

Local Legislatures and Delegation

David N. Schleicher* & Roderick M. Hills, Jr.**

The law governing local legislatures' delegations to local executives is a mess. Nondelegation doctrine, as applied to the state legislatures' delegations, has at least a coherent (if empirically dubious) formal logic in classic ideas about separation of powers. When applied to local governments, however, the logic underlying this doctrine disintegrates.

In the context of state legislatures' delegations, the doctrine rests on the notion that the state constitution intended the state legislature, as the most democratically accountable representative of the state people, to take direct and inalienable responsibility for major policy decisions, leaving only the "details" of "implementation" to be decided by executive officials. This reasoning is incoherent in the local government context. Many of local governments' most important legislative powers are derived from statutory delegations enacted by the state legislature, refuting any prohibition on that body's delegating "legislative powers." Further, that delegated power is carried out by unicameral local legislatures exercising a mix of both legislative and executive powers in defiance of state constitutional rules requiring bicameral legislatures to turn over implementation to executive officials.

Ignoring these realities, state courts routinely enforce some version of the nondelegation doctrine against local governments without differentiating between local and state delegations, sometimes even senselessly relying on separation-of-powers logic that makes little sense at the local level. This Article attempts to bring some coherence to the law governing local delegations by recognizing that limits on local delegation have nothing to do with state constitutional separation of powers. Instead, those limits rest on statutory presumptions that ought to be crafted in light of the peculiarities of local legislatures. Unlike some state legislatures or Congress, local governments regularly lack the partisan competition necessary to support jurisdiction-wide policy platforms. Local legislators, therefore, tend to adopt parochial policies that ignore jurisdiction-wide costs and benefits, including mutual deference to each legislator's exclusion of locally costly infrastructure or land uses from their

* Professor of Law, Yale Law School.

** William T. Comfort III Professor of Law, New York University Law School. The authors would like to thank Paul Diller, Noah Kazis, Julian Mortenson, Richard Pildes, Maria Ponomarenko, and Katrina Wyman as well the participants at the Fordham Urban Law Journal Cooper-Walsh 2022 Fall Colloquium. We also thank Aren Torikian and Rekha Kennedy, both students at Yale Law School, for their superb research assistance. The research on which this article is based was supported by the Filomen D'Agostino Research Fund at NYU School of Law, for which we are extremely grateful.

district and excessive deference to incumbent entitlement holders like vendors, contractors, public employees, and neighborhood associations.

This Article argues that state courts should recognize that, in contrast to local legislators, mayors, county executives, and city managers have broader name recognition and greater capacity to mobilize the voting public on behalf of jurisdiction-wide considerations. Nondelegation canons that impede local legislative bodies from delegating broad policy-making power to such unitary executives, therefore, undermine rather than strengthen democratic accountability. Rather than try to clone state-level nondelegation doctrine at the local level, judge-made local government doctrines ought to strengthen the hand of these jurisdiction-wide executives, not undermine them with gratuitous impediments like local nondelegation doctrines.

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Introduction

The nondelegation doctrine is alive and well at the local level, but no one quite knows why. Reported decisions abound with judicial declarations that local legislatures may not delegate “discretionary” or “policymaking” authority to local executives. “It is axiomatic,” intoned the Missouri Supreme Court, striking down the St. Louis city council’s delegation of fee-setting power to a parking meter commission, “that a legislative body cannot delegate its authority, but alone must exercise its legislative functions.”¹ Dozens of similar decisions can be pulled out of modern treatises: “[T]he right to delegate power by municipal authorities springs from the same reasons and is controlled in the same way as the delegation of the legislative power by the state,” one such treatise recites.² Just as the state legislature may

1. *Auto. Club of Mo. v. City of St. Louis*, 334 S.W.2d 355, 358 (Mo. 1960).

2. 2A MCQUILLIN MUN. CORP. § 10:44 (3d ed. 2023). Numerous state courts have made similar statements, asserting that the local legislatures’ power to delegate policymaking authority to local executive officials is derived from the state constitution. *See, e.g.*, *Kugler v. Yocum*, 69 Cal. 2d 371, 375 (1968) (“[W]e note that the doctrine prohibiting delegation of legislative power, although much criticized as applied, is well established in California. ‘The power . . . to change a law of the state is necessarily legislative in character, and is vested exclusively in the legislature and cannot be delegated by it.’” (citations omitted) (quoting *Dougherty v. Austin*, 29 P. 1092, 1093 (Cal. 1892))); *Turner v. Peters*, 327 S.W.2d 958, 959 (Ky. 1959) (“Consequently, the ordinance in question, in requiring the Mayor’s approval of the location without prescribing standards to guide him, is an unconstitutional delegation of power and a clear infringement of Section 2 of the Kentucky Constitution.”); *City of Cleveland v. Piskura*, 60 N.E.2d 919, 925 (Ohio 1945) (“Under the Constitution of Ohio the legislative power of this state is vested in the General Assembly. Insofar as the functions of the city of Cleveland are legislative, they are vested in the city council and that body cannot delegate the exercise of those functions to any other authority.”); *Thompson v. Bd. of Trs. of City of Alameda*, 144 Cal. 281, 283 (1904) (“In either case it is obvious that it was beyond the powers of the board by ordinance or otherwise to divest itself and succeeding boards, for a longer or a shorter period, of powers vested in it by the general law for the benefit of its constituents . . .”). In discussing how and to what extent the city of Minneapolis should be lighted, the Minnesota Supreme Court declared that:

The authority to determine it is delegated to the city council, and it comes under the rule that power requiring the exercise of judgment and discretion, especially if it be legislative or judicial, as distinguished from merely ministerial in its character, delegated to an agent, cannot be delegated to him unless authorized to do so by the principal.

Minneapolis Gas-Light Co. v. City of Minneapolis, 30 N.W. 450, 452 (Minn. 1886).

In *Keating v. Patterson*, the court noted that:

In order to render admissible such delegation of legislative power, however, it is necessary that the statute declare a legislative policy, establish primary standards for carrying it out, or lay down an intelligible principle to which the administrative officer or body must conform, with a proper regard for the protection of the public interests and with such degree of certainty as the nature of the case permits, and enjoin a procedure under which, by appeal or otherwise, both public interests and private rights shall have due consideration.

132 Conn. 210, 215 (1945) (quoting *State v. Stoddard*, 126 Conn. 623, 628 (1940)).

The court in *Chase v. City Treasurer* wrote that:

not turn over “legislative power” (whatever that elusive quarry might be) to a state executive agency, so too, cities may not turn over local legislative power to local agencies.

Yet the very existence of the City of St. Louis seemed to call the Missouri court’s axiom into question. The city, after all, derived much of its legislative power from statutes enacted by the Missouri state legislature—presumably, “a legislative body” that should have been barred from transferring such authority to the city under the very axiom announced by the court.

This paradox poses the question at the heart of this Article. Why should the City of St. Louis be barred from delegating a measly little power to set the maximum parking meter rate to a parking meter commission when the state legislature is entitled to delegate to the City of St. Louis the much greater “legislative power” of deciding whether to have parking meters at all?³

As we shall explain in this Article, the various doctrinal answers about why there is any local nondelegation doctrine at all are so obviously question-begging that courts barely bother repeating them. Thomas Cooley’s venerable *A Treatise on the Constitutional Limitations* just declares that the “immemorial practice of this country and of England” makes the nondelegation principle inapplicable to state laws conveying power to “municipal corporations.”⁴ Modern treatises agree that a state legislature is entitled to create “a miniature state within its locality.”⁵ But those same treatises go on to say that, for unexplained reasons, that miniature state is then bound by the very nondelegation doctrine that the state legislature was authorized to ignore when creating it.⁶ State courts further confuse matters

It is alleged in the complaint that amended specification No. 5 contains certain provisions which, when examined, we think, will be found to delegate duties which the council alone can perform. . . . We think those cases are determinative of the point here relied upon,—that there was an unauthorized delegation of power by the council.

122 Cal. 540, 546 (1898).

3. *See Auto. Club of Mo.*, 334 S.W.2d at 360–62 (holding that the city acted within its statutory delegation under the state statute delegating power to cities to use metered parking then codified at Mo. Rev. Stat. § 82.470 (1949)).

4. THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* 118 (1868).

5. *See, e.g.*, 1 MCQUILLIN MUN. CORP. § 3:6 (3d ed. 2023) (“The legislature may, within the limits of the constitution, give the municipal corporation all the powers such an artificial personality is capable of receiving, and make it, to use the expression of the Supreme Court of the United States, a miniature state within its locality.”).

6. For an incoherent combination of self-contradictory propositions, see, for example, 2A MCQUILLIN MUN. CORP. § 10:44 (3d ed. 2023), which asserts simultaneously that (1) “the right to

by frequently abandoning the idea that the local nondelegation doctrine has any constitutional foundation at all. Instead, for some courts, the question turns out to be purely a matter of statutory construction, a substantive canon of construction that the text of a state statute can waive.⁷ The justification for this nonconstitutional nondelegation canon, however, is left completely opaque.

This Article will argue that it is a fool's errand searching for any specific textual or doctrinal explanation for the origins and extent of limits on local legislative delegations. The text of state constitutions includes no basis for the creation of a local nondelegation doctrine. Courts have conjured this doctrine out of thin air. Further, courts have been silent as to such a doctrine's justification or precise scope beyond repeating nondelegation slogans that provide little guidance in determining whether or why a local legislature's delegation to an agency goes too far or is too vague. Consequently, very little can be derived from the current case law. All we know is that some sort of doctrine limiting local legislatures' delegating powers to executives exists and that no one knows for sure where it comes from or what it means.

We intend to fill this gap in the doctrine with constitutional- and policy-based arguments to explain why the courts should abandon the local nondelegation doctrine. The constitutional argument, laid bare in Part I, is simple: there is nothing in state constitutions that limits the power of state legislatures to give local legislatures the power to delegate to local agencies. The existence of a nondelegation doctrine at the state level does not imply anything at all about what powers local legislatures may or may not have. This argument expands on Nestor Davidson's insight that "courts should resist false parallels to higher levels of government, where structural realities may be very different."⁸

State and federal nondelegation doctrines are rooted in constitutional text that either explicitly requires, or implies an unwritten purpose of, parceling out legislative, executive, and judicial functions among three distinct statewide institutions. The underlying logic sounds in democratic accountability. Congress and state legislatures, as the allegedly most democratically accountable constitutional bodies, must make the

delegate power by municipal authorities springs from the same reasons and is controlled in the same way as the delegation of the legislative power by the state," but (2) "public powers conferred upon a municipal corporation and its officers and agents cannot be delegated to others," even though those allegedly nondelegable powers were conferred by the state legislature on which the municipality's legislative power is purportedly modeled.

7. See, e.g., *Cerini v. City of Cloverdale*, 191 Cal. App. 3d 1471, 1477–78 (Ct. App. 1987) (finding that the state statute authorizes the city council to delegate powers to a civil service commission); *Overton v. Town of Southampton*, 857 N.Y.S.2d 214, 216 (App. Div. 2008) (holding the town's establishment of the police commissioner position as a permissible delegation because such action was authorized by state statute).

8. Nestor M. Davidson, *Localist Administrative Law*, 126 YALE L.J. 564, 614 (2017).

fundamental policy choices, delegating to executives only the details of those policies' implementation.

Forests have perished trying to define this distinction between what is fundamental policy as opposed to mere details of implementation, but, whatever its meaning at the state level, that distinction is irrelevant to local governments. The internal structure of local governments is left undefined by the text of every state constitution. There is no dispute that state legislatures are free to create local governments with legislatures that look very different from themselves. For instance, almost all local governments have unicameral local legislatures, while all but one state legislatures are bicameral.⁹ Likewise, the executive branch in “council-manager” and related forms of city government works directly for the legislature: there is no separately elected executive but instead a professional administrator chosen by the legislature.¹⁰ The state legislature’s power to define local governments, in short, is not defined by anything in the text of state constitutions limiting the state legislature itself. It follows, we argue, that there should be no limitation in the state constitution on state legislatures’ delegating to local legislatures the power to subdelegate to local agencies.

What are the origins and content of the local nondelegation doctrine if it does not come from the state constitution? In subpart I(B), we argue that local nondelegation requirements are judge-made substantive canons of statutory interpretation, not constitutional rules. These canons read statutory and constitutional grants of authority to local governments by incorporating institutional features deemed desirable by state judges. As judge-made canons, these nondelegation values often reflect widely held public law values, so that they can run parallel to the requirements of state constitutional separation of powers. Still, courts are free to refashion these canons better to fit those public law values.

In Part II, this Article argues that courts should use their discretion to get out of the business of policing local delegations. Instead, courts should consider what we term the “disintegrative” tendencies of local legislatures. By “disintegrative” tendencies, we mean the obstacles faced by local legislatures in constructing jurisdiction-wide policies that balance costs and benefits across different interest groups or geographic areas within a local government.¹¹ This balancing is an inherently political task requiring

9. Noah M. Kazis, *American Unicameralism: The Structure of Local Legislatures*, 69 HASTINGS L.J. 1147, 1149 (2018).

10. See *infra* notes 96–98 and accompanying text.

11. “Disintegrative” tendencies at the local level are akin to what Professor Richard Pildes describes as “fragmentation” of policymaking more generally in liberal democracies. Richard H. Pildes, *The Age of Political Fragmentation*, J. DEMOCRACY, Oct. 2021, at 146–47. Professor Pildes argues that the division of policymaking authority among multiple rival groups and parties

controversial value judgments that pit incommensurable benefits and costs against each other, integrating rival values into a single program but also producing winners and losers within the local community.

