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# A PHOENIX FROM THE ASHES:

RESURRECTING A CONSTITUTIONAL RIGHT OF  
LOCAL, COMMUNITY SELF-GOVERNMENT IN  
THE NAME OF ENVIRONMENTAL SUSTAINABILITY

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By Thomas Linzey & Daniel E. Brannen Jr.

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OF LOCAL, COMMUNITY SELF-GOVERNMENT  
IN THE NAME OF ENVIRONMENTAL  
SUSTAINABILITY**

**By Thomas Linzey & Daniel E. Brannen Jr.<sup>1</sup>**

<sup>1</sup> This article began as a series of legal briefs filed in various federal courts in defense of several municipal communities who had asserted their local legislative authority to prohibit a variety of harmful corporate projects. As such, the authors wish to acknowledge and extend appreciation to several contributors, including Richard L. Grossman, Ben G. Price, Elizabeth Dunne, Esq., Lindsey Schromen-Wawrin, Esq., Natalie Long, Esq., and the staff of the Community Environmental Legal Defense Fund.



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## I. Environmental degradation and local democracy: the necessity of a constitutional right of local, community self-government.

Every day, people in municipalities across the United States confront industrial and commercial projects siting or expanding in their communities. Many of those projects will harm those communities, with adverse effects ranging from health hazards caused by pollution, to impacts on drinking water supplies, to larger impacts on the climate and natural environment.<sup>2</sup>

Since the advent of the nation’s major environmental laws and the rise of a regulatory system, comprised of environmental regulations and permits issued by regulatory agencies, most community activism against harmful projects has focused on trying to influence environmental agency decision-making, and then using administrative and judicial fora to challenge the issuance of permits by such agencies.<sup>3</sup>

As several legal commentators have noted, the environmental regulations that control the issuance of agency permits, however, are heavily shaped and written by the very entities the regulations ostensibly regulate. While the capture of agency officials by industry has been a

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<sup>2</sup> A recent, high-profile example of how a community can be affected by multiple layers of impacts is illustrated by the controversy over the Dakota Access pipeline, which is slated for construction through multiple municipal communities and traditional tribal lands. *See, e.g.*, Justin Worland, *What to Know About the Dakota Access Pipeline Protests*, TIME (Oct. 28, 2016), <http://time.com/4548566/dakota-access-pipeline-standing-rock-sioux/> (concerns among protesters range from protecting tribal water supplies from a pipeline crossing under the Missouri River, to climate concerns raised by the transportation of fossil fuels through that pipeline).

<sup>3</sup> For a description of the environmental “regulatory state,” *see, e.g.*, ZYGMUNT PLATER ET AL., ENVIRONMENTAL LAW & POLICY: NATURE LAW & SOCIETY (5th ed. 2016) at chaps. 5 (“An Overview of Environmental Regulation in the United States”) and 6 (“The Administrative Law of Environmental Law & Administrative Agency Process”); *see also* LISA SCHULTZ BRESSMAN ET AL., THE REGULATORY STATE (2d ed. 2013) at chaps. 1 (“Agencies in the Structure of Modern Federal Government”) and 6 (“Control of Agency Action”).

focus of various studies over the past 40 years<sup>4</sup>, those studies have essentially ignored the process by which environmental regulations are developed – a process characterized by heavy involvement of the affected corporations in every aspect of that development.<sup>5</sup> Given industry involvement in both the shaping of those regulations and their application, it is not surprising that the general state of the environment is worse now than before the enactment of the environmental laws from which those regulations spring.<sup>6</sup>

The commentators who have been ignored even more are those who have questioned the foundation of the modern regulatory state – raising the issue of whether environmental regulations are intended to protect health, safety, and welfare, or whether they are primarily designed to “legalize” certain emissions and extractions that, under other principles of law, would otherwise be illegal.<sup>7</sup>

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<sup>4</sup> See DANIEL CARPENTER & DAVID A. MOSS, PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 23-68 (2013); see also NORM ALSTER, CAPTURED AGENCY: HOW THE FEDERAL COMMUNICATIONS COMMISSION IS DOMINATED BY THE INDUSTRIES IT PRESUMABLY REGULATES at chap. 1 (2015) (“The Corrupted Network”).

<sup>5</sup> See DAVID C. KORTEN, WHEN CORPORATIONS RULE THE WORLD 91-138 (Karen Seriguchi ed., 3d ed. 2015).

<sup>6</sup> Environmental statistics support this conclusion. Each year in the United States alone, 570 billion pounds of municipal waste is produced, with sixty percent of that waste ending up in landfills or incinerators; four billion pounds of toxic chemicals, including seventy-two million pounds of known carcinogens are released into the atmosphere from 20,000 industrial polluters each year, and two trillion pounds of livestock waste are annually dumped into waterways and applied to land. See *Waste*, TOXICS ACTION CENTER, <http://www.toxicsaction.org/problems-and-solutions/waste> (last visited Nov. 9, 2016). 80,000 industrial chemicals are currently in use in the United States, with more than 700 now found within every human body, and 1,800 new chemicals are introduced annually. See Carol Blackburn, *Making Chemicals Safer, 21<sup>st</sup> Century*, JOHNS HOPKINS CENTER FOR TALENTED YOUTH, IMAGINE MAGAZINE (Mar/Apr 2014), [http://cty.jhu.edu/Imagine/docs/EPA\\_chemical\\_safety.pdf](http://cty.jhu.edu/Imagine/docs/EPA_chemical_safety.pdf). Forty percent of U.S. waterways fail to meet the minimal requirements of federal and state clean water laws, half of all plant and animal species have been extinguished, and 90% of America’s original forests have been deforested. See *Why is Our Water in Trouble? Threats to Freshwater Ecosystems*, THE NATURE CONSERVANCY, <http://www.nature.org/ourinitiatives/habitats/riverslakes/threatsimpacts/> (last visited Nov. 9, 2016); see also, *Earth has lost half of its wildlife in the past 40 years, says WWF*, THE GUARDIAN, <https://www.theguardian.com/environment/2014/sep/29/earth-lost-50-wildlife-in-40-years-wwf> (last visited Nov. 9, 2016); see also Brant Ran, *How Much Old Growth Forest Remains in the U.S.?*, [http://www.ran.org/how\\_much\\_old\\_growth\\_forest\\_remains\\_in\\_the\\_us](http://www.ran.org/how_much_old_growth_forest_remains_in_the_us) (last visited Nov. 9, 2016).

<sup>7</sup> See, e.g., RICHARD KAZIS & RICHARD LEE GROSSMAN, FEAR AT WORK: JOB BLACKMAIL, LABOR, AND THE ENVIRONMENT 76 (1991) (recounting the creation of the Interstate Commerce Commission, the first U.S. regulatory agency, and U.S. Attorney Richard Olney’s quote that the Commission “is, or can be made, of great help to the railroads. It satisfied the popular clamor for a government supervision of the railroads, at the same time that the supervision is almost entirely nominal”).

Regardless of whether the core problem of the accelerated degradation of our natural environment is the design of the environmental regulatory process or the actions of participants within it, communities faced with the sole option of working within that system are often left remediless if they determine that the best interests of their communities require an outright rejection of a proposed commercial or industrial project. If those communities refuse to invest resources and energy in the regulatory system because of the nature of that system, and instead attempt to use their local lawmaking power to ban proposed projects, they encounter three “well-settled” legal doctrines that block their way.

First, a corporation affected by such local laws can assert constitutional “rights” against them, especially if the corporation possesses a federal or state permit that authorizes the project. Those constitutional “rights” include the corporation’s Fifth Amendment right against having its permit nullified by the local law, as a “taking” of corporate property, or a claim under the U.S. Constitution’s Commerce Clause<sup>8</sup>, asserting that the local law seeks to regulate interstate commerce unlawfully. The corporation often asserts its rights as a civil rights claim, with a corresponding demand for damages and attorneys’ fees against the offending municipality.<sup>9</sup>

Second, most major energy, agribusiness, and waste disposal projects are protected by state and federal laws of preemption, which prohibit municipal communities from legislating in those and other areas.<sup>10</sup> Preemption laws, adopted by the state legislature or by Congress, are

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<sup>8</sup> U.S. CONST. art. I, §8 (“The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States.”). The Commerce Clause has been interpreted to include a dormant Clause, which preserves federal preemptive authority in the area of interstate commerce, even if Congress has not legislated in a specific issue area. For early jurisprudence recognizing the dormant Commerce Clause, *see* *In re State Freight Tax*, 82 U.S. 232, 281 (1872) (striking down a state railroad taxation law as a violation of the Commerce Clause).

<sup>9</sup> Violation of a corporation’s federal constitutional rights enables the corporation to pursue damages pursuant to 42 U.S.C. §1983 (2017), and attorney’s fees pursuant to 42 U.S.C. §1988 (2017), against the municipality enacting the local law. This is because federal law considers corporations to be persons with constitutional rights subject to vindication under that federal statute.

<sup>10</sup> *See, e.g.*, COLO. REV. STAT. ANN. § 34-20-101 (West) (preempting any Colorado municipality from regulating any oil and gas extraction operation.); *see also, e.g.*, *Town of Frederick v. N. Am. Res. Co.*, 60 P.3d 758, 763 (Colo.

privately enforceable, enabling corporations to file preemption claims in lawsuits brought against the offending municipality.<sup>11</sup> While there are many types of preemption, it is common practice for state legislatures to “ceiling preempt”<sup>12</sup> all local regulation of particular industries. Such preemption eliminates the ability of municipalities to ban any harmful activities by the covered industries, or to establish more stringent standards for such activities.

Third, a doctrine known as “Dillon’s Rule” applies to community lawmaking in almost all states. The Rule says that a municipal corporation only has the lawmaking powers granted to it by the state, and that if the municipality attempts to legislate in areas outside of those powers, such local laws are void.<sup>13</sup> As with ceiling preemption, Dillon’s Rule is privately enforceable - enabling corporations to file a Dillon’s Rule claim in lawsuits brought against offending municipalities.

Taken together, these three doctrines generally eliminate the authority of municipal communities to ban, or to regulate stringently, many industrial and commercial activities within their communities, regardless of the harm or danger inherent in those projects. Working to

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App. 2002) (prohibiting any Colorado municipality from regulating or controlling an oil and gas extraction operation).

<sup>11</sup> Corporate preemption claims are, of course, commonplace in all fields of law. *See, e.g., State Preemption of Local Smoke-Free Laws in Government Work Sites, Private Work Sites, and Restaurants --- United States, 2005--2009*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm5904a4.htm> (last updated Feb. 5, 2010) (providing a history of the state preemption of local smoke-free laws from 2005-2009).

<sup>12</sup> Within this article, the authors use the phrase “ceiling preempt” to include all state and federal legislative acts that preempt municipal communities from adopting measures exceeding the standards set by those legislative acts. As such, the phrase encompasses “express” preemption, “field” preemption, “implied” preemption, and “operational” (or conflict) preemption, if the preemption results in a prohibition on the adoption of local measures, including outright bans, that exceed the standards set by the particular legislative act.

<sup>13</sup> The Rule was most clearly delineated by the United States Supreme Court in *Hunter v. Pittsburgh*, 207 U.S. 196 (1907), where the Court declared that “[m]unicipal corporations are political subdivisions of the state, created by it and at all times wholly under its legislative control.”



convince their state legislature or Congress to overturn these long-standing doctrines seems futile, given the pivotal influence that particular industries hold over those governments.<sup>14</sup>

Given the wholesale degradation of the globe's ecosystems, something has to give. While the applicability of these three legal doctrines is considered "well-settled" by most legal commentators, failure to limit their reach will continue to result in the inability of municipal communities to stop the threats posed by harmful industrial and commercial projects. Assenting to life within their confines only guarantees the continued decline of all ecological and life support systems upon which these communities depend.

Many communities across the United States, understanding the nature of the federal and state regulatory systems and the powerlessness of communities within them, have begun to challenge these three legal doctrines as unconstitutional infringements of democratic authority. They are urging courts instead to recognize and enforce a fundamental constitutional right of the people of those municipalities to local, community self-government. They are enacting local laws pursuant to this constitutional right, and they are arguing that corporate constitutional "rights," ceiling preemption, and Dillon's Rule cannot apply when they infringe the right of local, community self-government. This article explores that argument, and asks whether the resuscitation of this right is necessary both for the protection of people within communities across the country, as well as for the preservation of the natural environment.

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<sup>14</sup>See Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 *PERSP. ON POL.* 564, 565 (2014), [https://scholar.princeton.edu/sites/default/files/mgilens/files/gilens\\_and\\_page\\_2014\\_testing\\_theories\\_of\\_american\\_politics.doc.pdf](https://scholar.princeton.edu/sites/default/files/mgilens/files/gilens_and_page_2014_testing_theories_of_american_politics.doc.pdf) ("economic elites and organized groups representing business interests have substantial independent impacts on U.S. government policy, while average citizens and mass-based interest groups have little or no independent influence").

## II. Local, community self-government as the foundation of the American system of constitutional law.

The Due Process Clause of the Fourteenth Amendment declares that no State shall “deprive any person of life, liberty, or property, without due process of law.”<sup>15</sup> Rights protected by the Clause include most of the rights specifically enumerated in the Bill of Rights, along with those rights that are “so rooted in the traditions and conscience of our people as to be ranked as fundamental.”<sup>16</sup> The United States Supreme Court has explained that “when considering whether a right is a fundamental right, the court [must] look to whether it is a right ‘deeply rooted in this nation’s history and tradition’” or one which is “fundamental to our scheme of ordered liberty[.]”<sup>17</sup>

In *Obergefell v. Hodges*, in which the Court declared that same-sex marriage is a fundamental liberty protected by the Clause, the Court reasoned:

The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility, however, has not been reduced to any formula. Rather, it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. That process is guided by many of the same considerations relevant to analysis of other constitutional provisions that set forth broad principles rather than specific requirements. History and tradition guide and discipline this inquiry but do not set its outer boundaries. That method respects our history and learns from it without allowing the past alone to rule the present. The nature of injustice is that we may not always see it in our own times. The

<sup>15</sup> U.S. Const. amend. XIV.

<sup>16</sup> See *Duncan v. Louisiana*, 391 U.S. 145, 180 (1968); see also, *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

<sup>17</sup> See *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 767 (2010); see also *Griswold v. Connecticut*, 381 U.S. 479, 493 (1965) (Brennan, J., concurring) (courts look to “traditions and (collective) conscience of our people to determine whether a principle is so rooted” there “as to be ranked as fundamental.”) (citations omitted); *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1997) (“Appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful ‘respect for the teachings of history (and), solid recognition of the basic values that underlie our society’”) (*quoting* *Griswold*, 381 U.S. at 501 (Harlan, J., concurring)). Cf. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (declaring that “[o]ur Nation’s history, legal traditions, and practices thus provide the crucial guideposts for responsible decision making” that direct the court’s recognition and enforcement of constitutional guarantees.) (citation omitted). Courts have also recognized that unenumerated fundamental rights “may draw on more than one Constitutional source. The idea is that certain rights may be necessary to enable the exercise of other rights, whether enumerated or unenumerated.” *Juliana v. United States*, 217 F. Supp. 3d 1224, 1249 (D. Or. 2016) (holding that a citizen’s right to a livable climate is a fundamental constitutional right).

generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution’s central protections and a received legal stricture, a claim to liberty must be addressed.<sup>18</sup>

The right of community self-governance is both deeply rooted in our nation’s history and tradition and fundamental to any scheme of ordered liberty. From the Mayflower Compact to the conflagration of the American Revolutionary War and the ratification of the United States Constitution, no principle has been more seminal than that of the people’s collective authority to govern, and no right more fundamental than the right of local, community self-government.<sup>19</sup>

The colonists’ struggle with British rule illustrates how community self-government took shape as the foundation of the contemporary American system of constitutional law. The colonists’ efforts culminated in the Declaration of Independence, which codified the principles of local self-government that had been forged by American settlements since the 1600s. By adopting the Declaration of Independence in 1776, the Second Continental Congress made clear that a government’s power originates from the people, and that the people have the right to alter their system of government to protect their “Life, Liberty . . . Safety and Happiness”:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. — That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, — That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and

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<sup>18</sup> *Obergefell v. Hodges*, 135 S.Ct. 2584, 2598 (2015) (recognizing a constitutional right to same-sex marriage) (internal citations and quotations omitted).

<sup>19</sup> *See, e.g.*, 1 EUGENE MCQUILLIN, *MUNICIPAL CORPORATIONS* § 70, at 156 (1911) (“local self-government of the municipal corporation does not spring from, nor exist by virtue of, written constitutions, nor is it a mere privilege conferred by the central authority. . . [T]he people of the various organized communities exercise their rights of local self-government under the protection of these fundamental principles which were accepted, without doubt or question, when the several state constitutions were promulgated.”).

organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.<sup>20</sup>

Forged in the cauldron leading up to the outbreak of hostilities between the colonists and the British, the Declaration of Independence codified the core test for whether a system of government is “republican” in nature, and thus, legitimate under the American system of law.<sup>21</sup> For a system of government to qualify, the Declaration requires it to secure the most basic of human civil and political rights and to incorporate the elements of self-government. When a government fails to meet those requisites, the people are naturally endowed with the basic right to change, reform, or abolish that government and replace it with another.

**A. Local, community self-government was the foundation of the early American colonies.**

The concept and exercise of community self-government in America dates back to the Mayflower Compact, adopted in 1620, over a hundred and fifty years before Thomas Jefferson codified the principles of local self-government in the Declaration of Independence.<sup>22</sup> The Mayflower Compact was the first constitution of its kind written by the American colonists, and it set the stage for an understanding of government that dramatically departed from imperial and divine rule. In one paragraph, the original colonists dismantled the old system of government—

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<sup>20</sup> Amer. Decl. of Ind. at ¶ 2.

<sup>21</sup> Alexander Tsesis, *Self-Government and the Declaration of Independence*, 97 CORNELL L. REV. 693, 751 (2012) (explaining that “[t]he Declaration contains the American creed against which all constitutional and statutory conduct must be measured. . . . Although often regarded as a historic artifact, the document remains relevant to constitutional theory”).

