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THE CHALLENGE OF THE NEW PREEMPTION

*Richard Briffault**

I. Introduction

The past 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 is inconsistent with pre-existing 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. Such “old preemption” disputes continue to arise, of course, but the real action today is the “new preemption” – new 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 of legislative subjects, from hot-button social issues like firearms regulation, sanctuary cities, and the rights of transgender individuals; to workplace disputes over wages, leave policies, and scheduling, to ostensibly more prosaic subjects like plastic bags, menu labeling, residential sprinkler systems, and puppy mills. New preemption measures frequently displace local action without replacing it with substantive state requirements. Often propelled by trade association and business lobbying,¹ preemptive state laws are aimed not at coordinating state and local regulation but preventing any regulation at all.

Several state legislatures have gone further, adopting **punitive preemption** laws that do not merely nullify inconsistent local rules – the traditional effect of preemption – but impose

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¹ See, e.g., Henry Grabar, *The Shackling of the American City*, Slate, Sept. 9, 2016, http://www.slate.com/articles/business/metropolis/2016/09/how_alec_acce_and_pre_emptions_laws_are_gutting_the_powers_of_american_cities.html; Mary Bottari, *The ALEC-Backed War on Local Democracy*, Huffington Post, Dec. 6, 2017, https://www.huffingtonpost.com/mary-bottari/the-alec-backed-war-on-lo_b_6961142.html.

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 non-urban and urban. To be sure, Democratic states preempt Democratic cities;² preemptive laws constrain small towns;³ and some measures impose progressive values on conservative communities.⁴ But the preponderance of deregulatory, punitive, and nuclear preemptive actions and proposals have been advanced by Republican-dominated state governments, embrace conservative economic and social causes, and respond to – and are designed to block -- relatively progressive regulatory actions adopted by activist cities and counties. Since 2011, Republicans have dominated state governments. In 2013 Republicans controlled both houses of twenty-six state legislatures, and had trifectas – control of the legislature and the governorship – in twenty-four states.⁵ By the start of 2017, the number of Republican legislatures and trifectas had risen to thirty-two and twenty-six, respectively.⁶ This Republican dominance includes so-called purple states – such as Florida,

² See, e.g., Jesse McKinley, Cuomo Blocks New York City Plastic Bag Law, N.Y. Times, Feb. 14, 2017, <https://www.nytimes.com/2017/02/14/nyregion/cuomo-blocks-new-york-city-plastic-bag-law.html>; Sam Adler-Bell, Why Are Rhode Island Democrats Blocking Minimum-Wage Increases?, The Nation, June 11, 2014, <https://www.thenation.com/article/why-are-rhode-island-democrats-blocking-minimum-wage-increases/>.

³ See, e.g., “AG Brnovich Finds Bisbee’s Plastic Bag Ban Violates State Law, Oct. 24, 2017, <https://www.azag.gov/press-release/ag-brnovich-finds-bisbees-plastic-bag-ban-violates-state-law>. (state challenge to plastic bag ban of Bisbee, pop. 5,538); Alan Greenblatt, Arkansas Cities Pass LGBT Protections That Defy State’s New Discrimination Law, Governing, May 11, 2015, <http://www.governing.com/topics/politics/gov-arkansas-discrimination-gay.html> (noting Arkansas’s preemption of local anti-discrimination measures was triggered in part by law passed by Eureka Springs, population, 2,074.)

⁴ See, e.g., Monique Garcia and Kim Geiger, Rauner narrowly beats back union push to ban right-to-work zones, Chicago Tribune, Nov. 8, 2017, <http://www.chicagotribune.com/news/local/politics/ct-met-bruce-rauner-right-to-work-override-20171107-story.html> (Governor’s veto of state legislation, triggered by action of suburban village of Lincolnshire, to prevent local governments from adopting right-to-work ordinances which bar employers from requiring employees to pay agency fees to union collective bargaining representatives); cf. Cal. Labor Code, § 1782 (denying state construction funds to charter cities that permit contractors not to pay prevailing wage on city construction projects); Governing, Michigan’s High Court Rules Localities Can’t Ban Medical Marijuana, Feb. 7, 2014, http://www.governing.com/news/headlines/Michigans-High-Court-Rules-Localities-Cant-Ban-Medical-Marijuana.html?no_redirect=true (state marijuana legalization preempts local anti-marijuana zoning ordinances).