Political parties facilitate such integration of rival values and interests in state and federal legislatures. As explained in subpart II(A), parties are best understood as coalitions of interests that force legislators and voters to compromise the needs of their districts or their favored narrow interest group for the sake of an overall policy agenda. Such parties, however, are generally missing from local legislatures. As the result of the efforts of Progressive reformers in the late nineteenth and early twentieth centuries to install nonpartisan elections, most local governments today lack any meaningful party organizations.¹² Unreformed cities are usually dominated by a single national party. The increasing nationalization of political parties has only aggravated this tendency. Consequently, political parties today have become national party brands permitting little local deviation, offering liberal or conservative areas without much in the way of local party competition on local issues.¹³

Subpart II(B) notes that, in both formally nonpartisan and one-party cities, turnout in relevant local elections is low, and information is costly in the absence of party competition. As a result, heavily invested local groups or narrow interests tend to dominate. Coupled with low turnout rates for local primary and general elections, these interest groups can swing the balance against local legislators who vote for programs that benefit a broad array of constituents but pinch any specific interests. The result is a tendency in local legislatures to ignore jurisdiction-wide preferences in favor of narrowly focused benefits for powerful interest groups such as current homeowners or renters, public employee unions, licensees, and other specific incumbent entitlement holders.

Subpart II(B) explains how the local generalist executive—the mayor, county executive, or city manager—plays a crucial integrative role in

undermines effective governance that is necessary for popular trust in government. *Id.* We likewise argue that the limitation of local executive power with doctrines like the nondelegation doctrine interfere so much with integrated policymaking as to discredit local democracy.

12. Note, *Local Nonpartisan Elections, Political Parties and the First Amendment*, 87 COLUM. L. REV. 1677, 1677 (1987). By the early 1960s, two-thirds of American cities elected their officials on a nonpartisan ballot. Phillips Cutright, *Nonpartisan Electoral Systems in American Cities*, 5 COMPAR. STUD. SOC'Y & HIST. 212, 212 (1963).

13. See DANIEL J. HOPKINS, *THE INCREASINGLY UNITED STATES: HOW AND WHY AMERICAN POLITICAL BEHAVIOR NATIONALIZED* 89–91 (2018) (noting that “[o]stensibly local issues turn out to divide people along familiar national lines” rather than any local political lines); David Schleicher, *Federalism and State Democracy*, 95 TEXAS L. REV. 763, 777–78 (2017) (recognizing that local parties organize themselves along national political lines, failing to develop locally specific platforms).

partyless legislatures. Such executives have jurisdiction-wide constituencies and managerial responsibilities that cut across multiple issue areas. They have, therefore, both the visibility and the incentives to create a jurisdiction-wide agenda that integrates costs and benefits across interest areas and neighborhoods. To the extent that these generalist executives control local government agencies, they can exercise their power to enforce that integrated policy agenda. For instance, a mayor in charge of collective bargaining can enforce a city-wide system of pensions and pay raises that comport with the city's long-term budget. Likewise, a mayor in charge of siting homeless shelters, which are often locally undesirable but regionally necessary, can place these shelters in neighborhoods that serve the needs of the shelters' residents. By contrast, local legislatures, especially those elected from single-member districts, have difficulty saying "no" to a powerful union or "yes" to necessary housing. As political scientists have shown, the collective decision-making of partyless legislatures tends towards distributive politics. In other words, it allows each member to get what he or she most wants (for example, pork spending or a veto on development in her district) even at the cost of jurisdiction-wide interests. The result can be runaway budgets or a shortage of housing supply.

Delegation can help solve collective action problems, which are endemic to partyless local legislatures. As a result, local legislatures often delegate power to executives to solve their collective action problems. Local legislatures, for instance, may recognize their inability to choose locations for locally unwanted land uses (LULUs) like garbage dumps or homeless shelters. Without issue-oriented competitive parties, members will be reluctant to vote for a bill that locates such a project in their district. Therefore, winning coalitions become hard to build because members worry about being on the losing end of such a fight over location (this is how "distributive politics" cashes out in local politics). Understanding the need to locate LULUs, legislatures may reasonably delegate the decision to the executive branch, even if it means later inveighing against the decision that the executive makes.

Not every local legislature is subject to collective action problems. As explained in subpart III(A), local governments with small, homogenous populations often have tightly unified legislatures that hire and closely monitor city managers or county executives to advance their constituents' shared interests. In these jurisdictions, limits on local delegations are simply unnecessary, because local legislatures can control excessive delegations to city managers simply by retracting them. By contrast, in larger, more heterogenous jurisdictions where local legislatures are a partyless and divided body, such legislatures probably cannot effectively govern a city without delegating broad powers to an executive capable of overcoming legislative paralysis. In short, limits on broad delegations to a strong

executive are either unnecessary because local legislatures can easily restrict them or harmful because local legislatures cannot govern without them.

As explained in subpart III(B), the benefits of local nondelegation doctrines must be weighed against the costs of such doctrines' empowerment of an unaccountable juristocracy. The history of the doctrine from the late nineteenth and early twentieth centuries up to the present suggests its possibility for ideological or even partisan abuse at the hands of judges. By contrast, the capacity of voters to determine their form of local government through charter fights makes all the more unnecessary such judicial interventions.

I. Why State Legislatures Need Not Clone Themselves in Creating Local Governments

Both constitutional text and local government practice suggest that the internal structure of local governments need not mimic that of state governments. As state constitutions are documents that limit the authority of states, not documents that grant them authority, the absence of any textual or structural reason for the local nondelegation doctrine is argument enough against its existence. The constitutional problem is even more profound. State nondelegation doctrines are rooted in state constitutional law about the separation of powers. States, however, regularly create local governments with promiscuously mixed executive and legislative powers that are very different from what we see at the state level. There is no way to square the existence of things like council-manager systems and one-house local legislatures with a local nondelegation doctrine.

It should be no surprise, then, that those decisions enforcing nondelegation norms turn out, often, to be mere canons of statutory interpretation. As explained in subpart I(B), decisions announcing a ban on local legislatures' delegating legislative powers seem to rest on the waivable presumption that powers conveyed to particular institutions by the state legislature should not be redelegated to other institutions. Such decisions, however, cannot be reconciled with bans on redelegation with state constitutional and statutory "home rule" provisions, protecting local governments' power to custom-tailor local institutions. Nor do courts explain why there should be a presumption against local nondelegation at all. In Part II, we will argue that courts should simply abandon local nondelegation. For now, the important point is that nothing in the judicial decisions provides any legal basis for the doctrine, beyond judges' whims.

A. *Irrelevance of State Constitutional Text to Local Governments' Internal Structure*

The U.S. Constitution's nondelegation doctrine, understood as a constitutional limit on Congress's powers, has long been moribund, although

several Supreme Court Justices recently have suggested that it ought to be revived.¹⁴ Harbingers of such a revival are recent decisions deploying a nondelegation canon of statutory construction to invalidate agency decisions as “major” decisions that therefore lacked sufficiently specific statutory authorization.¹⁵

Whatever the merits or future of either the federal constitutional limit or its corresponding canon, however, various state constitutions’ nondelegation doctrines are not only alive and well but also have a plausible home in constitutional text.¹⁶ The textual roots for the latter vary. Forty state constitutions expressly protect “separation of powers” with some constitutional provision.¹⁷ Some state constitutions assign legislative, executive, and judicial powers to three distinct branches of state government, explicitly barring any branch from exercising the powers assigned to the others.¹⁸ Whether these textual provisions were originally intended to limit

14. See *Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019) (Alito, J., concurring) (“If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort.”); *id.* at 2148 (Gorsuch, J., dissenting) (“I remain hopeful that the Court may yet recognize that, while Congress can enlist considerable assistance from the executive branch in filling up details and finding facts, it may never hand off to the nation’s chief prosecutor the power to write his own criminal code.”). As Cass Sunstein quipped backed in 2000, “[w]e might say that the conventional doctrine has had one good year, and 211 bad ones (and counting).” Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000).

15. Like the nondelegation constitutional limit on Congress, that nondelegation canon has provoked controversy among scholars. Compare Cass R. Sunstein, *The American Nondelegation Doctrine*, 86 GEO. WASH. L. REV. 1181, 1207 (2018) (describing certain applications of the Major Questions Doctrine as “at least plausible”), with John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 228 (noting that “enforcing the nondelegation doctrine through the canon of avoidance undermines, rather than furthers, the constitutional aims of that doctrine”). For three recent U.S. Supreme Court opinions construing agencies’ power narrowly to resolve such “major questions,” see, for example, *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2320, 2320–21 (2021) (denial of application to vacate stay) (Kavanaugh, J., concurring); *West Virginia v. EPA*, 142 S. Ct. 2587, 2616 (2022); and *Nat’l Fed’n of Indep. Bus. v. OSHA*, 142 S. Ct. 661, 665 (2022) (per curiam).

16. See Jason Iuliano & Keith E. Whittington, *The Nondelegation Doctrine: Alive and Well*, 93 NOTRE DAME L. REV. 619, 636 (2017) (describing numerous state courts’ decisions invalidating delegations to agencies under their state constitutions’ nondelegation doctrines).

17. JEFFREY S. SUTTON, WHO DECIDES? STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION 194 (2022).

18. See, e.g., FLA. CONST. art. II, § 3 (“The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.”); KY. CONST. § 27 (“The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another.”); MICH. CONST. art. III, § 2 (“No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.”). Article XXX of the Massachusetts Constitution of 1780 provides the template for this sort of provision, banning “the legislative department[’s] exercis[ing] the executive and judicial powers” or vice versa. MASS. CONST. part I, art. XXX.

the power of the states' legislative branches from delegating broad policymaking powers to executive agencies remains an open question.¹⁹ Moreover, the variation in the stringency of state courts' nondelegation doctrines, which is considerable, does not always turn on each specific state's constitutional text or history.²⁰

Regardless of state-specific variations, every state's version of the nondelegation doctrine rests on the principle that the state constitution allocates different types of power to different branches of state government.²¹ As a consequence, it explicitly or implicitly bars each branch from exercising the powers assigned to the others.

Every state's nondelegation doctrine sounds in separation of functions among different branches of government. This common foundation reveals why the doctrine has no textual application to local governments. Explicit constitutional text or implicit constitutional purpose limits these separation-of-powers provisions to the branches of the *state* government. No court has ever suggested that these separation-of-powers provisions apply to local governments, and numerous courts have explicitly held that local governments need not assign their legislative, executive, and judicial functions to different institutions or personnel.²² Textualism in both statutory and constitutional interpretation has been in fashion for the last couple of decades.²³ It is worth emphasizing, therefore, that there is no textual basis for

19. Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045 (1994), debates the question at length. For an elegant summary of arguments, see SUTTON, *supra* note 17.

20. For a dated categorization of state courts' nondelegation doctrines in terms of stringency, see Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1196–1200 (1999). The Michigan Supreme Court's recent strengthening of their doctrine in *In re Certified Questions from U.S. Dist. Ct.*, 958 N.W.2d 1 (Mich. 2020) mostly ignored Michigan-specific history in favor of citations to U.S. Supreme Court opinions—in particular, Justice Gorsuch's dissent in *Gundy*—and classic sources on general separation of powers like the Federalist Papers and John Locke's Second Treatise. *Id.* at 16–17, 26–27.

21. See *supra* notes 16–20 and accompanying text.

22. See *Moreau v. Flanders*, 15 A.3d 565, 579 & n.16 (R.I. 2011) (citing judicial authority from fourteen different states).

23. As Justice Elena Kagan famously observed in 2015, “[w]e are all textualists now.” Harvard Law School, *The 2015 Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 25, 2015), <https://www.youtube.com/watch?v=dpEtszFTOTg> [<https://perma.cc/A79Y-5QEM>]. The degree to which state supreme courts have embraced the alleged textualist revolution in the U.S. Supreme Court varies considerably from state to state. See Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1771 (2010) (noting that while some states have enacted legislation that directs state courts' interpretive processes, other states have resisted doing so). By the time that Professor Gluck provided her inventory of state courts' methodologies, the “new textualism” at the U.S. Supreme Court was also less than omnipotent. See John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 146 (noting Justices Scalia and Thomas's subscribing to the new textualism).

the local nondelegation doctrine. Despite many courts discussing constitutional limits on local legislative delegations to local administrative agencies, no court has found a specific textual basis for such a limit.

The problem is even deeper. Any requirement that local governments observe separation of powers applicable to the state branches would wreak havoc on the systems of local government in every state. In every state, state legislatures have created local governments that routinely mix legislative, executive, and judicial functions. In “Council-Manager” systems—by far the most common government structure for municipalities—or New England towns run by town meetings, the local legislature or the voters themselves function as the executive branch insofar as they appoint the civil servants who administer the government.²⁴ In counties, the county commission, often denoted a “court,” does double duty by simultaneously functioning as a legislative body enacting general rules like zoning ordinances as well as an adjudicative body, applying the ordinances that it enacts in particular cases. For example, local legislatures of counties, cities, towns, and villages routinely rule on individual developers’ applications for conditional use permits sought under zoning ordinances enacted by those very legislatures.²⁵

If local governments do not need to separate functions among different officials, then what is the basis for barring local legislatures from delegating legislative functions to nonlegislative institutions? As noted above, the nondelegation doctrine rests at the state level entirely on the idea that different functions must be housed in separate bodies.²⁶ Take away that foundation, and the premise on which the nondelegation doctrine relies collapses. Local governments are not structured like the state government, and local legislatures are not structured like the state legislature. State constitutions, therefore, do not require state legislatures to put any limits on how local legislatures operate.

One state justice has argued that because no legislature can delegate more power than it possesses, the powers conveyed to local governments by state legislatures must be constrained by the same limits that apply to the state legislature.²⁷ This argument proves too much. Applying this principle

24. For a celebratory account of the town meeting with details on its mechanics, see generally FRANK M. BRYAN, *REAL DEMOCRACY: THE NEW ENGLAND TOWN MEETING AND HOW IT WORKS* (2004). For an account of council-manager systems, see generally Kimberly L. Nelson & James H. Svara, *Form of Government Still Matters: Fostering Innovation in U.S. Municipal Governments*, 42 AM. REV. PUB. ADMIN. 257 (2012).

25. On the routine exercise of quasi-judicial power by local legislatures in zoning matters, see ROBERT C. ELLICKSON, VICKI L. BEEN, RODERICK M. HILLS, JR. & CHRISTOPHER SERKIN, *LAND USE CONTROLS: CASES AND MATERIALS* 402–04 (5th ed. 2021).

26. *See supra* notes 17–18.

