charter law does play out in cases that recognize a core of immunity from states regarding how local governments structure their own government and political process. Beyond governance choices, what a local government itself deems fundamental to its democracy should be most clearly protected in state–local conflicts, rather than courts searching for some indeterminate realm of “municipal” or “local” matters in the sense that first-wave home-rule reform suggested.²⁴⁴ Tying immunity to charters reinforces the core of local authority—and empowers local governments to weigh in on defining that core—even if courts will continue to grapple with marginal cases.²⁴⁵

Beyond doctrine that defines state–local conflicts, charter lawmaking can influence how courts approach decisions internal to local governments, as it mostly does in current practice. This is one meaning that can be read into the raff of cases asserting the supremacy of charter law over ordinary legislation at the local level.²⁴⁶ But courts can also reinforce the fundamentality of charter law by according greater deference to the results of charter process more generally, underscoring the hierarchy of sources of local law that a charter implies.

3. *Charters in Local Governance and the Rule of Law.*—Closely related to the process of defining higher law at the local level, charters can render structural choices more salient and more subject to accountability, echoing the insights of Progressive Era home-rule reform.²⁴⁷ This can legitimate local governance by advancing the rule of law through the clarity, notice, and stability that come from an appropriately framed foundational text.²⁴⁸ Indeed, there is a potential cyclical benefit to a clearly defined charter that bolsters the local rule of law because that legality, in turn, bolsters the legitimacy (and the democratic and regulatory identity) of local governments. Certainly, those values must be balanced against concerns about entrenchment,

244. *See supra* section I(A)(3).

245. In Kansas, for example, a local government can designate a local law as a “charter ordinance,” and if the local government follows specific procedural hurdles in enacting such an ordinance, the local law gains strengthened protection against state preemption. *See* KAN. CONST. art. 12, § 5(c)(2). The specific provision states:

A charter ordinance is an ordinance which exempts a city from the whole or any part of any enactment of the legislature as referred to in this section and which may provide substitute and additional provisions on the same subject. Such charter ordinance shall be so titled . . . and shall require a two-thirds vote of the members-elect of the governing body of such city.

Id.; *see also* Farha v. City of Wichita, 161 P.3d 717, 723–24 (Kan. 2007) (explaining how Kansas cities may use charter ordinances to “opt out” of state statutes with which they disagree).

246. *See supra* text accompanying notes 98–103.

247. *See supra* section I(A)(3).

248. *See supra* subpart II(C).

ossification, and the antidemocratic aspects of any legal instrument that requires extraordinary process—beyond ordinary politics—to amend or repeal. But the governance potential of clear constitutionalism at the local level should not be lightly dismissed.²⁴⁹

Improving the structure of local government can bolster what is practically and normatively attractive about localism. For example, local governments with better-functioning governance capacity can enhance experimentalism by, in essence, building better laboratories of democracy.²⁵⁰ Similarly, more functional local governance can enhance responsiveness and the tailoring of local policies to local preferences. To the extent that charters enhance local power by improving the quality of local governance—an empirical question, to be sure—they advance all the positive values of localism. (Charters also risk reinforcing the negative aspects of localism, about which more will be said below.²⁵¹)

Looking to municipal charters to promote rule-of-law principles and more generally advance good governance is great weight to place on a single instrument. But there is value in reviving the linkage between charters and governance that animated so many first-wave home-rule advocates, if for no other reason than that charters focus conversation in a concrete way. The point is not that there are given structural choices that are normatively or practically necessary or superior for all situations—empirical choices that are difficult to evaluate given how little we know about the implications of particular local structures—but that the discourse on those structural choices can be approached with greater intentionality, clarity, and technical input.²⁵²

C. *Normative Concerns with Localism and the Limits of the Constitutional Analogy*

For all the promise that a constitutional view of municipal charters holds, there are normative and conceptual crosscurrents auguring caution in placing too much weight on these instruments. As this subpart discusses,

249. Understanding local governments as places of constitutional innovation, there is an argument that, as Filippo Sabetti has noted, “the basic principles of constitutional government were worked out in the free cities of Italy and Germany long before the Americans confronted the problems of constitutional choice.” Filippo Sabetti, *Local Roots of Constitutionalism*, 33 *PERSP. POL. SCI.* 70, 74 (2004) (citing HAROLD J. BERMAN, *LAW AND REVOLUTION* (1983)). Sabetti credits early European city-republics with governance innovations, including mutual consent, non-hereditary rule, limited terms of government office, and a broad commitment to “rule under law.” *Id.*

250. *Cf.* SONENSHEIN, *supra* note 2, at xiii (exploring ways in which the framers of Los Angeles’s 1999 city charter sought to improve local democracy and participation by instituting a new system of neighborhood councils that were open to a broad range of stakeholders).

