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The Challenge of the New Preemption

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The Challenge of the New Preemption

Richard Briffault*

Abstract. The past decade has witnessed the emergence and rapid spread of a new and aggressive form of state preemption of local government action across a wide range of subjects, including among others firearms, workplace conditions, sanctuary cities, antidiscrimination laws, and environmental and public health regulation. Particularly striking are punitive measures that do not just preempt local measures but also hit local officials or governments with criminal or civil fines, state aid cutoffs, or liability for damages, as well as broad preemption proposals that would virtually end local initiative over a wide range of subjects. The rise of the new preemption is closely linked to the partisan and ideological polarization between red states and their blue cities.

This Essay examines the spread of the new preemption and explores the legal doctrines available to local governments for challenging it. It argues that the more extreme preemption measures threaten the capacity for local self-government and are at odds with the values of local autonomy, the cornerstone role local governments play in our governmental structure, and the widespread state constitutional commitment to home rule. It also considers whether arguments about localism, like arguments about federalism, are really just about means to specific policy ends. It concludes that particularly in the current era of polarization, our system ought to protect some local space for self-determination for problems that arise at the local level.

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Introduction

This decade has witnessed the emergence and rapid spread of a new and aggressive form of state preemption of local government action. Traditionally, preemption consisted of a judicial determination of whether a new local law conflicted with preexisting state law. Classic preemption analysis harmonized the efforts of different levels of government in areas in which both enjoy regulatory authority and determined the degree to which state policies could coexist with local additions or variations.¹ Classic preemption disputes continue to arise, but the real action today is the *new preemption*: sweeping state laws that clearly, intentionally, extensively, and at times punitively bar local efforts to address a host of local problems.

The new preemption runs the gamut from firearms regulation to sanctuary cities, from workplace equity to environmental protection and public health. New preemption measures frequently displace local action without replacing it with substantive state requirements. Often propelled by trade association and business lobbying,² many preemptive laws are aimed not at coordinating state and local regulation but at preventing any regulation at all.

Several states have adopted *punitive preemption* laws that do not merely nullify inconsistent local rules—the traditional effect of preemption—but rather impose harsh penalties on local officials or governments simply for having such measures on their books. Others have considered proposals that are tantamount to *nuclear preemption*, effectively blowing up the ability of local governments to regulate without affirmative state authorization.

The rise of the new preemption is closely connected to the interacting polarizations of Republican and Democrat, conservative and liberal, and nonurban and urban. To be sure, Democratic states preempt Democratic cities;³ preemptive laws constrain small towns;⁴ and some measures impose progressive values on conservative communities.⁵ But the preponderance of new preemption actions and proposals have been advanced by Republican-

1. See generally Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113 (2007).

2. See, e.g., Mary Bottari & Brendan Fischer, *The ALEC-Backed War on Local Democracy*, HUFFPOST (updated Dec. 6, 2017), <https://perma.cc/2RP7-S43Q>.

3. See, e.g., Jesse McKinley, *Cuomo Blocks New York City Plastic Bag Law*, N.Y. TIMES (Feb. 14, 2017), <https://perma.cc/ST2X-37KZ> (reporting that New York's governor killed a New York City law that would have imposed a fee on plastic bags).

4. See, e.g., Press Release, Ariz. Attorney Gen., AG Brnovich Finds Bisbee's Plastic Bag Ban Violates State Law (Oct. 24, 2017), <https://perma.cc/KPG4-BNUN> (involving a state challenge to the city of Bisbee's plastic bag regulations).

5. See, e.g., Monique Garcia & Kim Geiger, *Rauner Narrowly Beats Back Union Push to Ban Right-to-Work Zones*, CHI. TRIB. (Nov. 8, 2017, 6:45 AM), <https://perma.cc/62JC-GYK8> (discussing a Republican governor's veto of a state bill that would have "prevent[ed] local governments from establishing right-to-work zones").

dominated state governments, embrace conservative economic and social causes, and respond to—and are designed to block—relatively progressive local regulations. Since 2011, Republicans have dominated state government.⁶ As of 2016 Republicans controlled both houses of thirty-two state legislatures and had trifectas—control of the legislature and the governorship—in twenty-five states.⁷ Even as a majority of states are controlled by Republicans, most cities, particularly big cities, are led by Democrats. Thirty-three of the fifty largest cities have Democratic mayors; fourteen of those are in Republican trifecta states.⁸ The not-so-irresistible force of cities pushing progressive agendas increasingly runs into the immovable object of conservative state resistance, manifested by aggressive preemption.⁹

Part I of this Essay provides an overview of recent preemptive laws, with a focus on the most punitive and sweeping measures. Part II examines the limited ability of current federal and state legal doctrines to protect local governments from their states. Part III calls for closer state court scrutiny of preemptive measures, scrutiny grounded in (i) the values of local self-government, (ii) the crucial role local governments play in our governance structure, and (iii) the widespread state constitutional provision for home rule. Extreme new preemption measures that strike directly at the capacity for local self-government are inconsistent with the central place of local governments in our democracy.

Much of the criticism of the new preemption has focused on how conservative state lawmakers are blocking progressive local initiatives.¹⁰ But the concerns raised by the current state challenges to local self-government transcend the politics of the particular issues at stake. In this highly polarized era, local autonomy can reduce conflict by permitting diverse communities to take different approaches to different problems while also generating usable information about how debated public policies work in practice. State power is necessary to address the external effects of local action and the costs of varying local laws as well as to ensure that the scale of government action is consistent with the scope of economic and social problems. But our system ought to

6. See *Partisan Composition of State Legislatures*, PEW RES. CTR. (Mar. 2, 2015), <https://perma.cc/7B9G-Y4U7>; Stephen Wolf, *Republicans Now Dominate State Government, with 32 Legislatures and 33 Governors*, DAILY KOS (Nov. 14, 2016, 10:09 AM PST).

7. See Wolf, *supra* note 6.

8. See *List of Current Mayors of the Top 100 Cities in the United States*, BALLOTPEDIA, <https://perma.cc/R6RN-96T2> (archived May 11, 2018).

9. See Lori Riverstone-Newell, *The Rise of State Preemption Laws in Response to Local Policy Innovation*, 47 PUBLIUS: J. FEDERALISM 403, 404-07, 417-19 (2017) (discussing “[t]he rise in state preemption legislation as a means to undo progressive local policies” and noting that it is “a departure from preemption’s traditional use”).

10. See, e.g., *id.*

maintain some legal space for local self-determination concerning problems that arise at the local level.

I. The New Preemption

The new preemption is broad in scope and wide-ranging in subject matter. As of 2013, for example, forty-five states preempted local firearms regulation.¹¹ Many measures predate the past decade, but states have continued to add new prohibitions.¹²

Triggered by the leadership role many local governments have taken in strengthening workers' rights,¹³ the business community has turned to state legislatures to push back hard against local measures raising minimum wages, providing for paid sick or family leave, or protecting employees from abrupt scheduling changes.¹⁴ Twenty-five states now ban local minimum wage requirements above the federal or state floor, and twenty preempt local paid sick leave rules.¹⁵ Between 2015 and 2017, nine states preempted local predictive scheduling laws,¹⁶ and local ban-the-box laws regulating employer inquiries into the criminal records of prospective employees are at risk as well.¹⁷ Some of these statutes are particularly sweeping. Michigan's so-called Death Star law¹⁸—more formally, the Local Government Labor Regulatory

11. Joseph Tartakovsky, *Firearm Preemption Laws and What They Mean for Cities*, MUN. LAW., Sept./Oct. 2013, at 6, 7.

12. See, e.g., Joe Palazzolo et al., *City Gun Laws Hit Roadblock*, WALL ST. J. (Feb. 5, 2013, 7:07 PM ET), <https://perma.cc/2XX8-C8N4>.

13. See Marni von Wilpert, *City Governments Are Raising Standards for Working People—and State Legislators Are Lowering Them Back Down*, ECON. POL'Y INST. (Aug. 26, 2017), <https://perma.cc/8W48-8PEW>.

14. See U.S. CHAMBER OF COMMERCE, STATE LABOR LAW REFORM: TOOLS FOR GROWTH 20-25 (2016), <https://perma.cc/V5DB-YEG6> (urging preemption of local ordinances “involv[ing] higher minimum wages and additional sick leave requirements”); *Living Wage Mandate Preemption Act*, AM. LEGIS. EXCHANGE COUNCIL (updated Jan. 28, 2013), <https://perma.cc/8XAF-XLPH> (presenting a model state law designed to “prohibit[] political subdivisions from enacting laws establishing ‘living wage’ mandates on private businesses”).

15. See von Wilpert, *supra* note 13.

16. *Id.*

17. See, e.g., MISS. CODE ANN. § 17-25-33 (2017) (prohibiting local subdivisions from adopting laws “that in any way interfere with an employer’s ability to become fully informed about the background of an employee or potential employee”); Pamela Q. Devata et al., *A Ban on Ban-the-Box Laws?: Indiana and Texas Introduce Legislation That Would Prohibit Municipal and County Ban-the-Box Laws Within Their States*, SEYFARTH SHAW LLP (July 21, 2017), <https://perma.cc/GLD4-2G4G>.

18. See, e.g., *The Death Star Bill Has Become Law*, BRUCH L. OFFS. (Aug. 4, 2015), <https://perma.cc/3H49-S57P>.

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Limitation Act¹⁹—bars local governments from adopting, enforcing or administering local laws or policies concerning employee background checks, minimum wage, fringe benefits, paid or unpaid leave, work stoppages, fair scheduling, apprenticeships, or remedies for workplace disputes.²⁰

Environmental and public health preemption measures include bans on local nutrition regulations, such as calorie counts and other menu labeling rules; restrictions on promotional incentives (such as toys) with fast-food meals; and efforts to address “food deserts” (poor neighborhoods with few stores selling fruits or vegetables).²¹ Mississippi, for example, prohibits any local regulation of “the provision or nonprovision of food nutrition information or consumer incentive items at food service operations” or of the sale of food and beverages approved for sale by federal or state agencies.²² This is known colloquially as the “anti-Bloomberg bill” in ironic recognition of the public health efforts of New York City’s former mayor.²³ Other preempted public health subjects include pesticides,²⁴ tobacco products,²⁵ e-cigarettes,²⁶ factory farms,²⁷ and fire sprinkler installation in new homes.²⁸

Perhaps the most surprising flash point in the new preemption era has been plastic bags. Concerned about the aesthetic, environmental, and cleanup costs of plastic bags, at least a dozen major cities and counties have either

19. No. 105, 2015 Mich. Pub. Acts 64 (codified at MICH. COMP. LAWS §§ 123.1381-1396 (2018)).

20. MICH. COMP. LAWS §§ 123.1384-1390, .1392.

21. See *Preemption Watch: Nutrition*, GRASSROOTS CHANGE, <https://perma.cc/9SN3-GKK6> (archived Apr. 26, 2018); see also *Food and Nutrition Act*, AM. LEGIS. EXCHANGE COUNCIL (July 3, 2012), <https://perma.cc/Q9KU-DB3G> (presenting a model state law designed to preempt certain “regulations in regards to food service establishments”).