⁵ See Wikipedia, United States state legislatures’ partisan trend, https://en.wikipedia.org/wiki/United_States_state_legislatures%27_partisan_trend.

⁶ See Wikipedia, List of United States state legislatures, https://en.wikipedia.org/wiki/List_of_United_States_state_legislatures. This count does not include Nebraska’s unicameral and nominally nonpartisan legislature, which is dominated by Republican-affiliated members; Nebraska also has a Republican governor.

Michigan, North Carolina, Ohio, and Wisconsin – where Democrats compete effectively in presidential or United States Senate contests but in the last decade have been swamped in state elections.⁷ Even as a majority of states are controlled by Republicans, most cities, particularly big cities, are led by Democrats. Thirty-two of the fifty largest cities have Democratic mayors; fifteen of those are in Republican trifecta states, including Houston, Dallas, and Austin in Texas; Jacksonville and Miami, Florida; Phoenix and Tucson in Arizona; Columbus, Ohio; Charlotte, North Carolina; Detroit, Michigan; Memphis and Nashville, Tennessee; Milwaukee, Wisconsin; Kansas City, Missouri; and Atlanta, Georgia.⁸ The not-so-irresistible force of cities pushing progressive agendas in environmental regulation, public health, anti-discrimination, and workplace equity increasingly runs into the immovable object of conservative state resistance, manifested by aggressive preemption.⁹

This Article examines the rise of the new preemption and the challenges it raises for lawyers and scholars.¹⁰ Part II provides an overview of the range of preemptive measures, focusing on a handful of the most sweeping and punitive state laws. Part III turns to the difficult challenge for local governments of developing legal defenses against preemption. Existing federal and state legal doctrines provide local governments with few protections against intentional state efforts to curtail their powers. Although I will point to some doctrinal arguments that can be raised against the most punitive and deregulatory forms of the new preemption, the

⁷ See, e.g., Brief of International Municipal Lawyers Ass’n, et al, in *Gill v. Whitford*, U.S. S Ct., Np. 16-1161, Sept. 5, 2017. In 2017, four of those five states – all but North Carolina – were Republican trifecta states. North Carolina had been a Republican trifecta states in 2016, when it adopted HB 2, the so-called “Bathroom Bill,” a poster child of the new preemption.

⁸ See Wikipedia, List of mayors of the 50 largest cities in the United States, https://en.wikipedia.org/wiki/List_of_mayors_of_the_50_largest_cities_in_the_United_States. Adding the next fifty cities, 67 of the one hundred largest cities have Democratic mayors, including, in Republican trifecta states, Wichita, Kansas; Boise, Idaho; and Birmingham, Alabama. Professor Diller notes that 38 of the 51 cities with populations greater than 250,000 are more liberal than the national mean. See Paul Diller, Reorienting Home Rule, Part 1 – The Urban Disadvantage in National and State Lawmaking, 77 La. L. Rev. 287, 292-97 (2016).

⁹ See, e.g., Lori Riverstone-Newell, The Rise of State Preemption Laws in Response to Local Policy Innovation, 47 *Publius: The Journal of Federalism* 403 (2017); Greenblatt, Beyond North Carolina’s LGBT Battle: States’ War on Cities, *Governing*, March 25, 2016, <http://www.governing.com/topics/politics/gov-states-cities-preemption-laws.html>.

¹⁰ The New Preemption has already become the focus of a considerable critical literature from local government law scholars. See, e.g., Erin Scharff, Hyper Preemption? A Reordering of the State Local Relationship? 106 *Geo. L.J.* ____ (forthcoming 2018); Richard Schragger, The Attack on American Cities, ____ *Texas L. Rev.* ____ (forthcoming 2018), Kenneth Stahl, Preemption, Federalism and Local Democracy, 44 *Ford. Urb. L.J.* 133, 134 (2017); Diller, *supra*.

legal defense against preemption will require state courts to assume a greater role in defending local autonomy than most have traditionally been willing to undertake.