251. *See infra* section III(C)(1).

252. The time and place to have this discourse should be at moments of local constitutional change. *See infra* section IV(A)(2).

local power has long raised concerns about parochialism and exclusion that complicate any efforts to bolster local democracy—concerns that have relevance to charters. At the same time, some scholars are skeptical that the institutions of local government actually matter in light of constraints on local power that derive from the mobility of capital, limits on fiscal capacity, the burdens of state oversight, and similar external forces. These two challenges to local power and local democracy bear interrogation in the context of an argument for the value of charters as constitutions.

Moreover, there are basic differences in the law and practice of municipal charters that distinguish them from federal and state constitutions, including their optional nature and the extent of state control over their content and consequences. These limits to the constitutional analogy are important to note as well at this juncture, although they do not ultimately undermine the basic case for appreciating the constitutional aspects—and potential—of charters.

1. Reinforcing Local Parochialism or Simply Irrelevant?—As noted at the outset, the weight this Article places on charters may seem excessive, to say the least. To break that down—and to consider some responses—one might envision two opposing concerns at play, namely that charters do not matter or that they matter too much. On one hand, the argument would be that charters and what they represent structurally for governance are not ultimately that significant given external constraints on city power and local policy discretion (or at least uncertainty about the link between any given structure and any resulting policy outcome). This is similar to Richard Schragger’s argument that debates over questions such as strong-mayor/weak-mayor models are subordinate to questions about the constrained role of cities in our federal system.²⁵³ Legal (formal) authority and practical capacity, Schragger underscores, are not coterminous by any means—a city might have tremendous legal authority but be functionally constrained by a meager tax base or be at the mercy of mobile capital.²⁵⁴ In this view, until capacity and power have been altered, policy outcomes are not going to be

253. See Schragger, *supra* note 1, at 2545. Schragger argues:

[U]rban governance is highly constrained governance. Cities are simply not significant wielders of power in our political and constitutional system. Thus, the city’s political structure—whether reformed or unreformed—and the strength of the city’s mayoralty may have little to do with city leaders’ ability to pursue desired policy outcomes. The mayoralty is “constitutionally” weak; its power is limited by the same forces that limit city power more generally.

Id.

254. On debates about the interplay between local legal authority and external constraints on local governance more generally, see, for example, PAUL E. PETERSON, *CITY LIMITS* (1981); RICHARD SCHRAGGER, *CITY POWER: URBAN GOVERNANCE IN A GLOBAL AGE* (2016).

much different, however well designed a charter—and a structure of local governance—might be.

On the other hand, the opposite concern would be that the institutions of local governance, including charters, matter *too much* because localism itself is an enterprise that tends to foster parochialism and exclusion. There is a familiar litany of concerns about local empowerment reinforcing and giving legal sanction to social and economic stratification, as well as distinctive concerns about local governments as particularly threatening to individual rights, whether through police misconduct, civil forfeiture, exclusionary zoning, eminent domain abuse, or the like.²⁵⁵ Make local governments more responsive, efficient, and effective in their governance, this view would hold, and one is likely to deepen their worst tendencies.

Again, charters—and other local, legal-structural institutions—are only a small part of these debates, but they are relevant nonetheless. On the concern about irrelevance, it is undeniable that external constraints are real in local governance, and caution is appropriate in overly investing in any particular structural choice. Schragger is surely right about that. But it is also manifestly the case that governance still matters, even if it is difficult to establish a clear causal connection in any given instance between a structural choice and a given policy outcome. Admittedly, improving the structure of legal authority and the governance capacity to exercise that authority will do little, at least directly, for any given city's fiscal health or ability to attract employers. But that does not mean formal authority and the institutions through which it is exercised are irrelevant at the local level. One has to focus on both.

The concern with the dilemma of localism is important as well, but there are other ways to reaffirm local democracy while checking the worst excesses of local empowerment. In other work, I have suggested that one way to address the dilemma of localism is for the law of state–local relations to incorporate normative concerns in discerning the metes and bounds of local authority at the outer margins.²⁵⁶ Other commentators have argued that individual rights, particularly federal equal protection,²⁵⁷ represent a more appropriate constraint on local parochialism, as resting on rights might avoid overly empowering local governments.²⁵⁸ And there are other ways to constrain the worst excesses of localism without undermining the enterprise

255. See Davidson, *supra* note 193, at 975–78 (discussing critiques of localism).

256. *Id.* at 984–96.