22. See MISS. CODE ANN. § 75-29-901(3) (2017).

23. See Holly Yan, *No Soda Ban Here: Mississippi Passes “Anti-Bloomberg” Bill*, CNN (updated Mar. 21, 2013, 7:26 AM ET), <https://perma.cc/WV2P-GF48>.

24. See *Reclaiming Local Control*, PESTICIDE ACTION NETWORK N. AM., <https://perma.cc/KF8V-62M4> (archived Apr. 26, 2018); see also *State Pesticide Preemption Act*, AM. LEGIS. EXCHANGE COUNCIL (Jan. 28, 2013), <https://perma.cc/BA57-3LD6> (presenting a model state law designed to preempt pesticide ordinances).

25. *Map of Preemption on Advertising, Licensure, Smokefree Indoor Air, and Youth Access*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://perma.cc/5CFN-97WY> (archived Apr. 26, 2018).

26. *Preemption Watch: E-cigarettes*, GRASSROOTS CHANGE, <https://perma.cc/66ZP-DQYK> (archived Apr. 26, 2018).

27. *Preemption Watch: Factory Farms*, GRASSROOTS CHANGE, <https://perma.cc/MX3P-CEWE> (archived Apr. 26, 2018).

28. *Preemption Watch: Fire Sprinklers*, GRASSROOTS CHANGE, <https://perma.cc/3YR4-Y96F> (archived Apr. 26, 2018).

banned or taxed their use.²⁹ Some states have also adopted measures to discourage use of plastic bags or promote their recycling, but more recently the state-level action has been in the opposite direction, with at least nine states barring local plastic bag regulation.³⁰ The American City County Exchange—the local government offshoot of the American Legislative Exchange Council, which provides templates for state preemption laws—has strongly embraced state preemption of local plastic bag regulation in the name of “business and consumer choice.”³¹ Arizona’s attorney general’s enforcement of that state’s plastic bag ban ban (yes, that’s two “ban”s) against the tiny town of Bisbee caused a storm of controversy, with Bisbee ultimately yielding to the state’s force majeure without contesting it in court.³² Environmental preemption also includes state bans on local regulation of hydraulic fracturing, or fracking,³³ as well as state preemption of local regulation of polystyrene products (like Styrofoam).³⁴

States have also preempted local ordinances extending discrimination protections on the basis of sexual preference and gender identity.³⁵ The nationwide furor over North Carolina’s so-called Bathroom Bill—enacted in response to a Charlotte ordinance that extended antidiscrimination protections to gay, lesbian, and transgender people and allowed transgender people to select the bathroom consistent with their gender identity—appears to

29. See *State Plastic and Paper Bag Legislation*, NAT’L CONF. ST. LEGISLATURES (July 5, 2017), <https://perma.cc/5F62-FXPV>.

30. See *id.*

31. See *Regulating Containers to Protect Business and Consumer Choice*, AM. LEGIS. EXCHANGE COUNCIL (updated Sept. 4, 2015), <https://perma.cc/W2G8-T26W> (capitalization altered) (presenting a model state law designed to enshrine the principle that “[t]he free market is the best arbiter of the container”).

32. See, e.g., Dustin Gardiner, *Bisbee Repealing Plastic-Bag Ban to Dodge State Budget Hit*, ARIZ. REPUBLIC (updated Oct. 31, 2017, 6:26 PM MT), <https://perma.cc/P7WY-K6Z9>.

33. See, e.g., Richard Briffault et al., Am. Constitution Soc’y for Law & Policy, *The Troubling Turn in State Preemption: The Assault on Progressive Cities and How Cities Can Respond* 7 (2017), <https://perma.cc/8BFN-FUST>.

34. See, e.g., FLA. STAT. § 500.90 (2017).

35. See, e.g., ARK. CODE ANN. § 14-1-403(a) (2017) (prohibiting local subdivisions from “creat[ing] a protected classification or prohibit[ing] discrimination on a basis not contained in state law”); TENN. CODE ANN. § 4-21-102(20) (2017) (defining “sex” to mean “only . . . the designation of an individual person as male or female as indicated on the individual’s birth certificate”); NICOLE DUPUIS ET AL., NAT’L LEAGUE OF CITIES, *CITY RIGHTS IN AN ERA OF PREEMPTION: A STATE-BY-STATE ANALYSIS* 10 (2017), <https://perma.cc/U82N-36U2>.

have stalled these efforts for now,³⁶ but the issue is far from dead.³⁷ In a similar vein, as urban protests over public Civil War memorials to the Confederacy mushroomed, so too did state laws barring local actions to remove monuments within their borders.³⁸

Rounding out this overview, seventeen states preempt municipal broadband services;³⁹ thirty-seven preempt local regulation of ridesharing platforms;⁴⁰ three have displaced local regulation of homesharing and short-term rentals;⁴¹ twenty-six bar local rent control ordinances;⁴² and eleven appear to have adopted measures intended to prevent local inclusionary zoning requirements for new housing developments.⁴³ A few states even preempt local humanitarian measures that would bar the sale of animals raised in “puppy mills” known for keeping animals in poor conditions.⁴⁴

A. Punitive Preemption

Going beyond preemption’s traditional focus on simply negating local laws, some states now punish local officials or governments responsible for policies that have been preempted.

1. Personal liability

A half-dozen states reinforce firearms preemption by threatening local officials with fines, civil liability, or removal from office for enacting or

36. See, e.g., Jason Hanna et al., *North Carolina Repeals “Bathroom Bill,”* CNN (updated Mar. 30, 2017, 9:36 PM ET), <https://perma.cc/7T4H-SK4K>; Lauren McGaughy, *The Texas Bathroom Bill Is Dead—for Now,* DALL. NEWS (Aug. 15, 2017, 10:50 AM), <https://perma.cc/W6JW-2ZUE>.

37. See, e.g., Ray Sanchez, *First Days of 2017 Bring New “Bathroom Bills,”* CNN (updated Jan. 7, 2017, 10:11 AM ET), <https://perma.cc/67H8-JW9L> (noting measures introduced or pending in eight states).

38. See, e.g., ALA. CODE § 41-9-232 (2017); TENN. CODE ANN. § 4-1-412; see also Kaeli Subberwal, *Several States Have Erected Laws to Protect Confederate Monuments,* HUFFPOST (updated Aug. 18, 2017), <https://perma.cc/72K6-6U2N>.

39. DUPUIS ET AL., *supra* note 35, at 17.

40. *Id.* at 12.

41. *Id.* at 15.

42. *Id.* at 23.

43. See Richard Schragger, Legal Effort to Address Preemption (LEAP) Project, State Preemption of Local Laws: Preliminary Review of Substantive Areas 11 (2017), <https://perma.cc/VY2G-ADXQ>.

44. Henry Grabar, *Cities Are Slowly Putting Puppy Mills Out of Business. These States Are Trying to Stop Them,* SLATE (Sept. 9, 2016, 7:00 AM), <https://perma.cc/6GXU-9MXB>.

enforcing firearms measures.⁴⁵ In 2012, Kentucky created a private right of action for individuals and organizations to seek damages and litigation fees from local officials and actually made it a crime—official misconduct in either the first or second degree, depending on the circumstances—for a local official to violate the state gun preemption law “or the spirit thereof.”⁴⁶ Florida imposes civil penalties on any person who violates its gun preemption law by “enacting or causing to be enforced” any local measure “impinging upon [the state’s] exclusive occupation of the field.”⁴⁷ The penalties for “knowing and willful” violations include civil fines on individual officials of up to \$5000 and removal from office by the governor.⁴⁸ Individuals or groups “whose membership is adversely affected by any ordinance, regulation, measure, directive, rule, enactment, order, or policy promulgated or caused to be enforced in violation” of the gun preemption law may sue the local government for declaratory and injunctive relief and for damages.⁴⁹

In *Marcus v. Scott*, a Florida trial court held the application of the removal provision to county commissioners unconstitutional because the Florida Constitution authorizes the governor only to suspend commissioners, with the removal power vested in the state senate.⁵⁰ The court, however, limited its decision to the special case of the county commissioners mentioned in the constitution; it did not address the legislature’s authority to require removal of other local officers who violate the preemption law.⁵¹

In *Florida Carry, Inc. v. City of Tallahassee*, gun rights organizations sued the city and individual city officials, including the mayor and city commissioners, for failing to repeal two unenforced city gun ordinances dating to 1957 and 1984 dealing with the discharge of firearms in small lots and in city parks.⁵² The ordinances had been preempted by a 1987 state law, and the city’s police chief had specifically directed police personnel not to enforce them.⁵³ The gun

45. See, e.g., ARIZ. REV. STAT. ANN. § 13-3108(J) (2018) (termination from employment); MISS. CODE ANN. § 45-9-53(5)(c) (2017) (civil liability with no public indemnity for penalties or fees and costs); OKLA. STAT. tit. 21, § 1289.24(D) (2017) (civil liability); Tartakovsky, *supra* note 11, at 7.

46. Act of Apr. 11, 2012, ch. 117, § 1, 2012 Ky. Acts 958 (codified at KY. REV. STAT. ANN. § 65.870 (West 2018)); see KY. REV. STAT. ANN. § 65.870(2)-(3), (6); see also *id.* § 522.020 (first-degree official misconduct); *id.* § 522.030 (second-degree official misconduct).

47. See FLA. STAT. § 790.33(3)(a) (2017), *invalidated in part by Marcus v. Scott*, No. 2012-CA-001260, 2014 WL 3797314 (Fla. Cir. Ct. 2014).

48. *Id.* § 790.33(3)(c), (e). Public funds may not be used to defend or indemnify officials sued under Florida’s statute. *Id.* § 790.33(3)(d).

49. *Id.* § 790.33(3)(f).