<sup>22</sup> McQuillin, *supra* note 19, at 152 (“in this country from the beginning, political power has been exercised by citizens of the various local communities as local communities, and this constitutes the most important feature in our system of government.”). It must be acknowledged that this article recounts the histories of the early North American colonies and their forms of government, as those are the immediate basis for the American system of government today. This article does not recount the histories of indigenous communities that exercised their own forms of self-government for thousands of years prior to colonization by the French, Spanish, Dutch, or English. *See, e.g.*, ALL INDIAN PUEBLO COUNCIL CONST. pmb1. (the Constitution of the New Mexican Pueblos through their All Indian Pueblo Council, which decrees that the governance goal of the Pueblos confederation is to “preserve and protect. . . our inherent rights of self-government.”). The authors do not assert that indigenous histories are irrelevant to the right of self-government, or that colonial displacement of indigenous peoples was a proper exercise of the right of local, community self-government. Indeed, the authors would welcome scholarship that explores these important issues.

based on royal authority—and forged a new one based purely on the political sovereignty of the people. They declared:

[W]e covenant and combine ourselves together into a civil body politic, for our better ordering, and preservation, and furtherance of the ends aforesaid; and by virtue hereof to enact, constitute, and frame, such just and equal laws, ordinances, acts, constitutions, and offices, from time to time, as shall be thought most meet and convenient for the general good of the colony.<sup>23</sup>

Far from being unusual, such “self-organized” early American concepts of community self-government—that people naturally possessed the authority to create, control, and change their own governing systems—were the norm. In the 1620s, early colonists founded settlements in New Hampshire that became the towns of Portsmouth and Dover. Both were “wholly self-ruled,” and Dover’s inhabitants self-organized into a “body politique . . . with all such laws as shall be concluded by a major part of the Freemen of our Society.”<sup>24</sup> In 1639, the settlers of Exeter, New Hampshire, created their own government, declaring in the Exeter Compact that “[we] combine ourselves together to erect and set up among us such Government. . . according to the libertyes of our English colony of Massachusetts.”<sup>25</sup>

People in different towns, villages, and colonies also joined together to create broader levels of government to further secure their right to local, community self-government. For example, on January 14, 1639, residents of Windsor, Hartford, and Wethersfield joined together to adopt the “Fundamental Orders of Connecticut,” the first written state constitution in America, which secured self-governance within those towns.<sup>26</sup> Additionally, in 1643, colonists joined together to create the United Colonies of New England, by approving the Articles of

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<sup>23</sup> See *Mayflower Compact* at ¶ 1, THE AVALON PROJECT, [http://avalon.law.yale.edu/17th\\_century/mayflower.asp](http://avalon.law.yale.edu/17th_century/mayflower.asp) (last visited December 1, 2017).

<sup>24</sup> *The Dover Combination*, DOVER PUBLIC LIBRARY, <http://www.dover.nh.gov/government/city-operations/library/history/the-dover-combination.html> (last visited Dec. 21, 2016) (signed by the founders of Dover, New Hampshire in 1640).

<sup>25</sup> COLONIAL ORIGINS OF THE AMERICAN CONSTITUTION: A DOCUMENTARY HISTORY 26 (Donald S. Lutz ed., 1998).

<sup>26</sup> See *Fundamental Orders of 1639*, THE AVALON PROJECT, [http://avalon.law.yale.edu/17th\\_century/order.asp](http://avalon.law.yale.edu/17th_century/order.asp) (last visited May 9, 2016).

Confederation for the United Colonies declaring that the people of each plantation, town, and colony shall have “exclusive jurisdiction and government within their limits,” thereby securing their authority to self-govern locally.<sup>27</sup>

Judge Eugene McQuillin, author of a seminal treatise on the law of municipal corporations, explained that those communities constituted “miniature commonwealths. . . [with] the solid foundation of that well-compacted structure of self-government.”<sup>28</sup> Thus, the early American colonies were replete with constitutions, compacts, and agreements reflecting a self-organizing American form of government, one in which the people of those communities possessed the inherent and unabridged right to create, control, and change their systems of governance.<sup>29</sup>

### **B. Local, community self-government is the foundation of American constitutional law.**

While Great Britain tolerated the colonists’ self-rule initially, it believed that final authority over governing matters rested with the British king and parliament. Clashes between these two theories of government—the right of the American people to create, manage, and alter their systems of government as they saw fit; and the right of the British government to control colonial government—were commonplace in the period leading up to the Revolutionary War.<sup>30</sup>

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<sup>27</sup> See *Articles of Confederation of the United Colonies of New England; May 19, 1643*, THE AVALON PROJECT, [http://avalon.law.yale.edu/17th\\_century/art1613.asp](http://avalon.law.yale.edu/17th_century/art1613.asp) (last visited May 9, 2016).

<sup>28</sup> McQuillin, *supra* note 19, at 144.

<sup>29</sup> *Id.* at 384-85 (“[T]he people of the various organized communities exercise their rights of local self-government under the protection of these fundamental principles which were accepted, without doubt or question. . .”). An English writer in the middle of the nineteenth century explained how the freedom of a society correlates with the strength of local government: “There are two elements to which every form of Government may be reduced. These are local self-government on the one hand, and centralization on the other. According as the former or the latter of these exists more or less predominant, will the state of any nation be the more or less free, happy, progressive, truly prosperous, and safe. . . local self-government is that system of Government under which the greatest number of minds, knowing the most, and having the fullest opportunities of knowing it, about the special matter in hand, and having the greatest interest in its well-working, have the management of it, or control over it.” JOSHUA TOULMIN SMITH, LOCAL SELF-GOVERNMENT AND CENTRALIZATION 11-12 (1851).

<sup>30</sup> Foreshadowing the American Revolutionary War, there were no fewer than a dozen lesser-known armed peoples’ revolts against British rule between 1676 and the 1760’s. As with the Revolutionary War, almost all were triggered

Such clashes led to the further development of the doctrine of local, community self-government as constitutional law, and, inevitably, to revolutionary conflict.

In 1760, colonial lawyer James Otis, Jr. first used the right of local, community self-government as a constitutional doctrine in a judicial proceeding when he represented colonial merchants in a direct challenge to Great Britain's authority to adopt "writs of assistance."<sup>31</sup> The writs allowed British authorities to enter any colonist's residence without notice or probable cause. Otis argued that the writs were invalid because they had been adopted only by the British parliament, not by the people of the colonies. Otis' thesis—that the people themselves were the only rightful lawmaking authority—was the first known articulation of local, community self-government as a legal and constitutional doctrine within the colonial context.<sup>32</sup> Otis' work placed the right of local, community self-government (including the right to alter any system of governance that undermines that right) at the heart of the colonists' struggle. In his pamphlet, he explained:

There is no one act which a government can have a right to make that does not tend to the advancement of the security, tranquility, and prosperity of the people. . . . The form of government is by nature and by right so far left to the individuals of each society that they may alter it from a simple democracy or government of all over all to any other form they please. . . .<sup>33</sup>

### **C. Denial of the right of local, community self-government was the primary cause of the American Revolutionary War.**

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by British efforts to strip the colonists of self-governing authority. They included Bacon's Rebellion of 1676 (driven by the royal governor's refusal to implement measures adopted by the Virginia legislature); Culpeper's Rebellion of 1677 (evicting the proprietary government of Carolina due to the collection of a British-imposed tobacco duty); the Boston Revolt of 1689 (imprisoning the royal governor and re-establishing an earlier form of representative government); and the Mast Tree Riot of 1734 (against the royal government's prohibition on colonial use of mature pine trees used by the English navy for masts). JOHN C. MILLER, *ORIGINS OF THE AMERICAN REVOLUTION* 38 (Stanford Univ. Press 1959) (1943).

<sup>31</sup> *Id.* at 46.

<sup>32</sup> STEWART BEACH, *SAMUEL ADAMS: THE FATEFUL YEARS 1764-1776*, at 55 (1965).

<sup>33</sup> *See* 1 *THE FOUNDERS' CONSTITUTION* 390 (Philip B. Kurland & Ralph Lerner eds., 1987) (quoting "Some Political Writings of James Otis," Collected by Charles F. Mullett. University of Missouri Studies 4 (1929): 326-27.

The British Parliament's denial of the right of local, community self-government was the primary cause of the American Revolutionary War. In Boston, which would become the epicenter of the revolution, a concerted movement to replace British rule with a system of governance premised on local, community self-government began in 1764. That year, the British parliament passed the Currency Acts to remove colonial legislative control over the issuance of currency. In response, the people of Boston, through their Town Meeting,<sup>34</sup> voted to establish the first, temporary Committee of Correspondence. They tasked the Committee with informing the public about the Currency Acts, along with building public support for repeal.<sup>35</sup> Other towns formed similar committees.<sup>36</sup>

“Stamp Act Riots” against British authority ensued. In 1765, the Stamp Act Congress issued a “Declaration of Rights and Grievances,” which focused on the Currency and Stamp Acts’ violation of the colonial right to local, community self-government. The Stamp Act Congress argued that the Currency Act’s removal of monetary policy from the colonists, and the Stamp Act’s removal of tax policy, violated the colonists’ right of local, community self-government.<sup>37</sup>

The British Parliament retaliated by adopting the “American Colonies Act,” which rejected the colonists’ authority to self-govern. It proclaimed that Parliament “had hath, and of right ought to have, full power and authority to make laws and statutes of sufficient force and

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<sup>34</sup> The Boston Town Meeting was a regular event to which all the people of Boston were invited to discuss and vote upon issues important to Bostonians. The Town Meeting form of government continues today. Today, municipalities in Massachusetts, Vermont, Maine, and New Hampshire hold an annual Town Meeting (and special Town Meetings in between) to vote on resolutions and laws proposed by residents. *See, e.g.,* MASS. GEN. LAWS ch. 43A, § 4 (2017).

<sup>35</sup> PAULINE MAIER, *FROM RESISTANCE TO REVOLUTION: COLONIAL RADICALS AND THE DEVELOPMENT OF AMERICAN OPPOSITION TO BRITAIN, 1765-1776*, at 216 (1972).

<sup>36</sup> Kevin Phillips, *1775: A Good Year for Revolution* 38 (2012).

<sup>37</sup> *See Journal of the First Congress of the American Colonies, in Opposition to the Tyrannical Acts of the British Parliament*, N.Y. E. WINCHESTER, 1845 at 27-29 (<https://archive.org/details/journaloffirstco00stam>) (last visited December 1, 2017).



validity to bind the colonies and people of America . . . in all cases whatsoever.”<sup>38</sup> In response, the colonists attacked the Act as “inconsistent with the natural, constitutional and charter rights and privileges of the inhabitants of this colony.”<sup>39</sup>

Over the next decade, Parliament continued to assert taxation authority over the colonies and the American people continued to assert their right of local, community self-government. In 1772, the people of Boston voted to establish the first permanent Committee of Correspondence in the colonies, tasking it with proclaiming “the rights of the colonists. . . [and] to communicate and publish the same to the several towns in this province and to the world as the sense of this town.”<sup>40</sup> People in hundreds of towns and villages formed committees to coordinate responses to Parliamentary actions.

That same year, frontier settlers living along the Watauga and Nolichucky Rivers, in the eastern part of what would become Tennessee, joined together to become the Watauga Association - the first independent constitutional government in America. After negotiating a ten-year lease with the Cherokee, the settlers unanimously adopted the Articles of the Watauga Association, establishing a local government system, a five-member court, a courthouse, and a jail. President Theodore Roosevelt declared that “the Watauga settlers outlined in advance the nation’s work. . .they successfully solved the difficult problem of self-government.”<sup>41</sup>

In May 1773, Parliament adopted the Tea Act, allowing the East India Company to sell, for the first time, surplus tea directly to people in the colonies. Purchase of the English tea, and the payment of parliamentary taxes along with it, was viewed as an effort to weaken colonial opposition to parliamentary taxation, and thus to weaken colonial claims to the right of local,

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<sup>38</sup> Maier, *supra* note 35, at 145.

<sup>39</sup> MARC W. KRUMAN, BETWEEN AUTHORITY AND LIBERTY: STATE CONSTITUTION MAKING IN REVOLUTIONARY AMERICA 12 (1997).

<sup>40</sup> Miller, *supra* note 30, at 329-30.

<sup>41</sup> THEODORE ROOSEVELT, THE WORKS OF THEODORE ROOSEVELT: THE WINNING OF THE WEST 227 (1906).

community self-government.<sup>42</sup> The colonists rebelled, resulting in the Boston Tea Party, as well as similar tea parties hosted by the people of other towns and villages.<sup>43</sup>

To punish the colonists for opposing the Tea Act, Parliament adopted a series of laws known in the colonies as the “Intolerable Acts” or “Coercive Acts.” These sought to outlaw certain types of colonial self-government.<sup>44</sup> For instance, long seen as a model for local, community self-government, Massachusetts law had allowed wide latitude for local governments.<sup>45</sup> Then, the British-imposed Massachusetts Government Act sent a clear signal that Great Britain would not tolerate local, community self-government in the colonies.<sup>46</sup> The purpose of the Massachusetts Government Act was to displace the various legislative mechanisms of local, community self-government by expanding the royal governor’s powers. British officials believed that their inability to control the people of Massachusetts was attributable to the highly independent nature of the local governments and to operation of the Town Meeting.

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<sup>42</sup> Maier, *supra* note 35, at 275-78.

<sup>43</sup> In addition to the “Boston Tea Party,” colonial raids on shipping occurred in Charleston, South Carolina on December 22, 1773 (seizing 257 chests of tea from the *London*); in Philadelphia on December 25, 1773 (seizing 698 chests of tea from the *Polly*); in New York City in April, 1774 (seizing 698 chests of tea from the *Nancy*); in York, Maine on September 23, 1774 (seizing a half-chest of tea from the *Cynthia*); in Annapolis, Maryland on October 19, 1774 (seizing over two thousand pounds of tea from the *Peggy Stewart*); in Charleston, South Carolina on November 3, 1774 (seizing seven chests of tea from the *Magna Carta*); in Yorktown, Virginia on November 7, 1774 (seizing two half-chests of tea from the *Virginia*); in Elizabethtown, Maryland on November 25, 1774 (seizing a chest of tea from an unknown ship); in Greenwich, New Jersey on December 22, 1774 (seizing an unknown amount of tea from the *Greyhound*); and in Wilmington, North Carolina in April, 1775 (seizing an unknown amount of tea from an un-named ship). See *Other “Tea Parties” in the Colonies*, SULTANEDUCATION.ORG, <http://sultanaeducation.org/wp-content/uploads/2014/06/Other-Tea-Parties.pdf>.

<sup>44</sup> The Acts included the Quebec Act (stripping the people of Quebec of most governing authority, it was seen as a parliamentary model for future treatment of the colonists); the Administration of Justice Act (requiring trials of certain British officers to occur in British courts, removing the jurisdiction of colonial courts over them); the Massachusetts Government Act (banning Town Meetings without the consent of the royal Governor, and canceling part of the Colony’s original Charter by eliminating the authority of the colonial assembly to elect the Executive Council); and the Quartering Act (requiring the colonies to provide housing for British soldiers over the refusal of the assemblies of several states to do so). Phillips, *supra* note 36, at 7-9.

<sup>45</sup> The 1691 Charter for the Massachusetts Bay Colony provided that all residents of the Colony “shall have and enjoy all liberties and immunities of free and natural subjects. . . as if they and every one of them were born within this our realm of England.” Beach, *supra* note 32, at 48.

<sup>46</sup> Miller, *supra* note 30, at 369-70.

Consequently, the Act required that each “agenda item at every town meeting in Massachusetts. . . be submitted in writing to the governor and meet with his approval. . . No meeting could be called without the prior consent of the governor.”<sup>47</sup> As Lord North explained to Parliament, the purpose of the Act was “to take the executive power from the hands of the democratic part of government.”<sup>48</sup> The royal governor eventually used the Act to dissolve the Massachusetts Assembly completely.

The people of Massachusetts rebelled against this assault on their right of local, community self-government by closing down the British judicial system, so that it could not be used to enforce the Act. Citizens of Worcester, Springfield, Southampton, Salem, Marblehead, Taunton, and Stoughton not only forcibly closed the courts, but forced hundreds of British officials to resign their positions. Without the British courts, the people of those towns drew up their own plans for keeping order, while urging the people at Town Meetings to “pay no regard to the late act of parliament, respecting the calling of town meetings, but, to proceed in their usual manner.”<sup>49</sup>

#### **D. Local, community self-government is the foundation of the American Declaration of Independence.**

Beginning in 1773, in response to royal assertions of power and the consequent nullification of local, community self-governance, the people of 90 towns, villages, and counties across the 13 colonies began issuing local declarations of independence. By declaring that only their own homegrown, democratically-elected governments could “constitutionally make any laws or regulations,” those communities proclaimed their own independence from British rule

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<sup>47</sup> RAY RAPHAEL, *THE FIRST AMERICAN REVOLUTION BEFORE LEXINGTON AND CONCORD* 50 (2011).

<sup>48</sup> IAN R. CHRISTIE & BENJAMIN W. LABAREE, *EMPIRE OR INDEPENDENCE, 1760-1776* 188 (1976).

<sup>49</sup> Raphael, *supra* note 47, at 107.

years before Congress issued a national Declaration of Independence.<sup>50</sup> The Charlotte Town Resolves is one example of a local declaration of independence. In May 1775, over a year before the national declaration, it declared that “all Laws and Commissions confirmed by, or derived from the Authority of the King or Parliament, are annulled and vacated. . .”<sup>51</sup>

It was amidst the issuance of these local declarations that the colonists formed the First Continental Congress in September of 1774, with representatives attending from 12 of the 13 colonies. During that Congress, the delegates declared:

“[a]ssemblies have been frequently dissolved, contrary to the rights of the people ... [and] that the inhabitants of the English Colonies in North America, by the immutable laws of nature ... are entitled to life, liberty, and property, and they have never ceded to any sovereign power whatever a right to dispose of either without their consent.”<sup>52</sup>

This articulation of the right of local, community self-government laid the foundation for the final separation between the American colonies and Great Britain.

In May 1776, before the issuance of the national Declaration of Independence, the Second Continental Congress adopted a resolution that power be transferred from governments resting on the Crown’s sovereignty to those based upon popular authority and self-government. The preamble demanded “that the exercise of every kind of authority under the. . . Crown should be totally suppressed.”<sup>53</sup> Two weeks prior to the adoption of the Declaration of Independence by that Congress, the Patriot legislature of Virginia<sup>54</sup> adopted a “Declaration of Rights,” which set forth the constitutional doctrine of local, community self-government:

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<sup>50</sup> See, e.g., *The Sheffield Declaration*, *The Massachusetts Spy*, Or, *Thomas’s Boston Journal* (February 18, 1773).

<sup>51</sup> *The Charlotte Town Resolves*, THE AVALON PROJECT (May 31, 1775), [http://avalon.law.yale.edu/18th\\_century/charlott.asp](http://avalon.law.yale.edu/18th_century/charlott.asp).

<sup>52</sup> *Declaration and Resolves of the First Continental Congress, Oct. 14, 1774*, reprinted in *Documents Illustrative of the Formation of the Union of the American States*, 69th Cong., 1st Sess., H.R. Doc. No. 398 (1927).

<sup>53</sup> 4 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 358 (Worthington Chauncey Ford ed., 1906).

<sup>54</sup> The fifth such gathering, the Convention consisted of one hundred and thirty-two members – two from each county, and one each from the boroughs of Jamestown, Williamsburg, Norfolk, and the College of William and

Section 2. That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants and at all times amenable to them.