257. U.S. CONST. amend. XIV, § 1.

258. E.g., Thomas Silverstein, *Combating State Preemption Without Falling into the Local Control Trap*, 26 POVERTY & RACE (Poverty & Race Res. Action Council), Oct.–Dec. 2017, at 2, 12, <http://prrac.org/newsletters/octnovdec2017.pdf> [<https://perma.cc/LZA4-VJCJ>].

of local democracy altogether.²⁵⁹ That local governments can, at times, be parochial or exclusionary or tread on individual rights is ultimately not a compelling argument for throwing the democratic-governance baby out with the bathwater.

2. *What Distinguishes Charters in Constitutional Terms.*—Beyond the normative crosscurrents about local power, it is important to recognize the ways that municipal charters differ from federal and state constitutions as a conceptual matter. There are clear limits to the constitutional analogy, auguring for caution in placing too much weight on these instruments as well as suggesting avenues for reform.²⁶⁰

To begin, charters are paradigmatically optional documents and not strictly necessary as a formal matter to define the boundaries of local power.²⁶¹ In the American culture of constitutionalism, it is hard to imagine a polity without a basic law as such, but local governments do, in some instances, draw from state law to constitute their structure and form.²⁶²

Charters, even where adopted by a local political community, are inherently limited in the power they can confer. Depending on the nature of home rule in a state—and the issue at stake—charters may be subject to override not only by state and federal constitutional law but also by ordinary state legislation. This subsidiarity is also true of state constitutions under the federal Supremacy Clause in instances where federal and state authority overlap. But local governments are still more fundamentally understood as creations of state law, even in their most locally empowering incarnations.²⁶³

259. Fair housing law, for example, can address discrimination at the local level, and there are promising veins of state constitutional law, including the concept of general welfare as a constraint on state delegation, that can be deployed to moderate localism in instances of particularly egregious local parochialism. *See generally* Davidson, *supra* note 193.

260. These avenues are explored below. *See infra* subpart IV(A).

261. *See supra* subpart I(B).

262. Despite the presence of “local” courts in some jurisdictions, moreover, charter law is largely interpreted in state courts, another point of distinction with state and federal constitutional doctrine.

263. The federal government, the Supreme Court has made clear, cannot “commandeer” the apparatus of state government. *See, e.g.,* *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1478–81 (2018). The states, by contrast, often micromanage even the most mundane details of local governance, including city-council districting, city personnel and labor issues, and certainly the terms of local policy discretion—with increasing vehemence today. *See generally* RICHARD BRIFFAULT, NESTOR M. DAVIDSON & LAURIE REYNOLDS, *THE NEW PREEMPTION READER: LEGISLATION, CASES, AND COMMENTARY ON THE LEADING CHALLENGE IN TODAY’S STATE AND LOCAL GOVERNMENT LAW* (2019) (describing increasing conflict between local and state governments across a range of policy issues). In all but the strongest home-rule states, validly enacted state legislation tends to override most local authority. There are examples of strong home-rule states that, when the adoption of a charter is coupled explicitly with the sphere of local authority, protect charter law from state override on matters of local concern (including governmental

Another point of divergence between charters and other constitutions is that “charter law,” as such, is not clearly delineated as fundamental in some jurisdictions. While not necessarily the norm, charters at times evince no clear difference with ordinary legislation at the local level. And even where there are documents clearly delineated as “charters,” they can be remarkably detailed and unwieldy, obscuring their basic meaning from all but the most devoted acolytes.²⁶⁴ The New York City Charter, for example, runs to roughly 340 pages with seventy-four numbered chapters and several lettered sections following.²⁶⁵

Procedurally, unlike the federal Constitution, charters can be revised with relatively great frequency. This actually brings them closer, comparatively speaking, to state constitutions²⁶⁶ and to some constitutional cultures internationally, where political regime change often brings fundamental constitutional change.²⁶⁷

structure). *See, e.g.*, *Traders Sports, Inc. v. City of San Leandro*, 112 Cal. Rptr. 2d 677 (Cal. Ct. App. 2001) (holding that a city charter provision allowing a majority city-council vote to place a tax ordinance before voters prevails over an inconsistent state law mandating a two-thirds vote of the local governing body before a tax ordinance can be placed on a local ballot).

264. Conversely, it is equally problematic that issues that might seem fundamental to structuring local governance are adopted as ordinary legislation rather than in the charter.