27. *See* *Becker v. Dane Cnty.*, 977 N.W.2d 390, 414 (Wis. 2022) (Bradley, J., dissenting) (“Although Article IV, Section 22 [of the Wisconsin State Constitution] authorizes the initial

consistently would entail changing the legislative form of every city in the country to comply with state constitutional mandates that the state legislature be a bicameral body. While there were once some bicameral local legislatures, as Noah Kazis has shown, there are not any now, despite forty-nine out of fifty states having bicameral state legislatures.²⁸ Instead, state legislatures obliged to act bicamerally often confer on local legislatures the power to act unicamerally.²⁹ Further, no one doubts that state legislation can confer on local legislatures the power to exercise a mixture of legislative and executive powers foreclosed to the state legislature enacting such enabling acts.³⁰ If it is acceptable for local legislatures to exercise quasi-judicial and executive powers, then what is the objection to executive officers' exercising legislative powers?

More importantly, a state legislature that conveys a delegable legislative power to a local legislature is not granting more power than that which is available to the state legislature. Local legislative powers are more strictly confined by both geography and law than statewide legislative powers. Local agencies control smaller territories than state agencies. They also are supervised by two legislatures, state and local, as well as a host of state executive agencies. Given these constraints, municipal agencies are less threatening to whatever values the nondelegation doctrine advances at the state level.³¹ There may be some limits to the state legislature's power to delegate. The state legislature likely cannot create an all-powerful state "Goodness and Niceness Commission" with general power to pursue the public welfare.³² Still, it hardly follows that they cannot create the office of

delegation from the legislature to the county boards, the constitution does not authorize any subdelegation").

28. Kazis, *supra* note 9, at 1149. For a history of American cities' gradual adoption of unicameral legislatures, see *id.* at 1159–61.

29. See *id.* at 1167–69 (describing various state legislatures' insistence on unicameralism for local government).

30. See *supra* notes 24–25 and accompanying text.

31. See *Bd. of Cnty. Comm'rs v. Padilla*, 804 P.2d 1097, 1102 (N.M. Ct. App. 1990) (holding that separation-of-powers principles governing the New Mexico state legislature are inapplicable to New Mexico counties and noting that the "concern about the tyranny that can arise when one branch of government—the executive, legislative, or judicial—assumes the powers of another" is "diminished for a level of government whose powers are subordinated to higher levels of government or otherwise limited"). Legal scholars have also picked up on this point. See, e.g., Davidson, *supra* note 8, at 602 (arguing that lack of partisanship at the local level allows agencies to focus on efficiency and avoid issues inherent to state and federal levels); Kazis, *supra* note 9, at 1181 (explaining that, given constraints from higher levels of government and interlocal competition, local governments require fewer limits on policymaking than state and federal counterparts); Paul A. Diller, *Local Health Agencies, the Bloomberg Soda Rule, and the Ghost of Woodrow Wilson*, 40 *FORDHAM URB. L.J.* 1859, 1901 (2013) (noting that regulated industries have more influence over elected officials at higher levels of government than those at lower levels).

32. The idea of the legislature's creating a "Goodness and Niceness Commission" as an illustration of a delegation that plainly surpasses any reasonable view of delegation comes from Gary Lawson, *The Rise and Rise of the Administrative State*, 107 *HARV. L. REV.* 1231, 1239 (1994).

a mayor or county executive with similarly unconstrained executive powers. Indeed, state legislatures do so all the time, which is why, after all, we have mayors and county executives.

State constitutional separation-of-powers requirements are, in short, irrelevant to the powers of local governments. If there is a source for a local nondelegation doctrine, it must be found elsewhere.

B. Local Nondelegation Limits as Judge-Made Canons of Statutory Interpretation

Many state courts have quietly figured out that local nondelegation has no constitutional basis, casually noting that state legislatures can waive such limits if they choose.³³ As the Iowa Supreme Court noted in discussing the powers of a county board of health, policymaking powers delegated by statute “generally would not be subject to delegation *absent a legislative declaration*” in the state statute, such that the real “question is whether there is authority granted by [the] legislature to delegate that right to another entity.”³⁴ On this account, the local nondelegation doctrine, unlike the version applicable to the state legislature, is just a presumption against the local legislature’s redelegating powers that the state legislature assigns to particular local institutions. Sometimes this “anti-redelegation” presumption

33. For an example of how nondelegation limits imposed by courts on local governments turn on the interpretation of statutes conferring power on those governments, see *Jansco v. Waldron*, 360 A.2d 321, 324 (N.J. 1976), in which the court noted that whether the power to prescribe rules for disciplining police can be subdelegated to the director of public safety turns on the meaning of the state enabling act. State courts routinely note that local legislatures may delegate their legislative power to other local bodies if state statutes expressly authorize such re-delegations. See, e.g., *Mun. of Metro. Seattle v. Div. 587, Amalgamated Transit Union*, 826 P.2d 167, 169 (Wash. 1992) (en banc) (“Where the Legislature enacts enabling legislation which vests a municipal corporation or similar entity with legislative powers, that body may not delegate its power *absent specific statutory authorization*.” (emphasis added)); *Cerini v. City of Cloverdale*, 191 Cal. App. 3d 1471, 1477 (Ct. App. 1987) (“However, where a statute mandates that the city council is to exercise a specified discretionary power, the power is held in the nature of a public trust and may not be delegated to others *in absence of further statutory authorization*.” (emphasis added)); *Schwartz v. City of Camden*, 75 A. 647, 649 (N.J. Ch. 1910) (“It is a well-established principle that, *in the absence of express legislative authority for that purpose*, a municipal corporation cannot delegate its legislative functions” (emphasis added)); *Edwards v. City of Kirkwood*, 127 S.W. 378, 382 (Mo. Ct. App. 1910) (“Legislative power implies judgment and discretion upon the part of those who exercise it, and a special confidence and trust upon those who confer it. The discretion thus involved, therefore, may not be delegated to another *unless expressly authorized*.” (emphasis added)). Lastly, the court in *Minneapolis Gas-Light Co. v. City of Minneapolis* wrote:

The authority to determine it is delegated to the city council, and it comes under the rule that power requiring the exercise of judgment and discretion, especially if it be legislative or judicial, as distinguished from merely ministerial in its character, delegated to an agent, cannot be delegated to him *unless authorized to do so by the principal*.

30 N.W. 450, 452 (Minn. 1886) (emphasis added).

34. *Warren Cnty. Bd. of Health v. Warren Cnty. Bd. of Supervisors*, 654 N.W.2d 910, 914 (Iowa 2002) (emphasis added).

bars local legislatures from giving local agencies too much power.³⁵ Sometimes the reverse is true: the local legislature is forbidden from encroaching on the powers bestowed by state statute on a local agency.³⁶ Why such a presumption exists is left unexplained. In Part II, we'll argue that state policy and the broader ambit of state constitutional law do not argue for a local nondelegation presumption.

But there are also conflicts between the local nondelegation presumption and other state judicial practices. A presumption against local redelegation seems to run up against a rival "home rule" presumption in some states that allows local governments to define for themselves how to design their internal decision-making processes.³⁷ Such a presumption is embodied in the idea that local communities can draft and ratify charters that custom-tailor local institutions by waiving "off-the-rack" state rules for "statutory cities" and counties.³⁸ It is also embodied in several state constitutional and statutory provisions that require local powers to be "liberally construed."³⁹ In light of these provisions, why not construe the state legislature's initial assignment of powers as a mere default rule that the local legislature can alter?

The answer to such a question would ordinarily turn on each state's doctrine of implied preemption. As a general matter, such a doctrine ordinarily turns on some examination of a state statute's purpose to determine

35. *See, e.g.,* PRB Enters., Inc. v. South Brunswick Plan. Bd., 518 A.2d 1099, 1101–02 (N.J. 1987) (finding that the legislative body could not delegate to planning board the power to determine uses to be allowed within zone).

36. *See, e.g.,* Paruszewski v. Twp. of Elsinboro, 711 A.2d 273, 277 (N.J. 1998) (explaining that the state municipal land use law prohibits governing bodies from infringing on "powers expressly reserved to the planning and zoning boards").

37. *See, e.g.,* Cook–Littman v. Bd. of Selectmen, 184 A.3d 253, 256, 260–61 (Conn. 2018) (permitting a town charter provision for filling a vacancy on the town governing board to prevail over conflicting state law and recognizing local government as a matter of local concern); Nutter v. Dougherty, 938 A.2d 401, 403–04, 414 (Pa. 2007) (upholding Philadelphia's campaign finance law against preemption and stating that "[w]e cannot stress enough that a home rule municipality's exercise of its local authority is not lightly intruded upon, with ambiguities regarding such authority resolved in favor of the municipality"); Strode v. Sullivan, 236 P.2d 48, 54 (Ariz. 1951) (writing that the court could "conceive of no essentials more inherently of local interest or concern" than control over local elections).

38. On the general idea that "home rule" charters confer power on local governments to experiment with the structure of their government, see 2A MCQUILLIN MUN. CORP. § 9:15 (3d ed. 2023).

39. These provisions come in both constitutional and statutory flavors. *See, e.g.,* N.Y. CONST. art. IX, § 3(c) ("Rights, powers, privileges and immunities granted to local governments by this article shall be liberally construed."); WIS. STAT. § 61.34(5) ("For the purpose of giving to villages the largest measure of self-government in accordance with the spirit of [the home rule provision] . . . this chapter shall be liberally construed in favor of the rights, powers and privileges of villages to promote the general welfare, peace, good order and prosperity of such villages . . .").

whether it had the purpose of overriding local governments' policies.⁴⁰ Preemption doctrine at the state level is notoriously uncertain, and the details of that doctrine need not detain us here.⁴¹ The important point is that nothing in any state's preemption doctrine hints at any general presumption against local legislatures' delegating broad policymaking authority to local agencies. There are certainly some state courts that are suspicious of such delegations, but others are much more accommodating.⁴² Moreover, the normative justification for narrowly construing, say, the standards for granting variances or conditional use permits could rest as much on giving fair notice to either regulated landowners or their neighbors as on some general notion that only local legislatures should exercise broad policymaking power.

State court opinions barring local redelegation of local institutions' state statutory powers, in short, rest on a free-floating, judge-made preemption doctrine. Sometimes this doctrine is interpretative, resting loosely on the language and purposes of particular statutes. More often, it is a "substantive canon," explained not as a presumption about how best to read legislative intent but rather as a policy commitment about reading statutes. That is, sometimes the presumption against local redelegation looks more like *expressio unius* or the rule against surplusage, but more often, it appears to be like the rule of lenity.

Under either understanding, one would expect, or at least hope, that those opinions would say something substantial about the underlying normative purposes being judicially attributed to those statutes. Here, however, state constitutional clichés about separation of powers seem to crowd out judicial thought. Rather than analyze why a particular statute might have the purpose of barring redelegation of power away from some specific local institution or explain why the world would be better if local

40. In a typical example of a judicial inference that the state legislature intended to preempt state law, the court in *Cohen v. Board of Appeals of the Village of Saddle Rock* found "the Legislature intended to occupy the field and thus preempt local supersession authority" to regulate area variances based on "[n]umerous sources in the legislative history." 795 N.E.2d 619, 624 (N.Y. 2003).

41. For an overview of doctrine across states and normative theory to unify that doctrine, see generally Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113 (2007).

42. For instance, Maine courts construe narrowly the local legislative criteria used by local administrative agencies in granting variances or conditional use permits. See *Kosalka v. Town of Georgetown*, 752 A.2d 183, 187 (Me. 2000) (holding that the provision of a special-use-permit ordinance that required developments to "conserve natural beauty" is "totally lacking in cognizable, quantitative standards"). Other courts, however, dispense with such limits on local institutional design. See, e.g., *Edward Kraemer & Sons, Inc. v. Sauk Cnty. Bd. of Adjustment*, 515 N.W.2d 256, 261–63 (Wis. 1994) (upholding vague special exception criteria on ground that "[t]he purpose of the special exception-conditional use technique is to confer a degree of flexibility in the land use regulations").

re-delegations were limited absent clear legislative intent, courts recite the usual constitutional axiom against delegation of legislative powers.⁴³

These abstract pronouncements become especially grating when other prodelegation principles, equally judge-made, suddenly intrude into the analysis in particular contexts. For instance, in *City of Los Angeles v. Superior Court*,⁴⁴ the state appellate court held that Los Angeles could not be compelled to arbitrate the issue of furloughs for city employees.⁴⁵ The appellate court reasoned that compelled arbitration would run up against the principle barring delegation of policymaking power away from the local legislature.⁴⁶ The California Supreme Court reversed, announcing a rival principle that exclusion of issues from binding arbitration had to be “unmistakably and beyond any doubt provide[d] for” in the Memorandum of Understanding between the City and its public employee unions.⁴⁷ The court based the clear-statement rule for exclusions on U.S. Supreme Court precedents dealing with private unions’ collective bargaining agreements.⁴⁸

But why did such *federal* precedents dealing with *private* unions trump the nondelegation concerns that allegedly inform *state* collective bargaining law governing *public* employees? The court did not say, let alone explain, why either canon—each drawn from federal statutory or state constitutional laws that by their terms do not apply to local governments—was relevant at all to resolving the case.

In sum, state courts have offered little intelligible explanation for why separation-of-powers slogans bar local governments from delegating discretionary or policymaking powers to local governments. In particular, missing from the opinions is any consideration of what makes local legislatures distinct from state and federal ones. In the end, state judges treat local nondelegation limits as constraints judicially inferred from state statutes. Because judges made up the local nondelegation canon, they can just as easily unmake it. As we explain below, unmaking the doctrine is precisely the best use of their judicial discretion in creative statutory interpretation.

43. For citations of conclusory state court assertions that local legislative powers cannot be redelegated, see *supra* note 2.

44. 302 P.3d 194 (Cal. 2013).

45. *Id.* at 197.

46. *City of Los Angeles v. Superior Court*, 123 Cal. Rptr. 3d 610, 622–25 (Ct. App. 2011) (holding that an agreement to arbitrate furloughs resulting from fiscal emergencies would be an improper delegation of the city council’s discretionary policymaking).

47. *City of Los Angeles*, 302 P.3d at 203.

48. *Id.* at 200, 205 (applying the “presumption of arbitrability” test from *AT&T Techs. v. Commc’ns Workers*, 475 U.S. 643, 650 (1986)).