Section 3. That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or *community*; of all the various modes and forms of government, that is best which is capable of producing the greatest degree of happiness and safety and is most effectually secured against the danger of maladministration. And that, when any government shall be found inadequate or contrary to these purposes, a majority of the *community* has an indubitable, inalienable, and indefeasible right to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal.<sup>55</sup>

This fundamental principle of local, community self-government was recognized and reasserted by the Congress in June 1776, when it issued the national Declaration of Independence. Penned originally by Thomas Jefferson and edited by a congressional committee, the Declaration listed the infringement of local, community self-government as the primary basis for severance from Great Britain, declaring of the King:

[h]e has refused his Assent to Laws the most wholesome and necessary for the public good. [and]

. . . . .  
He has refused to pass other Laws for the accommodation of large districts of people, unless those people would relinquish the right of Representation in the Legislature, a right inestimable to them and formidable to tyrants only. [and]

. . . . .  
He has dissolved Representative Houses repeatedly, for opposing with manly firmness his invasions on the rights of the people. [and]

He has refused for a long time, after such dissolutions, to cause others to be elected, whereby the Legislative Powers, incapable of Annihilation, have returned to the People at large for their exercise; the State remaining in the mean time exposed to all the dangers of invasion from without, and convulsions within. [and]

. . . . .  
For taking away our Charters, abolishing our most valuable Laws and altering fundamentally the Forms of our Governments.<sup>56</sup>

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Mary. DAVID LLOYD PULLIAM, THE CONSTITUTIONAL CONVENTIONS OF VIRGINIA FROM THE FOUNDATION OF THE COMMONWEALTH TO THE PRESENT TIME 18-19 (1901).

<sup>55</sup> VIRGINIA DECLARATION OF RIGHTS art. III (1776), [http://avalon.law.yale.edu/18th\\_century/virginia.asp](http://avalon.law.yale.edu/18th_century/virginia.asp) (emphasis added).

<sup>56</sup> Amer. Decl. of Ind. at ¶¶ 4, 6, 8, 9, 24.

Drawing on the declarations of towns, villages, colonies, compacts, early constitutions, and on the writings of James Otis and others, the Declaration reaffirmed four major principles of constitutional law necessary to ordered liberty:

1. that certain rights—those of life, liberty, safety, and the pursuit of happiness—are natural rights, held by virtue of being human;
2. governments are created to secure those natural rights;
3. each government owes its existence to, and derives its power exclusively from, the community that creates it; and
4. when governments become destructive of the people’s natural rights, the people have a right - and duty - to alter or abolish that government and establish new forms.<sup>57</sup>

The Declaration of Independence has been congressionally recognized as an organic law of the United States, and so it is part of the United States Code.<sup>58</sup> In the words of historian Joshua Miller, the great principles “evoked in the Declaration are autonomy of collectivities, natural rights, and the legitimacy of revolution.”<sup>59</sup>

**E. State constitutions secure the right of local, community self-government to the people of all municipalities in their states.**

People writing state constitutions incorporated the Declaration’s articulation of the right of local self-government in one or more of three ways: first, by incorporating the Declaration’s core principles directly into state constitutional provisions; second, by inserting the Declaration itself into their state constitutions; and, third, by explicitly recognizing the right of local,

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<sup>57</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“That all men . . . are endowed by their Creator with certain unalienable Rights; that among these are Life, Liberty and the pursuit of Happiness.”) (“that to secure these rights, Governments are instituted among Men . . . .”) (“deriving their just powers from the consent of the governed . . . .”) (“whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. . . . [I]t is their right, it is their duty, to throw off such Government . . . .”).

<sup>58</sup> See The Organic Laws of the United States of America, *reprinted in* 1 UNITED STATES CODE, at I-III (Office of the Law Revision Counsel of the House of Representatives ed., 2006).

<sup>59</sup> JOSHUA JOHN MILLER, THE RISE AND FALL OF DEMOCRACY IN EARLY AMERICA, 1630-1789 70 (1991).

community self-government within the text of state constitutional provisions reiterating the Declaration's core principles.<sup>60</sup>

All state constitutions contain a recitation of the Declaration's core principles as part of their declaration of rights.<sup>61</sup> As an example, in Massachusetts, the people incorporated the four principles of the Declaration by including in the Preamble to their 1780 Constitution:

The end of the institution, maintenance and administration of government, is to secure the existence of the body-politic; to protect it; and to furnish the individuals who compose it, with the power of enjoying, in safety and tranquillity, their natural rights, and the blessings of life: And whenever these great objects are not obtained, the people have a right to alter the government, and to take measures necessary for their safety, prosperity and happiness.

The body-politic is formed by a voluntary association of individuals: It is a social compact, by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good. It is the duty of the people, therefore, in framing a Constitution of Government, to provide for an equitable mode of making laws, as well as for an impartial interpretation, and a faithful execution of them; that every man may, at all times, find his security in them.<sup>62</sup>

The Massachusetts Constitution also codified the principles of the Declaration directly into the body of the Constitution's Declaration of Rights, beginning with the nature of inalienable rights, continuing to the purpose of government as the protector of those rights, and reiterating that the people have an inalienable right to reform or alter their system of government:

Art. I.--All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.

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<sup>60</sup> In addition to being expressly secured by state constitutions, the right of local self-government was embodied in the *process* by which the people of each state drafted and adopted their constitutions. All but one of the thirteen original colonies entrusted the responsibility of drafting new constitutions to the people themselves through constitutional conventions, rather than through permanent state legislatures. See MARC KRUMAN, *BETWEEN AUTHORITY AND LIBERTY: STATE CONSTITUTION MAKING IN REVOLUTIONARY AMERICA* 157-58 (1997).

<sup>61</sup> For purposes of this article, reference to a "declaration of rights" is also a reference to a "bill of rights" or other listing of rights contained within state constitutions, whether or not preceded by a title for that particular section. See, e.g., PA. CONST. art. I ("Declaration of Rights"); GA. CONST. art. I ("Declaration of Fundamental Principles"); HAW. CONST. art. I ("Bill of Rights"); IND. CONST. art. I (no title).

<sup>62</sup> MASS. CONST. of 1780 pmbl.

...

VII.--Government is instituted for the common good; for the protection, safety, prosperity and happiness of the people; and not for the profit, honor, or private interest of any one man, family, or class of men; Therefore the people alone have an incontestible, unalienable, and indefeasible right to institute government; and to reform, alter, or totally change the same, when their protection, safety, prosperity and happiness require it.<sup>63</sup>

Other state constitutions stress the authority of people to change those governments which fail to act in the best interests of the whole community. Through their Constitution of 1776, the people of Delaware declared “[w]henver the ends of government are perverted, and public liberty manifestly endangered by the Legislative singly, or a treacherous combination of both, the people may, and of right ought to establish a new, or reform the old government.”<sup>64</sup>

Echoing the Declaration’s statement that the people’s right to change government included their right to change the form of that government, the people of Michigan stated that the people “have the right at all times to alter or reform the same, and to abolish one form of government and establish another, whenever the public good requires it.”<sup>65</sup> The people of Florida inserted a similar provision, declaring

[t]hat all political power is inherent in the people, and all free governments are founded on their authority, and established for their benefit; and, therefore, they have, at all times, an inalienable and indefeasible right to alter or abolish their form of government, in such manner as they may deem expedient.<sup>66</sup>

The people of New Hampshire further clarified the sovereign power of the people to change and reform their system of government, declaring a “right of revolution,” in that:

[w]henver the ends of government are perverted, and public liberty manifestly endangered, and all other means of redress are ineffectual, the people may, and of right ought, to reform the old, or establish a new government. The doctrine of

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<sup>63</sup> *Id.* arts. I, VII.

<sup>64</sup> DEL. CONST. OF 1776, Declaration of Rights, § 5.

<sup>65</sup> MICH. CONST. OF 1835, art. I, § 2.

<sup>66</sup> FL. CONST. OF 1838, art. I, § 2.



non-resistance against arbitrary power, and oppression, is absurd, slavish, and destructive of the good and happiness of mankind.<sup>67</sup>

Beginning in 1857, with the state of Nevada, the United States Congress predicated the entry of new states into the United States on their inclusion of the principles of the Declaration into their state constitutions. Specifically, Congress required that the constitutions for states seeking admission to the United States “not be repugnant to the principles of the Declaration of Independence.”<sup>68</sup> Thus, the people of the states of Nevada, Nebraska, Colorado, North Dakota, South Dakota, Montana, Washington, Idaho, Wyoming, Utah, Oklahoma, New Mexico, Arizona, Alaska, and Hawai’i all entered the United States pursuant to the explicit requirement that their state constitutions be consistent with the principles of the Declaration.<sup>69</sup>

In addition to reiterating the core principles of the Declaration within their state declaration of rights, the people of the state of New York went further, directly embedding the text of the Declaration of Independence into their state constitution. The 1777 Constitution of New York recited:

And whereas the Delegates of the United American States, in general Congress convened, did, on the fourth day of July now last past, solemnly publish and declare, in the words following; viz:

...

We hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are, life, liberty, and the pursuit of happiness; that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed;

<sup>67</sup> NH CONST. OF 1784, art. III, pt. I, § 10.

<sup>68</sup> Nevada Enabling Act, ch. 36 § 4, 13 Stat. 30-32 (1864) (Congressional enabling act for the State of Nevada, requiring a new State Constitution to “be republican, and not repugnant to the constitution of the United States, and the principles of the Declaration of Independence.”). See also Lawrence N. Park, *Admission of States and the Declaration of Independence*, 33 TEMP. L.Q. 403, 410 (1960) (“[t]he words respecting the Declaration of Independence first appeared in the Enabling Act for Nevada, Mar. 21, 1864.”).

<sup>69</sup> See Nebraska Enabling Act 13 Stat. 47 (1889); Colorado Enabling Act 18 Stat. 474 (March 3, 1875); North Dakota Enabling Act, South Dakota Enabling Act, Montana Enabling Act, and Washington Enabling Act 25 Stat. 676 (1889); Utah Enabling Act 28 Stat. 107 (July 16, 1894); Oklahoma Enabling Act 34 Stat. 267 (June 16, 1906); New Mexico and Arizona Enabling Act 36 Stat. 557 (June 20, 1910); Alaska Enabling Act 72 Stat. 339 (July 7, 1958); Hawai’i Enabling Act 73 Stat. 4 (Mar. 18, 1959). Although admitted during the same span of years, the states of Wyoming and Idaho did not have enabling acts, only admission acts. See 26 Stat. 222 (July 10, 1890) (admission act for Wyoming); 26 Stat. 215 (July 3, 1890) (admission act for Idaho).

that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness. . .

...

[w]hile we lament the cruel necessity which has rendered that measure unavoidable, we approve the same, and will, at the risk of our lives and fortunes, join with the other colonies in supporting it.<sup>70</sup>

The people of the states of Pennsylvania, Vermont, Virginia, and West Virginia not only chose to embed the principles of the Declaration into their state constitutions, they explicitly applied those principles to the governance of their own local communities. The people of the Commonwealth of Virginia, on June 12, 1776, adopted a Bill of Rights which declared:

[t]hat government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or *community*; of all the various modes and forms of government, that is best which is capable of producing the greatest degree of happiness and safety, and is most effectually secured against the danger of maladministration; and that, when any government shall be found inadequate or contrary to these purposes, a *majority of the community* hath an indubitable, inalienable, and indefeasible right to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal.<sup>71</sup>

The Pennsylvania Constitution of 1776, adopted three months later, declared:

That all men are born equally free, and independent; and have certain, natural, inherent, and inalienable rights; amongst which are; the enjoying and defending of life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining happiness and safety.

That all power being originally inherent in, and consequently derived from, the people; therefore all officers of government, whether legislative, or executive, are their trustees, and servants, and at all times accountable to them.

That government is, or ought to be, instituted for the common benefit, protection and security of the people, nation, or *community*; and not for the particular emolument or advantage of any single man, family, or set of men, who are a part only of that community; And that the *community* hath an indubitable, unalienable and indefeasible right to reform, alter, or abolish government in such manner as shall be by that *community* judged most conducive to the public weal.<sup>72</sup>

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<sup>70</sup> N.Y. CONST. OF 1777 pmb1.

<sup>71</sup> VA. CONST. OF 1776, Bill of Rights, § 3 (emphasis added).

<sup>72</sup> The history of local government in Pennsylvania at the time shows that the word “community” meant *local* communities. The members of Pennsylvania’s Constitutional Convention of 1776 consisted largely of people who

The people of the State of Vermont wrote an almost identical provision into their state constitution, declaring:

[t]hat government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation or *community*; and not for the particular emolument or advantage of any single man, family or set of men, who are a part only of that community; and that the *community* hath an indubitable, unalienable and indefeasible right to reform, alter, or abolish, government, in such manner as shall be, by that *community*, judged most conducive to the public weal.<sup>73</sup>

The people of West Virginia, through their Constitution of 1872, similarly codified the inalienable right of local self-government with the following constitutional provision:

Government is instituted for the common benefit, protection and security of the people, nation or *community*. Of all its various forms that is the best, which is capable of producing the greatest degree of happiness and safety, and is most effectually secured against the danger of maladministration; and when any government shall be found inadequate or contrary to these purposes, a *majority of the community* has an indubitable, inalienable, and indefeasible right to reform, alter or abolish it in such manner as shall be judged most conducive to the public weal.<sup>74</sup>

#### **F. The U.S. Constitution secures the right of local, community self-government to the people of all municipalities within the United States.**

The U.S. Constitution also secures the right of local, community self-government:

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resisted both British rule and the centralization of political power in the City of Philadelphia. See JOHN L. GEDID ET AL., THE PENNSYLVANIA CONSTITUTION 37-41 (2004) (describing how disenfranchised communities in the western part of the state fought to exercise political power with communities around Philadelphia); PAULINE MAIER, AMERICAN SCRIPTURE, ch. 2 (1997) (describing how Pennsylvania's legislative assembly that resisted separation from Great Britain dissolved and a constitutional convention composed of members favoring self-governance formed); WAYNE L. BOCKELMAN, LOCAL GOVERNMENT IN COLONIAL PENNSYLVANIA 9-14 (1969). Pennsylvania adopted a second constitution in 1790. The Pennsylvania Constitution of 1790 reaffirmed that people are the source of governmental power and, as such, they have the unalienable and indefeasible right to alter, reform, or abolish their government. See PA. CONST. OF 1790, art. IX Declaration of Rights, § II (reprinted in GORMLEY, THE PENNSYLVANIA CONSTITUTION at 880). All Pennsylvania Constitutions since that of 1790, including the current Pennsylvania Constitution, have contained, in the Declaration of Rights, both the inalienable right of self-government, and the exception of the right from the general powers of the state government. See PA. CONST. OF 1838, Art. IX Declaration of Rights, §§ II, XXVI (reprinted in GORMLEY, THE PENNSYLVANIA CONSTITUTION at 884, 887); PA. CONST. OF 1874, Art. I Declaration of Rights, §§ 2, 26 (reprinted in Gormley, THE PENNSYLVANIA CONSTITUTION at 887, 891); PA. CONST. OF 1968, Art. I Declaration of Rights, §§ 2 ("Reservation of Powers in People"), 25 (reprinted in GORMLEY, THE PENNSYLVANIA CONSTITUTION at 891, 895).

<sup>73</sup> VT. CONST. OF 1777, ch. 1, § VI (emphasis added).

<sup>74</sup> W.V. CONST. OF 1872, art. III, § 3 (emphasis added).

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.<sup>75</sup>

Three of the four principles of self-government from the Declaration appear here. The words “secure the blessings of liberty” express the Declaration’s principle that people possess certain innate natural rights. The words “in Order to” and “do ordain and establish” express the Declaration’s principle that people form governments to secure those rights. The words “We the People of the United States” express the Declaration’s principle that governmental authority stems from the people of the community exercising the powers of government, and is to be exercised for their benefit only. Only the Declaration’s fourth fundamental principle, the people’s authority to alter or abolish governments, fails to find literal expression in the Preamble, though it is clearly implied by the other three, as it is by the very act of writing and adopting the constitution.<sup>76</sup>

The founders debated whether to include all four principles of the Declaration of Independence in the Constitution’s preamble, or whether the people’s right of self-government was so fundamental that it need not be expressly stated in the text of the Constitution itself.<sup>77</sup>

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<sup>75</sup> U.S. CONST. pmb1.

<sup>76</sup> As one then-contemporary writer has explained, “[t]he people, who are sovereigns of the state, possess a power to alter when and in what way they please. To say [otherwise] ... is to make the thing created, greater than the power that created it.” FED. GAZETTE, Mar. 18, 1789, reprinted in Matthew J. Herrington, *Popular Sovereignty in Pennsylvania 1776–1791*, 67 TEMP. L. REV. 575 (1994).

<sup>77</sup> This debate was forced by the people of the states through their ratifying conventions. The conventions of many states chose to use the ratification process as another vehicle for securing their right to local, community self-government. They did so by offering amendments that incorporated the principles of the Declaration directly into the text of the Constitution. The states that voted to reject the Constitution outright (and the populations they represented), and the states that refused to ratify without the offering of those local self-government amendments (and the populations they represented) constituted a majority of the people living within the fourteen states that comprised the United States at the time of ratification. See *18th Century Documents: 1700-1799*, THE AVALON PROJECT, [http://avalon.law.yale.edu/subject\\_menus/18th.asp](http://avalon.law.yale.edu/subject_menus/18th.asp) (last visited May 9, 2016) (Ratification of the Constitution by the Various States). The total population represented by the 14 states reviewing the Constitution for ratification was approximately four million people; the total population represented by those states either outright rejecting the Constitution, or conditioning their approval on amending the principles of the Declaration into the Constitution was over two million people. The 14 states and their actions were Delaware (ratification without

Advocating for explicit inclusion, James Madison proposed amending the Constitution's preamble to include the following language:

That all power is originally vested in, and consequently derived from the people.

That government is instituted, and ought to be exercised for the benefit of the people, which consists in the enjoyment of life and liberty, with the right of acquiring and using property, and generally of pursuing and obtaining happiness and safety.