265. *See* CHARTER OF NEW YORK, N.Y.

266. The federal Constitution has been amended only twenty-seven times since its adoption in 1788 (less frequently if one treats the Bill of Rights as a single constitutional moment). Even though the last state constitutional convention was in 1984, it is generally easier to amend state constitutions, especially in states that allow amendment by initiative or referendum. *See* Cain & Noll, *supra* note 8, at 1520. The Constitution of Alabama, for example, has been amended nearly 800 times since it was adopted in 1901. Eduardo M. Peñalver, *Restoring the Right Constitution?*, 116 *YALE L.J.* 732, 760 n.97 (2007).

Indeed, closer to the variety evident with charters, there are many more ways to amend state constitutions than the federal Constitution. As John Dinan has noted:

Just over one-third of the states provide for a constitutional initiative, whereby the people can not only propose amendments by initiative petition but also approve those same amendments in a popular referendum, without any participation of the state legislature. In nearly one-third of the states, a referendum must be held periodically on whether to call a constitutional revision convention. In one state, amendments can be submitted to a popular referendum by a constitutional revision commission. Many states permit legislatures to submit amendments to the people upon a mere majority vote, albeit sometimes in consecutive legislative sessions.

John Dinan, *Patterns of Subnational Constitutionalism in Federal Countries*, 39 *RUTGERS L.J.* 837, 845 (2008) (citations omitted). All that said, the pace of constitutional change in the states is slowing significantly. *See* G. Alan Tarr, *Introduction to 1 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY 1, 2* (G. Alan Tarr & Robert F. Williams eds., 2006) (noting that while states held 144 constitutional conventions and adopted 94 new state constitutions in the nineteenth century, the twentieth century saw only 64 conventions and 23 new constitutions, and since 1984, there have been no constitutional conventions and only a single new constitution).

267. ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, *THE ENDURANCE OF NATIONAL CONSTITUTIONS* 129 (2009) (discussing constitutional endurance and noting that comparatively, the average life expectancy of a national constitution is nineteen years); *see* Thomas Ginsburg, Zachary

The normal valence of experimentalism usually runs from the local up to the national, but charters might be an area where the paradigmatic “schoolhouse of democracy” could learn from a national model. There is much to be said for the parsimony and modesty in modification evident in the constitutionalism around the federal Constitution for stability, rule-of-law notice value, and channeling democratic change through long-term institutions.

In short, recognizing the limitations in the analogical comparison between charters and other constitutions—indeed, between charters and the broader aims of constitutionalism—can provide a roadmap for how best to approach charters as local constitutions, as we shall now explore.

IV. A Reform Agenda for Charters

This final Part turns from the descriptive (what municipal charters *are*), the conceptual (how to think about municipal-charter constitutionalism), and the normative (what is the potential value in doing so) to the pragmatic. Elevating the constitutional nature of charters, this Part argues, raises the imperative for reform where actual charter practice falls short of the normative constitutional promise of charters. This Part closes with a brief coda, outlining a scholarly agenda moving forward that connects local practice to the discourse of comparative constitutional law and constitutionalism.

A. *Avenues for Pragmatic Reform*

The normative arguments in Part III point to some rules of thumb for how cities and other local governments should approach the substance of and process around charters. It is important for local governments to ensure that these documents best serve their core purpose. In many places they do, but there is value in coalescing some simple rules to apply to these constitutional texts where local practice merits reform.²⁶⁸

1. Simple Rules for Complex Instruments.—Several related pragmatic recommendations flow from a constitutional conception of local charters. First and most basically, it is important in the first instance that a local polity actually *have* a charter. Being able to have one requires constitutional reform

Elkins & James Melton, *The Lifespan of Written Constitutions*, U. CHI. L. SCH. NEWS (Oct. 15, 2009), <https://www.law.uchicago.edu/news/lifespan-written-constitutions> [<https://perma.cc/ZV3U-M58X>] (“According to an old joke, a patron goes into a library and asks for a copy of the French Constitution, only to be told that the library does not stock periodicals.”).

268. Reform efforts require rethinking elements of both state and local law (state law because it sets the preconditions for charter law and local law to the extent state law empowers local choice) as well as actual practice; it has to involve law in action and cultural change as much as technical legal change.

at the state level in the handful of states that fail to authorize charters.²⁶⁹ As noted earlier, some states mandate charters, and many allow charters as an optional expression of local democracy. For cities that have chosen to default to an externally imposed (state) fundamental law, there is value in going through the process of charter adoption.