50. See 2014 WL 3797314, at *3-4 (citing FLA. CONST. art. IV, § 7).

51. See *id.* at *3.

52. See 212 So. 3d 452, 455-56 (Fla. Dist. Ct. App. 2017).

53. *Id.*

rights groups, however, wanted the ordinances formally stricken from the city's books.⁵⁴ The city commission considered the matter but voted to indefinitely table discussion of repeal.⁵⁵ The gun groups then sued under the punitive preemption statute.⁵⁶ The Florida appellate court concluded that neither the tabling of the discussion of repeal nor the continued publication of the preempted ordinances in the city's code constituted "promulgat[ion]" within the meaning of the preemption statute and that given the lack of enforcement of the measures, the defendants were entitled to summary judgment.⁵⁷ But it declined to rule on the city officials' argument that punitive preemption violated principles of local legislative immunity and free speech, concluding that because no penalties had been imposed there was no need to address the issue.⁵⁸

In 2017, Texas included punitive provisions in its anti-sanctuary-city law, providing, among other things, for the removal from office of any local official who "adopt[s], enforce[s], or endorse[s] a [local] policy" that "prohibits or materially limits the enforcement of immigration laws."⁵⁹ A Florida anti-sanctuary bill that ultimately died in committee would have provided for suspension or removal from office for any local official who "willfully or knowingly fails to report a known or probable violation" of the law's requirements.⁶⁰

2. Fiscal sanctions

Some states impose fiscal penalties on local governments that adopt laws subject to preemption. Arizona's firearm preemption law targets noncompliant local governments with liability for fines of up to \$50,000 for knowing and willful violations.⁶¹ The Texas anti-sanctuary-city law makes local governments liable, with penalties of up to \$1500 for a first violation and \$25,500 for subsequent violations; each day of a continuing violation

54. *Id.* at 456.

55. *Id.*

56. *See id.*

57. *See id.* at 462-63 (citing FLA. STAT. § 790.33, *invalidated in part by* *Marcus v. Scott*, No. 2012-CA-001260, 2014 WL 3797314 (Fla. Cir. Ct. 2014)).

58. *Id.* at 465-66.

59. *See* TEX. GOV'T CODE ANN. § 752.053 (West 2017), *invalidated in part by* *City of El Cenizo v. Texas*, No. 17-50762, 2018 WL 2121427 (5th Cir. May 8, 2018); *id.* § 752.0565; *see also* Act of May 7, 2017, ch. 4, 2017 Tex. Gen. Laws 7 (codified in scattered sections of the Texas Codes).

60. H.R. 9, 25th Leg., Spec. Sess. § 2 (Fla. 2017); *see CS/HB 9: Federal Immigration Enforcement*, FLA. SENATE, <https://perma.cc/HGE2-LV82> (archived Apr. 28, 2018).

61. ARIZ. REV. STAT. ANN. § 13-3108(I) (2018).

constitutes a separate violation.⁶² Texas's governor, Greg Abbott, has withheld from sanctuary jurisdictions previously awarded and allocated grant funds for programs designed to benefit victims of family violence, veterans, and other at-risk communities, and he has refused grant applications from Travis County (Austin), including those unrelated to immigration matters, because of its sanctuary policy.⁶³ The Florida anti-sanctuary-city law that died in committee would have made noncompliant communities liable for fines of between \$1000 and \$5000 per day, ineligible for state grant funding for five years, and subject to a civil cause of action by victims of crimes committed by undocumented aliens on a finding that a locality's noncompliance with the law's requirements gave the alien access to the victim.⁶⁴

The most punitive⁶⁵ fiscal measure is surely what's known as Arizona's SB 1487,⁶⁶ which provides for a cutoff of state aid to localities with preempted laws. Under SB 1487, any state legislator may request the state attorney general to investigate and report a claim that a local official action violates state law.⁶⁷ On finding a violation, the attorney general must notify the offending local government and, if the local government "fail[s] to resolve the violation within thirty days," must notify the state treasurer, "who shall withhold and redistribute [to other localities] state shared monies" until the violation is resolved.⁶⁸ If the attorney general concludes merely that the local measure "[m]ay violate" state law, the attorney general must immediately bring a special action in the state supreme court to determine the issue.⁶⁹ However, in order to contest the action, the defendant local government must "post a bond equal to the amount of state shared revenue" it received in the preceding six months⁷⁰—a requirement that virtually no locality would be able to meet. "State shared revenue" constitutes roughly one-quarter of local revenues in Arizona;

62. See TEX. GOV'T CODE ANN. § 752.056(a)-(b).

63. See *City of El Cenizo v. Texas*, 264 F. Supp. 3d 744, 790-91 (W.D. Tex. 2017), *aff'd in part and vacated in part*, No. 17-50762, 2018 WL 2121427 (5th Cir. May 8, 2018).

64. H.R. 9, § 2.

65. Less dramatic but still coercive are a California law denying state construction funds to a charter city that awards a public works contract without requiring the contractor to comply with the state prevailing wage law, see CAL. LAB. CODE § 1782(b) (West 2018), and a Michigan law reducing school aid to local districts that use funds appropriated for education to pay expenses incurred related to a suit brought by the district against the state, see MICH. COMP. LAWS § 388.1764g (2018).

66. See Act of Mar. 17, 2016, ch. 35, 2016 Ariz. Sess. Laws 161 (codified as amended in scattered sections of the Arizona Revised Statutes).

67. ARIZ. REV. STAT. ANN. § 41-194.01(A) (2018).

68. *Id.* § 41-194.01(B).

69. *Id.* § 41-194.01(B)(2).

70. *Id.* A local government that loses a lawsuit against the state is liable for the state's costs. See *id.* § 12-348.01.

moreover, the state revenue sharing system was adopted in the 1970s as part of a package in which the state constitution was amended to bar a local income tax.⁷¹ The state funds affected by SB 1487 are crucial to local fiscal health; withholding funds would be an effective means of bludgeoning a recalcitrant locality into submission.

Since its enactment, SB 1487 has resulted in ten investigations into local practices or laws, concerning subjects such as firearms, marijuana cultivation, policing, truck regulation, and a plastic bag ban, with two findings of violations and two “may violate” determinations.⁷² The most significant case involved Tucson’s ordinance providing for the destruction of firearms the city had obtained through forfeiture or as unclaimed property.⁷³ The attorney general concluded that the ordinance was preempted by a 2013 state law forbidding municipalities from destroying firearms.⁷⁴ The city suspended enforcement but declined to repeal its ordinance and instead brought suit, contending that disposal of firearms in police custody is a local matter.⁷⁵ In *State ex rel. Brnovich v. City of Tucson*, the state supreme court rejected the city’s arguments that enabling a single legislator to trigger an investigation and authorizing the attorney general to determine that a local measure is preempted—with consequent loss of state shared revenue—violated state separation of powers principles.⁷⁶ The court criticized the law’s bond-posting provision not because it burdens local governments but because it is so onerous that it “would likely dissuade if not absolutely deter a city from disputing the Attorney General’s opinion,” thus infringing on the court’s role in deciding preemption cases.⁷⁷ But as the state had not sought a bond from the city, the court declined to rule on the constitutionality of that provision.⁷⁸ On the merits, the court rejected the city’s arguments that it had state constitutional authority as a home rule city to dispose of its own property as it saw fit and that its local interest in local public safety was greater than the state’s in

71. See *State Shared Revenue in Arizona: An Assessment*, GITHUSH (Mar. 13, 2010), <https://perma.cc/V5FE-A64H> (noting that as of 2007, Arizona cities received approximately \$2.1 billion from the state as compared to approximately \$6.1 billion in “own-source revenue”).

72. See *SB1487 Investigations*, ARIZ. ATT’Y GEN., <https://perma.cc/8GH3-8UG6> (archived Apr. 28, 2018).

73. See *Legislator Request for Attorney General Investigation of Alleged State-Law Violation by County, City, or Town* (2016), <https://perma.cc/6BGY-693U> (setting out the original investigation request asking “[w]hether the City of Tucson is destroying confiscated and/or forfeited firearms in violation of Arizona law”).

74. See *State ex rel. Brnovich v. City of Tucson*, 399 P.3d 663, 666-67 (Ariz. 2017).

75. *Id.* at 667.

76. See *id.* at 667-71.

77. *Id.* at 672.

78. See *id.*

regulating firearms and police behavior.⁷⁹ Subsequently, the town of Bisbee declined to contest the attorney general's SB 1487 determination that its plastic bag ban was preempted by state law, concluding that it could not afford to litigate the issue.⁸⁰

B. Nuclear Preemption

As one observer has noted, "The states aren't merely overruling local laws; they've walled off whole new realms where local governments aren't allowed to govern at all."⁸¹ Legislators in several states have raised the idea of completely eliminating local legislative power, either over entire fields of regulation or with respect to any subject in which the state has an interest. In 2016, the Oklahoma legislature considered but did not pass a measure providing that a municipality may not act with respect to any subject regulated under state law unless "expressly authorized by statute."⁸² In 2015, the Texas legislature considered but did not pass measures that would have preempted all local regulation of the use of private property, all local authority over any activity licensed by the state, and any local law setting higher standards than state law on the same subject.⁸³ Texas's Governor Abbott has said that the state should adopt a "ban across the board' on municipal regulations."⁸⁴ And in 2017 the Florida legislature had before it bills that would have expressly prohibited all local regulation of "businesses, professions, and occupations" unless expressly authorized by state law⁸⁵ and would have prohibited all local regulation of "commerce, trade, and labor."⁸⁶ Although neither bill became law, the speaker of the Florida House of Representatives declared himself "certainly a big fan of the concept" of preempting local regulation of business.⁸⁷

These measures would effectively nuke local power and are an existential threat to local self-government. Although continued political support for local

79. *See id.* at 676-79.

80. *See* Gardiner, *supra* note 32.

81. Emily Badger, *Blue Cities Want to Make Their Own Rules. Red States Won't Let Them.*, N.Y. TIMES (July 6, 2017), <https://perma.cc/P7E3-QNVZ>.

82. *See* S. 1289, 55th Leg., 2d Sess. § 1 (Okla. 2016).

83. *See Ground Zero: Preemption in Texas*, GRASSROOTS CHANGE (June 18, 2015), <https://perma.cc/5L59-SKE4>.

84. Daniel C. Vock, *The End of Local Laws?: War on Cities Intensifies in Texas*, GOVERNING (Apr. 5, 2017), <https://perma.cc/LSZ5-4LMA>.