That the people have an indubitable, unalienable, and indefeasible right to reform or change their government, whenever it be found adverse or inadequate to the purposes of its institution.<sup>78</sup>

Madison argued that “[i]f it be a truth, and so self-evident that it cannot be denied—if it be recognized, as is the fact in many of the State Constitutions. . . this solemn truth should be inserted in the Constitution.”<sup>79</sup>

The House rejected the addition because it deemed the language already incorporated within the Constitution's preamble. Roger Sherman explained that because:

this right is indefeasible, and the people have recognized it in practice, the truth is better asserted than it can be by any words whatever. The words “We the people,” in the original Constitution, are as copious and expressive as possible; any addition will only drag out the sentence without illuminating it. . . <sup>80</sup>

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amendments); Pennsylvania (ratification without amendments); New Jersey (ratification without amendments); Georgia (ratification without amendments); Connecticut (ratification without amendments); Massachusetts (ratification without self-government amendments); Maryland (ratification without amendments); South Carolina (ratification without self-government amendments); New Hampshire (ratification without self-government amendments); Virginia (ratification with self-government amendments); New York (ratification with self-government amendments); North Carolina (adjourned without ratification, offered self-government amendments); Rhode Island (refused to ratify, then ratified with self-government amendments); Vermont (ratified without amendments). *Ratification of the Constitution by the State of Virginia; June 26, 1788*, THE AVALON PROJECT, [http://avalon.law.yale.edu/18th\\_century/ratva.asp](http://avalon.law.yale.edu/18th_century/ratva.asp) (last visited May 9, 2016).

<sup>78</sup> See 1 ANNALS OF CONG. 451 (1789) (Joseph Gales ed., 1834), [http://press-pubs.uchicago.edu/founders/print\\_documents/v1ch14s52.html](http://press-pubs.uchicago.edu/founders/print_documents/v1ch14s52.html). (statement of Rep. Madison).

<sup>79</sup> *Id.*

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Fourteen years later, in *Marbury v. Madison*, the U.S. Supreme Court validated Sherman's stance. Interpreting the Constitution's preamble as recognizing the people's inherent and fundamental right of self-government, the Court concluded:

[t]hat the people have an original right to establish, for their future government, such principles as, in their own opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected.<sup>81</sup>

The right of local, community self-government, as a fundamental right, is also secured by the Ninth Amendment to the U.S. Constitution. It says, "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage other rights retained by the people."<sup>82</sup> As the concurrence in *Griswold* explained, "The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, [in addition to] those fundamental rights specifically mentioned in the first eight constitutional amendments."<sup>83</sup>

Historical evidence uncovered in the last 25 years shows that the intent of the Ninth Amendment was to elevate the natural rights of people that pre-existed the Constitution to fundamentally protected status, whether or not the rights were explicitly enumerated in the Bill of Rights.<sup>84</sup> These pre-existing natural rights include individual rights as well as collective rights.<sup>85</sup> Among the retained rights of the people is the fundamental right to alter or abolish their form of government whenever they see fit.<sup>86</sup> As legal scholar Kurt Lash explains:

The right to local self-government is a right retained by all people and can be exercised in whatever political direction the people please. What we have

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<sup>81</sup> *Marbury v. Madison*, 5 U.S. 137, 176 (1803).

<sup>82</sup> U.S. CONST. amend. IX.

<sup>83</sup> *Griswold v. Connecticut*, 381 U.S. 479, 488 (1965) (Goldberg, J., concurring).

<sup>84</sup> See Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1, 28-29 (2006).

<sup>85</sup> *Id.* at 20-21, 46.

<sup>86</sup> See *Henry Broderick, Inc. v. Riley*, 157 P.2d 954, 966 (Wash. 1945) (arguing that the Ninth Amendment serves as a "[sentinel] against overcentralization of government, [and as a monument] to the wisdom of the constitutional framers who realized that for the stable preservation of our form of government, it is essential that local governmental functions be locally performed."); See generally 2 WILLIAM BLACKSTONE, COMMENTARIES \*162.

forgotten, what we have lost, is that the right to local self-government is more than an idea. It is a right enshrined in the Constitution itself.<sup>87</sup>

### III. State supreme courts have recognized and enforced the right of local, community self-government.

Given that the history and tradition of this country require a recognition of the right of local, community self-government, it should not be a surprise that many state supreme courts have done so, and have enforced the right against actions that violated it.

In 1857, in the case of *People v. Draper*, the Court of Appeals of New York ruled that it was constitutional for the state legislature to create a police review board for a new, local four-county district.<sup>88</sup> In a seminal dissent that eventually became the majority opinion in future cases, the Court declared:

The right of self-government in the local bodies, and the power of the people of those communities to select the local officers and conduct the local administration, a right of very ancient origin, and hitherto deemed to be of inestimable value, would utterly disappear, or exist only at the pleasure of the legislature. . . The constitution of 1846 did not provide a government for a new people, for a community of men just collected together and without civil government. . . It was the amendment and reformation of a scheme already existing; the substantial and material institutions and forms of which had come down to us from our English ancestors. . . It was the object of the organic instrument to preserve them, to perpetuate them, to improve and perfect them by the knowledge and suggestions of later times; not to impair their strength or deform their fair propositions. . .

When the present instrument was formed, the entire territory of the state was separated, and appropriated by its civil divisions, its counties, cities, and towns. . . These civil divisions are coeval with the government. The state has never existed a moment without them. All our thoughts and notions of civil government are inseparably associated with counties, cities and towns. They are permanent elements in the frame of government, and so treated in the instrument that creates it. . . The state at large is, and ever has been, an aggregate of these local bodies. They have habitually and uninterruptedly exercised many of the

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<sup>87</sup> Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 TEX. L. REV. 331, 360 (2004); *See also* U.S. CONST. art. IV, § 4.

<sup>88</sup> *People ex rel. Wood v. Draper*, 15 N.Y. 532, 556-58, 560-62 (1857).

powers and functions of government. . . They are the opposites of those systems which collect all power at a common centre, to be wielded by a common will, and to effect a given purpose, which absorb all political authority, exercise all its functions, distribute all its patronage, repress the public activity, stifle the public voice, and crush out the public liberty.<sup>89</sup>

In 1871, the Michigan Supreme Court decided *People v. Hurlbut*, in which the Court held that the *inherent* right of local self-government prevented the legislature from permanently appointing members of a new Detroit board of public works.<sup>90</sup> The opinion of the Court established the “Cooley Doctrine” – that people possess an inherent, constitutionally-protected right of local, community self-government that state action cannot infringe. Chief Justice Cooley described it thusly:

[T]he question, broadly and nakedly stated, can be nothing short of this: Whether local self-government in this state is or is not a mere privilege, conceded by the legislature in its discretion, and which may be withdrawn at any time at pleasure? I state the question thus broadly because, notwithstanding the able arguments made in this case, and after mature deliberation, I can conceive of no argument in support of the legislative authority which will stop short of this plenary and sovereign right.

Now, it must be conceded that the judicial decisions and law writers generally assert that the state creates the municipal bodies, endows them with such of the functions of corporate life and entrusts them with such share in the local government, as to the legislative judgment shall seem best; that it controls and regulates their action while they exist, subjects them to such changes as public policy may dictate, and abolishes them at discretion; in short that the corporate entities are mere agencies which the state employs for the convenience of government, clothing them for the time being with a portion of its sovereignty, but recalling the whole or any part thereof whenever the necessity or usefulness of the delegation is no longer apparent. This I understand to be the accepted theory of state constitutional law as regards the municipal governments. We seldom have occasion to inquire whether this amplitude of legislative authority is or is not too strongly expressed, for the reason that its exercise is generally confined within such bounds as custom has pointed out, so that no question is made concerning it. But such maxims of government are very seldom true in anything more than a general sense; they never are and never can be literally accepted in practice.

Our constitution assumes the existence of counties and townships, and evidently contemplates that the state shall continue to be subdivided as it has

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<sup>89</sup> *Id.*

<sup>90</sup> *People ex rel. Le Roy v. Hurlbut*, 24 Mich. 44, 95-109 (1871) (emphasis added).



hitherto been; but it nowhere expressly provides that every portion of the state shall have county or township organizations. . . . If, therefore, no restraints are imposed upon legislative discretion beyond those specifically stated, the township and county government of any portion of the state might be abolished, and the people be subjected to the rule of commissions appointed at the capital. The people of such portion might thus be kept in a state of pupilage and dependence to any extent, and for any period of time the state might choose.

The doctrine that within any general grant of legislative power by the constitution there can be found authority thus to take from the people the management of their local concerns, and the choice, directly or indirectly, of their local officers, if practically asserted, would be somewhat startling to our people, and would be likely to lead hereafter to a more careful scrutiny of the charters of government framed by them, lest sometime, by an inadvertent use of words, they might be found to have conferred upon some agency of their own, the legal authority to take away their liberties altogether. If we look into the several state constitutions to see what verbal restrictions have heretofore been placed upon legislative authority in this regard, we shall find them very few and simple. We have taken great pains to surround the life, liberty, and property of the individual with guaranties, but we have not, as a general thing, guarded local government with similar protections. We must assume either an intention that the legislative control should be constant and absolute, *or, on the other hand, that there are certain fundamental principles in our general framework of government, which are within the contemplation of the people when they agree upon the written charter, subject to which the delegations of authority to the several departments of government have been made....*

The circumstances from which these implications arise are: *First*, that the constitution has been adopted in view of a system of local government, well understood and tolerably uniform in character, existing from the very earliest settlement of the country, never for a moment suspended or displaced, and the continued existence of which is assumed; and, *second*, that the liberties of the people have generally been supposed to spring from, and be dependent upon that system.

DeTocqueville. . . speaking of the New England township government, whose system we have followed in the main, says: "In this part of the union the impulsion of political activity was given in the townships; and it may almost be said that each of them originally formed an independent nation. When the kings of England asserted their supremacy, they were contented to assume the central power of the state. The townships of New England remained as they were before; and, although they are now subject to the state, they were at first scarcely dependent upon it. It is important to remember that they have not been invested with privileges, but that they seem on the contrary, to have surrendered a portion of their independence to the state. The townships are only subordinate to the states in those interests which I shall term *social*, as they are common to all the citizens. They are independent in all that concerns themselves; and among the inhabitants

is here speaking of the theory of our institutions, he is in error. It is not the accepted theory that the states have received delegations of power from independent towns; but the theory is, on the other hand, that the state governments precede the local, create the latter at discretion, and endow them with corporate life. But, historically, it is as difficult to prove this theory as it would be to demonstrate that the origin of government is in compact, or that title to property comes from occupancy. The historical fact is, that local governments universally, in this country, were either simultaneous with, or preceded, the more central authority. . .

.....

[L]ocal government is a matter of absolute right; and the state cannot take it away. It would be the boldest mockery to speak of a city as possessing municipal liberty where the state not only shaped its government, but at discretion sent in its own agents to administer it; or to call that system one of constitutional freedom under which it should be equally admissible to allow the people full control in their local affairs, or no control at all.

.....

[W]hen the state reaches out and draws to itself and appropriates the powers which from time immemorial have been locally possessed and exercised, and introduces into its legislation the centralizing ideas of continental Europe, under which despotism, whether of monarch or commune, alone has flourished, we seem forced back upon and compelled to take up and defend the plainest and most primary axioms of free government, as if even in Anglican liberty, which has been gained step by step, through extorted charters and bills of rights, the punishment of kings and the overthrow of dynasties, nothing was settled and nothing established.<sup>91</sup>

Following the seminal decision in *Hurlbut*, other state supreme courts recognized the right of local, community self-government. In *People v. Lynch*, the California Supreme Court ruled on a challenge by a landowner to a local property tax assessment, which had been mandated directly by the state legislature rather than by the local government.<sup>92</sup> In striking down the authority of the state to impose the assessment and thus exercise a local governmental power, the Court declared that:

[h]ad the Constitution of California been silent in respect to cities and incorporated villages, the Legislature would have possessed the power to create them; but it would perhaps have been more difficult to say whether the people could not have been deprived of these local governments. . .What did they have in their minds when they spoke of cities and villages? It needed but to recall their

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<sup>91</sup> *Id.*

<sup>92</sup> *People v. Lynch*, 51 Cal. 15 (1875).

origin and history to impress the Constitutional Convention with a conviction that municipalities are invaluable to a great and free people. The enlightened genius of the Roman civilization was planted and fostered by the establishment of colonies with urban privileges. In the Dark Ages the chartered towns in Europe served to curb the turbulence of the more potent of the crown vassals, and to erect barriers for the protection of personal rights against the rude force of the feudal barons.

It often happened that from such centres of self-government the spirit of freedom was extended and expanded, and it may safely be said of the English boroughs--for example--that they were largely instrumental in developing the constitution of government which made that people jealous of the liberty they possessed, and capable of receiving still greater accessions of the same blessing. In our own country the existence of local political corporations began with the earlier settlement of the colonies. The benefits of such subordinate communities as schools of preparation for the discharge by the citizen of the duties he owes to his country at large, have been highly estimated by philosophical writers who have given their attention to the subject,--the distinguished author of *La Democratie en Amerique* considering the New England "towns"--which are like cities in so far as they possess certain powers of government--as the very life of American liberty.<sup>93</sup>

In *State v. Denny*, the Supreme Court of Indiana overturned a state act that sought to replace existing fire and police boards with new boards appointed by the state legislature.<sup>94</sup> In declaring that the act violated the right of the people of those communities to local self-government, the court declared:

It is contended by counsel for appellants that by the constitution of the state all power is vested in the legislative department of the government, except such as is expressly granted to the executive, the judiciary, and retained by the people in the constitution itself. We are not in harmony with counsel's theory of our state government, but we state it this way: At the adoption of the state constitution all power was vested in the people of the state. The people still retain all power except such as they expressly delegated to the several departments of the state government by the adoption of the constitution; that the legislative, executive, and judiciary departments of the state have only such powers as are granted to them by the constitution. In the first section and first article of the constitution it is declared "that all power is inherent in the people." . . . In construing and giving an interpretation to the constitution, we must take into consideration the situation as it existed at the time of its adoption, the fact expressed in the instrument that all power is inherent in the people, the rights and powers vested in and then exercised by the people, the existence of cities and towns, and the right of local self-government exercised by them, the laws in force, and form of government

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<sup>93</sup> *Id.* at 29-30.

<sup>94</sup> *State v. Denny*, 21 N.E. 274 (Ind. 1889).

existing at the time of its adoption. *One of the fundamental principles of municipal corporations is the right of local self-government*, including the right to choose local officers to administer the affairs of the municipality.

.....  
 We might quote from numerous other authorities to the same effect as the above, but we have quoted sufficient to show that the right of local self-government, including the right of the people of a municipality to select their own officers, was a sacred fundamental principle and idea of municipal corporations, well founded, sacredly guarded, and long enjoyed by the people of the state at the time of the adoption of the constitution. *As we interpret the theory of our state government, this right of local self-government vested in, exercised, and enjoyed by the people of the municipalities of the state at the time of the adoption of the constitution yet remains in them, unless expressly yielded up and granted to one of the branches of the state government by the constitution.*

.....  
*The conclusion we unhesitatingly reach is that the right of local self-government in towns and cities of this state is vested in the people of the respective municipalities, and that the general assembly has no right to appoint the officers to manage and administer municipal affairs; that the right of the general assembly ends with the enactment of laws prescribing the manner of selection and the duties of the officers. . .*

.....  
 Judge Cooley, in his work on Constitutional Limitation, (5th Ed. 47) says: "In considering state constitutions we must not commit the mistake of supposing that because individual rights are guarded and protected by them they must also be considered as owing their origin to them. These instruments measure the powers of the rulers, but they do not measure the rights of the governed. What is a constitution, and what are its objects? It is easier to tell what it is not than what it is. It is not the beginning of a community, nor the origin of private rights; it is not the fountain of law, nor the incipient state of government; it is not the cause but consequence of personal and political freedom; it grants no rights to the people, but is the creature of their power, the instrument of their convenience. Designed for their protection in the enjoyment of the rights and powers which they possessed before the constitution was made, it is but the frame-work of the political government, and necessarily based upon the pre-existing condition of laws, rights, habits, and modes of thought." Again, he says on the same page: "A written constitution is, in every instance, a limitation upon the powers of government in the hands of agents, for there never was a written republican constitution which delegated to functionaries all the latent powers which lie dormant in every nation, and are boundless in extent and incapable of definition."<sup>95</sup>

The Iowa Supreme Court recognized the right of local, community self-government in

*State v. Barker*, in which the court struck a state statute that authorized the legislature to replace

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<sup>95</sup> *Id.* at 277-83 (emphasis added).

a local board with a board of state appointees.<sup>96</sup> In finding the existence of a right of local self-government, the Court explained that:

[o]ur own towns were established in accordance with the English principles of liberty, but they generally possess greater powers of local self-government than their English prototypes; and, as said by Cooley in his work on Constitutional Limitations (page 223): "In contradistinction to those governments where powers are concentrated in one man, or in one or more bodies of men, whose supervision and active control extends to all the objects of government within the territorial limits of the state, the American system is one of complete decentralization, the primary and vital idea of which is that local affairs shall be managed by local authorities, and general affairs only by the central authorities."

.....  
This immunity from unlimited legislative control has been expressly recognized by the supreme court of the United States in *City of New Orleans v. New Orleans Waterworks Co.*, 142 U. S. 79, 12 Sup. Ct. 142, 35 L. Ed. 943, where it is said "that the municipality, being a mere agent of the state, stands in its governmental or public character in no contract relation with its sovereign, at whose pleasure its charter may be amended, changed, or revoked without the impairment of any constitutional obligation, while with respect to its private or proprietary rights and interests it may be entitled to the constitutional protection." . . . Some of the cases cited proceed on the theory that the legislature has no power, after creating a municipal corporation, to take away from it the right of local self-government. The argument is that the intention to preserve and perpetuate the ancient right of local self-government, which the law recognizes as of common-law origin, and having no less than common-law franchises, is apparent throughout the scope of most American constitutions. Some of the judges even go so far as to say "that, local self-government having always been a part of the English and American systems, we shall look for its recognition in any such instrument [constitution]; and, if not expressly recognized, it is still to be understood that all these instruments are framed with its present existence and anticipated continuance in view"; "that back of all constitutions are certain usages and maxims that have sprung from the habits of life, mode of thought, methods of trying facts, and mutual responsibility in neighborhood interests; precepts that have come from revolutions which overturned tyrannies; sentiments of manly independence and self-control, which impelled our ancestors to summon the local community to redress local evils, instead of relying upon king or legislature at a distance to do so; that form the living spirit of the lifeless skeleton known as the constitution; that gives it force and attraction, and that distinguishes it from the numberless so-called constitutions of Europe; and that this so-called living spirit should supply the interpretation of the words of the written charter." We are not to be understood as fully approving all that is said in some of the cases regarding the right of local self-government, nor do we mean to hold that there is an unwritten constitution complete and comprehensive in itself. All that we intend to announce is that

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<sup>96</sup> *State v. Barker*, 89 N.W. 204 (Iowa 1902).

written constitutions should be construed with reference to and in the light of well-recognized and fundamental principles lying back of all constitutions, and constituting the very warp and woof of these fabrics. . .<sup>97</sup>

In *Ex Parte Lewis*, the Texas Court of Criminal Appeals overturned a conviction obtained under a Galveston city ordinance, which had, in turn, been adopted by three gubernatorial appointees, rather than by local officials.<sup>98</sup> The convicted man argued that because the state had appointed a majority of the members of the board, the right of local self-government had been violated, and, therefore, the conviction must be overturned. In agreeing with the appellant, the Court explained:

In *State v. McAlister*, it was said that municipal governments had existed before the formation of the Constitution, and the well-known and common method of city government was recognized as pre-existent. It was further said "that a purpose to destroy a system of municipal government so common in the state will not be attributed to the convention that framed the Constitution unless the language used is so certain as to compel such a construction by the courts." This, as we have seen, is in consonance with the views expressed by Judge Cooley and other jurists. The fact that a system of municipal government was long in vogue prior to the enactment of the Constitution, and that under this system, from time immemorial, local self-government was recognized, and the power of the suffragans in cities to elect their own municipal officers was conceded, and that nowhere and at no time had the power ever been claimed on the part of the Legislature to interfere by authorizing the Governor to appoint local municipal officers, must afford strong evidence of an existing condition which would indicate that there was no purpose on the part of those who framed our organic law to destroy a system of municipal government which had always heretofore been recognized. We do not understand that the Constitution grants all power which is not expressly reserved to the legislative body of the government. This is reserved to the people. Only the lawmaking power belongs to the Legislature, and this must be in accordance with the Constitution and with the principles of local self-government reserved to the people of the state, because the Constitution says that all political power is inherent in the people, not in the Legislature, and the right of local self-government is reserved to the state.