Drawing on lessons from the literature on written constitutionalism,²⁷⁰ charters should be embodied in a single, clearly demarcated document rather than a disparate collection of local (and state) statutes. This bolsters the ability of such documents to serve as focal points and signals to internal and external audiences regarding exactly what a community considers its fundamental law.

Next, if the charter is to serve that function, it is critical that communities address only “charter-worthy” issues in their charters. Defining the appropriate realm of higher law at the local level is obviously subject to contestation and will, of necessity, vary from community to community. Core questions of structure and political process seem obvious candidates; although even there, charter drafters would do well to prioritize parsimony and resist the temptation to burden charters with ordinance-like details that overly entrench the more prosaic aspects of structure.²⁷¹ Beyond that core, the important pragmatic point is to have a local political and legal discourse that understands the need to filter higher law from ordinary law and correspondingly to be wary of allowing charters to function as a procedurally convenient avenue for prosaic lawmaking, especially where the charter is used to circumvent ordinary process.

If those conditions adhere—which is to say there is a clearly delineated local constitution, and it is reserved for higher lawmaking—then other legal actors should give the charter the legal and social deference it is due. This is true for the states that oversee local governments. It should be equally true as a doctrinal matter for courts that review questions implicating charters. And this deferential principle should guide the internal relationship between “charter law” and ordinary legislation and administration at the local level, no less than constitutional law constrains state and federal governments.

These simple rules are aspirational to be sure. And it is important to be realistic about the capacity of many local governments—and local communities—to approach governance with the intentionality and reflection

269. *See supra* section I(B)(1).

270. *See supra* subpart II(C).

271. Concerns about entrenchment in general and the particular risks of local entrenchment, *see generally* Serkin, *supra* note 20, reinforce the imperative to focus charter provisions on a relatively narrow core of particularly important structural and value-reflecting provisions. If one advantage of constitutional law is that it is not as easily altered, that as a practical matter augurs strongly for parsimony in the types of provisions—and the quantum of law—actually placed outside the ordinary political process.

that this kind of reform would require. But it is essential to have in mind something of an ideal type when evaluating current practice and some guidelines toward which to strive when communities approach charter questions.

2. *The Importance of Local Constitutional Process.*—One final consequence of understanding charters as local constitutions is the pragmatic focus that the framing can bring to the distinctive constitutional moment of creation and the process for revision. If constitutionalism theory underscores that constitutions not only operate as the legal source of structure and rights for a polity but can also serve as a focal point for “constituting” that polity, that understanding puts appropriate weight on the process through which charters are adopted and amended. Simply put, how a charter is adopted (and the constraints that law places on the process of amendment) matters for legitimating these fundamental texts and helping them serve their most important functions.²⁷²

Why is it important to try to mark out an area of more deliberative politics in charter adoption and reform? For one thing, local elections paradigmatically suffer from low voter turnout,²⁷³ and local voters tend not to be representative of the overall makeup of their communities, skewing older and wealthier.²⁷⁴ Beyond electoral politics, there have long been concerns with unequal power dynamics at the local level. For all these reasons, it is critical to focus on inclusion and broad involvement when adopting and amending charters.²⁷⁵

272. The link between participation and the substantive form of charters has long been an endemic problem. When St. Louis pioneered the modern home-rule city charter in the 1870s, the State of Missouri empowered a group of property owners, the Board of Freeholders, to undertake the task of formulating the charter. Perhaps not surprisingly, the charter they then produced strongly protected property owners, expressly limiting citywide property taxes and entrenching a special assessment with regard to infrastructure spending. See Barron, *supra* note 2, at 2296–97.

273. Davidson, *supra* note 1, at 626 n.291.

274. See David Schleicher, *Stuck! The Law and Economics of Residential Stagnation*, 127 YALE L.J. 78, 111 (2017) (noting that homeowners and older citizens turn out at higher rates for “low-information local elections”).

275. The National Civic League has promulgated a helpful guide on how to approach revision, as part of its Model City Charter, entitled “Citizen-Based Government: A Process to Engage Citizens in Charter Revision.” NAT’L CIVIC LEAGUE, GUIDE FOR CHARTER COMMISSIONS 11–14 (6th ed. 2011), <https://www.nationalcivicleague.org/resources/guide-charter-commissions-2011/> [<https://perma.cc/XWF9-MD5F>]; see also Lisa Blomgren Bingham, *Collaborative Governance: Emerging Practices and the Incomplete Legal Framework for Public and Stakeholder Voice*, 2009 J. DISP. RESOL. 269, 323 (discussing collaborative governance in the context of charter reform).

