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Three major distribution of powers decisions confront the framers of a state constitution.[1] The first has to do with the distribution of powers between the people and the sovereign. Typically, as in Louisiana, this issue is dealt with in a Declaration of Rights article entrenching concepts of limited government.[2] The second decision involves the establishment and distribution of powers among the executive, legislative, and judicial branches of state government.[3] The third, most important issue for the purposes of this article, involves the distribution of powers between state and local government.[4]

The United States Advisory Commission on Intergovernmental Relations ("A.C.I.R.") recognized, "two concepts of local government have contended for ascendancy in the American federal system: home rule and creatures of the state."[5] The home rule concept emphasizes local government autonomy while the creature theory emphasizes local government subordination to the state.[6] The A.C.I.R. report offered the following definition of the scope of local autonomy:

> Local government autonomy consists of degrees of discretionary authority separately established for cities and counties in four basic areas: (1) structure—determining their form of government and internal organization; (2) function—choosing the functions they perform; (3) fiscal—raising revenue, borrowing, and spending; and (4) personnel—fixing the numbers, types, and employment conditions of their employees.[7]

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1. *See generally* S.E. Finer, 1 The History of Government 72-78 (1997).
2. La. Const. art. I.
3. *See, e.g.*, La. Const. art. II. *See generally* M.J.C. Vile, Constitutionalism and the Separation of Powers (1967).
4. *See, e.g.*, La. Const. art. VI. *See generally* United States Advisory Comm'n on Intergovernmental Relations, Local Government Autonomy (1993) [hereinafter A.C.I.R.]; A Decade of Devolution: Perspectives on State-Local Relations (E. Blaine Liner ed.,1989).
5. A.C.I.R., *supra* note 4, at 1 (emphasis omitted).
6. *Id.*
7. *Id.* (emphasis omitted).

The A.C.I.R. further defined the meaning of local autonomy as encompassing the power of local governments to initiate policy as well as their immunity from state legislation.[8] This distinction between initiative and immunity has been recognized and applied by the Louisiana Supreme Court in the leading decision *City of New Orleans v. Board of Commissioners of the Orleans Levee District*.[9] In this decision, the court defined initiative as "a local government's ability to initiate legislation and regulation in the absence of express state legislative authorization."[10] Alternatively, immunity involves "the power of localities to act without fear of the supervisory authority of the state government."[11] Accordingly, initiative and immunity serve as complementary theories in the arena of local government autonomy.

In addition, the A.C.I.R. made the following recommendation as a benchmark for appraising the local government article in the constitutions of the several states:

> The Commission finds that the provisions for local home rule and discretionary authority in many states are being eroded by increases in regulatory and statutory control of local government functioning through enactment of federal and state mandates and preemption of local decisionmaking. The state courts have increasingly asserted their power to adjudicate state-local relations, supplying their own solutions in the absence of clear constitutional and/or statutory direction. Thus, ambiguity in state-local relations places substantial political decisionmaking authority in the hands of the judiciary.
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> *The Commission recommends, therefore, that the states review the local government articles in their constitutions and/or statutes governing the powers of local governments, and consider amending them as appropriate to clarify:*
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> *(a) The extent of local power intended to initiate structural, functional, fiscal, and personnel matters without prior permission of the state, and to ensure a proper balance among these powers;*
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> *(b) The degree of immunity from the reach of state statutes intended, including limitations on the right of the state to preempt local authority and to mandate*

8. *Id.*
9. 640 So. 2d 237 (La. 1994).
10. *Id.* at 242.
11. *Id.*

> *functions without giving local governments the fiscal resources to carry out required functions;*
> *(c) Liberal rules of construction to be followed by the courts in interpreting these constitutional or statutory provisions in favor of local governments;*
> *(d) The status of local governments as juridicial persons having the same capacity and rights to assert legal claims against the state as natural persons and private corporations; and*
> *(e) The extent to which autonomy and discretion are to be accorded to different types of local governments, including counties, municipalities, townships, school districts, and special districts.*[12]

The findings and recommendations of the A.C.I.R. represent both the strengths and the limitations of the analytic approach to law making and adjudication.[13] Framers of state constitutions ought to aim for a degree of clarity and consistency in the articulation of the parameters of state-local relations. Courts have less experience with the intellectual problems posed by constitutional provisions dealing with the distribution of powers between state and local governments than in the closely related areas of individual rights embodied in the Declaration of Rights article and the institutional rights embodied in the separation of powers article.