II. Executive Power and Delegation as Substitute for Party Competition in Local Lawmaking

The rule against local nondelegation is not merely bad constitutional law. Whether it takes the form of a prohibition or an interpretive presumption, it remains a deeply bad idea.

Local delegations to executives solve particular problems endemic to local governance in ways that federal or state delegations do not (or, rather, do so to a greater extent than federal or state delegations). As one of us has argued in earlier work, local legislatures generally lack partisan competition between parties that focus on local issues, either inside legislatures or in elections.⁴⁹ Given this absence of competitive local parties, local legislatures tend towards what scholars call “distributive politics” or protecting the interests of one’s district, even if it comes at the cost of citywide goals.⁵⁰ This can be understood as a collective action problem among legislators. They may want to achieve citywide goals, whether it is lower taxes or building sufficient homeless shelters. Still, they are worried that doing so will mean that their district loses out to others. As a result, they become part of “universal log-rolls,” meaning agreements to trade votes to protect every legislator’s pet goals. Further, in most local governments, the only relevant elections are low-turn-out primaries or nonpartisan elections, dominated by few high-information voters with idiosyncratic local or special interest goals.⁵¹ Without parties, it is just hard for legislators to push for jurisdiction-wide programs.

49. David Schleicher, *Why Is There No Partisan Competition in City Council Elections?: The Role of Election Law*, 23 J.L. & POL. 419, 419 (2007) [hereinafter *Why Is There No Partisan Competition*]. Schleicher has followed up this article with an examination of how the absence of state-specific parties affects the behavior of state legislatures. See generally Schleicher, *supra* note 13. Unlike local legislatures, however, there generally are two political parties with significant numbers of members in every state. By contrast, local governments tend to be dominated by only one of the two national parties. See SUSAN WELCH & TIMOTHY BLEDSOE, URBAN REFORM AND ITS CONSEQUENCES: A STUDY IN REPRESENTATION 29, 96 (1988) (noting that only a third of city councils in cities of under 100,000 population have a “substantial party cleavage” and that only 12% of city councils have a “very important” rivalry between the Democratic and Republican Parties). The absence of competing political parties does not necessarily indicate lack of political competition, because there might be substantial competition between politicians within a single party. However, Jessica Trounstine found that in nearly 30% of the largest American cities, a dominant organization was able to monopolize political power for an extended period of time by biasing the political system in favor of incumbents. JESSICA TROUNSTINE, POLITICAL MONOPOLIES IN AMERICAN CITIES: THE RISE AND FALL OF BOSSES AND REFORMERS 217 (2008).

50. Roderick M. Hills, Jr. & David N. Schleicher, *Balancing the “Zoning Budget”*, 62 CASE W. RESRV. L. REV. 81, 102–03 (2011) (explaining the tendency of partyless legislative bodies to adopt universal log-rolls to distribute policy goods and bads).

51. See, e.g., Kriston Capps, *In the U.S., Almost No One Votes in Local Elections*, BLOOMBERG (Nov. 1, 2016, 1:25 PM), <https://www.bloomberg.com/news/articles/2016-11-01/almost-no-one-votes-in-mayoral-elections-in-the-u-s> [https://perma.cc/3Q5X-NVF7] (noting that, in fifteen of the

One solution to this challenge is for the legislature to delegate the difficult tradeoffs to a single executive with authority over the entire local jurisdiction. Chief executives stand outside of these dynamics to some degree. They are necessarily citywide in their orientation and thus do not face collective action problems. Voters are more likely to know the general policy positions taken by their mayor, city manager, county executive, or other jurisdiction-wide executive. Therefore, voters are more likely to internalize the political costs and benefits of an integrated policy package. That is, even in nonpartisan cities, mayors have their own “brand” to which they can be held accountable.

Local nondelegation doctrines make it impossible for local legislators to solve their collective action problems by giving authority to more democratically responsive citywide officials. Ironically, they take that solution off the table in the name of democratic accountability, insisting that the local legislators are the most democratically accountable people to make these fundamental policy decisions. As we have seen, at the local level, this is untrue. By weakening those executives, local nondelegation doctrines undermine rather than strengthen the political accountability that they claim to promote.

A. *The Problem of Making Policy Trade-Offs Without Partisan Competition*

Local legislatures differ from Congress insofar as they are generally not divided between competitive political parties that take stances on locally important issues.⁵² This is true in the organization of the legislatures. There generally aren’t party caucuses, whips, and efforts to get local officials to toe a party line. And it’s true at the ballot box as well: voters generally focus on national issues and figures when voting in local legislative elections.

There are several reasons for the lack of partisan competition in local legislatures. To start, most local legislatures are formally nonpartisan, insofar as law bars political party labels from appearing on local ballots.⁵³ This does not mean there cannot be party competition in either the legislature itself or in legislative elections. Legislators can act in a partisan manner if they so

thirty most populous cities in the United States, voter turnout in mayoral elections is routinely lower than 20% of eligible voters); J. ERIC OLIVER, SHANG E. HA & ZACHARY CALLEN, *LOCAL ELECTIONS AND THE POLITICS OF SMALL-SCALE DEMOCRACY* 55 (2012) (finding that turnout for most local elections is generally under 25% of eligible voters and often below 10%).

52. Schleicher, *Why Is There No Partisan Competition*, *supra* note 49, at 420–21.

53. See Curtis Wood, *Voter Turnout in City Elections*, 38 *URB. AFFS. REV.* 209, 224 tbl.3 (2002) (noting that forty-seven out of fifty-seven cities included in the study ran nonpartisan elections).

choose, and voters can know things that do not appear on the ballot.⁵⁴ But formal non-partisanship nevertheless impedes the ability of party coalitions to form and for voters to make associations with local officials on local issues.⁵⁵

But even where there formally is partisan competition, in practice such competition is infrequent. In 2021, the New York City Republican Party, for instance, had its most successful year in City Council elections in years by winning five seats out of fifty-one. (Before the election it had only three.)

The result is that local legislatures lack political parties internal to them. The lack of parties creates a particular legislative pathology. As Gary Cox, Mathew McCubbins, and others have argued, political parties play an important role in legislatures by giving legislators a reason to cooperate.⁵⁶ Legislators in parties agree to give up certain control over the legislative agenda in order to work together to control the legislature and promote a

54. See Jack Lucas, *Do “Non-Partisan” Municipal Politicians Match the Partisanship of Their Constituents?*, 58 URB. AFFS. REV. 103, 105 (2020) (finding partisan match between voters and candidates in nonpartisan municipal elections in Canada); Zoltan Hajnal & Jessica Trounstone, *What Underlies Urban Politics? Race, Class, Ideology, Partisanship, and the Urban Vote*, 50 URB. AFFS. REV. 63, 80 (2014) (finding that racial-group voting blocs are “not simply a function of partisanship,” with little difference in racial-group cohesion between nonpartisan and partisan elections); Chris Tausanovitch & Christopher Warshaw, *Representation in Municipal Government*, 108 AM. POL. SCI. REV. 605, 618 (2014) (“Cities with partisan elections and cities without partisan elections appear to have roughly the same level of responsiveness.”).

55. Timothy Bledsoe & Susan Welch, *Patterns of Political Party Activity Among U.S. Cities*, 23 URB. AFF. Q. 249, 261 (1987) found from a survey of almost 200 cities that political parties’ activity is increased by the presence of partisan ballots. For one study showing that formally nonpartisan elections depress turnout and increase the power of incumbency, see Brian F. Schaffner, Matthew Streb & Gerald Wright, *Teams Without Uniforms: The Nonpartisan Ballot in State and Local Elections*, 54 POL. RSCH. Q. 7, 25 (2001). Minority party candidates in nonpartisan elections consistently outperform minority party candidates in cities with partisan elections. Brian F. Schaffner, Matthew J. Streb & Gerald C. Wright, *A New Look at the Republican Advantage in Nonpartisan Elections*, 60 POL. RSCH. Q. 240, 246–47 (2007). John. P. Pelissero & Timothy B. Krebs, *City Council Legislative Committees and Policy-making in Large United States Cities*, 41 AM. J. POL. SCI. 499, 505, 507 (1997), found from a survey of city clerks in 160 cities with populations over 100,000 that city councils with nonpartisan elections were significantly less likely to have any committee system, suggesting an internal organization less focused on majority party control of floor votes.

56. GARY W. COX & MATHEW D. MCCUBBINS, *LEGISLATIVE LEVIATHAN: PARTY GOVERNMENT IN THE HOUSE* 270 (1993) [hereinafter COX & MCCUBBINS, *LEGISLATIVE LEVIATHAN*], and GARY W. COX & MATHEW D. MCCUBBINS, *SETTING THE AGENDA: RESPONSIBLE PARTY GOVERNMENT IN THE U.S. HOUSE OF REPRESENTATIVES* 24 (2005) [hereinafter COX & MCCUBBINS, *SETTING THE AGENDA*], both set forth what has sometimes been termed the procedural cartel theory of legislative parties in which individual members delegate to majority party leaders the power to control the legislative agenda in order to gain the benefits of a string party brand even at the expense of individual party members’ losing the power to offer amendments favored by voters in their district.

common brand on which they collectively run in elections.⁵⁷ By running on a platform, legislators can advertise their successes in achieving broad policy goals, oppose the incumbent of an opposite party, and deflect criticism for unpopular stances by hiding behind party labels that are generally popular.⁵⁸

Political parties tend to limit the tendency inside legislatures towards what political scientists call “distributive politics.”⁵⁹ Without parties, legislators are frequently concerned that an interest specific to their district will get lost and thus join “universal log-rolls” under which a legislator protects her project even at the expense of jurisdiction-wide goals. In many ways, this is a typical collective action problem.⁶⁰ Local legislators may want to achieve jurisdiction-wide goals, but they need to ensure that their district isn’t losing out. Parties in legislatures are a solution to this problem, a way of getting voters to focus on individual politicians’ efforts towards jurisdiction-wide goals rather than their influence on highly localized concerns.⁶¹

57. See D. RODERICK KIEWIET & MATHEW D. MCCUBBINS, *THE LOGIC OF DELEGATION: CONGRESSIONAL PARTIES AND THE APPROPRIATIONS PROCESS* 39–42 (1991) (describing party label as a collective good developed by candidates to signal preferences to electorate).

58. Sometimes one’s party is a liability. See KEITH KREHBIEL, *PIVOTAL POLITICS: A THEORY OF U.S. LAWMAKING* 223 (1998) (describing unpopular party labels as a “bad-luck charm”). For a description of candidates’ strategic use of partisan brand in congressional elections, see Jacob R. Neihsel & Sarah Niebler, *The Use of Party Brand Labels in Congressional Election Campaigns*, 38 *LEGIS. STUD. Q.* 377, 378, 395 (2013).

59. The classic study of distributive politics is JOHN A. FERREJOHN, *PORK BARREL POLITICS: RIVERS AND HARBORS LEGISLATION, 1947–1968* (1974). For an overview of the literature from the 1970s and 1980s on distributive politics and universal coalitions, see generally Barry R. Weingast, *Reflections on Distributive Politics and Universalism*, 47 *POL. RSCH. Q.* 319 (1994).

60. Cox and McCubbins describe political parties’ use of committees as a mechanism for overcoming collective action problems that otherwise would stymie the majority party’s collective goals. See COX & MCCUBBINS, *LEGISLATIVE LEVIATHAN*, *supra* note 56, at 134–35 (suggesting that establishment of attractive and elective party positions can help solve collective action problems).

61. See Royce Carroll & Jason Eichorst, *The Role of Party: The Legislative Consequences of Partisan Electoral Competition*, 38 *LEGIS. STUD. Q.* 83, 96–97 (2013) (presenting evidence that individual members more readily follow the party leaders’ platform when the party has a majority in the legislature with a competitive minority party, suggesting that the party’s reputation for achieving a jurisdiction-wide platform provides electoral benefits to individual members); Damon M. Cann & Andrew H. Sidman, *Exchange Theory, Political Parties, and the Allocation of Federal Distributive Benefits in the House of Representatives*, 73 *J. POL.* 1128, 1139 (2011) (finding that party leaders in the House of Representatives offer individual members district-specific distributive benefits to ensure members adhere to the party’s general platform); Gerald Gamm & Thad Kousser, *Broad Bills or Particularistic Policy? Historical Patterns in American State Legislatures*, 104 *AM. POL. SCI. REV.* 151, 164–65 (2010) (finding that legislators are more prone to support district-specific particularistic benefits rather than broad policy in chambers dominated by one party, suggesting that partisan competition provides incentive to favor policies that enhance the reputation of majority parties). The power of general partisan ideology to trump district-specific benefits is supported by evidence that Republican House of Representatives incumbents benefit more from district-specific spending (pork barrel spending) when levels of partisan polarization are

The actual operation of local elections enhances the tendency in local legislatures without party competition toward highly localized and interest-group-dominated politics. As scholars like Daniel Hopkins, Steve Rogers, Jacob Grumbach, and one of us have argued, voters increasingly use national-level associations when voting for state and local officials.⁶² That is, voters rely on party labels defined by mostly locally irrelevant issues like attitudes towards Donald Trump, abortion, immigration, or the war in Ukraine.⁶³ Moreover, even voters' views on issues of local importance, like local economic inequality and air pollution, are not much influenced by their local conditions.⁶⁴ What city councilors vote for in the local legislature barely registers with voters, probably because voters are unaware of those roll-call votes.⁶⁵

There are a number of reasons why local elections have been nationalized. Voters lack information about what local factions are up to and, consequently, rely on national party affiliations, which carry at least some information.⁶⁶ Associational desires make voters want to support their team

lower. ANDREW H. SIDMAN, PORK BARREL POLITICS: HOW GOVERNMENT SPENDING DETERMINES ELECTIONS IN A POLARIZED ERA 156–57 (2019). Sidman's findings are reenforced by Dan Alexander, Christopher R. Berry & William G. Howell, *Distributive Politics and Legislator Ideology*, 78 J. POL. 214, 230 (2016), which finds that centrist legislators are more likely to receive district-specific pork barrel spending than partisan extremists, suggesting that party leaders and lobbyists pay a higher price to buy votes when ideology or party loyalty fails. Cox and McCubbins argue that party leaders use district-specific benefits to reward individual members who support a general party platform despite electoral risks from voters in the members who oppose aspects of that platform. COX & MCCUBBINS, SETTING THE AGENDA, *supra* note 56, at 46–47, 159.