85. H.R. 17, 25th Leg., Reg. Sess. § 1 (Fla. 2017).

86. S. 1158, 25th Leg., Reg. Sess. §§ 1-3 (Fla. 2017).

87. Bill Cotterell, *Cities and Counties Are Playing Defense in 2018 Session*, TALLAHASSEE DEMOCRAT (updated Sept. 16, 2017, 4:12 PM ET), <https://perma.cc/PMN4-GNYX> (quoting Richard Corcoran, speaker of the Florida House of Representatives).

autonomy has so far prevented the enactment of these far-reaching proposals, the pressure on local governments remains strong. With conservative groups at even the local level celebrating the importance of state sovereignty and decrying “runaway local governments,”⁸⁸ such nuclear preemption remains a real possibility.

II. Legal Arguments Against Preemption

Existing legal doctrines provide local governments with few protections against state preemption. Federal constitutional law treats state-local relations as almost entirely a matter for the states. State constitutions, despite the widespread adoption of home rule provisions governing at least some localities, typically allow their state governments to curtail the regulatory authority of their local governments. There are doctrinal tools that could protect local officials and perhaps local governments from some penal sanctions, but broader protections will require new legal approaches to local autonomy and state-local relations.

A. Federal

The U.S. Constitution does not recognize local governments, and the U.S. Supreme Court has long treated local governments as essentially subdivisions of their states, no more protected from state regulation or displacement than the state’s department of motor vehicles.⁸⁹ In effect, federalism trumps any claim of localism. Local governments have no constitutional rights against their states,⁹⁰ and local residents have no federal constitutional claim to the rights, powers, boundaries, or even the very existence of their local governments.⁹¹ State laws changing local boundaries or stripping local governments of powers can be invalidated if they evince an intent to violate the equal protection or due process rights of individuals,⁹² but many preemption measures—such as those dealing with environmental or public health regulation—lack such substantive constitutional implications. State laws barring local antidiscrimination ordinances present a closer case, but recent

88. See Jon D. Russell & Aaron Bostrom, *Am. City Cty. Exch., Federalism, Dillon Rule and Home Rule 4* (2016), <https://perma.cc/L599-N4TB> (capitalization altered).

89. See, e.g., *Nixon v. Mo. Mun. League*, 541 U.S. 125, 133-34 (2004).

90. See, e.g., *Williams v. Mayor of Balt.*, 289 U.S. 36, 40 (1933).

91. See, e.g., *Hunter v. City of Pittsburgh*, 207 U.S. 161, 176-79 (1907).

92. See, e.g., *Romer v. Evans*, 517 U.S. 620, 631, 634-36 (1996); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 476, 487 (1982); *Gomillion v. Lightfoot*, 364 U.S. 339, 342-48 (1960). Local governments may challenge state measures that violate federal laws. See, e.g., *Lawrence County v. Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256, 260-68 (1985).

preemption measures have left in place protections against the kinds of discrimination the Court has recognized as unconstitutional. They do not facially deny any group protection but simply preclude localities from providing more antidiscrimination protections than their states do, invoking the noninvidious goal of a uniform statewide rule.⁹³

Some preemption measures have the effect of shifting decisionmaking authority from majority-minority local governments to a white-dominated state government. The Supreme Court has found an equal protection violation when a state took away a local power after the locality had exercised it to advance a racial minority's interests.⁹⁴ But when the majority-black city of Birmingham raised that theory in challenging Alabama's preemption of local minimum wage authority in the immediate aftermath of Birmingham's adoption of a minimum wage, a federal district court rejected it.⁹⁵ The court determined that the preemption law was racially neutral on its face and supported by the value of pursuing a "uniform economic policy throughout the state" and that the plaintiffs had failed to meet the high standard of proof of intentional discrimination required in the absence of a clear racial classification.⁹⁶

Some lower federal courts have suggested that local governments have First Amendment rights, either for themselves or as associations of their residents, which might provide a basis for challenging sanctions imposed when local laws express views about firearms, immigration, or plastic bags.⁹⁷ As Judge Posner put it, "There is at least an argument that the marketplace of ideas would be unduly curtailed if municipalities could not freely express themselves on matters of public concern"⁹⁸ Similarly, Judge Weinstein wrote that "[a]

93. See, e.g., *Protect Fayetteville v. City of Fayetteville*, 510 S.W.3d 258, 259-60, 262-63 (Ark. 2017).

94. See *Seattle Sch. Dist. No. 1*, 458 U.S. at 476, 483-84, 487.

95. See *Lewis v. Bentley*, No. 2:16-CV-690-RDP, 2017 WL 432464, at *1-2, *11-13 (N.D. Ala. Feb. 1, 2017), *appeal docketed*, No. 17-11009 (11th Cir. Mar. 3, 2017); *Alabama: Law Bans Cities from Setting Minimum Wage*, N.Y. TIMES (Feb. 25, 2016), <https://perma.cc/T2BE-KBR8>.

96. See *Lewis*, 2017 WL 432464, at *1-2, *11-13. The "political process" theory of discrimination embodied in *Seattle School District No. 1* was undermined by *Schuette v. Coalition to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equality by Any Means Necessary (BAMN)*, 134 S. Ct. 1623 (2014), which rejected strict scrutiny for state actions that make it more difficult for racial minorities than for other groups to secure government policies that are in their interest, see *id.* at 1626, 1637 (plurality opinion).

97. See, e.g., *Creek v. Village of Westhaven*, 80 F.3d 186, 192-93 (7th Cir. 1996); *County of Suffolk v. Long Island Lighting Co.*, 710 F. Supp. 1387, 1390 (E.D.N.Y. 1989); see also Josh Bendor, *Municipal Constitutional Rights: A New Approach*, 31 YALE L. & POL'Y REV. 389, 425-26 (2013) (making a freedom of association argument for municipalities).

98. *Creek*, 80 F.3d at 193.

municipal corporation, like any corporation, is protected under the First Amendment in the same manner as an individual.⁹⁹ Judge Posner also hinted at a freedom of association argument, suggesting that a local government is an association of its residents, “a megaphone amplifying voices that might not otherwise be audible,” such that “a curtailment of its right to speak might be thought a curtailment of the unquestioned First Amendment rights of those residents.”¹⁰⁰ These cases, however, involved private challenges to local government litigation or lobbying, not local resistance to state restrictions. Moreover, in *Ysursa v. Pocatello Education Ass’n*, the Supreme Court rejected the very idea that municipal corporations may be analogized to business corporations for First Amendment purposes.¹⁰¹ *Ysursa* sustained Idaho’s ability to regulate municipal labor relations and did not involve a measure punishing a locality for retaining an invalid law, but in strongly reiterating the creature-of-the-state model of local government it did not leave much room for a locality-as-association-of-its-residents theory.¹⁰²

The First Amendment could, however, provide some protection for local officials. The Court has held that the First Amendment does not apply to a legislator’s vote,¹⁰³ but the First Amendment does protect the speech of local officials, even on preempted issues. As the Court has observed, “Legislators have an obligation to take positions on controversial political questions so that their constituents can be fully informed by them”¹⁰⁴

In *Spallone v. United States*, the Court was troubled when a federal district court, seeking to remedy a city’s ongoing civil rights violation, imposed fines on local legislators who failed to vote for the remedy the district court sought.¹⁰⁵ Noting that the fines were “designed to cause them to vote, not with a view to the interest of their constituents or of the city, but with a view solely to their own personal interest[.]” in avoiding paying the fines, the Court deemed the district court’s order a “perversion of the normal legislative process,” far more troublesome than the imposition of sanctions on the city government.¹⁰⁶

99. *Long Island Lighting*, 710 F. Supp. at 1390.

100. *Creek*, 80 F.3d at 193.

101. See 555 U.S. 353, 362-64 (2009) (holding that the First Amendment analysis is identical for government employee payroll deduction bans at the state and local levels).

102. See *id.*

103. See *Nev. Comm’n on Ethics v. Carrigan*, 564 U.S. 117, 125-26 (2011) (holding that a legislator “has no personal right” to cast a legislative vote). *Carrigan* involved a requirement that a legislator abstain from voting on a matter presenting a conflict of interest. *Id.* at 119. It did not address whether the First Amendment applies to a law punishing a legislator for a vote.

104. *Bond v. Floyd*, 385 U.S. 116, 136 (1966).

105. See 493 U.S. 265, 267 (1990).

106. See *id.* at 279-80.

Spallone, however, ultimately turned on the equitable powers of federal district courts rather than the First Amendment per se.¹⁰⁷

In *City of El Cenizo v. Texas*, a federal district court preliminarily enjoined on First Amendment grounds the section of Texas’s anti-sanctuary-city law providing for removal from office of local officials who “endorse” sanctuary policies;¹⁰⁸ the Fifth Circuit subsequently affirmed, although it narrowed the injunction to provide relief only for elected officials.¹⁰⁹ This is only one decision, but it suggests that going beyond substantive preemption to penalize local expressive activity may trigger judicially enforceable free speech concerns.

B. State

Local governments are a bit, but only a bit, better off raising state law defenses. Many state constitutions impose restrictions on state legislative processes which, while not necessarily aimed at protecting local governments per se, can provide a basis for challenging preemptive legislation.¹¹⁰ These limits on the legislative process can provide local governments with protection against poorly drafted measures but ultimately can be overcome by a determined state legislative majority. The major state constitutional defense against aggressive preemption is provided by home rule.

1. Home rule

State preemption litigation is primarily a struggle over the meaning of “home rule”: the commitment to local lawmaking capacity codified in the constitutions and statutes of the vast majority of states.¹¹¹ Home rule was

107. See *id.* at 274.

108. See 264 F. Supp. 3d 744, 777-78, 812-13 (W.D. Tex. 2017) (citing TEX. GOV’T CODE ANN. § 752.053 (West 2017)), *aff’d in part and vacated in part*, No. 17-50762, 2018 WL 2121427 (5th Cir. May 8, 2018).

109. See *City of El Cenizo v. Texas*, No. 17-50762, 2018 WL 2121427, at *11, *16 (5th Cir. May 8, 2018).

110. See, e.g., *Coop. Home Care, Inc. v. City of St. Louis*, 514 S.W.3d 571, 575, 580-81 (Mo. 2017); *Leach v. Commonwealth*, 141 A.3d 426, 427-28, 433-35 (Pa. 2016).