Local self-government is not the mere whim and caprice of the legislative department, nor does it appertain to any distinctive locality of the state, but to the whole state, and as it had aforesaid existed in the state. The principle of local self-government is applicable to every organized portion of the state; and if in the

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<sup>97</sup> *Id.* at 206-07.

<sup>98</sup> *Ex Parte Lewis*, 45 Tex. Crim. 1, 73 S.W. 811, 817-19 (1903).

history and traditions of our commonwealth, as well as that of other states, municipalities always exercised the right to select their own local municipal officers, then it would seem to follow that this was a part of the local self-government which remains unimpaired to the state. The Legislature is the lawmaking power, and to it alone is referred the authority to make laws; but it has no right, under the guise of its lawmaking authority, to overturn the principles of local self-government which have been handed down to us from our fathers.

It may be that here and there, under our American system, cities may be given over to corruption, and lawless elements permitted to run riot over the best interests of the municipality, but this can only be temporary. If we adhere rigidly to the principles of local self-government, in the end conservatism and enlightenment and American citizenship will triumph. But if this incentive on the part of the better classes for good government is removed, and localities taught to depend on some central power to take care of them, we may never expect an improvement. On the contrary, the seeds of our free institutions, planted by the fathers in the townships and municipalities, will be scattered to the winds, anarchy will run riot throughout the entire body politic, while we look in vain for some strong central power to arrest the destruction of our liberties which have rested hitherto upon that vital and essential principle of the republic-local self-government by the people.<sup>99</sup>

In *Commonwealth v. McElwee*, the Pennsylvania Supreme Court recognized the right of local, community self-government.<sup>100</sup> There, the state legislature adopted an act that empowered the Pennsylvania Auditor General to appoint individuals to serve on a board of taxation assessment that would set tax rates in all counties of the third class. The constitutionality of the act was challenged by Montgomery County’s existing board of taxation assessment. In finding the act unconstitutional, the Court explained that:

[O]ne is impressed with the fact that it violates the principle of “home rule,” i.e., local self-government, which, like the tripartite separation of governmental powers, is a vital part of both the foundations and the general framework of our state and federal governments. . . . In other states, notably Michigan, the principle of “home rule” is declared by the highest courts of these states to be implicit in the Constitution. Some of the most eminent juristic authorities uphold th[at] view.

<sup>101</sup>

<sup>99</sup> *Id.*

<sup>100</sup> *Commonwealth ex rel. Smillie v. McElwee*, 327 Pa. 148, 193 A. 628, 630 (1937).

<sup>101</sup> *Id.*

The Court further declared that:

Cooley in his “Constitutional Limitations” (8th Ed.), aptly says:

“In the examination of American constitutional law, we shall not fail to notice the care taken and the means adopted to bring the agencies by which power is to be exercised as near as possible to the subjects upon which the power is to operate. In contradistinction to those governments where power is concentrated in one man, or one or more bodies of men, whose supervision and active control extends to all the objects of government within the territorial limits of the State, the American system is one of complete decentralization, the primary and vital idea of which is, that local affairs shall be managed by local authorities, and general affairs only by the central authority. . . The system is one which seems a part of the very nature of the race to which we belong.”<sup>102</sup>

The Court then adopted the reasoning of the Michigan Supreme Court in *People v. Hurlbut*, in which the Court declared that:

[t]he constitution has been adopted in view of a system of local government, well understood and tolerably uniform in character, existing from the very earliest settlement of the country; never for a moment suspended or displaced, and the continued existence of which is assumed. . . and that the liberties of the people have generally been supposed to spring from, and be dependent upon, that system.<sup>103</sup>

The above is a small sampling of judicial recognition of the right of local, community self-government. The highest courts of at least fourteen states have followed Cooley’s principle from *Hurlbut*, finding as he did the existence of an inherent right of local self-government. Only one of those decisions (in Nebraska) has been overturned, the others therefore remaining good law.<sup>104</sup> Consistent with this solid body of jurisprudence, jurists and legal commentators alike

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<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> In addition to the cases *supra*, see, e.g., Lynch, *supra* note 92, at 27 (approving Judge Cooley’s opinion that the right of local self-government is implied in our constitutions, and adding in this regard, “By the Tenth Amendment of the Constitution of the United States . . . The Government of the United States can exercise only such powers as are expressly granted to it, and such as are necessarily implied from those granted. It follows from this, that the people of the States respectively retain such powers as have neither been granted, expressly or by implication, to the Government of the United States, nor conferred on the State governments.”); *State v. Moores*, 76 N.W. 175, 177-180 (Neb. 1898), *overruled by* *Redell v. Moores*, 88 N.W. 243 (Neb. 1901) (“It cannot be asserted that the only rights reserved to the people are those enumerated in said article of the constitution, since section 26 thereof declares, “This enumeration of rights shall not be construed to impair or deny others, retained by the people, and all



have recognized the constitutional basis of the right of local, community self-government, and have written extensively about it.<sup>105</sup>

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powers not herein delegated, remain with the people.... On the contrary, it is very evident that the constitution was framed upon the theory of local self-government.”); *State ex rel. Pearson v. Hayes*, 61 N.H. 264, 322 (1881) (“Local self-government (including much administration of law, and the extensive use of the law-making powers of taxation and police), introduced not only before the organization of both the state and province of New Hampshire, but also before the extension of Massachusetts jurisdiction to the Piscataqua, and continuing in uninterrupted operation more than two hundred years, has been constitutionally established by recognition and usage.”); *Rathbone v. Wirth*, 45 N.E. 15, 17 (N.Y. 1896) (the right of local self-government “inheres in a republican government and with reference to which our Constitution was framed .... [A]s Judge Cooley has remarked with reference to the Constitutions of the states, ‘if not expressly reserved, it is still to be understood that all these instruments are framed with its present existence and anticipated continuance in view.’”); *Helena Consol. Water Co. v. Steele*, 49 P. 382, 386 (Mont. 1897) (“We think the two provisos of the law under discussion are in violation of the clauses of the constitution quoted and referred to above, as well as the spirit of our governmental system, which recognizes ‘that the people of every hamlet, town, and city of the state are entitled to the benefits of local self-government.’”); *State v. Stanford*, 66 P. 1061, 1062 (Utah 1901) (“An examination into its early history will show the existence of a system of territorial subdivisions of the state into counties when the present constitution was adopted. At this early date the system of local self-government existed under the general laws of the territory, and there is no provision in the constitution which can be construed as impairing that right .... [T]he Constitution implies a right of local self-government to each county”); *Schubel v. Olcott*, 60 Or. 503, 513 (1912) (“The principle of local self-government is regarded as fundamental in American political institutions. It is not an American invention, but is traditional in England, and is justly regarded as one of the most valuable safeguards against tyranny and oppression.”); *Simpson v. O’Hara*, 70 Or. 261, 263 (1914) (“Local self-government lies at the very foundation of freedom, and the private and local affairs of a community are sacred from the interference of the central power, unless oppressive and unreasonable encroachment on the liberties of the citizen renders such interference imperatively necessary...”); *Fed. Gas & Fuel Co. v. City of Columbus*, 118 N.E. 103, 105 (Ohio 1917) (“If all political power is inherent in the people, as written in our Constitution, for the government of the state, it would seem at least of equal importance that all political power should be inherent in the people for the government of our cities and villages.”); *State v. Essling*, 195 N.W. 539, 541 (Minn. 1923) (“The doctrine that local self-government is fundamental in American political institutions; that it existed before the states adopted their Constitutions, and that it is more than a mere privilege conceded by the Legislature in its discretion is ably discussed in *People v. Hurlbut*.”); *Town of Holyoke v. Smith*, 226 P. 158, 158 (Colo. 1924) (“The central idea of government in this country was and is that in local matters municipalities should be self-governing.”).

<sup>105</sup> A contemporary treatise, McQuillin’s *Municipal Corporations*, acknowledges that many jurisdictions have, contrary to history and practice, rejected the concept of an inherent, inalienable right of local self-government: “Contrary to general opinion and to practice largely, it seems that the doctrine of the existence of an inherent right of local self-government or home rule does not at present exist, and according to some authorities never did. According to some, however, this view is contrary to the historical development of cities and towns both in England and in this country.” 1 EUGENE MCQUILLIN, *MUNICIPAL CORPORATIONS*, § 1:45 (Thomson Reuters 3d ed., 2010). McQuillin shows how, despite contrary jurisprudence, the right is firmly embedded in the history of American government, making it a component of liberty that individuals today may assert in good faith: “The history of the early American settlements establish that the principle of local self-government found a firm lodging on our soil. Everything relating to the public life of the colonists indicates that a home or local government was their central political idea.” *Id.* at § 1:38. “Since our country was conceived on the theory of local self-government, political power has, from the beginning, been exercised by citizens of the various local communities. Having been so dedicated by long practice, local self-government has come to be regarded as the most important feature in our system. The American people have always acted upon the deep-seated conviction that local matters can be better regulated by the people of the locality than by the state or central authority .... Local self-government is, thus, a guaranty of individual liberty.” *Id.* at § 1:40; *See, e.g.,* Amasa M. Eaton, *The Right to Local Self-Government*, 13 HARV. L. REV. 441, 570 (1900).

#### IV. Corporate constitutional “rights,” Dillon’s Rule, and ceiling preemption all unconstitutionally infringe the people’s right of local, community self-government.

Despite the colonial history of local, community self-government, the constitutional and judicial fabric woven from that principle, and the necessity of the principle to ordered liberty, community lawmaking as the legitimate exercise of self-government has generated mostly critical, occasionally derisive treatment from legislators, jurists, and commentators.<sup>106</sup> Consistent with this attitude, American jurisprudence has developed legal doctrines that infringe the right of local, community self-government, both by denying it outright and by severely restricting local governmental power allowed for communities by state law. These doctrines include corporate constitutional “rights,” Dillon’s Rule, and ceiling preemption.<sup>107</sup>

##### A. Corporate constitutional “rights” infringe the people’s right of local, community self-government.

Over the past 150 years, the judiciary has conferred constitutional rights, initially intended to protect only natural persons, upon corporations.<sup>108</sup> It has done so by “finding” corporations in the Fourteenth Amendment<sup>109</sup>, the Bill of Rights<sup>110</sup>, and the Contracts and

<sup>106</sup> See, e.g., Howard Lee McBain, *The Doctrine of an Inherent Right of Local Self-Government: I. The Extent of its Application by American Courts*, 16 COLUM. L. REV. 190, 195 (1916) (declaring that Judge Cooley’s “elaborate argument in support of the existence of a legal right of local self-government independent of constitutional provisions was not only confessedly but also logically dictum”).

<sup>107</sup> For purposes of this article, the phrase “corporate ‘rights’” includes both corporate “personhood” rights (those core constitutional rights belonging to natural persons, that have been conferred by the judiciary on the corporate form), and those judicially-conferred on the corporate form through the Commerce and Contracts Clauses of the United States Constitution. “Dillon’s Rule” refers to the legal doctrine developed by Judge John Forrest Dillon of the Iowa Supreme Court, which established plenary municipal subordinancy to state government. See *supra*, at 5.

<sup>108</sup> *Monell v. Dep’t of Soc. Servs. of the City of New York*, 436 U.S. 658, 687 (1978) (“by 1871, it was well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis.”).

<sup>109</sup> Corporations were declared to be “persons” entitled to Fourteenth Amendment equal protection and due process protections in *Santa Clara County v. S. Pac. R.R. Co.*, 118 U.S. 394, 394-95. (1886) (equal protection) and *Minneapolis & St. Louis R.R. Co. v. Beckwith*, 129 U.S. 26, 28 (1889) (due process).

<sup>110</sup> Corporations were declared to be entitled to First Amendment protections in *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); to Fourth Amendment protections in *Hale v. Henkel*, 201 U.S. 43 (1906); and to Fifth

Commerce Clauses<sup>111</sup> of the United States Constitution. As the judiciary conferred constitutional rights on corporations, the legal community justified these bestowals with literature asserting that corporations are merely groups of persons, and thus entitled to such protections.<sup>112</sup>

Endowed by state and federal governments with constitutional rights, business corporations have used their First,<sup>113</sup> Fifth,<sup>114</sup> and Fourteenth Amendment<sup>115</sup> “rights” to nullify laws that seek to protect the people’s health, safety, and welfare. Corporations have also used rights under the Contracts<sup>116</sup> and Commerce<sup>117</sup> Clauses of the U.S. Constitution to strike down

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Amendment protections in *Noble v. Union River Logging R. Co.*, 147 U.S. 165 (1893); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922); and *Fong Foo v. United States*, 369 U.S. 141 (1962).

<sup>111</sup> Courts conferred Contracts Clause protections on corporate charters in *Dartmouth Coll. v. Woodward*, 17 U.S. 518 (1819). For a contemporary use of the Contracts Clause to override local decision making, see *City of New Orleans v. BellSouth Telecomm., Inc.*, 690 F.3d 312 (5th Cir. 2012) (striking a law that imposed new consideration on a telecommunications corporation for the use of rights-of-way within the City). For an example of Commerce Clause protections for the corporate form, see *S.D. Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583 (8th Cir. 2003) (striking down the State’s anti-corporate farming law as a violation of agribusiness corporations’ rights under the Commerce Clause).

<sup>112</sup> MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960*, at 80, 101, 145 (1992) (explaining that “[t]he efforts by legal thinkers to legitimate the business corporation during the 1890’s were buttressed by a stunning reversal in American economic thought – a movement to defend and justify as inevitable the emergence of large-scale corporate concentration”).

<sup>113</sup> In 2010, the Supreme Court invalidated federal campaign finance laws as violative of the corporate “right” to free speech as a “person.” *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010). See *Int’l Dairy Foods v. Amestoy*, 92 F.3d 67 (2d Cir. 1996) (nullifying a dairy labeling law in Vermont that violated the corporate “right” not to be compelled to speak under the First Amendment); see *CTIA-The Wireless Ass’n v. City of San Francisco*, No. 11-17707, No. 11-17773 (9th Cir., unreported memorandum opinion, Sep. 10, 2012) (striking a City law requiring retail point-of-purchase warnings for health risks from cellular telephone radio emissions as a violation of speech rights); see *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (nullifying a state law banning corporate spending on political referenda); see *Pac. Gas & Elec. Co. v. Pub. Util. Comm’n*, 475 U.S. 1 (1986) (preventing utility ratepayers from using space within a utility’s monthly billing envelopes for consumer communications); see *Cent. Hudson Gas & Elec. Corp. v. Pub. Util. Comm’n*, 447 U.S. 557 (1980) (overturning regulations aimed at conserving electricity during the 1970’s energy crisis); *Jacobus v. Alaska*, 338 F.3d 1095 (9th Cir. 2003) (banning states from curtailing corporate participation in electoral activities as a violation of corporate free speech rights).

<sup>114</sup> *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922) (overturning a Pennsylvania law - the Kohler Act – which required coal operators to leave pillars of coal in place to prevent subsidence, as violating the Fifth Amendment rights of coal corporations).

<sup>115</sup> For the seminal cases conferring Fourteenth Amendment due process and equal protection rights onto the corporate form, see *Santa Clara County v. S. Pac. R.R.* 118 U.S. 394 (1886) (conferring equal protection rights onto the corporate form); *Minneapolis & St. Louis R.R. v. Beckwith*, 129 U.S. 26 (1889) (conferring due process rights onto the corporate form).

<sup>116</sup> See *Dartmouth Coll. v. Woodward*, 17 U.S. 518 (1819) (declaring that corporate charters were contracts protected by the Constitution’s Contracts Clause, and therefore, that state legislatures were prohibited from unilaterally altering those charters. Interestingly, the Court also explained that municipal charters were not subject to the same prohibitions, thus enabling States to alter laws governing municipal corporations at will).

similar laws. But when a corporation asserts a constitutional “right” to nullify a federal, state, or local law that secures people’s political or civil rights, it infringes upon the fundamental right of local, community self-government. That right is none other than the people’s fundamental power to govern to protect their political and civil liberties. In short, a corporation’s assertion of constitutional rights to nullify a law negates the people’s fundamental power to govern themselves.

In addition to such direct infringement of the right of local, community self-government through the nullification of laws, these assertions of corporate constitutional rights indirectly infringe the right of self-government by “chilling” the actions of state and local legislators. For example, when Chemical Waste Management, Inc. successfully sued the State of Alabama, claiming that the State’s differential taxation of out-of-state-generated hazardous waste violated the corporation’s rights under the Commerce Clause,<sup>118</sup> the decision served to eliminate legislative options across all states that sought to protect residents from the influx of out-of-state-generated hazardous waste.<sup>119</sup>

The judiciary’s finding of corporations within these constitutional rights—and especially within the Fourteenth Amendment’s guarantees of due process and equal protection—has been

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<sup>117</sup> *South Dakota Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583 (8th Cir. 2003) (using the Commerce Clause to overturn South Dakota’s anti-corporate farming law, which banned corporations from owning farmland or engaging in farming within the State); *See Smithfield Foods, Inc. v. Miller*, 367 F.3d 1061 (8th Cir. 2003) (striking down laws regulating corporate involvement in hog production); *Synagro-WWT, Inc. v. Rush Twp.*, 204 F. Supp. 2d 827 (M.D. Pa. 2002), 299 F. Supp. 2d 410 (M.D. Pa. 2003) (striking down local laws intended to protect residents from corporate-hauled land applied sewage sludge); *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525 (1949) (striking down laws dealing with milk licenses intended to protect competition and milk supply); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935) (striking down laws mandating milk dealer prices which were adopted to ensure economically viable dairy farming).