62. See JACOB M. GRUMBACH, LABORATORIES AGAINST DEMOCRACY: HOW NATIONAL PARTIES TRANSFORMED STATE POLITICS 195 (2022) (describing how the nationalization of state politics interacts with partisan polarization to undermine democratic responsiveness at state level); HOPKINS, *supra* note 13, at 89 (noting a lack of evidence of “vibrant, local-level political parties that function independently of the national parties”); Schleicher, *supra* note 13, at 774–75 (recognizing that voters rely on their national preferences in state legislative elections); Steven Rogers, *National Forces in State Legislative Elections*, 667 ANNALS AM. ACAD. POL. & SOC. SCI. 207, 209 (2016) (“Instead of being local affairs, state legislative elections are dominated by national politics.”).

63. See *supra* note 62 for sources discussing the intense influence of national political issues on local politics.

64. HOPKINS, *supra* note 13, at 121–22, 122 tbl.5.2 (finding no significant correlation between local conditions and survey respondents' views on seven out of ten issues when local conditions are highly relevant to those issues).

65. A voluminous literature on voters' ignorance of the details of politics has accumulated since WALTER LIPPMANN, PUBLIC OPINION (1922). For a chapter-length survey of that literature, see CHRISTOPHER H. ACHEN & LARRY M. BARTELS, DEMOCRACY FOR REALISTS: WHY ELECTIONS DO NOT PRODUCE RESPONSIVE GOVERNMENT 21–51 (2016). For a quick overview, see Christopher S. Elmendorf & David Schleicher, *Informing Consent: Voter Ignorance, Political Parties, and Election Law*, 2013 U. ILL. L. REV. 363, 371–73 (2013).

66. See Elmendorf & Schleicher, *supra* note 65, at 396 (“Citizens who do not see the local content of major-party brands are likely to rely on their national party preferences when voting.”).

regardless of the local policy outcomes.⁶⁷ Regardless of the reasons, most voters use their national party affiliations to make decisions about how to vote for local legislatures. They do so despite the fact that the main functions of local governments (zoning, sewers and local infrastructure, and local services like sanitation, public employee unions, etc.) differ from those on which national parties take positions.⁶⁸

As a result, even when local elections are partisan, there is little competition in local elections on local issues. The national-level preferences of voters mostly determine local legislative elections. Further, because most jurisdictions are dominated by one party at the national level, local legislatures rarely see close elections or fights for control over the legislature.⁶⁹

To the extent that there is competition in local legislative elections, it primarily takes place in quiet, low-turnout elections, primaries or nonpartisan races where voters are not given heuristic on-ballot cues about the ideological stances of individual legislators.⁷⁰ Anyone who has voted in a local legislative or other non-chief-executive race knows how this goes: for most people, the ballot is just a list of unrecognizable names.⁷¹ That these elections are usually held “off-cycle” or not concurrently with state or national elections further depresses turnout.⁷² The people who do show up are not representative of the broader population: they are older, richer, whiter, and far more likely to be homeowners than the general population or even the

67. See Levi Boxell, Matthew Gentzkow & Jesse M. Shapiro, *Cross-Country Trends in Affective Polarization 2* (Nat'l Bureau of Econ. Rsch., Working Paper No. 26669, 2021) (noting that “affective polarization” means “the extent to which citizens feel more negatively toward other political parties than toward their own”); see generally Shanto Iyengar, Gaurav Sood & Yphtach Lelkes, *Affect, Not Ideology: A Social Identity Perspective on Polarization*, 76 PUB. OP. Q. 405 (2012) (offering an account of partisans increasingly disliking their opponents).

68. See Sarah F. Anzia, *Party and Ideology in American Local Government: An Appraisal*, 24 ANN. REV. POL. SCI. 133, 139 (2021) (noting that it is unclear from current studies whether citizens' opinions on these local government functions highly correlate with their choices of major party presidential candidates).

69. For example, New York City general elections are frequently noncompetitive. See FRANCIS S. BARRY, *THE SCANDAL OF REFORM: THE GRAND FAILURES OF NEW YORK'S POLITICAL CRUSADERS AND THE DEATH OF NONPARTISANSHIP 172–73* (2009) (observing that in only five of New York City's last 255 city council elections was the margin of victory less than ten percentage points).

70. Elmendorf & Schleicher, *supra* note 65, at 385–87 (describing effects of nonpartisan and mismatched partisan elections on voter information).

71. See Cameron D. Anderson, R. Michael McGregor & Scott Pruyers, *Incumbency and Competitiveness in City Council Elections: How Accurate Are Voter Perceptions?*, 53 CANADIAN J. POL. SCI. 853, 866–67 (2020) (showing through survey evidence that less than one-third of voters could recognize the names of the top two finishers in elections where an incumbent was running).

72. See SARAH F. ANZIA, *TIMING AND TURNOUT: HOW OFF-CYCLE ELECTIONS FAVOR ORGANIZED GROUPS 3* (2014) (noting that turnout in municipal elections hinges on whether they are held on the same day as national elections).

voting population in on-cycle elections.⁷³ And they tend to have idiosyncratically strong opinions about local issues, either because they are “neighborhood defenders,” opponents of local change, or because some local interest, like a local union or another heavily invested group, brought them to the polls.⁷⁴

The result of both the lack of competitive party politics inside local legislatures and the lack of partisan competition in local elections is that local legislatures tend towards having localized and interest-group-heavy politics. Local legislators who lack meaningful partisan affiliations face a special difficulty in taking stances that impose costs on well-organized and politically informed groups. Suppose local parties existed that took positions on these tradeoffs. In that case, local legislators could rely on party labels to convey information to voters about the overall benefits of the legislator’s position. However, such parties do not exist.⁷⁵ Therefore, the jurisdiction-wide benefits produced by the local legislator’s votes will not resonate with voters at large. By contrast, members of well-organized groups burdened by some policy supported by a legislator are far more likely to mobilize against local legislators in low-turnout primary or nonpartisan elections.

Unsurprisingly, local legislators may be reluctant to take specific positions that burden members of well-organized interest groups, even when those positions provide benefits in excess of costs for the whole jurisdiction. Local politics provide familiar examples of such policies. Locally undesirable land uses (LULUs) like gas stations, apartment buildings, and garbage truck depots generate citywide benefits at the expense of the neighborhoods in which the LULUs are located.⁷⁶ Homeowners abutting proposed sites for such uses have strong incentives to oppose their approval.⁷⁷ In contrast, local consumers of the excluded uses, like prospective renters or

73. See Zoltan Hajnal & Jessica Trounstone, *Where Turnout Matters: The Consequences of Uneven Turnout in City Politics*, 67 J. POL. 515, 531 (2005) (“[M]oving the dates of local elections to coincide with national contests could substantially reduce black underrepresentation at the local level.”); cf. KATHERINE LEVINE EINSTEIN, DAVID M. GLICK & MAXWELL PALMER, *NEIGHBORHOOD DEFENDERS: PARTICIPATORY POLITICS AND AMERICA’S HOUSING CRISIS* 97 (2020) (finding that participants in community meetings for new housing developments were “older, whiter, longtime residents, and more likely to be homeowners”).

74. On the dominance of a few interest groups in municipal politics, see generally SARAH F. ANZIA, *LOCAL INTERESTS: POLITICS, POLICY, AND INTEREST GROUPS IN US CITY GOVERNMENTS* (2022). On the dominance of “neighborhood defenders”—older, wealthier, whiter homeowners—in land-use hearings, see generally EINSTEIN ET AL., *supra* note 73.

75. See sources cited *supra* note 49.

76. See ELLICKSON ET AL., *supra* note 25, at 55–56 (demonstrating how LULUs impose unique problems on the “project of internalizing external costs”).

77. See William A. Fischel, *The Homevoter Hypothesis: How Home Values Influence Local Government Taxation, School Finance, and Land-Use Policies* 12 (2001) (noting that these incentives include “importance and vulnerability” of the asset as well as “personal attachment” to the neighborhood and community).

shoppers, are unlikely to be aware of the controversy.⁷⁸ Likewise, generous pensions for city workers can win support from public employee unions more easily than opposition from future taxpayers, who will ultimately bear the cost.⁷⁹

If local voters were affiliated with competitive political parties that took stances on local issues, then party leaders could bear the burden of mobilizing voters to counteract opposition by well-organized interest groups.⁸⁰ But that is not a real option for local legislators. Local legislators, therefore, are in a very different position from members of Congress who can rely on party labels to mobilize otherwise ignorant voters to protect them to some extent against narrowly focused interest groups. Therefore, the temptation is great for local legislators to focus on constituent services like fixing potholes and streetlights and ignore general policies that require controversial tradeoffs.⁸¹

B. Delegations to Local Executives as Political Cover for Partyless Legislatures

Local executives with jurisdiction-wide responsibilities can provide some of the benefits of local political parties by carrying out general policies that individual legislators fear endorsing through roll call votes. If the executive is a mayor independently elected from a jurisdiction-wide constituency, then he or she has a greater capacity to develop name recognition—a political “brand”—that can be used to mobilize voters in support of a city-wide policy with general benefits. If the executive is a professional city manager selected by the entire city council, then each council member is insulated from blowback for the manager’s decisions. In either case, the jurisdiction-wide executive can carry out general policies that impose concentrated costs more easily than individual legislators can vote for such policies.

78. *See id.* at 10 (observing that apartment owners and dwellers are rarely “NIMBYs”). On the effect of ward-based local legislative elections to increase this tendency towards neighborhood-specific votes in zoning, see, for example, Michael Hankinson & Asya Magazinnik, *The Supply-Equity Trade-Off: The Effect of Spatial Representation on the Local Housing Supply*, 85 J. POL. 1033, 1045 (2023), which describes the reduction in housing production associated with the move from at-large to districted local elections, and James Clingermayer, *Distributive Politics, Ward Representation, and the Spread of Zoning*, 77 PUB. CHOICE 725, 733–34 (1993), which finds that “ward representation and manufacturing employment may both substantially encourage ordinance adoption.”

79. *Cf.* Richard T. Boylan & Dru Stevenson, *The Impact of District Elections on Municipal Pensions and Investment*, 14 J.L. ECON. & POL’Y 127, 145 (2017) (finding that moves from at-large to districted elections are associated with bigger pension promises and less pre-funding of those promises).

80. For a general explanation, see Hills & Schleicher, *supra* note 50, at 97–102.

81. For an informal account of local legislatures as arenas of “parochialism and feudalism,” see Rob Gurwitt, *Are City Councils a Relic of the Past?*, GOVERNING, April 2003, at 20.

As examples of executive policymaking that limit legislative control, consider two mechanisms by which legislatures delegate policymaking to the executive. Under New York City's charter and zoning resolution, the city council cannot enact amendments to the zoning map without first presenting them to the planning commission for approval.⁸² However, the planning commission is largely under the control of the mayor, who appoints the commission chair.⁸³ If the commission refuses to approve a proposed map amendment, then the council lacks the power to pass the amendment over the commission's refusal.⁸⁴

Likewise, New York's Taylor Law, the state statute controlling collective bargaining between local governments and their public employee unions, confers the duty to negotiate collective bargaining agreements upon each local government's chief executive officer.⁸⁵ As a result, the legislature cannot enact local laws impeding the full range of negotiations between the union and executive. For instance, the legislature cannot insist on equal pay between different categories of city workers,⁸⁶ negotiate separate pension benefits with particular unions,⁸⁷ or veto collective bargaining agreements already negotiated through the annual appropriations process.⁸⁸

In both the zoning and collective bargaining context, the policies adopted by the executive typically impose concentrated costs on well-organized constituencies defined either by geography (zoning) or occupation (collective bargaining). If the executive formulates the general policy, however, then each legislator can avert political blame by pointing to the executive's responsibility for imposing costs on groups well-organized enough to complain. The executive, in turn, has the visibility to internalize the benefits produced by the overall package (for instance, additional housing, labor peace, labor cost-savings, or productivity) when seeking reelection by the local voters or reappointment by the local legislature. In effect, the executive plays the role that a local party leader would play in a jurisdiction with genuine partisan competition, absorbing blame and taking credit for the tradeoffs that policymaking entails.

82. See N.Y.C., N.Y., NEW YORK CITY CHARTER ch. 8, § 197-d (2023) (defining the city council's power to review planning commission zoning map amendments).

83. *Id.* § 192(a).

84. The council has the power to review commission decisions to approve or approve with modifications proposed map amendments. It does not, however, have the power to initiate its own map amendments if the planning commission proposes no changes. *Id.* § 197-d(b).

85. N.Y. CIV. SERV. LAW § 201(12) (McKinney 2023) (defining "agreement" as "the result of the exchange of mutual promises between the chief executive officer of a public employer and an employee organization").

86. *Doyle v. City of Troy*, 380 N.Y.S.2d 789, 791 (App. Div. 1976).

87. *Yonkers P.B.A.*, 23 PERB ¶ 4519 (1990).

88. *Ass'n of Surrogates v. State*, 577 N.E.2d 10, 16 (N.Y. 1991).

For the purposes of the nondelegation doctrine, the important point is that the delegation of broad policymaking responsibility to the executive improves rather than reduces political accountability. Indeed, the case for local delegation above runs parallel to the case for generally improving political accountability by strengthening the hand of directly elected mayors.⁸⁹ Mayors have the visibility to build a coalition and thus a “brand” in favor of reforms that pinch locally but have jurisdiction-wide benefits.⁹⁰ Local legislators do not. By allowing local legislatures to turn over policymaking to such a visible leader, the courts would not erode democratic accountability but strengthen it.