Planning theory and practice similarly emphasize both the critical importance of inclusive participation and the perennial challenges that planners face in fostering and managing public participation. See, e.g., Diane Day, Note, *Citizen Participation in the Planning Process: An Essentially Contested Concept?*, 11 J. PLANNING LITERATURE 421, 428–30 (1997) (reviewing

Another reason to highlight the moment of adoption and amendment of charters is the synergy between process and substance that comes from a distinctive avenue of lawmaking outside ordinary politics. This can have the practical benefit of insulating, at least to some degree, “charter politics” from the ordinary give-and-take of particular communities and sub-local interests within a city.²⁷⁶ But it can also reinforce the doctrinal and cultural meaning of the resulting lawmaking.²⁷⁷ That positive feedback loop—more inclusive, transparent, and comprehensive political process leading to greater legal and social salience for the resulting lawmaking—should be embraced.²⁷⁸

Finally, taking charters seriously as constitutional texts highlights the importance of technical expertise, particularly on questions of structure. Although the public-management and political-science evidentiary base on any given question facing a charter commission or other public body may not be sufficiently robust to answer any particular question—strong mayor vs. weak mayor for a mid-size city facing post-industrial downsizing, for example, or the relative merits of at-large versus district council elections—there *is* an evidentiary base to draw on.

It is perhaps partially for this reason that the National Civic League advocates for charters to be adopted through a process of public deliberation, channeled through experts in a commission.²⁷⁹ Experts can help with that research-to-structural-choice challenge, even if many of the choices involved in charter adoption and amendment are ineluctably value-driven. This is not to adopt any given structure of deliberation per se—the NCL’s or otherwise—but to say that, particularly for the majority of local governments

scholars’ debate over the dichotomy of planning and public participation). The relationship between planning and zoning has at times been analogized to the relationship between constitutions and ordinary legislation, with echoes about the interplay between ordinary and extraordinary political process and questions of democratic legitimacy and rule-of-law values. *See generally* Charles M. Haar, “*In Accordance with a Comprehensive Plan*,” 68 HARV. L. REV. 1154 (1955) (describing city master plans as “long-term, general outline[s] of projected development” while zoning serves as a “tool[] . . . to implement the plan”).

276. *See supra* text accompanying notes 227–28.

277. This is not dissimilar to other areas of supermajoritarian process at the local level, which are not uncommon. For example, adopting debt at the local level can require a supermajority vote of the local legislature, John R. Brooks II, *Fiscal Federalism as Risk-Sharing: The Insurance Role of Redistributive Taxation*, 68 TAX L. REV. 89, 106 (2014), and there can similarly be quasi-constitutional process for the adoption of comprehensive plans. *Cf.* Theodore C. Taub, *Comprehensive Plans: The Law of the Land or Idealistic Legislation?*, SP011 ALI-ABA 1175 (2008) (surveying comprehensive planning process). These are examples of the calibration of precommitment and a process designed to raise the salience of a particular local issue outside the ordinary channels of local politics.

278. Fostering this feedback loop is another reason to be cautious about the frequency of revision and the risk of opening the charter process too easily, as in jurisdictions that place relatively few practical constraints on the ability of citizens to pursue charter revision by initiative, especially where initiative is not permitted for ordinary legislation.

279. NAT’L CIVIC LEAGUE, *supra* note 275, at 11–14.

for which the legislative process is a low-resourced affair, channeling advice and expertise in ideally infrequent “constitutional moments” at the local level can elevate not just the salience but, more importantly, the quality of the resulting law.²⁸⁰

B. Coda: A Scholarly Agenda for Local Constitutions

Finally, it is worth closing with brief reflections on where the study of municipal charters might fruitfully proceed within the discourse of local-government law and comparative constitutionalism. Legal scholars are increasingly engaged with questions involving the internal structure and operations of local government, as scholars have long grappled with similar constitutive projects at the national level.²⁸¹ If the institutions of local governance bear greater scrutiny and if charters as local constitutions present a fruitful avenue of inquiry, as this Article has argued, where might scholarship proceed from here?

From a local-government-law perspective, there would be great value—for scholars as well as local officials—in deeper study of the *content* of charters. This could help foster a better understanding of the link between structure and policy at the local level. This is not, strictly speaking, a question of charters per se, but charters bring focus to structure, and the governance and policy implications of local structural choices bear greater examination.