<sup>118</sup> *See Chemical Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334 (1992).

<sup>119</sup> Rosemary O’Leary, *Trash Talk: The Supreme Court and the Interstate Transportation of Waste*, 57 PUB. ADMIN. REV. 281, 281 (1997) (explaining that “[i]n a series of five key cases, the Supreme Court has tied the hands of state and local governments, severely limiting their options in regulating waste.”).

challenged by both U.S. Supreme Court jurists<sup>120</sup> and by state supreme court judges. Despite the well-settled nature of the doctrine of corporate constitutional “rights,” state courts in particular have begun to exhibit an increasing resistance to the doctrine.

In 2011, for example, Montana Supreme Court Justice James C. Nelson explained how corporate personhood is a perverted mutation of liberty’s roots in natural rights:

Lastly, I am compelled to say something about corporate “personhood.” While I recognize that this doctrine is firmly entrenched in the law, *see* *Bellotti*, 435 U.S. at 780 n. 15, 98 S. Ct. at 1418 n. 15; *but see* 435 U.S. at 822, 98 S. Ct. at 1439-40 (Rehnquist, J., dissenting), I find the entire concept offensive. Corporations are artificial creatures of law. As such, they should enjoy only those powers—not constitutional rights, but legislatively-conferred powers—that are concomitant with their legitimate function, that being limited-liability investment vehicles for business. Corporations are not persons. Human beings are persons, and it is an affront to the inviolable dignity of our species that courts have created a legal fiction which forces people—human beings—to share fundamental, natural rights with soulless creations of government. Worse still, while corporations and human beings share many of the same rights under the law, they clearly are not bound equally to the same codes of good conduct, decency, and morality, and they are not held equally accountable for their sins. Indeed, it is truly ironic that the death penalty and hell are reserved only to natural persons.<sup>121</sup>

<sup>120</sup> *See* *Connecticut Gen. Life Ins. v. Johnson*, 303 U.S. 77, 85-90 (1938) (Black, J., dissenting) (declaring that “[n]either the history nor the language of the Fourteenth Amendment justifies the belief that corporations are included within its protection”); *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 580 (1949) (Douglas, J., and Black, J., dissenting) (declaring that “I can only conclude that the *Santa Clara* case was wrong and should be overruled”); *See also* *Hale v. Henkel*, 201 U.S. 43, 78 (1906) (Harlan, J., concurring) (declaring that “in my opinion, a corporation—an artificial being, invisible, intangible, and existing only in contemplation of law—cannot claim the immunity given by the 4<sup>th</sup> Amendment; for it is not a part of the ‘people’ within the meaning of that Amendment. Nor is it embraced by the word ‘persons’ in the Amendment”); *Bell v. Maryland*, 378 U.S. 226, 263 (1964) (Douglas, J., dissenting) (declaring that “[t]he revolutionary change effected by affirmance in these sit-in cases would be much more damaging to an open and free society than what the Court did when it gave the corporation the sword and shield of the Due Process and Equal Protection Clauses of the Fourteenth Amendment”); *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 822 (1978) (Rehnquist, J., dissenting) (declaring that “[t]his Court decided at an early date, with neither argument nor discussion, that a business corporation is a ‘person’ entitled to the protection of the Equal Protection Clause of the Fourteenth Amendment”); *Citizens United v. Fed. Election Comm.*, 558 U.S. 310, 466 (2010) (Stevens, J., concurring in part, dissenting in part) (“corporations have no consciences, no beliefs, no feelings, no thoughts, no desires. . . they are not themselves members of ‘We the People’ by whom and for whom our Constitution was established. . . [today’s decision] is thus a rejection of the common sense of the American people, who have recognized a need to prevent corporations from undermining self-government since the founding. . .”); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2794 (2014) (Ginsburg, J., dissenting) (the “exercise of religion is characteristic of natural persons, not artificial legal entities.”).

<sup>121</sup> *W. Tradition P’ship, Inc. v. Attorney Gen. of State*, 271 P.3d 1, 36 (Mont. 2011) (Nelson, J., dissenting), *cert. granted, judgment rev’d sub nom.* *Am. Tradition P’ship, Inc. v. Bullock*, 132 S. Ct. 2490 (2012).

In 2013, in a case dealing with an oil and gas corporation's attempt to shield a settlement agreement from disclosure pursuant to the corporation's Fourth Amendment "rights," President Judge O'Dell-Seneca of the Washington County, Pennsylvania, Court of Common Pleas declared:

[t]here are no men or women defendants in the instant case; they are various business entities. . . These are all legal fictions, existing not by natural birth but by operations of state statutes. . . Such business entities cannot have been 'born equally free and independent,' because they were not born at all. Indeed, the framers of our constitution could not have intended them to be "free and independent," because, as the creations of the law, they are always subservient to it. . . In the absence of state law, business entities are nothing. Once created, they become property of the men and women who own them, and, therefore, the constitutional rights that business entities may assert are not coterminous or homogenous with the rights of human beings. . . Were they so, the chattel would become the co-equal to its owners, the servant on par with its masters, the agent the peer of its principals, and the legal fabrication superior to the law that created and sustains it. . . They cannot be 'let alone' by government, because businesses are but grapes, ripe upon the vine of the law, that the people of this Commonwealth raise, tend, and prune at their pleasure and need.<sup>122</sup>

**B. Corporate constitutional "rights" are not necessary to a compelling governmental interest.**

As shown earlier, the primary cause of the American Revolutionary War was the systemic usurpation of the right of local, community self-government by the British King and Parliament.<sup>123</sup> Those usurpations occurred not only through direct suppression of colonial legislation, but also through the King's empowerment of eighteenth century corporations of global trade, such as the East India Company. Oft-cited as the final spark of the War, the Boston Tea Party was the direct result of colonial opposition to the East India Company. The Company had secured its own interests from the British government through transfer of corporate tariff

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<sup>122</sup> *Hallowich v. Range Res. Corp.*, No. 2010-3954 (Wash. Co. 2013) (holding that corporation's privacy rights are not protected by the Pennsylvania Constitution's Declaration of Rights).

<sup>123</sup> *See, e.g.*, THE DECLARATION OF INDEPENDENCE para. 1-6 (U.S. 1776) (listing the first six grievances of the colonists).

obligations to the colonists as taxes.<sup>124</sup> This preferential treatment of corporations enabled the Company to monopolize the tea market in the colonies, even as Great Britain worked to eliminate the people’s rights to representation and local self-government.

It is well-settled law that business corporations are creations of the state.<sup>125</sup> Furthermore, the United States Supreme Court has repeatedly reaffirmed that business corporations are “creatures” of the state.<sup>126</sup> As such, they are chartered by the state, in the name of the people. It also is well-settled law that the Constitution protects people not only against the “State itself,” but also against “all of its creatures.”<sup>127</sup>

<sup>124</sup> JAMES K. HOSMER, SAMUEL ADAMS 236 (John T. Morse, Jr. ed., 1885) (stating that the British Parliament hoped that “the prosperity of the East India Company would be furthered, which for some time past, owing to the colonial non-importation agreements, had been obliged to see its tea accumulate in its warehouses, until the amount reached 17,000,000 pounds”).

<sup>125</sup> See *St. Louis, I.M. & S Ry. Co. v. Paul*, 173 U.S. 404 (1899) (declaring that corporations are “creations of state”); *Bank of Augusta v. Earle*, 38 U.S. 519, 520 (1839) (stating that “corporations are municipal creations of states”); *United States v. Morton Salt Co.*, 338 U.S. 632, 650 (1950) (explaining that corporations “are endowed with public attributes. They have a collective impact upon society, from which they derive the privilege as artificial entities”); *Hale v. Henkel*, 201 U.S. 43, 75 (1906) (declaring that “the corporation is a creature of the state. It is presumed to be incorporated for the benefit of the public. . . . Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation”); *Chinleclamouche Lumber & Broom Co. v. Commonwealth*, 100 Pa. 438, 444 (1881) (stating that “the objects for which a corporation is created are universally such as the government wishes to promote. They are deemed beneficial to the country”); See also *People v. N. River Sugar Refining Co.*, 24 N.E. 834, 835 (N.Y. 1890) (declaring that “[t]he life of a corporation is, indeed, less than that of the humblest citizen.”); *F.E. Nugent Funeral Home v. Beamish*, 173 A. 177, 179 (Pa. 1934) (declaring that “[c]orporations organized under a state’s laws. . . depend on it alone for power and authority”); *People v. Curtice*, 117 P. 357, 360 (Colo. 1911) (declaring that “[i]t is in no sense a sovereign corporation, because it rests on the will of the people of the entire state and continues only so long as the people of the entire state desire it to continue”).

<sup>126</sup> See, e.g., *Virginia Bankshares v. Sandberg*, 501 U.S. 1083, 1093 (1991); *Kamen v. Kember Fin. Servs.*, 500 U.S. 90, 99 (1991); *Braswell v. United States*, 487 U.S. 99, 105 (1988); *Burks v. Lasker*, 441 U.S. 471, 478 (1979); *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 778 fn.14 (1978); *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 479 (1977); *Cort v. Ash*, 422 U.S. 66, 84 (1975); *United Steelworkers of America v. R.H. Bouligny, Inc.*, 382 U.S. 145, 147 (1965); *Shapiro v. United States*, 335 U.S. 1, 66 (1948); *Ferry v. Ramsey*, 277 U.S. 88, 96-97 (1928); *Essgee Co. of China v. United States*, 262 U.S. 151, 155 (1923); *Yazoo & M.V.R.Co. v. Clarksdale*, 257 U.S. 10, 26 (1921); *United States v. American Tobacco Co.*, 221 U.S. 106, 142-143 (1911); *Wilson v. United States*, 221 U.S. 361, 383 (1911); *Hale v. Henkel*, 201 U.S. 43, 74 (1906); *Terre Haute & I. R. Co. v. Indiana*, 194 U.S. 579, 584 (1904); *Fidelity Mut. Life Ass’n v. Mettler*, 185 U.S. 308, 327 (1902); *Hancock Mut. Life Ins. Co. v. Warren*, 181 U.S. 73, 76 (1901); *Jellenik v. Huron Copper Mining Co.*, 177 U.S. 1, 11-13 (1900); *Woodruff v. Mississippi*, 162 U.S. 291, 299, 309 (1896); *Philadelphia & S. Mail S.S. Co. v. Pennsylvania*, 122 U.S. 326, 345 (1887); *Sinking-Fund Cases*, 99 U.S. 700, 718 (1878); *R.R. Co. v. Maryland*, 88 U.S. 456, 469, 471 (1874); *Dodge v. Woolsey*, 59 U.S. 331, 332 (1855); *Bank of Augusta v. Earle*, 38 U.S. 519, 520 (1839); *Briscoe v. President & Directors of Bank of Kentucky*, 36 U.S. 257, 328 (1837).

<sup>127</sup> See *W. Va. State Board of Educ. v. Barnette*, 319 U.S. 624, 637 (1943). Control and supervision over corporate entities - as creatures of state government - was once an area of serious concern. After the Revolution—and in recognition of their experiences with British corporations—the colonists placed corporations under strict control.

Applying corporate constitutional “rights” to overturn local laws infringes on the people’s right of local, community self-government. As the right of local, community self-government is fundamental, and as corporations are part of the state apparatus,<sup>128</sup> such infringement must satisfy strict scrutiny to be constitutional.<sup>129</sup> This means the infringement must be justified, (1) by a “compelling governmental interest,” (2) be “narrowly tailored” to achieve that compelling interest, and (3) be the “least restrictive” means for achieving that interest.<sup>130</sup>

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Early legislatures granted charters one at a time, for a limited number of years, held business owners liable for harms and injuries, revoked corporate charters when necessary, forbade banking corporations from engaging in trade, prohibited corporations from owning each other, and established that corporations could only be chartered for “public purposes.” See RICHARD GROSSMAN & FRANK ADAMS, *TAKING CARE OF BUSINESS: CITIZENSHIP AND THE CHARTER OF INCORPORATION* 6-9 (1993) (explaining that “the revolutionaries did not give governors, judges or generals the authority to charter corporations. Citizens made certain that *legislators* issued charters, one at a time, and for a limited number of years”) (emphasis in original). See *Louis K. Liggett Co. v. Lee*, 288 U.S. 517 (1933) (Brandeis, J., dissenting) (stating that “at first the corporate privilege was granted sparingly; and only when the grant seemed necessary in order to procure for the community some specific benefit otherwise unattainable.” Brandeis also answered the question of why incorporation for business was commonly denied long after it had been freely granted for religious, educational, and charitable purposes. *Id.* at 549-50. ROBERT HAMILTON, *THE LAW OF CORPORATIONS* 6 (1991). As the Supreme Court of Virginia reasoned in 1809, if the applicant’s “object is merely private or selfish; if it is detrimental to, or not promotive of, the public good, they have no adequate claim upon the legislature for the privileges.” MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 112 (1977).

<sup>128</sup> While this article asserts that governmental creation and endowment of private corporations renders those corporations “state actors” for purposes of constitutional analysis, it must be noted that current jurisprudence does not recognize private corporations in that capacity. The U.S. Supreme Court has, however, held that the involvement of state and federal courts in the enforcement of rights-denying actions may itself create state action. See *Shelley v. Kraemer*, 334 U.S. 1, 14 (1948) (“[t]hat the action of state courts and of judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court”). See also *West v. Atkins*, 487 U.S. 42, 49 (1988) (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941) (“[t]he traditional definition of acting under color of state law requires that [an actor] have exercised power ‘possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.’”). In addition, litigants may argue that the right of local, community self-government is a right capable of enforcement against private actors, in addition to state actors. See, e.g., *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439 (1968) (holding that congressional authority pursuant to the Thirteenth Amendment extended to the regulation of “the conduct of private individuals. . . to eliminate all racial barriers to the acquisition of real and personal property.”); *Runyon v. McCrary*, 427 U.S. 160, 179 (1976) (holding that congressional authority pursuant to the Thirteenth Amendment enabled Congress to prohibit private schools from discriminating on the basis of race).

<sup>129</sup> The authors here suggest the application of strict scrutiny, and so apply such analysis. As the right of self-government is the very foundation of our system of government, it must at least be fundamental, and fundamental rights may not be infringed without satisfying strict scrutiny. But the authors acknowledge that the right is actually the very power of government. It is not only a civil right protected from infringement by government. As such, it might be that a different, more stringent test than strict scrutiny applies. As there is yet no such test in our constitutional jurisprudence, such test would have to be developed in our political and judicial arenas.

<sup>130</sup> For a discussion and application of strict scrutiny judicial review, see, e.g., *United States v. Windsor*, 570 U.S. 12-307, 133 S. Ct. 2675 (2013) (holding that federal interpretation of “marriage” and “spouse” to apply only to opposite-sex unions violates the Due Process Clause of the Fifth Amendment).



As shown above, the right of local, community self-government right is a fundamental right, specifically of a *political* character. Given this, it seems unlikely that a governmental interest that would infringe of the right by the application of corporate “rights” could be sufficiently compelling for two reasons. First, under the Privileges and Immunities Clause, it is well-established that corporations are not citizens.<sup>131</sup> As corporations are not citizens, allowing their rights to infringe the necessarily superior rights of citizens would elevate the created over the creator. In other words, it would render government subservient to its chartered creation. There can be no compelling governmental interest in subverting itself; this would be tantamount to alienating a power that is inalienable.

Second, this leaves us with corporations as a species of property. It is well-settled law that property rights are not “fundamental” under our constitutions.<sup>132</sup> Government typically only needs a rational basis to infringe property rights. So, it would be irrational to assert that there is a compelling governmental interest for the exercise of rights that themselves are subject only to rational basis scrutiny when infringed.<sup>133</sup> Therefore, the doctrine of corporate constitutional “rights” infringes the right of local, community self-government without being necessary to serve a compelling state interest, and so the application of that doctrine must yield to the right.

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<sup>131</sup> Paul v. Virginia, 75 U.S. 168, 177-78, 182 (1868).

<sup>132</sup> It is noteworthy in this regard that the Declaration of Independence’s list of God-given inalienable rights – namely life, liberty, safety, and happiness – does not include property. Ownership of property is an important right in a free society, and is therefore protected by provisions in our constitutions. But property rights are not fundamental rights. *See, e.g.*, Weems v. Little Rock Police Dep’t, 453 F.3d 1010, 1015-16 (8th Cir. 2006) (holding that right to acquire, enjoy, own, and dispose of property did not implicate a fundamental right); Clajon Prod. Corp. v. Petera, 70 F.3d 1566, 1580 (10th Cir. 1995) (holding that economic regulations have traditionally been afforded only rational relation scrutiny); and Nat’l W. Life Ins. Co. v. Commodore Cove Improvement Dist., 678 F.2d 24, 26 (5th Cir. 1982) (“[t]he right freely to alienate real property is not a ‘fundamental right’ that calls for application of strict scrutiny”).

<sup>133</sup> Absent a compelling governmental interest, it is not possible to resolve explicitly whether the exercise and enforcement of corporate “rights” is narrowly tailored to serve such interest, or is the least restrictive means of doing so, as there is no content for the analysis. For an example of how strict scrutiny analysis is applied in other scenarios, *see, e.g.*, Adarand Constructors v. Peña, 515 U.S. 200, 235-238 (1995) (establishing a strict scrutiny analysis for remedial race-based contracting).

### C. **Dillon’s Rule unconstitutionally infringes the people’s right of local, community self-government.**

When suing municipal communities to overturn local laws, corporate plaintiffs often rely on a doctrine known as “Dillon’s Rule.” The Rule says that local governments serve at the whim of state legislatures, which have absolute authority to create them, define and limit their powers, and even to eliminate them.<sup>134</sup> In actions against municipalities, corporate plaintiffs advance Dillon’s Rule to assert that lawmaking by the municipality in areas outside of delegated state authority is void and unenforceable.

This is the very same theory of government that the colonists rejected during the American Revolutionary period.<sup>135</sup> The British viewed colonial governments as creatures of the crown, serving at the whim of the King, with laws subject to revision or rejection by him.<sup>136</sup> Similarly, under Dillon’s Rule, local governments – and as a derivative consequence, the people of their municipalities in their political capacity – are merely creatures of the state. It follows that local laws enacted by local governments can only be made pursuant to a power the state allows, and that local laws therefore always remain in danger of being struck on that basis.<sup>137</sup>

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<sup>134</sup> See 1 JOHN FORREST DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 98, at 154-56 (5th ed. 1911) (“Municipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. . . It is not necessary to a municipal government that the officers should be elected by the people. Local self-government. . . is not required by any inexorable principle.”). The United States Supreme Court first recognized the doctrine in *Barnes v. District of Columbia*, 91 U.S. 540, 544-45 (1876) (“a municipal corporation, in the exercise of all of its duties, including those most strictly local or internal, is but a department of the State. The legislature may give it all the powers such a being is capable of receiving. . . [or] it may strip it of every power, leaving it a corporation in name only. . .”); and *Hunter v. Pittsburgh*, 207 U.S. 161, 178-79 (1907) (upholding the power of the State of Pennsylvania to consolidate the city of Allegheny into the City of Pittsburgh).