III. Robert Moses Versus Juristocracy: Comparing Rival Risks of Excessive Delegations to Executives and Judges

One might reasonably object that the case for delegation laid out above rests on some controversial assumptions about local political behavior. Maybe sometimes policy-based blocs *can* form in local legislatures, even those produced by nonpartisan elections.⁹¹ Or maybe mayors will not help much, because they themselves are constrained in their own policymaking by state and federal law.⁹² Evidence about local legislatures’ behavior is hard to come by: unlike Congress or state legislatures, local legislatures’ roll call votes are not easily available, and only recently have scholars used those roll calls to examine whether stable voting coalitions form in local legislatures.⁹³ More than forty years ago, however, Heinz Eulau used surveys of legislators from eighty-two northern Californian local legislatures to find that roughly a quarter of the eighty-two jurisdictions had local legislatures with “bipolar” voting⁹⁴—that is, voting in which relatively stable coalitions or factions

89. For a summary of the argument that strong mayors improve democratic accountability, see Richard C. Schragger, *Can Strong Mayors Empower Weak Cities? On the Power of Local Executives in a Federal System*, 115 *YALE L.J.* 2542, 2571–76 (2006).

90. For evidence that mayors act on the basis of their own partisan affiliation, see Justin de Benedictis-Kessner & Christopher Warshaw, *Mayoral Partisanship and Municipal Fiscal Policy*, 78 *J. POL.* 1124, 1136 (2016).

91. See, e.g., Craig M. Burnett, *Parties as an Organizational Force on Nonpartisan City Councils*, 25 *PARTY POL.* 594, 599, 604 (2019) (providing evidence that legislators elected in San Diego’s nonpartisan elections nevertheless took positions based on their partisan affiliations).

92. See Elisabeth R. Gerber & Daniel J. Hopkins, *When Mayors Matter: Estimating the Impact of Mayoral Partisanship on City Policy*, 55 *AM. J. POL. SCI.* 326, 337 (2011) (finding that mayors adopted policies congruent with their partisan affiliation only in a few policy areas, like public security, over which the city had broad discretion).

93. For one such recent study, see generally Peter Bucchianeri, *Party Competition and Coalitional Stability: Evidence from American Local Government*, 114 *AM. POL. SCI. REV.* 1055 (2020).

94. See Heinz Eulau, *The Informal Organization of Decisional Structures in Small Legislative Bodies*, 13 *MIDWEST J. POL. SCI.* 341, 350 tbl.1 (1969) (categorizing twenty of the eighty-two city councils surveyed as bipolar in structure).

squared off against each other.⁹⁵ Perhaps a significant number of these local legislative bodies with stable coalitions can formulate detailed policies, the details of which local executives can then fill in as required by nondelegation orthodoxy.

Uncertainty about local legislatures' likely behavior, however, counsels in favor of judicial deference to local delegations for two reasons. First, as explained below in subpart III(A), while the policy consequences of local experimentation with delegation are uncertain, the risks of excessive executive power are low, because executive powers are easy for local voters and legislators to retract *ex post*. Second, as explained in section III(B)(1), the free-floating character of the nondelegation doctrine constitutes a sweeping delegation of power to judges, a power that judges can and have abused for partisan reasons. Rather than rely on such a judicial cleaver to control local executives, it seems more sensible for judges to use more refined doctrinal tools, some of which will be catalogued in section III(B)(2).

A. *The Low Risks and High Rewards of Local Governments' Delegation Experiments*

To assess the risks of executive abuses realistically, one cannot treat local governments as a homogenous mass. Risks of executive abuses logically vary with the capacity of the local legislature to reverse executive actions. If the local legislature can quickly and easily overrule the executive's decisions that contradict local public opinion, then there would seem to be little point in worrying that the initial standards governing executive power were too fuzzy. Therefore, the risks of executive abuses will be lowest where the local legislature can respond quickly to unpopular executive actions with *ex post* retraction of powers (including the outright dismissal of the local executive). The risks are highest where the local legislature cannot easily form a majority for decisive *ex post* action.

It is useful, therefore, to divide local governments into two rough categories: those in which the local executive branch works directly for the legislature, in council-manager forms of government, and those, usually larger jurisdictions, with directly elected and powerful mayors. In the former, judicial intervention in the form of a nondelegation doctrine is not necessary to control executive power, because local legislatures can easily overrule unpopular executive action. The city manager works for the legislature and has no independence. In the latter, the executive has much more power to exploit vague local legislation and divisions in the local legislature to make

95. *Id.* at 348. Eulau relied on survey data collected by Stanford's Institute for Political Studies as part of their City Council Research Project. That data and Eulau's findings regarding the structure of city council voting were later published in HEINZ EULAU & KENNETH PREWITT, LABYRINTHS OF DEMOCRACY: ADAPTATIONS, LINKAGES, REPRESENTATION, AND POLICIES IN URBAN POLITICS (1973).

policy free from fear of being overruled. However, far from being a blot on democratic accountability, such “boss rule” in large local jurisdictions is a necessary precondition for any democratic rule at all for the reasons we laid out above.

Consider first the most common form of local government in the United States—the council-manager system of government.⁹⁶ Populations in council-manager governments, the form used in most smaller jurisdictions, tend to be more demographically homogenous compared to larger-scale governments in terms of income, race, and property tenure (renters versus homeowners).⁹⁷ The powers of such governments are limited not only by state law but also by social consensus: because few major social divisions split such a constituency, local legislative elections are likely to produce what J. Eric Oliver, Shang E. Ha, and Zachary Callen call a “managerial democracy” in which executive performance is assessed by a few widely accepted metrics like school test scores, crime rates, tax levels, and home values.⁹⁸

In such jurisdictions, the local legislature can easily rein in city managers that exercise authority in ways unpopular with local constituents. Local legislatures in council-manager systems exercise the executive power of hiring and firing the city manager by a simple majority. Moreover, the balance of probabilities is that the local legislatures in such managerial democracies generally vote unanimously by consensus on most matters.⁹⁹ It defies common sense to believe that city managers will transform themselves into local autocrats in such low-conflict jurisdictions because their legislative remit is drawn in vague terms. Existing empirical evidence suggests that, to the contrary, city managers’ power varies with the level of conflict in the city council.¹⁰⁰

The danger of a runaway executive arises in a different sort of local government, one that governs a larger and more heterogenous population where divisive and cross-cutting issues make it difficult for the council to muster a majority. The danger arises from both institutional and coalitional conditions.

96. See Nelson & Svava, *supra* note 24, at 258 & tbl.1 (categorizing the majority of local governments as one of three variations of the council-manager form).

97. *But see id.* at 274 (asserting that the demographic homogeneity of council-manager systems has decreased in recent years).

98. OLIVER ET AL., *supra* note 51, at 31, 34, 56.

99. In Eulau’s terminology, these bodies are “unipolar.” Eulau, *supra* note 94, at 348.

100. See, e.g., Tansu Demir, Christopher G. Reddick & Branco Ponomariov, *Political Conflict in City Councils: Implications for Power and Leadership of Professional Managers*, 43 PUB. ADMIN. Q. 252, 274 (2019) (finding that political conflict was negatively associated with manager’s power, meaning that more political conflict suggested a “reduced sense of power for managers”).

On the institutional side, such jurisdictions sometimes opt for separation of powers in the form of a mayor–council system to manage such political conflicts.¹⁰¹ In such jurisdictions, a directly elected mayor not only enjoys an electoral mandate separate from the city council but also often a veto that requires a council super-majority to override.¹⁰² Even where a majority might theoretically coalesce against a mayor’s most extreme proposals, the mayor can choose one of several possible policies within a “gridlock zone” of moderation that is immune from a veto-proof majority.¹⁰³ If the mayor enjoys agenda-setting power over issues like collective bargaining or the budget, then the mayor can also exploit the power of the agenda-setter, presenting the council with alternatives to the mayor’s preferred policy that are so unpalatable that the council will reluctantly endorse whatever the mayor proposes.¹⁰⁴ Such strategic agenda-setting was indeed one of Robert Moses’s signature moves in controlling the parks budget, responding to budget cuts by threatening to close the city’s most popular parks.¹⁰⁵

Quite apart from the formal institutional rules, informal coalitional conditions in the council make it likely that the mayor can exploit vaguely defined powers to defy the council. Peter Bucchianeri has produced evidence from roll call votes in 151 cities showing that there is often no stable majority coalition at all in divided city councils lacking two competitive political parties.¹⁰⁶ In such jurisdictions, mayors can choose one of several—perhaps

101. See James H. Svara & Douglas J. Watson, *Introduction: Framing Constitutional Contests in Large Cities*, in *MORE THAN MAYOR OR MANAGER: CAMPAIGNS TO CHANGE FORM OF GOVERNMENT IN AMERICA’S LARGE CITIES* 1, 8 (James H. Svara & Douglas J. Watson eds., 2010) (noting that “[n]early two-thirds of the cities with populations between 25,000 and 250,000 use council–manager government as of 2007” and that, “[a]bove this population level, the mayor–council government is used . . . in just over half of the cities with populations between 250,000 and 499,999 and two-thirds of the cities with populations over 500,000”).

102. See Victor S. DeSantis & Tari Renner, *City Government Structures: An Attempt at Clarification*, 34 *STATE & LOC. GOV’T REV.* 95, 100, 101 tbl.3 (2002) (categorizing cities where the mayor has veto power and a formal role in budgeting or appointment as “strong mayor–council” forms); 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, 95 (noting that some councils in mayor–council jurisdictions can override mayoral vetoes with a super-majority vote).

103. KREHBIEL, *supra* note 58, at 26, 47, describes the concept of a “gridlock interval” within which the status quo is difficult to change because of institutional rules giving minorities a veto over new policy.

104. See Thomas Romer & Howard Rosenthal, *Political Resource Allocation, Controlled Agendas, and the Status Quo*, *PUB. CHOICE*, no. 4, 1978, at 27, 27–28 (describing the agenda setter’s ability to present a “take it or leave it” choice between the setter’s proposal or fallback position, rather than “competitive” substitute proposals).

105. For Robert Moses’s consistent manipulation of the city council and parks program, see generally ROBERT A. CARO, *THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK* (1974).

106. Bucchianeri, *supra* note 93, at 1055–56.

many—policies that enjoy some majority support, governing by decree without much fear that their positions will be overruled.

Should courts wield some sort of local nondelegation doctrine to curb “boss rule,” at least in these larger cities with disorganized legislatures lacking competitive political parties?

The problem with such judicial intervention is that it substitutes rule by a strong mayor for misrule by a chaotic local legislature. As explained in Part II, partyless local legislatures often cannot make any stable policy at all. Vexed by low voter turnout, no legislator will step up to the task of pressing for jurisdiction-wide policies that pinch any well-organized group. Instead, local legislatures reach for voting strategies that protect them from being frozen out of coalitions that deliver benefits to those groups. One such strategy is the universal log-roll in zoning decisions, in which each member defers to every other member’s desire to exclude locally undesirable land uses from their district, thereby creating a local housing crisis.¹⁰⁷ Another strategy is to expand generous pension benefits sought by public employee unions, thereby running up deficits for future legislators.¹⁰⁸

Local delegations, in short, have a high probability of being either harmless (because they can be reversed) or valuable (because they provide a remedy for partyless local government). By contrast, the local nondelegation doctrine is not a judicial cure for a disease of municipal misrule, but rather the prohibition of such a cure. In cities where the local legislature is unorganized by party and unable to act to pursue coherent policies, such a judicial doctrine has the potential to replace rule by a democratically elected mayor with rule by . . . no one. Anarchy, however, is not a desirable outcome for any city, regardless of how well it comports with some judge’s high school civics textbook.

The perversity of judicial limits on local delegations is exacerbated by the “home rule” capacity of local voters to choose between strong legislatures or strong executives. Bossism in the nineteenth century had the quality of (or at least was described by municipal reformers as) an imposition on passive voters by an unopposed partisan “machine.”¹⁰⁹ The description was, as Jon

107. See Roderick M. Hills, Jr. & David Schleicher, *Planning an Affordable City*, 101 IOWA L. REV. 91, 93, 95 (2015) (offering binding, comprehensive plans as a solution to log-rolling zoning decision votes).

108. See Sarah F. Anzia & Terry M. Moe, *Polarization and Policy: The Politics of Public-Sector Pensions*, 42 LEGIS. STUD. Q. 33, 36–37 (2017) (explaining that current politicians are incentivized to increase benefits because future politicians and taxpayers will be responsible for the costs); see also ESTER R. FUCHS, *MAYORS AND MONEY: FISCAL POLICY IN NEW YORK AND CHICAGO* 103 (1992) (noting that “cities have lost control over work rules and retirement policies” from reforms and collective bargaining agreements with municipal employee unions).

109. For the classic denunciation of urban political parties as undemocratic rule by “bosses” lacking electoral accountability, see generally LINCOLN STEFFENS, *THE SHAME OF THE CITIES*

Teaford has shown, empirically inaccurate even in the nineteenth century, but the normative objection was plausible.¹¹⁰ Today, by contrast, vigorous and highly visible political fights over whether to maintain or reject council-manager forms of government are an ordinary occurrence in numerous American cities.¹¹¹

Given this vigorous democratic review of city form, it makes little sense for judges to butt in. There are deep uncertainties about the right mix of legislative and executive oversight required by different sorts of communities. Both of us are on record (two decades apart!) expressing deep skepticism about the merits of giving local governments the broad home rule authority to resist state legislation in general.¹¹² None of those objections, however, apply to the narrow home rule authority to resist state judges on the specific question of allocating power between executive and legislative bodies. Localizing such decisions with the charter revision process especially makes sense in light of the deep uncertainty and variation regarding how local legislative bodies behave, the absence of predictable negative consequences on neighboring communities, and the demonstrated capacity of the charter revision process to make transparent, intelligible, and democratically accountable choices about the form of government.

B. The High Risks and Low Rewards of Juristocracy Over Local Governments

Suppose, however, that one were more skeptical about the capacities of local voters to determine for themselves the right brand of separated powers for their communities. Even then, the nondelegation doctrine would not be a sensible antidote to these local deficiencies unless state judges outperformed the charter revision process. After all, the nondelegation doctrine is a delegation of power to judges. The doctrine is notoriously murky in how it defines the distinction between legislative power to define policy and

(1948), a book that reprinted a series of his earlier magazine articles on corruption in the politics of several major American cities.

110. See JON C. TEAFORD, *THE UNHERALDED TRIUMPH: CITY GOVERNMENT IN AMERICA, 1870–1900*, at 186–87 (1984) (describing limits of so-called Boss Rule through party machines).