A focus on the constitutional dimensions of municipal charters can similarly foster better interdisciplinary engagement with the consequences of form and structure at the local level. Political scientists, economists, and public-management scholars have done important work that begins to excavate the implications of local-government structure.²⁸² Much more engagement is warranted, however, particularly on the empirical consequences—to the extent they can be discerned—of various specific governmental-structural choices.

The recognition and elevation of charters as local constitutions can also benefit local-government scholars and practitioners by linking local doctrine to the broader discourse on constitutional theory and interpretation. There are

280. As discussed below, bringing greater technical sophistication to the process of charter adoption and amendment requires greater engagement by scholars of public management and political science. *See infra* subpart IV(B).

281. The institutional turn in local-government legal scholarship is a welcome development for the potential it carries to highlight and elevate questions of internal governance and local-government structure for the legal system.

282. *See, e.g.*, Stephen Coate & Brian Knight, *Government Form and Public Spending: Theory and Evidence from US Municipalities*, AM. ECON. J.: ECON. POL’Y, Aug. 2011, at 82 (comparing fiscal outcomes in mayor-council versus council-manager forms of local government); Mark Lubell, Richard C. Feiock & Edgar E. Ramirez de la Cruz, *Local Institutions and the Politics of Urban Growth*, 53 AM. J. POL. SCI. 649, 658, 661 (2009) (exploring the interplay between local institutional structure and interest-group influence).

and have long been deep and serious conceptual and methodological debates within the discourse of constitutionalism. Originalism versus living constitutionalism is one leading contemporary example.²⁸³ But the discourse is rife with others. These kinds of debates might refract differently when applied to charters but are almost entirely absent at the local level. Courts and scholars have not begun to probe the challenging theoretical and doctrinal questions that might attend to interpreting charters as constitutional texts because they have rarely taken seriously what it means to do so. That discourse is long overdue.

Foregrounding the constitutional nature of local charters has the potential as well to offer comparative lessons for scholars of constitutional law.²⁸⁴ Constitutional scholarship is dominated by the overriding paradigm of the federal Constitution, and there is certainly a rich literature as well on comparative constitutionalism in the international context.²⁸⁵ Comparative constitutional scholarship, however, can benefit from more fully denaturalizing governmental structure and attending to first principles within our own legal system. If fifty states provide some fodder for that domestic comparative project,²⁸⁶ the nearly forty thousand local governments of general jurisdiction that serve as our most immediate source of governance can add much more.²⁸⁷ There can also be a fruitful dialogue between scholars of the constitutional dimensions of American Indian sovereignty and the implications of municipal charters.²⁸⁸ In short, scholarly examination of

283. *See generally* DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010) (surveying and responding to debates about originalism and the concept of a living constitution).

284. *Cf.* Robert F. Williams, *Foreword: Continuing Sophistication in Subnational Constitutionalism*, 6 *PERSP. FEDERALISM*, no. 2, 2014, at E-I, E-IV (“A careful study of subnational constitutionalism also may have lessons to offer the practice and study of *supernational* constitutionalism.”).

285. *See generally* ROUTLEDGE HANDBOOK OF CONSTITUTIONAL LAW (Mark Tushnet, Thomas Fleiner & Cheryl Saunders eds., 2015) (collecting papers on constitutional law).

286. *See supra* note 13.

287. *See* CARMA HOGUE, U.S. CENSUS BUREAU, G12-CG-ORG, GOVERNMENT ORGANIZATION SUMMARY REPORT: 2012, at 1 (2013) (noting 38,910 general-purpose local governments in the United States).

288. There is much potential for comparative constitutional dialogue between scholars of American Indian law and local-government scholars. Although beyond the scope of this Article, there are some parallels between tribal constitutions and other “substitutions,” *see* Ginsburg & Posner, *supra* note 190 (exploring “substitutions”), particularly state constitutions, given that tribes, unlike local governments, have recognized sovereignty in the U.S. legal system. *See* *United States v. Wheeler*, 435 U.S. 313, 319–23 (1978) (holding that “cities are not sovereign entities” but that Indian tribes, on the other hand, enjoy sovereignty “of a unique and limited character”); *see also* Seth Davis, *The Constitution of Our Tribal Republic*, 65 *UCLA L. REV.* 1460 (2018) (thinking about treaties and agreements with Indian tribes in constitutional terms); Angela R. Riley, *Native Nations and the Constitution: An Inquiry Into “Extra-Constitutionality,”* 130 *HARV. L. REV. F.* 173 (2017) (exploring the “extra”-constitutional, or “pre”-constitutional, status of Indian tribes in the American legal and political system).

constitutionalism from the international to the national to the tribal to the subnational should rightly carry through all the way down to the local.²⁸⁹

Conclusion

Municipal charters are the forgotten constitutions of our federal system. Charters, however, hold tremendous potential if properly understood and framed. Charters can define the terms of local power at a moment in which the democratic legitimacy of cities and other local governments is under significant threat. Charters can serve as focal points for community meaning and as a form of lawmaking buffered, at least to some extent, from the compromises of ordinary politics. Charters can improve local governance and reinforce the rule of law.