111. All but three states make some provision for home rule. In forty-one states, home rule is grounded in the state constitution; an additional six states provide for home rule by statute. See DALE KRANE ET AL., HOME RULE IN AMERICA: A FIFTY-STATE HANDBOOK app. at 476 tbl.A1, 477 tbl.A2 (2001). Home rule may also result from judicial action rather than constitutional or statutory provisions. See, e.g., *State v. Hutchinson*, 624 P.2d 1116, 1118-26 (Utah 1980).

Some preemption measures have run afoul of other state constitutional provisions such as those requiring that a bill address only a single subject. See, e.g., *Coop. Home Care*, 514 S.W.3d at 575, 580-81 (invalidating a minimum wage preemption provision tacked onto a bill dealing with community improvement districts); *Leach*, 141 A.3d at 427-28, footnote continued on next page

adopted against the assumptions that states possess plenary authority over their local governments; that local governments are mere creatures of their states, possessing only those powers delegated to them by their states; and that state grants of authority are to be narrowly limited—under the judicial canon of interpretation known as Dillon’s Rule—to only those powers expressly granted, necessarily implied in the express grant, or essential for the accomplishment of state-prescribed purposes.¹¹² A primary purpose and the principal effect of home rule has been to undo Dillon’s Rule and enable local governments to take the initiative and adopt local laws without having to wait for specific or express state authority.¹¹³ But home rule has been far less focused on, and far less successful at, protecting local measures from state displacement.

Indeed, the principal modern approach to home rule focuses exclusively on expanding local power to take action while conceding that general state laws can preempt local laws.¹¹⁴ An older home rule model sought to provide protection from preemption for local laws addressing “local” or “municipal” matters, but the meaning of those terms was often left undefined, with courts reading them relatively narrowly in cases of state-local conflict.¹¹⁵ Moreover, with the same language used to establish both local initiative and protection from state displacement, narrow judicial readings of “local” or “municipal” in preemption cases sometimes led to comparably narrow interpretations in initiative cases.¹¹⁶ It was this unanticipated result of combining initiative with immunity that led many home rule advocates to put forward the now-dominant initiative-only approach.

To be sure, many state courts read local powers generously and avoid finding preemption where there is a plausible argument that the state has not sought to bar local action and that state and local laws can coexist.¹¹⁷ Some

433-35 (invalidating a statute that tucked a firearms preemption provision into other provisions principally dealing with theft of “secondary metal” (citing PA. CONST. art. III, § 3)); *see also* *Marcus v. Scott*, No. 2012-CA-001260, 2014 WL 3797314, at *3-4 (Fla. Cir. Ct. 2014) (holding that a state constitutional provision barred application of a punitive preemption law’s provision for removal from employment to county commissioners).

112. *See* RICHARD BRIFFAULT & LAURIE REYNOLDS, *CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW* 289-90, 327-28 (8th ed. 2016).

113. *See id.* at 346-51.

114. *See* BRIFFAULT & REYNOLDS, *supra* note 112, at 347-48; KRANE ET AL., *supra* note 111, at 14.

115. *See* BRIFFAULT & REYNOLDS, *supra* note 112, at 347.

116. *See id.*

117. *See, e.g.,* *City of Riverside v. Inland Empire Patients Health & Wellness Ctr., Inc.*, 300 P.3d 494, 500-13 (Cal. 2013); *Wallach ex rel. Norse Energy Corp. USA v. Town of Dryden*, 16 N.E.3d 1188, 1195-1201 (N.Y. 2014); *Watson v. City of Seattle*, 401 P.3d 1, 12-14 (Wash. 2017).

state constitutions provide more specific protections for local control over certain subjects, most commonly local elections and the structure of the local government, the local municipal workforce, or local-government-owned property and public works.¹¹⁸ These strengthen the capacity for local self-government but provide little protection for local power to regulate private behavior.

A handful of state courts have been more protective of local lawmaking. The California Supreme Court limits preemption to situations where the state law not only addresses a matter of statewide concern but also is “reasonably related” to the state concern and “narrowly tailored” to avoid unnecessary interference with local governance.¹¹⁹ The Ohio Supreme Court has gone further, holding that a state law preempting local regulation cannot merely block local action but must include some substantive replacement regulation.¹²⁰

Ohio, like many states, provides that a local law may be preempted only by a “general” state law,¹²¹ but whereas most states treat “general” as meaning broadly applicable or not narrowly targeting an arbitrarily small subset of local governments,¹²² Ohio’s courts have held that to be “general” a law must “prescribe a rule of conduct upon citizens generally”—that is, it must “set forth police, sanitary, or similar regulations, rather than purport only to grant or limit legislative power of a municipal corporation to set forth police, sanitary, or similar regulations.”¹²³ As a result, Ohio courts have rejected state laws purporting to preempt local regulation of foods containing trans fats,¹²⁴ local regulation of towing companies,¹²⁵ and local hiring requirements on certain local construction contracts,¹²⁶ as well as laws burdening local use of cameras to enforce traffic laws.¹²⁷ In each case, the state law did not set forth a substantive rule of conduct but only regulated municipalities in the exercise of their home rule powers. As the Ohio appellate court found in upholding Cleveland’s longstanding “Fannie Lewis Law,” which imposed a limited local

118. See, e.g., *Strode v. Sullivan*, 236 P.2d 48, 52-54 (Ariz. 1951); *State Bldg. & Constr. Trades Council of Cal. v. City of Vista*, 279 P.3d 1022, 1026-34 (Cal. 2012); *Town of Telluride v. San Miguel Valley Corp.*, 185 P.3d 161, 164-71 (Colo. 2008).

119. See *Cal. Fed. Sav. & Loan Ass’n v. City of Los Angeles*, 812 P.2d 916, 925, 930 (Cal. 1991).

120. See *City of Canton v. State*, 766 N.E.2d 963, 967-68 (Ohio 2002).

121. See OHIO CONST. art. XVIII, § 3; see also, e.g., CAL. CONST. art. XI, § 7.

122. See generally BRIFFAULT & REYNOLDS, *supra* note 112, at 299-318.

123. See *City of Canton*, 766 N.E.2d at 968.

124. See *City of Cleveland v. State*, 989 N.E.2d 1072, 1075, 1079-83 (Ohio Ct. App. 2013).

125. See *City of Cleveland v. State*, 5 N.E.3d 644, 646-47 (Ohio 2014).

126. See *City of Cleveland v. State*, 90 N.E.3d 979, 981-82, 988-89 (Ohio Ct. App. 2017).

127. See *City of Dayton v. State*, 87 N.E.3d 176, 179 (Ohio 2017).

hiring requirement for large city construction projects, the 2016 state ban on local hiring requirements regulated only the ability of local governments to set the terms of their public works contracts and was “no[t] . . . directed toward employees or contractors.”¹²⁸

Given the powerful deregulatory focus of much of the new preemption, Ohio’s substantive approach to “general law” would be useful to local governments in other states fighting state displacement. To date, the doctrine appears to have had no impact outside Ohio,¹²⁹ possibly because its nonintuitive reading of “general law” is quite different from the way other state courts have interpreted that phrase. Nonetheless, Ohio courts are clearly on to something. Stripping local governments of regulatory authority over a subject without adopting a substantive state rule for that subject is not merely a denial of local immunity but is inconsistent with the local initiative that is the essence of home rule.

2. Challenging punitive preemption

There are state law arguments for invalidating punitive preemptive measures, particularly those imposing civil or criminal liability on local officials. The vast majority of state constitutions include a provision, analogous to the federal Speech or Debate Clause,¹³⁰ immunizing state legislators from suit for their votes, statements made during legislative debate, or other actions connected to their legislative work.¹³¹ These provisions do not by their terms protect local legislators, but at least one state supreme court has so applied its state’s provision. As the Washington Supreme Court explained, although the state clause “on its face applies only to the State Legislature . . . , the necessity for free and vigorous debate in all legislative bodies is part of the essence of representative self-government” and thus extends to a member of a city council.¹³² Other state courts have held that the common law legislative

128. See *City of Cleveland*, 90 N.E.3d at 981-82, 989.

129. My May 2018 Westlaw review of references to the foundational decision in *City of Canton v. State*, 766 N.E.2d 963 (Ohio 2002), found that all but one of the 284 judicial or administrative citations were from Ohio.

130. U.S. CONST. art. I, § 6, cl. 1 (“[F]or any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place.”).

131. See Steven F. Huefner, *The Neglected Value of the Legislative Privilege in State Legislatures*, 45 WM. & MARY L. REV. 221, 224 (2003) (“The constitutions of forty-three states contain a privilege for state legislators analogous to the privilege that the federal Constitution provides members of Congress, and the common law has frequently recognized a similar protection as well.”). Even constitutions without such a clause protect legislators from arrest or civil process while the legislature is in session, which has been used to provide a broader privilege. See *id.* at 237 & n.54.

132. See *Moore v. Call (In re Recall of Call)*, 749 P.2d 674, 677 (Wash. 1988).

privilege that predated and inspired the Speech or Debate Clause applies to local legislative bodies.¹³³ This privilege may even extend to executive branch officials, such as mayors, who participate in the local legislative process, or to local administrative bodies with executive powers.¹³⁴

The case for the extension of protection is clear. As the Arizona Supreme Court explained:

[There is no] good reason . . . that city or town council members should be more inhibited in debate than state or federal legislators.

Many local law-makers . . . legislate on matters of more immediate importance to their electorate than state or federal legislators. Such legislation should be based on all relevant information—both favorable and unfavorable—and subjected to the most vigorous debate possible.¹³⁵

A Maryland appellate court concluded that the state had conferred upon local legislative bodies “the same responsibility for debating and setting basic public policy that is vested in legislative bodies generally” and that “[t]he need for legislative integrity and independence is thus as important in the local context, for the advantage of the citizens of the local community, as it is at the State level.”¹³⁶ The U.S. Supreme Court reasoned similarly in holding local legislators absolutely immune for their legislative activities from civil rights liability under 42 U.S.C. § 1983.¹³⁷ As the Court put it, “Regardless of the level of government, the exercise of legislative discretion should not be inhibited by judicial interference or distorted by the fear of personal liability.”¹³⁸

To be sure, these cases involved either private suits against local legislators or a prosecution in which there was no state law withdrawing common law legislative immunity. Except for the Washington constitutional holding discussed above, the decisions turned on common law precedents or state statutes that could potentially be undone by an explicit punitive preemption

133. See, e.g., *Sanchez v. Coxon*, 854 P.2d 126, 128-31 (Ariz. 1993); *State v. Holton*, 997 A.2d 828, 833-34 (Md. Ct. Spec. App. 2010), *aff'd in other part*, 24 A.3d 678 (Md. 2011); *Montgomery County v. Schooley*, 627 A.2d 69, 73 (Md. Ct. Spec. App. 1993); *Voelbel v. Town of Bridgewater*, 747 A.2d 252, 253 (N.H. 1999); Huefner, *supra* note 131, at 230-35 (discussing the preconstitutional roots of the legislative privilege); see also *Smith v. Martin*, 331 S.W.3d 637, 640-42 (Ky. Ct. App. 2011) (holding that a state statute provides local legislators with an absolute privilege for statements made during legislative debate).