This need for constitutional guidance is well illustrated by the course of Louisiana jurisprudence leading to *City of New Orleans*.[14] In that case, a state agency sought to build a marina on state-owned land within the boundaries of the City of New Orleans without complying with the city's zoning ordinances. The lower court and the dissent interpreted Louisiana's home rule provision in the 1974 Constitution as incorporating a "state-local" approach which would have immunized the state agency from the city's regulatory authority. That understanding had been adopted by the Louisiana Supreme Court itself in earlier cases.[15] In repudiating that precedent, the majority adverted to a wide variety of doctrinal material including treatises, law review articles, and textbooks to find that the "basic distinction between the power of initiation and

12. A.C.I.R., *supra* note 4, at 2-3 (italics in original).

13. *See generally* Wesley N. Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning and other Legal Essays (Walter W. Cook ed., 1923) [hereinafter Hohfeld].

14. 640 So. 2d 237 (La. 1994).

15. City of New Orleans v. State, 426 So. 2d 1318 (La. 1983); City of New Orleans v. State, 364 So. 2d 1020 (La. 1978).

the power of immunity provides an interpretative key to comprehending diverse state constitutional home rule provisions."[16]

The solvent of doctrinal legal analysis aims at extracting such fundamental distinctions in order to create certainty and predictability in public law.[17] Doctrinal analysis, based on a comparative study of the provisions of home rule articles and court decisions interpreting and applying such provisions, is of use both to courts and to framers of state constitutions.[18] However, the home rule article of the state constitution, is, like other parts of the state constitution, not "a brooding omnipresence in the sky." The particular provisions of the Louisiana Constitution at issue in the *City of New Orleans* case—Article VI, Section 4 and Article VI, Section 9(B)—must be addressed in the context of provisions of the state constitution which deal with the same subject matter as the texts under scrutiny. Provisions of the Louisiana state constitutions of 1921, 1913, 1898, and 1879 dealing with the same subject provide further context. Again, previous decisions of Louisiana courts interpreting and applying those texts are germane. Because state constitutional provisions are often framed in a state constitutional convention in which legal, political, and public policy issues are inextricably intertwined, legislative history is pertinent. Similarly, contemporary newspaper articles and other accounts reporting the Convention's activities comprise part of the relevant context. All of these contextual factors are particular to Louisiana's history of constitutional, political, and policy choices.[19] And that historicity, that path-dependence makes problematic an uncautious reliance on the concept of home rule or any other set of conceptual distinctions. In the real world of positive law, there is only California home rule or Ohio home rule or Louisiana home rule, each with a particular and historically conditioned body of public law which cannot safely be generalized beyond the boundaries of each jurisdiction. The Louisiana Supreme Court so recognized this Louisiana home rule when it examined each of the above-mentioned contextual factors in crafting its decision in *City of New Orleans*.

The Louisiana Supreme Court in *City of New Orleans* acknowledged the shift in the relationship between the state and its

16. *City of New Orleans*, 640 So. 2d at 242.

17. Hohfeld, *supra* note 13.

18. A model of such work is Frank P. Grad, The Drafting of State Constitutions, Working Papers for a Manuel (1967). *See generally* Dale Krane, Home Rule in America: A Fifty State Handbook (2001).

19. For a brief sketch of Louisiana's constitutional history, see Lee Hargrave, The Louisiana State Constitution 1-19 (1991). For a thorough exposition of the principle of contextuality in interpretation, see Myres S. McDougal et al., The Interpretation of Agreements and World Public Order 273-302 (1967).

agencies and home rule entities. The court noted this relationship moved from mandating obedience to the state's policy choices to Louisiana's theory of local government autonomy.

Arguably, such a different view of state-local relations is entrenched in the Louisiana Constitution and bottomed on the principle of local self-government.[20] Future dealings between the state and the city of New Orleans should be based on agreements rather than commands. Conflicts ordinarily will be resolved by a process of bargaining and compromise not by constitutional litigation. If the experiment proves successful, the framers of the next constitution may consider extending the scope of immunity to other home-rule entities. If the experiment does not work,[21] the tools of analysis sketched above[22] permit the framers to delineate the desired changes with a heightened degree of clarity and precision.

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20. There is an interesting congruence between the trajectory of ethical thinking from morality as obedience to morality as self-governance and the evolution of institutional policy analysis from exclusive focus on the unitary state towards recognition of the project of decentralized self-government. *See* J.B. Schneewind, *Modern Moral Philosophy, in* A Companion of Ethics 147-57 (Peter Singer ed.,1993); Vincent Ostrom et al., *Institutional Analysis and Development: Rethinking the Terms of Choice, in* Rethinking Institutional Analysis and Development 439-63 (Vincent Ostrom et al. eds., 1988).

21. For a skeptical examination of the devolution of powers to localities in the fields of land use regulation, finance, and provision of public services, see, Richard Briffault, *Our Localism*, 90 Col. L. Rev. 1 (1990). For a description of how village ordinances can play a significant role in combating the AIDS epidemic in Tanzania, see Michael M. Phillips, *New Taboos*, Wall St. J., Jan. 12, 2001, at A1.

22. *See* text accompanying *supra* note 12.