<sup>135</sup> See *supra* pp. 12-19.

<sup>136</sup> See, e.g., “Charter of King Charles II of England to William Penn,” 4 March 1681, section V (bestowing upon the Penn family the power to make laws for the good and happy government of the colony, “Provided; Nevertheless, that the said Lawes bee consonant to reason, and bee not repugnant or contrarie, but as neere as conveniently may bee agreeable to the Lawes, statutes and rights of this our Kingdome of England. . .”).

<sup>137</sup> As Joshua Smith wrote in his English treatise: “The practical idea, and the result, of Centralization . . . is . . . that the State is something apart from its members; and that it has the function, and the right, to keep each and all of those members within a certain tether, the length of which it belongs to it to determine, and on which no right nor responsibility of judging belongs to them.” Smith, *supra* note 29, at 34.

Judge Eugene McQuillin identified this irony in his 1911 treatise on the law of municipal corporations:

Among the colonists the creation of government for the management of local concern, in most cases, antedates the establishment of central or state authority. It should be observed, however, it is not the accepted theory in this country that the states have received delegations of power from independent towns; on the other hand, the theory is that the state governments precede the local, create the latter at discretion and endow them with corporate life. But, historically, it is as difficult to prove this theory as it would be to demonstrate that the origin of government is in compact, or that title to property comes from occupancy. The historical fact is, that local governments universally, in this country, were either simultaneous with or preceded the more central authority....

It thus appears that, in this country from the beginning, political power has been exercised by citizens of the various local communities as local communities, and this constitutes the most important feature in our system of government....

Political students at home and abroad have been impressed favorably with our system of local self-government and have regarded it as forming the principle of the life of American liberty throughout our entire national history. In truth, this system constitutes the strength of all free nations. These local organizations enable the people themselves to exercise governmental power in supplying local needs, conveniences and comforts and in regulating the rights of the individual as a component part of the local society in his relations with his neighbors touching public matters....

[F]rom the historical examination of this subject, it becomes manifest that local self-government of the municipality does not spring from nor exist by virtue of written constitutions; that it is not a mere privilege, conferred by the central authority, but that the people in each municipality exercise their franchises under the protection of the fundamental principles just indicated, which were not questioned or doubted when the state constitutions were adopted, and which ... no power in the state can legally disregard.<sup>138</sup>

All state courts subscribe to some variant of Dillon's Rule.<sup>139</sup> Although purely a doctrine that defines the relationship between the municipal corporation and the state government, the

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<sup>138</sup> McQuillin, *supra* note 19, at 141, 151-53, 156 (footnotes omitted). In his English treatise, Joshua Smith showed how the right of self-government is inextricably bound to a duty, the marriage of which constitutes freedom: "Not by having our affairs well managed *for* us, by others, are we, or can we ever be, free, or maintain free Institutions; but by having the ever-present consciousness that it is to us ourselves that the right and the responsibility belong of doing, and doing well, what the common welfare, or our own, demands." Smith, *supra* note 29, at 33-34.

<sup>139</sup> While many legal commentators divide states into "Dillon's Rule" states and "home rule" states, the state retains plenary authority over municipalities in both categories. While it is true that municipal corporations in "home rule"

Rule is privately enforceable by those interests affected by municipalities that breach it. A recent case in Pennsylvania discussed below illustrates how resource extraction corporations use the Rule to overturn local laws that affect them.

In June 2014, the Township Supervisors in Grant Township, Indiana County, Pennsylvania, adopted a local Ordinance that recognized the right to a sustainable energy future, rights to clean air, water, and soil for township residents, and that banned frack wastewater injection wells as a violation of those rights.<sup>140</sup> In response, the Pennsylvania General Energy Corporation, LLC (PGE), filed an action in federal district court against the township to overturn the Ordinance. In its complaint, which asserted many claims,<sup>141</sup> PGE asserted two Dillon’s Rule counts. First, it asserted that the local law was an “impermissible exercise of police power under the Second Class Township Code.” PGE argued that Grant Township – as a second class township governed by Pennsylvania’s statutory municipal code – lacked state-delegated broad police powers.

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states are allowed to assert any power not specifically denied to them by the state, the blanket authority by the state to specifically deny certain powers to municipalities in those states remains unquestioned. *See* Hugh Spitzer, “Home Rule” vs. “Dillon’s Rule” for Washington Cities, 38 SEATTLE UNIV. L. REV. 809 (2015). As an example of how state courts define and apply Dillon’s Rule, Pennsylvania courts provide a good illustration. *See* City of Philadelphia v. Fox, 64 Pa. 169, 180 (1870) (“The City of Philadelphia is beyond all question a municipal corporation, that is, a public corporation created by the government for political purposes, and having subordinate and local powers of legislation”); *Naylor v. Township of Hellam*, 565 Pa. 397, 403, 773 A.2d 770, 773 (2001) (“Initially, we note that it is fundamental that municipalities are creatures of the state and that the authority of the Legislature over their powers is supreme”); *Huntley & Huntley, Inc., v. Borough Council of Borough of Oakmont*, 600 Pa. 207, 220, 964 A.2d 855, 862 (2009) (“Municipalities are creatures of the state and have no inherent powers of their own. Rather, they ‘possess only such powers of government as are expressly granted to them and as are necessary to carry the same into effect.’”). *But see* State v. Hutchinson, 624 P.2d 1116, 1118-1120 (Utah 1980) (“if there were once valid policy reasons supporting [Dillon’s Rule], we think they have largely lost their force and that effective local self-government, as an important constituent part of our system of government, must have sufficient power to deal effectively with the problems with which it must deal”).

<sup>140</sup> The Grant Ordinance, known as the “Grant Township Community Bill of Rights Ordinance,” was adopted on June 3, 2014 by a unanimous vote of the Grant Township Board of Supervisors. Grant Township Community Bill of Rights Ordinance (signed on June 3, 2014).

<sup>141</sup> The other claims filed by the company against the municipality included corporate “rights” counts, as well as counts alleging that the Township had violated state preemption law on oil and gas extraction by establishing more stringent standards for that extraction. *See* Amended Complaint at 7-12, Pennsylvania Gen. Energy Co., LLC v. Grant Twp., 139 F. Supp. 3d 706 (W.D. Pa. 2015) (No. 1:14-cv-209); *id.* at 14-18.

The company's second Dillon's Rule claim asserted that the Township "possess[ed] only such powers that have been granted to them by the Pennsylvania General Assembly" and that "any authority of Grant Township to regulate" frack wastewater injection wells "must originate from the Second Class Township Code." Accordingly, PGE argued that "[t]he Second Class Township Code does not authorize Grant Township to regulate [frack wastewater injection wells] and, therefore, the [Ordinance] is not within the scope of the powers granted to Grant Township by the General Assembly. . . [and thus, the Ordinance] is an impermissible exercise of Grant Township's legislatively granted authority."<sup>142</sup>

The court overturned key portions of the Ordinance on these and other grounds. In her opinion, Magistrate Judge Susan Paradise Baxter first dismissed the township's argument that the Ordinance was an exercise of a right of local, community self-government.<sup>143</sup> The court then embraced the reach of Dillon's Rule, as urged by the company:

A municipality is a creature of the state and thus necessarily subordinate to its creator, and can exercise only such power as may be granted to it by the legislature. . . There is no state authority expressly granting a municipal government or its people the authority to regulate the depositing of waste from oil and gas wells or to invalidate permits granted by the state or federal government. Any provision enacted without underlying legislative authority is invalid and unenforceable. Grant Township exceeded its legislative authority under Pennsylvania's Second Class Township Code by enacting [the ban on frack wastewater injection wells], and accordingly, these Sections are invalid and unenforceable.<sup>144</sup>

Invalidating local law because state law does not authorize the municipality to enact it infringes the people's right of local, community self-government because the right is fundamental, and

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<sup>142</sup> Amended Complaint, *supra* note 142, at 12-13.

<sup>143</sup> In refusing to consider Grant's argument in this regard, Judge Baxter summarily declared that the "Defendant claims the right to local community self-government is deeply rooted in our nation's history and tradition. . . Defendant seeks judgment upholding its Ordinance based solely upon these historical events. Defendant provides no precedential statute or constitutional provision authorizing its action. . ." Pa. Gen. Energy Co., LLC v. Grant Twp., 139 F. Supp. 3d 706, 714 (W.D. Pa. 2015) (granting Pennsylvania General Energy LLC's motion for judgment on the pleadings and denying Grant Township's motion for judgment on the pleadings).

<sup>144</sup> *Pennsylvania General Energy*, 139 F. Supp. 3d at 716.

such infringement cannot satisfy a strict scrutiny standard of review. This means that Dillon's Rule must be necessary to serve a compelling governmental interest, be narrowly tailored to serve that interest, and be the least restrictive means necessary to do so.

Dillon's Rule cannot survive this test for two reasons. First, the right of local, community self-government belongs to the people naturally, not to the municipality. A state doctrine concerning what municipalities may and may not do fails to recognize that when the people exercise their right of local, community self-government, they are not subject to limitations on the municipality itself.

Second, this article assumes that Dillon's Rule, in application if not in theory, is a doctrine concerning state control not only over lawmaking by municipalities, but also over lawmaking by local people under their right of local, community self-government. Which returns us to strict scrutiny, and first requires identification of a compelling governmental interest. Dillon's Rule applies as a blanket rule, regardless of the subject of local lawmaking; the absence of state authorization for local legislation is thus not related to the subject of local legislation at issue in a particular case. This means that the government's compelling interest can have nothing to do with any particular subject of lawmaking. Thus, the only "compelling interest" that could be advanced by the state would be its interest in the general uniformity of the law.

Uniformity here would mean that a state desires a general rule that local communities are limited to legislating matters of health, safety, and welfare, but only in ways that are authorized by the state. But neither uniformity, nor conformity to such, are compelling state interests in themselves.<sup>145</sup> In other words, the desire for such uniformity is not compelling enough to justify

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<sup>145</sup> See, e.g., *Dunham v. Pulsifer*, 312 F. Supp. 411, 420 (D. Vt. 1970) (quoting *Richards v. Thurston*, 304 F. Supp. 449, 454 (D. Mass. 1969); *aff'd*, 424 F.2d 1281 (1st Cir. 1970) (declaring, as part of its examination of a compelling state interest, that "[s]tanding alone, conformity *per se* is neither a reason or a justification. . . uniformity for its own sake. . . is not a reason in and of itself").

the infringement of a people’s inherent right to locally legislate for the protection of the political and civil rights, or their health, safety, and welfare. It is also difficult to conceive of an argument in which the state’s plenary deprivation of local lawmaking authority could be deemed to be “narrowly tailored” or “least restrictive,” because it is, inherently, a blanket rule that applies to all municipal lawmaking. Therefore, the requirement of state legislative authority for the enactment of local laws infringes the right of local, community self-government without being necessary to serve a compelling state interest, and so must yield to the right.

**D. The doctrine of preemption – when applied to set a ceiling, rather than a floor, for local lawmaking standards – unconstitutionally infringes the people’s right of local, community self-government.**

Whereas Dillon’s Rule requires state authorization of local lawmaking, preemption occurs when either the federal government or a state government prohibits certain local lawmaking. Congress and state legislatures often wield preemption expressly, writing legislation with provisions that prevent people within municipalities from enacting their own laws in particular areas of concern. Even when a law does not expressly preempt local regulation, courts often find implied preemption through the judicial doctrines of field and conflict preemption.<sup>146</sup>

Preemptive state and federal laws that establish a “floor” of statutory standards for the protection of health, safety, or welfare do not violate the right of local, community self-government because those standards are enacted by the citizens of the state or nation as a whole as minimal measures for protection.<sup>147</sup> But preemptive laws that prevent the local enactment of

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<sup>146</sup> As explained by the Commonwealth Court of Pennsylvania in *Burkholder v. Zoning Hearing Board*, 902 A.2d 1006, 1012 (Pa. Cmwlth 2006) (citations omitted) (emphasis added), “The matter of preemption is a *judicially created principle*, based on the proposition that a municipality, as an agent of the state, cannot act contrary to the state. . . Obviously, local legislation cannot permit what a state statute or regulation forbids or prohibit what state enactments allow.” Indeed, the Supreme Court of Pennsylvania has declared that preemption may even bar local lawmaking if state regulation of the subject area is inadequate. *Harris-Walsh, Inc. v. Borough of Dickson City*, 420 Pa. 262, 274 (1966).

<sup>147</sup> Such a standard would allow municipal communities to exceed minimum state standards through local lawmaking, but would not allow municipal communities to lower those minimum state standards. Analogous

more stringent and protective standards, or that prevent the local enactment of any standards at all, whether or not state or federal standards exist, directly infringe the people’s right of local, community self-governance. While floor preemption allows communities to legislate more protective standards at the local level, ceiling preemption divests people of the authority to do so, thus infringing upon their authority to exercise their right of self-governance to protect their community from harm.

State statutory codes are replete with constraints on local legislation within particular subject areas, even if those local enactments would impose more stringent standards for the protection of public health or the environment.<sup>148</sup> Most of those subject areas feature large economic actors who wield those preemptive laws to limit municipal involvement in their areas of business.<sup>149</sup> In Pennsylvania, for example, dominant economic actors in the area of mining, banking, oil and gas extraction, agriculture, timber extraction, land development, waste management, and water withdrawals are the prime beneficiaries of state legislation preempting community control.<sup>150</sup>

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standards currently exist between the state and federal government to determine the preemptive effect of federal law. *See, e.g., Fla. Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963) (finding preemption only where compliance with state agricultural regulations would preclude compliance with federal regulations).

<sup>148</sup> It is not the intent of this article to provide a comprehensive listing of those state preemptive laws, as traditional legal interpretation uniformly recognizes the plenary authority of state and federal governments to override almost any law adopted by communities through their municipal governments. This portion of the Article is primarily concerned with illustrating how such laws infringe the people’s right of local, community self-governance.

<sup>149</sup> *See State ex rel. Morrison v. Beck Energy Corp.*, 143 Ohio St.3d 271 (2015) (O’Neill, J., dissenting) (majority opinion struck down local bans and regulation of hydro-fracking for natural gas) (“What the drilling industry has bought and paid for in campaign contributions it shall receive. The oil and gas industry has gotten its way, and local control of drilling-location decisions has been unceremoniously taken away from the citizens of Ohio.”).

<sup>150</sup> Laws resulting from corporate influence have preempted local control in Pennsylvania over issues including **mining** (52 P.S. § 681.1 *et seq.* (Act of June 27, 1947)); *see Harris-Walsh, Inc. v. Borough of Dickson City*, 216 A.2d 329 (Pa. 1966) (striking a local ordinance regulating anthracite coal mining within the municipality)); *see also* 53 P.S. § 10603(i) (amending the Municipalities Planning Code to mandate that each municipality allow “reasonable development of minerals”); **banking** (7 P.S. § 101 *et seq.*; *see City of Pittsburgh v. Allegheny Valley Bank of Pittsburgh*, 488 Pa. 544, 412 A.2d 1366 (1980) (striking a local tax on banks)); **oil and gas wells** (Oil and Gas Act, 58 P.S. § 601.602; *see Range Res. Appalachia v. Salem Twp.*, 964 A.2d 869 (Pa. 2009) (striking a township’s oil and gas regulatory scheme, in part because it was more stringent than state regulation)); **factory farming** (Right to Farm Act amendment, 3 P.S. § 952 (1996, June 12, P.L. 336, No. 52, § 1); Nutrient Management Act, 3 P.S. § 1717; *see Burkholder v. Richmond Twp.*, 902 A.2d 1006 (Pa. Cmwlth. 2006) (striking a municipal setback provision for



Preemption has been applied extensively in the field of energy regulation to prevent local communities from banning or regulating oil and gas extraction that harms their communities. Recently, the Colorado Supreme Court underscored the reach of state preemptive authority over local adoption of more protective standards for the extraction of oil and gas.<sup>151</sup> In that case, several communities in Colorado had adopted either bans on hydrofracking for natural gas, or more stringent regulation of that form of oil and gas extraction. In its ruling, the Colorado Supreme Court held:

[t]he [Colorado] Oil and Gas Conservation Act and the [State’s] pervasive rules and regulations, which evince state control over numerous aspects of fracking, from the chemicals used to the location of waste pits, convince us that the state’s interest in the efficient and responsible development of oil and gas resources includes a strong interest in the uniform regulation of fracking. [These local laws], however, prevent operators from using the fracking process even if they abide by the Commission’s rules and regulations, rendering those rules and regulations superfluous. Thus, by prohibiting fracking and the storage and disposal of fracking waste, [these local laws] materially impede the effectuation of the state’s interest. . . We therefore hold that state law preempts [them].<sup>152</sup>

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factory farm manure storage facilities)); **sewage sludge** (Solid Waste Management Act, 35 P.S. § 6018.101 *et seq.*; see *Liverpool Twp v. Stephens*, 900 A.2d 1030 (Pa. Cmwlth. 2006) (striking a township’s sewage sludge regulatory scheme as preempted by the SWMA, in part because the local scheme was more stringent)); **timber harvesting** (in 2000, the legislature amended the Municipalities Planning Code to make timber harvesting a “permitted use by right in all zoning districts in every municipality.” 53 P.S. § 10603(f)); **water withdrawal** (in 2002, the legislature removed authority from municipalities to control or regulate large water withdrawals; see 27 Pa.C.S. § 3136(b)); **land development** (53 P.S. § 10103; see *Rural Area Concerned Citizens, Inc. v. Fayette County Zoning Hearing Bd.*, 646 A.2d 717 (Pa. Cmwlth. 1994), *appeal denied*, 658 A.2d 798 (declaring that all decisions made about uses of land enacted contrary to the Municipalities Planning Code are preempted)); **hydraulic fracturing** (Act 13 of 2012, ch. 33, “Local Ordinances Relating to Oil and Gas Operation,” partially overturned by the Pennsylvania Supreme Court in *Robinson Twp. v. Commonwealth of Pennsylvania*, 83 A.3d 901 (2013)); and **genetically modified seeds** (3 Pa.C.S. § 7120(b)), among other issues.