134. See, e.g., *Humane Soc’y of N.Y. v. City of New York*, 729 N.Y.S.2d 360, 361, 364 (Sup. Ct. 2001).

135. *Sanchez*, 854 P.2d at 130.

136. *Holton*, 997 A.2d at 856.

137. See *Bogan v. Scott-Harris*, 523 U.S. 44, 53-54 (1998). Immunity also attaches to nonlegislators when they perform legislative functions. See *id.* at 55.

138. See *id.* at 52.

law. Nevertheless, they signal that respect for local democracy requires that local government officials not be punished for their legislative acts.

The case for protecting local governments from punitive financial penalties is more difficult. States may reasonably want to tie state funds to compliance with conditions governing use of those funds and to make local governments financially responsible for injuries their violations of state laws cause. Nonetheless, many of the new punitive provisions go well beyond protecting the state fisc or remedying private losses from local government misconduct and, instead, take advantage of limited local resources to bully local governments into submission. The Supreme Court's invalidation of the federal government's threat in the Patient Protection and Affordable Care Act to cut off all Medicaid funding—including funding for preexisting services—from states that decline to expand their Medicaid programs is a compelling analogy.¹³⁹ As the Court determined in *National Federation of Independent Business v. Sebelius (NFIB)*, although “Congress may use its spending power to create incentives for States to act in accordance with federal policies,” it cannot coerce the states into compliance.¹⁴⁰ The loss of some federal funding for not participating in a federal program is not impermissibly coercive, but a cutoff of over 10% of a state's overall budget, as the Medicaid expansion would have imposed on recalcitrant states, was “a gun to the head” that left the states “with no real option but to acquiesce.”¹⁴¹ Surely, the threat built into Arizona's SB 1487 to cut off one-fourth of local revenues¹⁴² is a gun to the head as well.

To date, only two state courts have considered the *NFIB* analogy in cases involving the cutoff of state funds to localities. In *City of El Centro v. Lanier*, a California appellate court rejected the argument that a state law denying state construction funds to any charter city that authorized its contractors not to comply with the state's prevailing wage laws was an *NFIB*-type gun to the head.¹⁴³ The state supreme court had applied home rule to hold that charter cities could not be required to abide by the state's prevailing wage laws; the cutoff was plainly an effort to use a financial incentive to circumvent that decision.¹⁴⁴ Although the dissenting justice in *City of El Centro* found that the funding cutoff would “diminish[] the vigor with which the home rule doctrine

139. See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S. Code); see also 42 U.S.C. § 1396c (2016), *invalidated by Nat'l Fed'n of Indep. Bus. v. Sebelius (NFIB)*, 567 U.S. 519 (2012).

140. 567 U.S. at 577-78 (opinion of Roberts, C.J.).

141. See *id.* at 580-82.

142. See *supra* text accompanying notes 66-71.

143. See 200 Cal. Rptr. 3d 376, 384-89 (Ct. App. 2016).

144. See *id.* at 390 (Benke, J., dissenting) (citing State Bldg. & Constr. Trades Council of Cal. v. City of Vista, 279 P.3d 1022 (Cal. 2012)).

protects local prerogatives,”¹⁴⁵ the majority determined that without evidence that municipalities were “dependen[t] on state funding or financial assistance for municipal projects,” the financial coercion argument fell short.¹⁴⁶ Similarly, after an Ohio trial court found that a state statute regulating municipal use of photo-monitoring devices to enforce traffic laws violated the city of Toledo’s home rule authority and enjoined the law’s enforcement, the state legislature enacted a budget that reduced payments to localities that failed to comply with the enjoined photo-monitoring law.¹⁴⁷ An Ohio appellate court found that the state’s budget would require the city “to choose between compliance with the unconstitutional statute [and] a loss of state funding for its noncompliance.”¹⁴⁸ The court, however, ultimately rested its decision not on home rule but on how the “end-run around the trial court’s injunction” unconstitutionally intruded on the prerogatives of the judiciary.¹⁴⁹

III. Protecting the Capacity for Local Self-Government

The rise of the new preemption raises anew the uncertain legal status of local governments. Our governmental structure is in form a two-tier federal one but in reality a three-tiered federal-state-local system. This is true normatively, practically, and legally. Many of the values associated with federalism are advanced as well, if not better, by local governments. Most of the governance functions of the states are actually carried out by a multitude of local governments. And the great majority of states, in response to and in support of this extensive local role, have provided for home rule in their constitutions or through general enabling legislation.¹⁵⁰ Yet local governments receive no federal constitutional mention and relatively minimal state constitutional defense. This lack of effective legal protection might be acceptable in the context of relatively cooperative state-local relations, especially given the essential role the states must play in overseeing and managing the state-local system. But at a time when “legislatures seem fraught with open hostility in a way they haven’t been in the past,”¹⁵¹ the traditional laissez faire approach risks jeopardizing the ability of local governments to play their key role in our system.

145. *Id.* at 393.

146. *See id.* at 385 (majority opinion).

147. *See City of Toledo v. State*, 72 N.E.3d 692, 694 (Ohio Ct. App.), *appeal allowed*, 83 N.E.3d 938 (Ohio 2017).

148. *Id.* at 699.

149. *See id.*

150. *See supra* note 111 and accompanying text.

151. Alan Ehrenhalt, *What Do States Have Against Cities, Anyway?*, GOVERNING (Nov. 2017), <https://perma.cc/3VEQ-Z43G>.

The legal status of local governments can be bolstered, and local governments provided greater protection against state preemption, without falling into the trap of trying to distinguish the “state” from the “local.” With so many public policy arenas combining both state and local concerns, that approach, like its dual federalism analog, is likely to fail. Instead, I suggest that the empowered local self-government that is at the core of home rule necessarily places limits on state preemption. Laws that punish local officials or governments for exercising their home rule powers or that broadly sweep away local lawmaking over vast areas of local concern are fundamentally inconsistent with the idea of home rule. So too, state measures that displace local policies without replacing them with state ones or that unduly constrain local powers beyond what is needed to achieve state goals are in deep tension with the value of local autonomy enshrined in most state constitutions and many state laws. Such an approach would take seriously the mix of values, practices, and laws that make local self-government a cornerstone of our political system while respecting the state’s overarching authority to preempt when it sets statewide policy or addresses the costs localities impose on nonlocal residents or on the state as a whole.

The case for protecting local self-government draws together the values associated with local self-determination, the significance of its widespread practice, and the recognition it receives under state law. The values of local autonomy are frequently celebrated in our system, as they are the values of federalism. As the Supreme Court recently reiterated, “The federal structure allows local policies ‘more sensitive to the diverse needs of a heterogeneous society,’ permits ‘innovation and experimentation,’ enables greater citizen ‘involvement in democratic processes,’ and makes government ‘more responsive by putting the States in competition for a mobile citizenry.’”¹⁵² To be sure, notwithstanding the reference to “local policies,” the Court was talking about the states. But the Court’s conflation of federalism with “local” self-governance and accountability to local electorates is noteworthy,¹⁵³ and many of the Court’s federalism cases actually dealt with local governments.¹⁵⁴ The Court’s normative concerns with responsiveness to diverse needs in a heterogeneous society, innovation and experimentation, and citizen

152. *Bond v. United States*, 564 U.S. 211, 221 (2011) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)); see also Heather K. Gerken, *The Supreme Court, 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 6 (2010) (“[F]ederalism promotes choice, competition, participation, experimentation, and the diffusion of power.”).

153. See, e.g., *United States v. Morrison*, 529 U.S. 598, 617-18 (2000) (“The Constitution requires a distinction between what is truly national and what is truly local.”).

154. See, e.g., *Printz v. United States*, 521 U.S. 898, 904 (1997); *City of Boerne v. Flores*, 521 U.S. 507, 511 (1997); *Nat’l League of Cities v. Usery*, 426 U.S. 833, 836 (1976), *overruled in other part by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

involvement in democratic processes apply even more to local governments than to states.¹⁵⁵ Ironically, it is the very responsiveness of local governments to citizen engagement, their attentiveness to distinctly local preferences and concerns, and their policy innovations intended to address local problems that have provoked the new preemption. As an aspect of state power, the new preemption is entirely consistent with federalism *per se*. But it is in deep tension with the values the Court has invoked to give federalism normative force.

Local decisionmaking is not merely honored by judicial rhetoric; it is widely practiced and is central to our governmental structure. Most of the subnational governance that federalism protects actually occurs at the local level. As the Court explained in requiring that local elections comply with the one person, one vote principle:

[T]he States universally leave much policy and decisionmaking to their governmental subdivisions. . . . What is more, in providing for the governments of their cities, counties, towns, and districts, the States characteristically provide for representative government—for decisionmaking at the local level by representatives elected by the people. . . . In a word, institutions of local government have always been a major aspect of our system, and their responsible and responsive operation is today of increasing importance to the quality of life of more and more of our citizens.¹⁵⁶

The Court has repeatedly pointed out in cases dealing with the local role in education that “local control . . . affords citizens an opportunity to participate in decisionmaking, permits the structuring of school programs to fit local needs, and encourages ‘experimentation, innovation, and a healthy competition for educational excellence.’”¹⁵⁷ State supreme courts, too, have celebrated “effective local self-government . . . as an important constituent part of our system of government,” particularly when “the nature of . . . problems varies from county to county and city to city.”¹⁵⁸

Thus, critical public services such as public safety and law enforcement, water supply, waste management, public health and hospitals, streets and roads, community development, and land use regulation are primarily local matters. The vast majority of public servants providing these services work for

155. Cf. Richard Briffault, “What About the ‘Ism?’: Normative and Formal Concerns in Contemporary Federalism,” 47 VAND. L. REV. 1303, 1312-16 (1994) (“[I]t would seem that the characteristics of the states and of federalism that promote these values are even more pronounced at the local level.”).