These are certainly aspirational goals to associate with legal instruments that rarely intrude on the discourse of constitutionalism, and they may now mostly be honored in the breach. But taking municipal charters seriously as constitutions is an important exercise nonetheless, as an inroad into understanding their potential and as a lodestar for reform. Bringing the reality of charter law and practice closer to the potential that charters hold is well worth the endeavor at a moment of newfound—and profound—relevance for local governance.

289. Cf. Gerken, *supra* note 171 (arguing for “federalism all the way down”).

Appendix: The Home-Rule/Charter Nexus

State	Legal Approach to Charters: mandatory/optional/by city size/not allowed?	<i>Imperio</i> home rule, legislative home rule, or Dillon's Rule?†
Alabama	Not allowed; no provision for home-rule charters	Dillon's rule (applies only to counties)
Alaska	"First class" cities and boroughs (municipalities with at least 400 residents)	Legislative
Arizona	Cities with +3,500	Legislative
Arkansas	Optional	<i>Imperio</i>
California	Optional	<i>Imperio</i>
Colorado	Optional	<i>Imperio</i>
Connecticut	Optional	<i>Imperio</i>
Delaware	Optional	Legislative
Florida	Mandatory	<i>Imperio</i>
Georgia	Mandatory	<i>Imperio</i>
Hawaii	Optional	<i>Imperio</i>
Idaho	Not allowed; no provision for home-rule charters	<i>Imperio</i>
Illinois	Not allowed (but home rule adoption in cities is)	Legislative
Indiana	Not allowed; no provision for home-rule charters	Legislative
Iowa	Optional	<i>Imperio</i>
Kansas	Optional	<i>Imperio</i>
Kentucky	Not allowed (only for consolidated governments)	Legislative
Louisiana	Optional	<i>Imperio</i>
Maine	Optional	<i>Imperio</i>
Maryland	Mandatory	<i>Imperio</i>
Massachusetts	Optional	Legislative
Michigan	Optional	<i>Imperio</i>
Minnesota	Optional	Legislative
Mississippi	Optional	<i>Imperio</i>
Missouri	Municipalities with +5,000	Legislative

† In this chart, "*imperio*" refers to systems that prioritize first-wave home-rule approaches of discerning a realm of protected "local" or "municipal" affairs, "legislative" refers to systems that prioritize the second-wave home-rule approach of delegating legislative authority but retaining state preemption oversight, and "Dillon's Rule" refers to systems without home rule. In practice, states are rarely cleanly in one system only, often adopting aspects of various systems or applying home rule to some but not all jurisdictions, *see* Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1125–27 (2007), so this chart is necessarily reductionist to a certain degree.

Montana	Optional	Legislative
Nebraska	Municipalities with +5,000	Legislative
Nevada	Optional	Dillon's rule
New Hampshire	Optional	Legislative
New Jersey	Optional	Legislative
New Mexico	Municipalities with +300	Legislative
New York	Optional	<i>Imperio</i>
North Carolina	Mandatory	Dillon's rule
North Dakota	Municipalities with +100	<i>Imperio</i>
Ohio	Optional	<i>Imperio</i>
Oklahoma	Municipalities with +2,000	Legislative
Oregon	Mandatory	Legislative
Pennsylvania	Optional	Legislative
Rhode Island	Mandatory	<i>Imperio</i>
South Carolina	Not allowed (state constitution authorizes home-rule charters, but the general assembly has not yet passed legislation required to implement the provision)	<i>Imperio</i>
South Dakota	Optional	Legislative
Tennessee	Optional	Legislative
Texas	Municipalities with +5,000	Legislative
Utah	Optional	<i>Imperio</i>
Vermont	Optional	Dillon's rule
Virginia	Mandatory	Dillon's rule
Washington	Optional	Legislative
West Virginia	Optional	<i>Imperio</i>
Wisconsin	Optional	<i>Imperio</i>
Wyoming	Not allowed	<i>Imperio</i>