111. See generally Svava & Watson, *supra* note 101 (analyzing charter fights in fourteen cities).

112. See David Schleicher, *Constitutional Law for NIMBYs: A Review of “Principles of Home Rule for the 21st Century” by The National League of Cities*, 81 OHIO ST. L.J. 883, 885–86 (2020) (expressing concern that a National League of Cities report did not address “reasons for skepticism about local authority” or offer suggestions for local governance); Roderick M. Hills, Jr., *Romancing the Town: Why We (Still) Need a Democratic Defense of City Power*, 113 HARV. L. REV. 2009, 2018 (2000) (book review) (emphasizing that home rule provisions are rarely read as creating areas of local autonomy).

executive power to implement that policy.¹¹³ Armed with such a mushy distinction, judges can pick the delegations they favor for ideological and even partisan reasons unrelated to any plausible objectively legal consideration.

Why trust elected state judges with such power? Judicial interference of this sort seems inconsistent with the spirit of the trend in home rule since World War II, which has been to reduce the authority of the judiciary to define the scope of local power unmoored from specific state legislative actions. State court judges are, in many ways, rivals of local governments. In the late nineteenth and early twentieth centuries, state judges wielded a variety of legal doctrines, including the nondelegation doctrine, to curb municipal experiments with government ownership in ideologically freighted ways.¹¹⁴ The dominant post-World War II model of home rule has sought to supplant such judicial limits with state legislative oversight by broadly delegating to local governments all the powers that a state legislature could delegate, with exceptions and limited by preemptive state laws.¹¹⁵ As Terrence Sandalow noted in a much-cited article contemporary with this shift away from judicially defined local power, the new model of home rule “rest[ed] upon the indisputable premise that the allocation of governmental

113. For an effort to rationalize state courts’ nondelegation decisions, see Benjamin Silver, *Nondelegation in the States*, 75 VAND. L. REV. 1211, 1214 (2022). For a skeptical assessment that any principle can unify the various strands of state nondelegation doctrine, see Roderick M. Hills, Jr., Response, *Hunting for Nondelegation Doctrine’s Snark*, 75 VAND. L. REV. EN BANC 215, 221–22 (2022).

114. See, e.g., NEIL J. LEHTO, *THE THIRTY-YEAR WAR: A HISTORY OF DETROIT’S STRETCARS, 1892–1922*, at 162, 164–65, 292 n.26 (2017) (describing the much-criticized Michigan Supreme Court opinion in *Att’y Gen. v. Pingree*, 79 N.W. 814 (Mich. 1899)). The court rejected Governor Hazen Pingree’s efforts to confer on Detroit the power to regulate streetcar fares in an opinion influenced by “political hostility to municipal ownership.” *Id.* at 292 n.26. Likewise, the New York Appellate Division struck down New York City’s efforts to create municipally operated bus lines, declaring that “no implication can be drawn of a grant of power to cities in the state to assume those activities which according to our conception of government founded on the principle of individualism, is left to private enterprise.” *Brooklyn City R.R. Co. v. Whalen*, 182 N.Y.S. 283, 286 (App. Div. 1920).

115. The American Municipal Association promulgated a model of home rule that conferred on local governments the power to “exercise any power or perform any function which the legislature has power to devolve upon a non-home rule charter municipal corporation.” MODEL CONST. PROVISIONS FOR MUN. HOME RULE § 6 (AM. MUN. ASS’N 1953). The National Municipal League’s rival model law suggested a provision for self-executing home rule powers that enumerated discrete categories of local powers rather than granting to local governments a blanket power to regulate whatever the state legislature could delegate. MODEL STATE CONST. § 8.02 (NAT’L MUN. LEAGUE 1968). The AMA model was compared to the model pushed by the NML model in Arthur W. Bromage, *Home Rule—NML Model*, 44 NAT’L MUN. REV. 132 (1955).

power is a political question” and that “[j]udges . . . lack both the training and experience requisite to wise judgment in such matters.”¹¹⁶

Evaluated for its “fit” with the spirit of home rule, therefore, judicial enforcement of a mushily defined local nondelegation doctrine seems like a usurpation of power that voters deliberately sought to redirect away from judges.¹¹⁷ The local nondelegation doctrine pushes state judges back into the fray by requiring them to determine whether local laws delegate too much or the wrong sort of power to local executives, without any recourse to state legislative guidance. The vagueness of nondelegation tests invites judges to impose their own judicial view of sound policy on local governments under the guise of interpreting a constitutional doctrine.

The risk of politicized judicial decisions on the right scope of local executive power is well illustrated by two recent decisions from two different states enforcing different nondelegation limits on cities. In *New York Statewide Coalition of Hispanic Chambers of Commerce v. New York City Department of Health and Mental Hygiene*,¹¹⁸ the New York Court of Appeals struck down the New York City Board of Health’s rule limiting the portion size of sugary soft drinks that food retailers could sell on the ground that the Board lacked sufficiently specific authority under New York City’s charter to issue such a rule.¹¹⁹ In *Becker v. Dane County*,¹²⁰ by contrast, the Wisconsin Supreme Court upheld Dane County’s ordinance delegating broad powers to the county and City of Madison’s local health officer to “control communicable disease” with COVID-19 control measures.¹²¹

Although reaching opposite results about the scope of local executive authority, these two opinions illustrate well the politically fraught and policy-soaked character of nondelegation principles, suggesting the inadvisability of judicial enforcement. *Becker* and *Hispanic Chambers* also nicely illustrate how such judicial enforcement is either unnecessary or affirmatively harmful, depending on the character of the local government. In smaller and more ideologically homogenous jurisdictions like Madison, Wisconsin, the legislature can easily retract broad powers. By contrast, in large, heterogeneous cities like New York, the legislature lacks the partisan impetus

116. Terrance Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643, 687 (1964). A report by the Advisory Commission on Intergovernmental Relations put the point of the AMA reforms more colorfully as an effort to achieve “[j]udicial emasculation” on “the belief that the courts should not make policy decisions.” ADVISORY COMM’N ON INTERGOVERNMENTAL RELS., MEASURING LOCAL DISCRETIONARY AUTHORITY M-131, at 5 (1981).

117. On the role of “fit” and “justification” in constitutional interpretation, see RONALD DWORKIN, *LAW’S EMPIRE* 239 (1986).

118. 16 N.E.3d 538 (N.Y. 2014).

119. *Id.* at 541, 544.

120. 2022 WI 63, 403 Wis. 2d 424, 977 N.W.2d 390.

121. *Id.* ¶¶ 5, 71, 403 Wis. 2d 424, 977 N.W.2d 390.

to make policy on controversial issues. In either case, far from advancing democratic accountability, local nondelegation doctrines undermine it.

1. *The Local Legislative Power to Retract Delegations in Becker v. Dane County.*—First, consider, how *Becker*'s rejection of nondelegation limits protected the power of the Dane County Commission and Madison City Council. In dispute in *Becker* was the Dane County Health Officer's imposition of various measures to prevent the spread of COVID-19, such as banning indoor sports activities.¹²² These limits on gatherings were undoubtedly irksome, but they were also approved by a triple-layer set of local elected officials: the Dane County director of health derived her authority from Dane County and City of Madison ordinances and was additionally supervised by a board of health on which county commissioners and city council members also sat.¹²³ These locally elected overseers, in turn, derived their powers from the Wisconsin state legislature.¹²⁴

Any of these four sets of elected politicians, state or local, could pull the plug on any order by their health officer had their constituents disapproved of the balance struck between safety and liberty. Moreover, Dane County and the City of Madison are hardly gridlocked legislative bodies. They are unicameral bodies representing a fairly liberal constituency with fairly liberal legislators sitting in small bodies that have the practical capacity to act with unity.¹²⁵ Indeed, the Madison city council routinely votes unanimously on even controversial matters like homeless shelters.¹²⁶ In short, these bodies reflect the tendency towards what Oliver and his co-authors describe as the “managerial democracy” that dominates most American local governments:

122. *Id.* ¶ 4, 403 Wis. 2d 424, 977 N.W.2d 390.

123. See DANE CNTY., WIS., ORDINANCES tit. 9, ch. 46, § 46.40(2) (2022) (making it a violation to “refuse to obey” an order of the director of public health); MADISON, WIS., CODE OF ORDINANCES ch. 7, § 7.06(1) (2015) (authorizing director to investigate communicable disease and take preventative measures).

124. WIS. STAT. § 252.03(4) (2022).

125. See MADISON, WIS., CODE OF ORDINANCES ch. 2, § 2.01(1) (2023) (describing the unicameral legislature, the common council); *Dane County Legislative Process, Dane County Board of Supervisors*, CNTY. OF DANE, <https://board.countyofdane.com/Legislative-Process> [<https://perma.cc/N2XZ-TNLK>] (illustrating the creation of legislation in Dane County's unicameral legislative body); *2020 General Election, Election and Voting Information*, CNTY. OF DANE, <https://elections.countyofdane.com/Election-Result/124#race0004> [<https://perma.cc/VS9N-K86U>] (reporting that in the 2020 general election, 75.5% of the Dane County vote went to the Biden and Harris ticket).

126. The common council unanimously voted on a men's homeless shelter in 2022. *Madison Common Council Unanimously Approves Permanent Men's Homeless Shelter*, WKOW.COM (Apr. 20, 2022), https://www.wkow.com/news/madison-common-council-unanimously-approves-permanent-mens-homeless-shelter/article_a79faf36-c09c-11ec-a4dd-7371586031d1.html [<https://perma.cc/7KWQ-87K9>].

they vote by consensus because their constituents are largely united on what they want from local government.¹²⁷

In upholding the delegation to the director of health, the Wisconsin Supreme Court emphasized this practical capacity of local legislators to retract the delegation.¹²⁸ In so doing, the *Becker* court practically, if not officially, also recognized that state nondelegation principles applied very differently to local than to statewide executives. Importantly, *Becker* recognized that local governments were not clones of the state government insofar as nondelegation principles were concerned.¹²⁹ *Becker*'s recognition of this fact was officially dicta as the *Becker* court stated that it “need not define what those different principles are here” because the local laws “would pass constitutional muster” even on the assumption that state nondelegation principles applied.¹³⁰ But the court also stressed that “the adequacy of attending procedural safeguards against arbitrary exercise of that [delegated] power” could save what might otherwise constitute an excessively broad delegation: “The greater the procedural safeguards, the less critical we are toward the substantive nature of the granted power.”¹³¹

In making procedural safeguards a part of the analysis, the *Becker* court effectively recognized that local legislative delegations were practically subject to much more lenient scrutiny than state legislative delegations to state agencies. Following an earlier state precedent, the *Becker* court concluded that the practical capacity of the legislature to retract a delegation could cure what would otherwise be an excessive delegation.¹³² As *Becker* recognized, the Dane County Commission and Madison Common Council had “particularly strong” practical powers to retract any powers that its director of health misused or that proved unpopular with the legislature’s

127. See OLIVER ET AL., *supra* note 51, at 6–10 (distinguishing the managerial nature of local elections from the ideological nature of national elections).

128. See *Becker v. Dane Cnty.*, 2022 WI 63, ¶ 41, 403 Wis. 2d 424, 977 N.W.2d 390 (noting that there are adequate “procedural safeguards” to control broad delegations to health officers because “[l]ocal officials can act decisively if a local health officer acts contrary to the preferred public health policy of the constituency” and “the County’s board and the City’s common council control the Health Department’s annual budget and thus may leverage appropriations to affect a local health officer’s actions”).

129. See *id.* ¶ 33, 403 Wis. 2d 424, 977 N.W.2d 390 (“After all, the constitution defines the state legislature’s relationship with the other two state-level branches differently than both the state legislature’s relationship to local governments and a local legislative body’s relationship with its local executive and judicial counterparts.”).

130. *Id.* ¶ 34, 403 Wis. 2d 424, 977 N.W.2d 390.

131. *Id.* ¶ 31, 403 Wis. 2d 424, 977 N.W.2d 390.

132. See *id.* ¶¶ 40–43, 403 Wis. 2d 424, 977 N.W.2d 390 (citing *Panzer v. Doyle*, 2004 WI 52, 271 Wis. 2d 295, 680 N.W.2d 666, *abrogated in part*, *Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, 295 Wis. 2d 1, 719 N.W.2d 408) (recognizing that local controls like removal power protect against any arbitrary use of the director of health’s authority, making the ordinance a constitutional grant of authority).

constituents.¹³³ These powers included not only the power to repeal the ordinance under which the officer acted but also the power to remove the officer herself.¹³⁴

Becker recognized, in other words, that local legislatures, unlike their state or federal counterparts, are not only legislative bodies but also local executives themselves, and the legislative powers to delegate are supplemented by the executive power to fire. This recognition constituted de facto acknowledgment of the principle defended in Part I of this Article: State nondelegation principles cannot sensibly be applied to local governments because local governments defy the careful parceling out of different functions to different bodies. The very absence of separated powers at the local level implies the absence of the usual worries about a local executive taking advantage of gridlock in the legislature to govern against the legislature's will. At least in the sorts of jurisdictions that constitute most local governments in the United States, the local legislature is nimble enough to bring errant executives to heel when they exceed the powers that local constituents want the government to have.

2. *The Unmet Need for Executive Power in Hispanic Chambers of Commerce.*—But what about delegations in larger, more heterogenous cities where the local legislature might lack the practical capacity to act so decisively? *Hispanic Chambers of Commerce* illustrates the high costs of judicial activism in enforcing a vigorous local nondelegation doctrine. In particular, the ideologically freighted character of the doctrine that the New York Court of Appeals read into New York City's charter suggests why it makes little sense to trade an elected mayor for an unelected court in designing systems for local governance.

At issue in *Hispanic Chambers of Commerce* was New York City's rule capping the portion size that retailers could use in selling sugary drinks. The idea behind the cap was to discourage the overconsumption of unhealthy beverages.¹³⁵ The board had issued this rule pursuant to a New York City charter provision granting the board general authority to regulate “the reporting and control of communicable and chronic diseases and conditions hazardous to life and health.”¹³⁶

133. *See id.* ¶ 40, 403 Wis. 2d 424, 977 N.W.2d 390 (describing the procedural safeguards in the state statute and county ordinance as “particularly strong” because “the state legislature may curb exercises of granted power it deems excessive by amending Wis. Stat. § 252.03 or repealing the statute entirely”).