156. *Avery v. Midland County*, 390 U.S. 474, 481 (1968).

157. *Milliken v. Bradley*, 418 U.S. 717, 742 (1974) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 50 (1973)).

158. See, e.g., *State v. Hutchinson*, 624 P.2d 1116, 1120, 1126 (Utah 1980).

local governments.¹⁵⁹ To be sure, unlike the states, cities and counties cannot claim to be sovereigns. But their central role in policing, including the power to make arrests and use deadly force, indicates that they regularly exercise some of the attributes of sovereignty.¹⁶⁰ So too, their special role in maintaining public safety and their daily encounters with crime and disorder have made them particularly attentive to the connections between violence and the widespread availability of firearms, as well as to the need to work with members of immigrant communities—two of the major contemporary sources of state-local tension.

As both democratically elected governments and service providers that regularly tackle the street-level problems that create the need for—and affect how they deliver—their services, local governments may feel a greater urgency to act than do the more distant state governments. With their major responsibility for public health and hospitals, especially for low-income residents, cities and counties may be more aware of the costs of gun violence, obesity and food deserts, pesticide use, or lack of medical leave—all areas where local responsiveness to local responsibilities has triggered conflicts with states. Local responsibility for garbage pickups, street cleaning, and parks may have heightened local governments' awareness of the costs of nonbiodegradable products like plastic bags and Styrofoam, much as their central role in land use planning, public health, maintenance of physical infrastructure and public spaces, and economic development has led many local governments—even conservative ones¹⁶¹—to take a leadership role in adopting smart growth and resiliency initiatives to address the ostensibly nonlocal problem of climate change.¹⁶²

Local dependence on local resources to pay for local programs¹⁶³ contributes both to the practice of local autonomy and to the policies localities pursue, often in surprising ways. Expansive antidiscrimination laws, for example, may reflect not simply responsiveness to larger urban populations of LGBT residents but also the desire to attract “creative class” residents by signaling that

159. See *State and Local Government Employment and Payroll Data: March 2016*, U.S. CENSUS BUREAU (Oct. 19, 2017), <https://perma.cc/UY7X-YRJY>; see also KRANE ET AL., *supra* note 111, at 3.

160. Cf., e.g., Fred Smith, *Local Sovereign Immunity*, 116 COLUM. L. REV. 409, 411 (2016); Noah M. Kazis, *Special Districts, Sovereignty, and the Structure of Local Police Services*, 48 URB. LAW. 417, 450 (2016).

161. See, e.g., Alan Greenblatt, *The City Preparing for Climate Change Without Ever Saying the Words*, GOVERNING (Nov. 2017), <https://perma.cc/CZ9N-UA22>.

162. See, e.g., Fernanda G. Nicola & Sheila Foster, *Comparative Urban Governance for Lawyers*, 42 FORDHAM URB. L.J. 1, 19, 22 (2014).

163. See *State and Local Government Finances by Level of Government and by State: 2015*, U.S. CENSUS BUREAU, <https://perma.cc/S6PM-DYU9> (archived Apr. 28, 2018) (indicating that roughly 66% of total state and local revenue is “revenue from own sources”).

a city values equality and diversity, with the result that state preemption laws “make it harder for cities to succeed in a global economy that rewards diversity and a liberal approach to immigration.”¹⁶⁴ Moreover, the need to maintain a viable tax base provides a powerful incentive to carefully balance the costs and benefits of workplace measures that could reduce urban poverty but raise the risk of discouraging business. As one member of the legislative council of Madison, Wisconsin put it, “Municipal governments are about getting stuff done.”¹⁶⁵

The values of local autonomy are far from uncontested. Local actions can have extralocal effects, and multiple and conflicting local rules can burden individuals or firms that are active in multiple localities to the detriment of the state as a whole. Local governments are not always “good guys.” As the explosion of attention to police violence in the aftermath of the deaths of black men in Ferguson, Staten Island, Baltimore, and elsewhere indicates, local governments can be abusive,¹⁶⁶ and local responsiveness to local concerns can result in exclusionary zoning, segregation, and interlocal inequality. The scope of local autonomy is necessarily a matter of state law, subject to an ongoing renegotiation of the state-local relationship. But local autonomy is also more than just a matter of political values and government practices. It has legal significance due to the widespread state constitutional authorization of home rule.

Home rule emerged as a response to both the expansion of local responsibilities and threats to local autonomy in the late nineteenth and early twentieth centuries.¹⁶⁷ It was intended to provide a firmer legal foundation for local autonomy. As Lynn Baker and Daniel Rodriguez put it, “[H]ome rule made concrete, and legally salient, the notion that many basic police power functions—including the protection of health, safety, and general welfare—were well within the competence of, and even perhaps best effectuated by,

164. See Kenneth A. Stahl, *Preemption, Federalism, and Local Democracy*, 44 *FORDHAM URB. L.J.* 133, 154 (2017) (quoting Ronald Brownstein, *The Twin Challenges Facing Charlotte*, *ATLANTIC* (June 16, 2016), <https://perma.cc/69ZE-473X>); see also Michèle Finck, *The Role of Localism in Constitutional Change: A Case Study*, 30 *J.L. & POL.* 53, 72 (2014); cf. Greenblatt, *supra* note 161 (“[S]tates [are] impeding the ability of cities to realize their full economic potential.” (quoting Bruce Katz of the Brookings Institution)).

165. See Henry Grabar, *The Shackling of the American City*, *SLATE* (Sept. 9, 2016, 5:53 AM), <https://perma.cc/TS3Z-P7BW> (quoting Mark Clear of the Common Council of Madison).

166. See, e.g., Jonathan Chait, *Why the Worst Governments in America Are Local Governments*, *NEW YORK: DAILY INTELLIGENCER* (Sept. 7, 2014, 9:00 PM), <https://perma.cc/DD7W-CCGS>; see also Lydia Polgreen, *From Ferguson to Charleston and Beyond, Anguish About Race Keeps Building*, *N.Y. TIMES* (June 20, 2015), <https://perma.cc/GH4T-3KGC>.

167. See HOWARD LEE MCBAIN, *AMERICAN CITY PROGRESS AND THE LAW* 1-4 (1918).

municipal governments.”¹⁶⁸ Indeed, “state constitutions typically contemplate that significant regulatory and administrative power will be exercised by municipal governments.”¹⁶⁹ As Rodriguez has pointed out, this “is a deliberate strategy to create opportunities for local governments to employ their ‘local knowledge’ to make innovative policy.”¹⁷⁰ Local exercise of the police power, including regulation of private behavior, to promote local health, safety, and welfare is the essence of home rule.¹⁷¹

Home rule is not a state-local analog to federalism. Unlike the states, local governments are not “indestructible” but rather are subject to boundary change and abolition.¹⁷² They are not formally represented in the structure of state governments, and they lack plenary lawmaking authority. Yet in one fundamental sense, federalism and the state-constitutional localism created by home rule are similar: They operate less by guaranteeing the nominally lower level of government immunity from an otherwise constitutional action of the higher and more by assuring independent lawmaking capacity for that lower level. In other words, even without formal immunity protections from state preemption, local home rule matters because local initiative is state-constitutionally-grounded. Even if a state constitution does not grant local governments formal immunity protections, a preemption measure should be held invalid if it interferes with the power to act in the first place, which is the undisputed purpose of home rule and which is crucial to local government’s place in our system.

This approach to preemption would focus on whether a state law unduly impinges on the local capacity for self-governance. It could be applied in the following ways.

First, it would require the invalidation of punitive preemption. As the speech or debate clause and common law immunity cases indicate,¹⁷³ few actions can have a greater chilling effect on local self-government than threatening local officials with fines or the loss of office simply for supporting certain local measures whether or not subject to preemption. Preemption alone should be enough to vindicate the state’s interest, with penalties applied only, if at all, to officials who attempt to enforce preempted laws in the face of contrary judicial determinations. To say that local legislators expose themselves to liability or removal from office for proposing or voting for

168. Lynn A. Baker & Daniel B. Rodriguez, *Home Rule and Judicial Scrutiny*, 86 DENV. U. L. REV. 1337, 1354 (2009).

169. Daniel B. Rodriguez, *State Constitutional Failure*, 2011 U. ILL. L. REV. 1243, 1258.

170. *Id.* at 1271-72.

171. *See, e.g.*, *Coop. Home Care, Inc. v. City of St. Louis*, 514 S.W.3d 571, 586-87 (Mo. 2017).

172. *See Hunter v. City of Pittsburgh*, 207 U.S. 161, 176-79 (1907).

173. *See supra* Part II.B.2.

certain measures chills both local self-government and the debate that is appropriate for any subject of state-local conflict. A Palm Beach County official, for instance, noted that the county had been exploring possible gun regulatory measures but that Florida's statute providing for the removal of officials who approved firearms laws "stopped [officials] in [their] tracks."¹⁷⁴ "Once our jobs were at stake," he continued, "we dropped the plan entirely."¹⁷⁵ Punishing local officials for exploring regulations they consider appropriate for addressing local needs and concerns is inconsistent with local self-government.

Similarly, excessive penalties for local governments—like the withdrawal of state shared revenue and bond posting requirements of Arizona's SB 1487 or the large civil fines for harms notionally resulting from preempted laws¹⁷⁶—go beyond protecting state policy supremacy and undermine the ability, if not the willingness, of local governments to undertake the lawmaking vouchsafed to them by home rule. As the mayor of Bisbee, Arizona pointed out in explaining his town's decision not to fight the state attorney general's determination that its plastic bag ban was preempted, "The state was ready to pass a death sentence on a city over a plastic bag. . . . This is a draconian measure when they can bankrupt you. We would have gone belly up."¹⁷⁷ It is one thing for cities to lose the legal battle over whether they have authority to adopt certain regulations, but it is far worse if financial threats make them unable to defend their own measures or unwilling even to try to probe the line of what is legally permissible for them. States can tie funding for specific programs to compliance with otherwise legally permissible conditions. But financial penalties that go beyond any misuse of earmarked state funds or any actual harm from preempted local conduct penalize local lawmaking, and that is inconsistent with the local autonomy provided by home rule.