<sup>151</sup> Like Pennsylvania, Colorado has extensively preempted a range of issues, including local regulation of plastic containers (COLO. REV. STAT. ANN. § 25-17-104 (West)); the adoption of laws setting a minimum wage (COLO. REV. STAT. ANN. § 8-6-101 (West); § 8-3-102 (West)); oil and gas extraction (COLO. REV. STAT. ANN. § 34-60-106 (West)); mining (COLO. REV. STAT. ANN. § 34-20-101 (West)); bans on cyanide leaching for gold mining (COLO. REV. STAT. ANN. § 34-32-101 (West)); water withdrawals (see *Chatfield E. Well Co. v. Chatfield E. Prop. Owners Ass’n*, 956 P.2d 1260, 1268 (Colo. 1998)); bans on the land application of sewage sludge (COLO. REV. STAT. ANN. § 25-8-501 (West)); the regulation of agricultural operations as nuisances (COLO. REV. STAT. ANN. § 35-3.5-102 (West)); regulation of the sale, purchase, or possession of a firearm (COLO. REV. STAT. ANN. § 29-11.7-103 (West)); and rent control (COLO. REV. STAT. ANN. § 38-12-301 (West)).

<sup>152</sup> *City of Longmont v. Colorado Oil and Gas Ass’n*, 369 P.3d 573, 585 (Colo. 2016); See Arie R. Mielkus, *City of Longmont Colorado v. Colorado Oil & Gas Association*, 0 PUB. LAND AND RES. L. REV. 6, 4-5 (2016) (analyzing the Colorado Supreme Court’s preemption discussion in the *Longmont* litigation).

In Ohio, similar attempts to regulate oil and gas extraction more stringently than the state have met with similar results. In response to five Ohio communities adopting local laws to ban or regulate fracking, the Supreme Court of Ohio declared:

Article II, Section 36 [of the Ohio Constitution] vests the General Assembly with the power to pass laws providing for the ‘regulation of methods of mining, weighing, measuring, and marketing coal, oil, gas, and all other materials.’ With the comprehensive regulatory scheme [pursuant to Ohio statute], the General Assembly has done exactly that. We hold that [Ohio law] does not allow a municipality to discriminate against, unfairly impede, or obstruct oil and gas activities and production operations that the state has permitted.<sup>153</sup>

State preemption legislation has also been used to prohibit municipal bans on genetically-modified seeds and crops. At least 16 states have adopted legislation that prohibits municipalities from adopting seed regulations to control the use of genetically modified seeds and the planting of genetically modified crops.<sup>154</sup> Recently, in Hawai’i, the Ninth Circuit Court of Appeals applied those preemptive rules to strike down county laws on the islands of Maui, Hawaii, and Kauai that sought to control and regulate genetically modified crops more stringently.<sup>155</sup> In *Atay*, the Court explained that the local laws were preempted by state agricultural laws:

We conclude that the legislature intended to create an exclusive, uniform, and comprehensive state statutory scheme for potentially harmful plants. By banning commercialized GE [genetically-engineered] plants, the Ordinance impermissibly intrudes into this area of exclusive State regulation and thus is beyond the County’s authority. . . and preempted.<sup>156</sup>

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<sup>153</sup> State ex rel. Morrison v. Beck Energy Corp., 143 Ohio St.3d 271 (2015).

<sup>154</sup> According to the group Beyond Pesticides, as of 2013, 16 states had adopted laws preempting local regulation and control of GMO crops. See Matthew Porter, *State Preemption Law: The Battle for Local Control of Democracy*, BEYOND PESTICIDES, <http://www.beyondpesticides.org/assets/media/documents/lawn/activist/documents/StatePreemption.pdf> (last visited Dec. 27, 2016). As an example of those laws, the state of Arizona has decreed that “[t]he regulation and use of seeds are of statewide concern. The regulation of seeds pursuant to this article and their use is not subject to further regulation by a county, city, town, or other political subdivision of this state.” ARIZ. REV. STAT. ANN. § 3-243 (2016).

<sup>155</sup> See *Hawai’i Papaya Industry Ass’n v. County of Haw.*, No. 14-17538 (9th Cir. 2016);

*Atay v. Cty. of Maui*, 842 F.3d 688 (9th Cir. 2016); *Syngenta Seeds v. Cty. of Kauai*, 842 F.3d 669 (9th Cir. 2016).

<sup>156</sup> *Atay*, 842 F.3d at 710.

As these cases illustrate, one of the main issues with ceiling preemption is that it prevents a local community from doing more to protect its health, safety, and welfare than state or federal laws do. Indeed, the Supreme Court of Pennsylvania has declared that preemption bars local lawmaking even if state regulation of the subject area is inadequate. In *Harris-Walsh, Inc. v. Borough of Dickson City*, the Supreme Court declared that:

It may not be inappropriate to note that the reason why the Borough passed this ordinance was its belief that the Commonwealth has not acted adequately in attempting to regulate this industry and that the legislation enacted was simply a 'half measure', weak and supine. *The belief of the Borough may be well founded.* However, the adequacy of the legislation to cope with the problem and the wisdom or the lack thereof on the part of the legislature in framing this legislation is not for us to determine. Such questions are solely for the legislature to determine and upon their province we must not encroach.<sup>157</sup>

As argued by Pennsylvania Supreme Court Justice Nigro, in his dissent in *Ortiz v. Commonwealth*, such control by the state cannot be reconciled with community self-governance:

In my opinion, whenever the state legislature fails to enact a statute to address a continuing problem of major concern to the citizens of the Commonwealth, a municipality should be *entitled* to enact its own local ordinance in order to provide for the public safety, health, and welfare of its citizens. . . Since Philadelphia County is besieged by a multitude of violent crimes which occur involving a variety of hand guns and automatic weapons it is *fundamentally* essential that the local government enact legislation to protect its citizens whenever the state legislature is unable or unwilling to do so.<sup>158</sup>

Applying federal or state preemptive laws to overturn local laws infringes upon the people's right of local, community self-government. As the right to local, community self-government is fundamental, such infringement must satisfy strict scrutiny to be constitutional. As in the strict scrutiny analysis for Dillon's Rule,<sup>159</sup> the interest of uniformity – by itself – would fail to supply a “compelling state interest.” A state's desire to have either no standard, or just a single standard, for health, safety, and welfare in a field of law statewide, is not compelling

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<sup>157</sup> *Harris-Walsh, Inc. v. Borough of Dickson City*, 420 Pa. 262, 274 (1966) (emphasis added).

<sup>158</sup> *Ortiz v. Commonwealth*, 545 Pa. 279, 681 A.2d 152, 157 (1996) (Nigro, J., dissenting) (emphasis in original).

<sup>159</sup> *See supra* pp. 50-52.

enough to justify infringing upon the people’s inherent right to locally legislate. In short, uniformity, though convenient for industry, commerce, and other businesses, should not be considered to be compelling enough to force a community to accept hazards that it finds unacceptable. So, the analysis for this strict scrutiny test becomes fact-specific. For example, does the state have a compelling state interest in allowing and exclusively regulating the extraction of oil and gas, or a compelling state interest in allowing and exclusively regulating the use of genetically modified seeds?<sup>160</sup> If the answer is yes, the inquiry must then determine whether the state’s interest is superior to the public health and environmental protections codified by the municipal law. This inquiry begins to look remarkably similar to the one undertaken to determine whether the municipal community had a “rational basis” for adopting the law.<sup>161</sup> In other words, if the state has one set of standards, and the community has a more stringent set, and the community’s standards are rationally related to protecting health, safety, and welfare, there is no legitimate way to assert that the state’s interest is superior.

The final inquiry is whether the state preemptive law is narrowly tailored to attain the state’s compelling interest and is the least restrictive means of attaining it. Because the inquiry will be issue-specific, it is difficult here to speculate the result of that judicial exploration, but it will most likely be difficult to satisfy these standards, given that the specific preemptive law has

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<sup>160</sup> Many state preemptive laws, of course, already contain these assertions. *See, e.g.*, W. Va. Code § 22C-9-1 (the declaration of policy in West Virginia’s Oil and Gas Conservation law, which asserts that “[i]t is hereby declared to be the public policy of this state and in the public interest to: Foster, encourage, and promote exploration for and development, production, utilization, and conservation of oil and gas resources.”); COLO. REV. STAT. § 34-20-101 (The Colorado Oil and Gas Act proclaims that “[t]he general assembly hereby finds and declares that the extraction of mineral resources is a necessary and proper activity. . . [and] that the mining industry is vital to the economy of this state and that the state’s mineral and energy resources are of commercial and strategic value to the entire country”).

<sup>161</sup> A “rational basis” standard of review would normally be used to examine whether a law is valid absent the infringement of a fundamental right. *See, e.g.*, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 40 (1973) (explaining the test requires only that a law “be shown to bear some rational relationship to legitimate state purposes.”). Under this scenario, the *reasons* supporting rationality would be applied to gauge the *validity* of the state’s advancement of a compelling state interest.

such a wide sweep on its face – applying across all municipalities - rather than having force only in the affected one.

## V. Conclusion: The contours of a contemporary right of local, community self-government.

A modern jurisprudence recognizing a right of local, community self-government will only emerge as more municipal communities enact local laws securing and exercising that right.<sup>162</sup> Those laws will then provoke the affected business entities to file lawsuits against those municipalities<sup>163</sup>, charging that the laws violate the various legal doctrines outlined in this article. For a contemporary jurisprudence to arise that fully explores the metes and bounds of a right of local, community self-government, the municipal law must be defended on the basis that the people of the municipality possess the fundamental right to govern themselves, and that they themselves exercised that right through the municipality.<sup>164</sup>

Given early American history, revolutionary American history, the forging of the Declaration of Independence, the history and drafting of state constitutions, the embedded values

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<sup>162</sup> The Appendix to this article contains the authors' current articulation of such a right.

<sup>163</sup> Given the subject matter, the most likely litigants are corporations and other business entities affected by the local laws. *See, e.g.*, *Seneca Resources v. Highland Twp.*, 863 F.3d 245 (3d. Cir. 2017) (affirming the overturning of a local ban on frack wastewater injection wells); *City of Longmont Colorado v. Colorado Oil & Gas Association*, 369 P.3d 573 (Colo. 2016) (overturning a local ban on hydraulic fracturing); and *Swepti, LP v. Mora Cty.*, 81 F. Supp.3d 1075 (D. N.M. 2015) (overturning a local ban on hydrocarbon extraction).

<sup>164</sup> Because it is the municipal corporation which becomes the defendant in these actions, not the people of the municipality, and because it is the community itself which is generally the impetus for the adoption of the local law rather than their elected officials, the municipal corporation is less apt to defend the law aggressively. That generally means that the legal defense for the municipal corporation is based not on the fundamental right to self-governance, but on attempting to argue that the enactment complies with existing legal doctrines. That strategy, for the reasons laid out in this Article, is a losing one. *See, e.g.*, Bob Downing, *Judge Strikes Down Broadview Heights' Community Bill of Rights That Banned Additional Drilling*, AKRON BEACON (March 13, 2015), <http://www.ohio.com/news/local/judge-strikes-down-broadview-heights-community-bill-of-rights-that-banned-additional-drilling-1.574801> (explaining that in a lawsuit brought by the oil and gas industry against the City of Broadview Heights, Ohio, that “[t]he city largely agreed with the plaintiffs in court that state law supersedes local restrictions”). Another factor that influences the behavior of the municipal corporation is the plaintiff-corporation's oft-advanced claim that the municipality has violated the corporation's constitutional “rights,” an assertion made pursuant to 42 U.S.C. § 1983 and 42 U.S.C. § 1988, which could result in liability for the municipal corporation in the form of damages and attorneys' fees. *See e.g.*, Amended Complaint, *supra* note 142, at 21 (demanding that the Township pay “compensatory and consequential damages pursuant to 42 U.S.C. §1983, including its legal rights taken as a result of the Community Bill of Rights Ordinance. . . [and] all fees and costs incurred in this action, including all reasonable attorneys' fees pursuant to 42 U.S.C. §1988.”).

of the United States Constitution, and prior judicial recognition of the right of local, community self-government, any court finding that a right of local, community self-government is a fundamental, federally-guaranteed constitutional right would find itself on firm ground. Proceeding to a strict scrutiny analysis after that finding, however, means first determining whether the local law in question should be afforded the protection of that right.<sup>165</sup>

There are many types of municipal lawmaking, ranging from the mundane to the rights-expanding. Courts constructing modern jurisprudence must determine the scope of protection afforded by the right of local, community self-government and whether the local enactment falls within that scope. Several traditional rules and doctrines may determine the scope and provide a guide for its application.

First, to be a legitimate exercise of the right, the local enactment cannot weaken existing state or federally-guaranteed constitutional rights belonging to its citizens. Individuals within the United States are citizens of both their respective state and the United States. As such, they are guaranteed certain civil and political rights by virtue of that citizenship, including the right of self-government within those other spheres.<sup>166</sup> The very operation of that principle means municipal laws cannot be afforded the protection of the right of local, community self-government if their application and enforcement would violate the constitutional rights of people as recognized by state and federal frameworks.<sup>167</sup> Pursuant to the same principle, no municipal law could be afforded the protection of the right if its application and enforcement would weaken

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<sup>165</sup> Being afforded the protection of the right, of course, means being insulated from the application of the three doctrines summarized by this article, unless strict scrutiny is satisfied.

<sup>166</sup> These rights would not include corporate “rights,” as they have been explored in this article, for two reasons. First, corporations are property themselves, and are not capable of being rights-holders; and second, it has been determined that corporations are not “citizens” for purposes of constitutional law. *See Paul v. Virginia*, 75 U.S. 168, 177 (1869) (“The term citizens [in the Fourteenth Amendment] applies only to natural persons. . . not to artificial persons created by the legislature”).

<sup>167</sup> These frameworks would include international agreements to which the United States is a party, which become federal law upon ratification.

existing statutory standards for the protection of health, safety, and welfare provided under state or federal law. Because those statutory standards are generally predicated on the recognition of quasi-rights<sup>168</sup>, they also confer certain state and federal protections on individuals that cannot be divested by a local law.

Second, just as “political speech” resides at the core of constitutionally-protected free speech under the First Amendment to the United States Constitution<sup>169</sup>, so too could it be that certain local laws offer a fuller expression of the right of local, community self-government than other laws do. For example, a municipal community adopting a local law to recognize new civil, political, or environmental rights, or to broaden the scope of such existing rights, may be deemed more appropriate for the protections afforded by the right of local, community self-government than laws that pertain to mundane issues unrelated to basic rights.

There are several supporting arguments for affording plenary protection of the right of local, community self-government to “rights-based” local laws adopted by municipal communities. The first is that “rights-based” laws lie at the core of essential governmental functions, as recognized by the organic law of the United States. That core consists of an irreducible minimum – that governments must, in the words of the Declaration of Independence, “be instituted among men. . . to secure these rights. . . of life, liberty, and the pursuit of happiness.”<sup>170</sup> It follows that when people act to recognize and secure their civil and political rights through the governments closest to them, those enactments should be afforded the highest and most comprehensive protections of the right of local, community self-government.

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<sup>168</sup> See 42 U.S.C. § 7401 *et seq.* (providing, in the Clean Air Act, an example of this “quasi-right” by stating its purpose was to “protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population.”); 42 U.S.C. § 7401(b)(1) (As a “quasi-right” accruing to the people as citizens of the United States, the protections afforded by the statute are not capable of being eliminated or lessened by a local law.).

<sup>169</sup> See, e.g., *Mills v. Alabama*, 384 U.S. 214, 218 (1966) (“[t]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs”).

<sup>170</sup> THE DECLARATION OF INDEPENDENCE para 2. (U.S. 1776).

Third, an analogous, well-defined body of jurisprudence already exists that upholds the authority of people – acting through their state constitutions – to expand existing federally-guaranteed constitutional rights.<sup>171</sup> This body of law can be applied to determine whether a local enactment expands existing civil and political rights and the scope of that expansion, thus giving reviewing courts a framework for modeling a contemporary jurisprudence around the right of local, community self-government.<sup>172</sup>

In the absence of recognition of a right of local, community self-governance, or of a jurisprudence applying and enforcing that right to uphold local enactments, the power to determine future policies around agriculture, energy, and waste management, among others, will continue to reside with those economic actors best situated to pull legislative and judicial levers in the federal and state capitals. That, in turn, guarantees a continued trend towards environmental degradation and the inability of communities to create sustainable economic systems and environmental conditions. Alone, the emergence of a doctrine recognizing the fundamental right of local, community self-government will not solve these larger problems. But, it could serve to liberate local communities across the United States to transform their municipal governments into full state actors capable of using democratic governance to supplant the current state of affairs.

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<sup>171</sup> See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); *State v. Sieyes*, 168 Wash.2d 276, 292, 225 P.3d 995 (2010) (“Supreme Court application of the United States Constitution establishes a floor below which state courts cannot go to protect individual rights. But states of course can raise the ceiling and afford greater protections under their own constitutions.”).

<sup>172</sup> See, e.g., *Commonwealth vs. Blood*, 400 Mass. 61, 71 507 N.E.2d 1029, 1035 (1987); see also *Commonwealth v. Thorpe*, 384 Mass. 271, 286, 424 N.E.2d 250, 259 (1981) (applying Article 14 of the Massachusetts Constitution as providing greater privacy protections than the Fourth Amendment to the United States Constitution).



## Appendix A – An Articulation of the Fundamental Right of Local, Community Self-Government.

The right of local, community self-government is a fundamental political right of people to govern their local communities. It is a right held individually, and exercised collectively, by all eligible electors of a local government. As the right is fundamental, government may not infringe it without satisfying strict scrutiny.

The right of local, community self-government includes three component rights. The first component is the right to a system of government within the local community that is controlled by a majority of its citizens. The second is the right to a system of government within the local community that secures and protects the political and civil rights of every person in the community. And the third is the right to abolish any system of local government that infringes these component rights, and to reconstitute local government in a form that secures them.

The right of local, community self-government, including its component rights, is inherent and unalienable. It derives necessarily from the fundamental principle that *all* political power is inherent in the people, and is exercised by *them*, for *their* benefit, and subject to *their* control. First articulated federally by the American Declaration of Independence, this fundamental principle and its derivative political right are secured by the Declaration, the U.S. Constitution, state constitutions, and, when enacted, local law. As the right is inherent and unalienable, all legitimate governments are bound to secure and protect it fully. As the right is fundamental, no government may infringe it without satisfying strict scrutiny.

Laws and legal doctrines that infringe the right of local, community self-government fall generally into three categories. The first, Dillon’s Rule, says that local governments may enact laws only when authorized to do so by state law. The second, preemption, says local laws are

invalid when preempted by state or federal law. The third, corporate constitutional rights, says local laws are invalid when they violate the supposed constitutional rights of corporations, which are mere properties, inferior to people and their political and civil rights.

Because the right of local, community self-government is fundamental, no government may infringe it without satisfying strict scrutiny. This means that courts must apply strict scrutiny whenever a local law properly enacted pursuant to the people's right is challenged as invalid under Dillon's Rule, preemption, or as a violation of corporate constitutional "rights." The question becomes whether application of the doctrine of law at issue is necessary, narrowly tailored, and the least restrictive means to serve a compelling state interest. When the answer is no, the Court must reject the challenge and uphold the local law.