134. *Id.* ¶ 41, 403 Wis. 2d 424, 977 N.W.2d 390.

135. *N.Y. Statewide Coal. of Hisp. Chambers of Com. v. N.Y.C. Dep't of Health and Mental Hygiene*, 16 N.E.3d 538, 541 (2014).

136. *N.Y.C., N.Y., NEW YORK CITY CHARTER* ch. 22, § 556(c)(2) (2023).

The New York Court of Appeals adopted a narrow reading of that charter grant, holding that the board's rule constituted an exercise of "legislative" power by the board that exceeded the charter's grant of merely "regulatory" power.¹³⁷ In reaching this conclusion, the court emphasized nondelegation principles drawn from *Boreali v. Axelrod*,¹³⁸ precedent governing the powers of a state agency.¹³⁹ Citing *Boreali*, the court faulted the New York City Board of Health for "choosing among competing policy goals, without any legislative delegation or guidance" and thereby "engag[ing] in law-making" that "infringed upon the legislative jurisdiction of the City Council of New York."¹⁴⁰ The court justified importing state nondelegation principles into the city charter by noting that the charter conferred "the legislative power" of the city on the city council.¹⁴¹ The *Hispanic Chambers* court reasoned that the definite article indicated that the charter reproduced the division between executive and legislative powers familiar from state constitutional law.

A single three-letter article, however, is a weak hook on which to hang a constitutional theory of functionally separated powers in a jurisdiction where the legislature has the final word on parcel-specific applications for conditional use permits and map amendments under the charter's land-use provisions.¹⁴² Those parcel-specific decisions would seem to fall within the traditional understanding of "executive" or, perhaps "quasi-judicial" power to be exercised by agencies under the supervision of the mayor as the city's chief executive officer.¹⁴³ The model of functionally separated powers, it turns out, does not fit New York City any better than it fits any other American local governments.

In the name of that ill-fitting model, however, the *Hispanic Chambers* court proceeded to enforce a limit on the board of health's powers that was unabashedly focused on the court's balancing of the burdens on personal autonomy against the social value of the rule. Noting the rule's intrusion on individuals' "personal autonomy" to purchase large portion sizes, the court held that the rule involved "a policy choice relating to the question of the extent to which government may legitimately influence citizens' decision-making."¹⁴⁴ That sort of policy choice was just too "legislative" because it

137. *Hisp. Chambers of Com.*, 16 N.E.3d at 541.

138. 517 N.E.2d 1350 (N.Y. 1987).

139. See *Hisp. Chambers of Com.*, 16 N.E.3d at 542 (describing the *Boreali* court's finding that the New York State Public Health Council had exceeded its regulatory authority).

140. *Id.* at 541.

141. *Id.* at 543.

142. Compare N.Y.C. CHARTER ch. 2, § 21 (2023) ("[T]he council shall be vested with the legislative power of the city."), with *id.* at ch. 8, § 197-d (describing the council's power to review decisions on parcel-specific applications for special use permits and map amendments).

143. See *id.* at ch. 1, § 3 ("The mayor shall be the chief executive officer of the city.").

144. *Hisp. Chambers of Com.*, 16 N.E.3d at 547.

was designed to “influence citizens’ decision-making” regarding soft drink consumption, a purpose that “was itself a policy choice, relating to the degree of autonomy a government permits its citizens to exercise and the ways in which it might seek to modify their behavior indirectly.”¹⁴⁵ By contrast, *Hispanic Chambers* distinguished the board’s earlier rule requiring food retailers to post the calories in their food and beverages on the ground “it could be argued that personal autonomy issues related to the regulation are non-existent and the economic costs either minimal or clearly outweighed by the benefits to society, so that no policy-making in the *Boreali* sense is involved.”¹⁴⁶

It is difficult to imagine a more policy-laden inquiry than a test that distinguishes “legislative” from “regulatory” powers through a judicial balancing of “personal autonomy” against “the benefits to society.”¹⁴⁷ The court’s noting that its conclusion was merely a position that “could be argued” highlighted the degree to which *Hispanic Chambers* redistributed a policymaking power from the board of health to the court.¹⁴⁸ Indeed, the court’s attacking the board for intruding into New Yorkers’ “personal autonomy” concerning “choices” of “what they consume” mimicked the public relations campaign that soft-drink retailers launched against Mayor Bloomberg’s health initiative, mocking the mayor as the “nanny mayor.”¹⁴⁹ It turns out that the New York Court of Appeals’ legal distinction between the “legislative” and “executive” mapped onto the ideological distinction between unacceptably coercive paternalism and acceptable consumer advisories like menu labels.

In adopting a libertarian frame with which to define local government power, the *Hispanic Chambers* court reasoned in the same spirit as the New York court in the 1920s that struck down the city’s sponsoring a city-operated bus service at the behest of a private rail company on the ground that “no implication can be drawn of a grant of power to cities in the state to assume those activities which according to our conception of government founded on the principle of individualism, is left to private enterprise.”¹⁵⁰ “The principle of individualism” adopted by the 1920 Appellate Division, like the principle of “personal autonomy” embraced by the 2014 Court of Appeals,

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*; see also Ron Dicker, ‘Nanny Bloomberg’ Ad in New York Times Targets N.Y. Mayor’s Anti-Soda Crusade (PHOTO), HUFFINGTON POST (Dec. 6, 2017), https://www.huffpost.com/entry/nanny-bloomberg-ad-in-new_n_1568037 [<https://perma.cc/R2MK-F45U>] (captioning a humorous photoshopped image of Mayor Bloomberg “The Nanny: You only *thought* you lived in the land of the free”).

150. *Brooklyn City R.R. Co. v. Whalen*, 182 N.Y.S. 283, 286 (App. Div. 1920).

are both commendable values, but it is not obvious why state judges rather than elected mayors should be the ones to define them.

In theory, *Hispanic Chambers* was defending the exclusive legislative prerogative of the city council. After all, nothing prevented Mayor Bloomberg from seeking a clarifying amendment to the city charter from the council, granting to the board of health legislative authorization for its portion-cap rule. The opposite default rule, however, also preserved the council's legislative power to overrule the board if a majority of council members disapproved of the board's rule as excessively paternalistic. The *Hispanic Chambers* court's choice narrowly to confine the board's power, therefore, rested on the implicit premise that, without the council's imprimatur, the board's rule would lack democratic legitimacy as the execution of the will of New Yorkers' sovereign "legislative" representatives.

In reality, however, the New York City council does not and never has functioned like the center of city policymaking, because its members are mostly unknown to the public and have little electoral mandate to make policy. New York City is a one-party city in which the only election is the Democratic primary. Primaries, however, lack any party labels by which voters could be informed about the basic ideological differences between the candidates. It should hardly be surprising, therefore, that in this contest between "teams without uniforms," few spectators show up. The turnout in party primaries for council seats is generally very low, resulting in sweeps for incumbents who enjoy little name recognition as a result of their lopsided victories.¹⁵¹ Turnout for mayoral elections has also declined with the decline of electoral competition, dropping from 57% of eligible voters in the Dinkins–Giuliani race to barely more than a quarter of eligible voters in 2013 voting in the de Blasio–Lhota race and an abysmal 23.3% in Eric Adams's 2021 election.¹⁵² Mayors, however, enjoy sufficient visibility and name recognition that they can be assessed by voters, at least somewhat.¹⁵³ City council members, by contrast, languish in obscurity that defies their efforts to raise their profiles through innovative policymaking.¹⁵⁴ The drafters of the

151. BARRY, *supra* note 69, at 158, 167, 174.

152. *New York Voter Turnout Initiative, Archived Elections and Voting Reform*, CITIZENS UNION, <https://citizensunion.org/portfolio-item/archived-elections-and-voting-reform/> [<https://perma.cc/TE3J-SBHX>]; NEW YORK CITY CAMPAIGN FINANCE BOARD, 2021–2022 VOTER ANALYSIS REPORT 39 fig.3.1 (2022), https://www.nycffb.info/pdf/2021-2022_VoterAnalysisReport.pdf [<https://perma.cc/5U6P-L7FS>].

153. See Schleicher, *supra* note 13, at 801 ("Mayors, due to their high profile, are judged at least somewhat on their performance in office.").

154. For a profile of how council members struggle for public attention, see generally Jarrett Murphy, Sarah Crean, Michelle Han, Curtis Stephen, Chloe Tribich & Helen Zelon, *A Week in the Life of the New York City Council*, CITY LIMITS MAG., Spring 2009, at 5. The council's

1989 charter, recognizing this cold, hard reality, created other citywide elected offices (comptroller and public advocate) by which to generate electoral competition for the mayor.¹⁵⁵

Expecting the city council to be the center of city policymaking, therefore, is like expecting that a fish will ride a bicycle. Designing a system of separated powers with the idea that the council's legislative powers preclude mayoral powers will not lead to more democratic accountability. It will lead, instead, to policy paralysis. If the charter actually required such an arrangement by its plain terms, then New York City would be stuck with poor governance. But there is no reason in text or logic to read state concepts of separated powers into a document designed for the very different task of governing a city.

Conclusion: Designing Local Administrative Law as if Politics Matter

The problem with the local nondelegation doctrine is that it takes neither law nor politics seriously. Insofar as it automatically imports from the state constitution legal concepts tied to very different text, the doctrine ignores the legal text that it purports to interpret. To the extent that it seeks to advance an agenda of democratic accountability, the doctrine ignores how local democracy works. Local governments struggle with the task of mobilizing the public in a partyless system of low-turnout elections. Participation in such a system will tend to favor the already organized over diffuse and latent interests. Dividing up powers functionally to give the power to initiate policies exclusively to local legislatures exacerbates this problem of domination by a small number of stakeholders with focused interests.

In designing or construing local administrative law, judges and lawyers should scrap the playbook that they inherited from state and federal governments and start from scratch. They should confront the fundamental challenge of constructing constituencies that can be mobilized on behalf of city-wide interests. Law can play a role in generating those constituencies, because laws have “constituency effects” by providing focal points around

policymaking passivity was recognized in 1988 by the chair and counsel of the charter commission that drafted the 1989 charter under which the present council is still elected. *See generally* Frederick A.O. Schwarz, Jr. & Eric Lane, *The Policy and Politics of Charter Making: The Story of New York City's 1989 Charter*, 42 N.Y.L. SCH. L. REV. 723 (1998).

155. *See* Schwarz & Lane, *supra* note 154, at 723, 816, 820–21 (noting that other citywide offices were to act as checks on a powerful mayor). “As a matter of principle, we had to assume that a democratically elected body would rise up to reflect the voters’ expectations,” they recounted, *id.* at 782, but they also acknowledged that there was little they could do about the lack of partisan competition that ensured a low voter turnout that was the root cause of Council’s lack of initiative. *See id.* at 747–48 (“We took some actions that increased party competition, but only slightly.”).

which otherwise-latent interests can rally.¹⁵⁶ In a political ecology with thin media and few organized interest groups, the executive elected on a city-wide basis plays a critical role in creating those constituencies. Such executives have some chance of generating enough publicity for their proposals to mobilize a city-wide constituency in its defense.

Local administrative law should take seriously this challenge of protecting the mobilizing power of those officials. This challenge implies skepticism towards legal doctrines that create speed bumps and detours in front of local officials in the name of stopping executive overreach. Such doctrines exaggerate the danger of such overreach in the managerial democracies that predominate in small to mid-sized jurisdictions and underestimate the danger of executive paralysis in larger, more heterogeneous jurisdictions. The local nondelegation doctrine is one such doctrine, but we suggest that a focus on the realities of local politics suggests that other doctrines, including those that define the right level of deference for administrative agencies' findings of fact and conclusions of law, could smoke out other problems with how courts review local agency action.

Important new scholarship has focused on local administrative law by emphasizing how different the local context is from state and federal contexts.¹⁵⁷ Familiarity, however, bestows a gravitational force on the state and federal models that can draw scholars away from the core problems posed by local democracy. The question of whether local administrative agencies' decisions are backed by sufficient expertise, for instance, might be misplaced if one regards the chief problem of local governments to mobilize a public to address problems at all, even in an inexperienced fashion.¹⁵⁸ Likewise, the idea that political "capture" is primarily the result of large, well-financed business interests' involvement in politics might be misplaced in a political system where relatively small-scale incumbent interests like homeowners,

156. See Roderick M. Hills, Jr. & David Schleicher, *Building Coalitions Out of Thin Air: Transferable Development Rights and "Constituency Effects" in Land Use Law*, J. LEGAL ANALYSIS, no. 12, 2020, at 79, 109–10 (arguing zoning law creates a powerful constituency effect by mobilizing homeowners, giving them an outsized influence over local land-use policy).

157. See, e.g., Maria Ponomarenko, *Substance and Procedure in Local Administrative Law*, 170 U. PA. L. REV. 1527, 1532 (2022) (suggesting that "although procedural requirements may play an important role in fostering agency legitimacy, they may be less likely at the local level to improve the quality of the decisions made"); Davidson, *supra* note 8, at 614 (warning against "false parallels" to state and federal governments); Kazis, *supra* note 9, at 1150 (recognizing that local governments are structured very differently from their state and federal counterparts).

158. Paul Diller focuses on the authority the board of health in *Hispanic Chambers of Commerce* has as an expert body exercising scientific impartiality. See Diller, *supra* note 31, at 1861 (using the portion-cap rule at issue in the case "as a prism through which to analyze the distinctive characteristics of the local administrative process"). This is not wrong, exactly, but it elides the chief virtue of the board's effort. The board advanced the mayor's agenda, putting forward an important policy proposal from the most democratically responsive branch of city government in a highly visible way.

licensees, public employees, or contractors are the main voices in the room.¹⁵⁹

The central problem of city politics is often the lack of mass politics, the capacity for ordinary voters to use government to achieve their ends. To the extent that there is room for interpretation, filling that empty room with an engaged, mobilized, and informed public should be a focus of the law. At the very least, the law should not gratuitously get in the way. Ending the local nondelegation doctrine as an obstacle to local executives' creative policymaking is one, but not the only way, to clear away the legal impediments to effective and democratic government.

159. See Ponomarenko, *supra* note 157, at 1561–62 (discussing local “capture” by groups such as homeowners and certain business interests).