Second, nuclear preemption—the wholesale denial of local lawmaking authority over broad fields like commerce, trade, or labor; denying local authority over any field in which the state has also engaged in lawmaking; or requiring state legislative consent for local action in these areas¹⁷⁸—is inconsistent with home rule. These proposals would, in effect, eliminate local initiative by effectively reinstating Dillon's Rule of limited local delegation.¹⁷⁹ Granted, it may be difficult to determine when a preemptive measure becomes too broad. These are questions of degree that are likely to be disputed. But

174. See Palazzolo, *supra* note 12 (quoting Burt Aaronson, county commissioner).

175. See *id.* (quoting Burt Aaronson, county commissioner).

176. See *supra* Part I.A.2.

177. See Gardiner, *supra* note 32 (quoting David Smith, mayor of Bisbee).

178. See *supra* Part I.B.

179. See *supra* text accompanying note 112.

certainly a law that makes local action contingent on state legislative approval or provides that any area touched by state law—which would likely reach every subject in the state—is outside the scope of local legislation would go too far in eviscerating local self-government.

Third, this approach would provide a basis for challenging state laws that create a regulatory vacuum by displacing local measures without replacing them with substantive state standards or requirements. Such measures are aimed not at determining which level of government should control a field but at simply denying local power to act. That is inconsistent with home rule's authorization of local action unless inconsistent with state policy. That displacement without replacement is less a resolution of competing state and local concerns and more an unambiguous anti-local suppression underlies Ohio's doctrine that preemption laws that do not prescribe a substantive rule of conduct are not "general laws" and thus cannot supersede otherwise proper local laws.¹⁸⁰ Such laws are inconsistent with the spirit and practice of home rule, even home rule narrowly defined as local initiative without protection against substantive preemption. This approach could, arguably, be circumvented by state laws declaring as a matter of substantive state policy that a matter should not be regulated at all but left to private ordering, although that has apparently not so far been the response of Ohio's legislature to the decisions of its state courts. But even that would have the value of having the legislature go on the record as declaring that a subject should not be regulated rather than employing the current subterfuge of having legislators say that the matter should be subject to a statewide rule rather than varying local ones but then failing to adopt any rule.

Finally, greater respect for local lawmaking capacity should lead state courts to adopt a version of the California Supreme Court's requirement that preemptive laws be narrowly tailored to the scope of the state's substantive concern and not interfere with local decisionmaking more than is necessary to achieve the state's goals.¹⁸¹ This accepts state primacy but requires the value of local decisionmaking to be taken into account to avoid unnecessary interference with local self-governance. The goal here, as with standards for preemption generally, is to harmonize the state's ability to set statewide policies without unduly constraining local capacity for self-governance. This could lead courts to question, for example, whether the state needs to preempt local regulations that impose requirements or restrictions in addition to those set by the state. But if a state can demonstrate that limiting local authority is

180. *See supra* text accompanying notes 120-28.

181. *See, e.g.,* Johnson v. Bradley, 841 P.2d 990, 996-97 (Cal. 1992); *supra* text accompanying note 119.

necessary to achieve the state's substantive goals, then the state would still prevail.

These proposals would not constrain the ultimate power of the states to preempt local regulations by replacing them with different substantive state laws, but that is a design feature of our state-local system. The states must be able to address the extralocal consequences of local actions; the burdens that can result from multiple and divergent local rules; and the scale at which economic, social, environmental, and other problems are handled. But these proposals—grounded in the values, governmental practices, and legal structure of our system—would constrain the worst abuses of the new preemption. Beyond that, the scope of local autonomy and the resolution of state-local conflicts over the substance of regulatory policies would continue to be a matter for state politics.

Conclusion: Local Autonomy—Means or End?

A particularly salient feature of the new preemption has been the reversal of the presumed association of liberals and Democrats with big government and conservatives and Republicans with local control. As one commentator noted, North Carolina's notorious Bathroom Bill is "a striking example of how North Carolina's Republicans have decided that culture-war issues ought to take precedence over traditional conservative preference for local control."¹⁸² So too, in Texas, the *Houston Chronicle* noted "the glaring contradiction of conservative champions of local control seeking to override municipal ordinances they don't like."¹⁸³ Indeed, the American City County Exchange consists of local officials who have championed limits on local power and local subordination to the states.¹⁸⁴ Conservative state legislators have not been shy about asserting that "[w]hen we talk about local control, we mean state control,"¹⁸⁵ and emphasizing that federalism is not shorthand for decentralization but is really only about the states. The Florida legislator who has been pushing nuclear preemption in the Sunshine State put it this way: "We are the

182. David A. Graham, *North Carolina Overturns LGBT-Discrimination Bans*, ATLANTIC (Mar. 24, 2016), <https://perma.cc/W7EU-CGTV>.

183. See Editorial, *Good, Bad, Ugly in Austin*, HOUS. CHRON. (updated Mar. 20, 2015, 10:20 PM), <https://perma.cc/DKC3-MQ4R>.

184. See Nicholas Riccardi, *US Conservatism Expands to Final Frontier: City Hall*, ASSOCIATED PRESS (July 27, 2017), <https://perma.cc/2WRL-ZR8N>; Russell & Bostrom, *supra* note 88, at 1-5, 9.

185. See Richard Florida, *City vs. State: The Story So Far*, CITYLAB (June 13, 2017), <https://perma.cc/Q492-LYPH> (quoting a Republican state senator).

United States of America. We are not the United Towns of Florida. We're not the United Counties of Florida."¹⁸⁶

Heather Gerken has observed that “federalism” (and presumably she would add localism) “doesn’t have a political valence,”¹⁸⁷ but there is a considerable political valence as to who supports federalism—or localism—with respect to a specific issue or at a particular point in time. As one Tennessee county commissioner put it, “[P]eople like to talk about local control and they’re all for it unless they have a substantive policy preference they care more about and then local control gets thrown to the sidelines.”¹⁸⁸ So are the concerns raised by the new preemption really about local autonomy, or is local autonomy only a means to the end of advancing preempted policies? If, as Kenneth Stahl argues, “it is unlikely that voters and legislators will see the question of local power as anything but a partisan issue,”¹⁸⁹ should these issues—of firearms, workplace equity, discrimination, immigration law enforcement, or public health—be argued solely on substantive policy lines rather than as also involving local autonomy?

Certainly there is no necessary connection between local autonomy and progressive values. Some local governments have been associated with a range of nonprogressive policies, including anti-immigrant,¹⁹⁰ anti-union,¹⁹¹ anti-evolution,¹⁹² anti-medical marijuana,¹⁹³ and exclusionary zoning policies,¹⁹⁴ as well as with abusive law enforcement.¹⁹⁵ As David Barron has pointed out, an important conservative strand in the early home rule movement saw home rule as a means of limiting the scope of local government action.¹⁹⁶ Nor are states ineluctably conservative; some have championed sanctuary laws,¹⁹⁷

186. See Badger, *supra* note 81 (quoting Randy Fine, Florida state representative).

187. Heather K. Gerken, Distinguished Scholar in Residence Lecture, *A User’s Guide to Progressive Federalism*, 45 HOFSTRA L. REV. 1087, 1087 (2017).

188. See Josh Goodman, *Republican Legislatures Move to Preempt Local Government*, PEW CHARITABLE TR.: STATELINE (Mar. 19, 2012), <https://perma.cc/KY34-2ZNW> (quoting Steve Mulroy, member of the Shelby County Board of Commissioners).

189. See Stahl, *supra* note 164, at 176.

190. See, e.g., *Lozano v. City of Hazelton*, 724 F.3d 297, 300-02 (3d Cir. 2013).

191. See, e.g., Grabar, *supra* note 165.

192. See, e.g., *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 708 (M.D. Pa. 2005).

193. See, e.g., *City of Riverside v. Island Empire Patients Health & Wellness Ctr., Inc.*, 300 P.3d 494, 497 (Cal. 2013).

194. See, e.g., *BRIFFAULT & REYNOLDS*, *supra* note 112, at 520-23.

195. See Chait, *supra* note 166.

196. See David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2257, 2288-301 (2008).

197. See, e.g., NAT’L CONFERENCE OF STATE LEGISLATURES, REPORT ON STATE IMMIGRATION LAWS, 2017, at 1 (2018), <https://perma.cc/5MXJ-LJB4>.

workplace reforms,¹⁹⁸ and environmental protections.¹⁹⁹ A sharp turn of the political wheel could change the “valence” of the preemption issue.

Nevertheless, there are reasons to support local autonomy per se apart from the identification of local governments with a particular political or policy agenda. Two arguments for local autonomy are especially salient in our current period of intense polarization.

First, local autonomy deals with polarization by devolving policymaking to communities with particular conditions, preferences, and concerns. Instead of having to resolve hotly contested issues statewide, with the large numbers of people on the losing side aggrieved and subject to rules they oppose (or unable to implement policies with broad support in their communities), local autonomy enables different communities to have different rules. Polarization of viewpoints is accommodated rather than resolved by the contested victory of a narrow statewide majority over the rest.

Second, local autonomy permits the testing of varying approaches to disputed issues and the development of real-world evidence of how these approaches work in practice. Do tighter firearms regulations promote or impair personal security? Do sanctuary laws assist or undermine the well-being of communities with large numbers of immigrants? Do living wage, family leave, and predictive scheduling laws burden or benefit the local economy? One way to find out the answers to these and other contested questions is to let local governments experiment and then evaluate the results. Knowledge of how disputed programs work could lower the partisan temperature and depolarize issues. But for this to happen, local governments need to be given some space to try new programs.

Local autonomy has its limits. Measures that have significant extralocal effects, burden intrastate mobility, threaten fundamental rights, or violate constitutional norms are necessarily beyond the scope of local action. But local regulations whose effects are largely absorbed within the regulating community and don't implicate fundamental rights or constitutional norms should be accepted as within the scope of local decisionmaking by progressives and conservatives alike. Opponents should fight these policies on the merits but not by undermining the capacity for local self-government.

Structural values like federalism or localism regularly give way to the urgent desire to prevail on the political issue of the moment. But if the rise of the new preemption has any value, it is as a reminder of the importance of local governments in our political structure and of the need to protect their capacity to be effective policymakers.

198. See, e.g., *Paid Family Leave Resources*, NAT'L CONF. ST. LEGISLATURES (Jan. 10, 2018), <https://perma.cc/RDK8-AWHX>; *Paid Sick Leave*, NAT'L CONF. ST. LEGISLATURES (Oct. 23, 2017), <https://perma.cc/4ZBK-GZ9L>.

199. See, e.g., *State Plastic and Paper Bag Legislation*, *supra* note 29.