Part IV makes the case for closer state court scrutiny of preemptive measures, grounded in the values of local self-government; the crucial role local governments play in practice in our governance structure; and the widespread state constitutional recognition of local autonomy. Attention to home rule provides a basis for challenging the more extreme new preemption measures that strike directly at the idea of local self-government, although most preemption measures may still pass muster.

Part V concludes by considering whether, in light of the new preemption, local autonomy should be seen as a value in itself, or merely as a means to other political ends. Much of the criticism of the new preemption has come from advocates of “progressive localism” and has focused on how conservative state lawmakers are using preemption to block progressive initiatives. Should local autonomy be protected irrespective of the purposes to which local power is being put? I will suggest a tentative, somewhat hedged, yes. In this highly polarized era, local autonomy can reduce conflict by permitting diverse communities to take different approaches to difficult problems, while also generating usable information about how debated public policies work in practice. Some superior state power is necessary to address the external effects of local action and the costs of varying local laws for the well-being of the state as a whole, and to assure that the scale of government action is consistent with the scope of economic and social problems. But our system ought to maintain some legal space for local self-determination concerning problems that arise at the local level.

II. The New Preemption

A. An Overview

The new preemption is broad in scope and wide-ranging in subject matter. Putting aside sanctuary city issues, which until very recently were more a matter of federal preemption,¹¹

¹¹ In 2017, thirty-six states considered sanctuary legislation concerning undocumented aliens, with measures both supporting and opposing local noncooperation with federal immigration enforcement. Mississippi and Texas both passed sweeping anti-sanctuary laws. See Miss. Code Ann 25-1-119; Vernon’s Tex. Code Ann. Gov’t Code §§752.051-752.057. Multiple sections of the Texas law were blocked by a preliminary injunction, see *City of El Cenizo v. State*, 264 F.Supp.3d 744 (W.D. Tex. 2017), with parts of that injunction subsequently stayed pending appeal. See *City of El Cenizo v. Texas*, 2017 WL 4250186, ___ F.3d ___ (5th Cir., Sept. 25, 2017).

states have barred local actions in areas as diverse as, *inter alia*, firearms, workplace relations, public health and the environment, anti-discrimination, Civil War monuments, the sharing economy, and puppy mills.

Forty-five states prohibit local governments from regulating firearms; most do so by statute but in New Mexico the ban is in the state constitution.¹² Twelve states absolutely ban all local firearms regulation; others permit some restrictions, such as limiting the discharge of guns in public places or the carrying of firearms in government buildings.¹³ Many measures predate the past decade but states have continued to add new prohibitions.¹⁴

Local workplace regulation may be the most significant target of the new preemption, triggered by the leadership role many local governments have taken in strengthening worker rights.¹⁵ More than forty cities and counties require at least some employers to pay wages higher than the federal or state minimum.¹⁶ Others require employers to provide paid sick leave or family leave,¹⁷ or to give notice concerning scheduling changes;¹⁸ some have passed “fair chance” laws regulating employer inquiries into the criminal records of prospective employees.¹⁹ The business community has turned to the state legislatures to push back hard against these measures.²⁰ Twenty-five states now ban local minimum wage requirements above the federal or

¹² Tartakovsky, Firearm Preemption Laws and What They Mean for Cities, 54 Mun. L. 6, 7 (2013).

¹³ *Id.*

¹⁴ See, e.g., Joe Palazzolo, et al, City Gun Laws Hit Roadblock, Wall St. J., Feb. 2, 2013, <https://www.wsj.com/articles/SB10001424127887324761004578286072929691906>.

¹⁵ Marni von Wilpert, Economic Pol. Inst., City governments are raising standards for working people – and state legislators are lowering them back down, Aug. 26, 2017, <http://www.epi.org/publication/city-governments-are-raising-standards-for-working-people-and-state-legislators-are-lowering-them-back-down/>.

¹⁶ Nat’l Emp. L. Proj., Fighting Preemption: The Movement for Higher Wages Must Oppose State Efforts to Block Local Minimum Wage Laws, July 2017, <http://www.nelp.org/publication/fighting-preemption-local-minimum-wage-laws/>.

¹⁷ See, e.g., More California Cities, Chicago, Minneapolis, and St. Paul enact paid sick leave laws, Sept. 2016, <https://www.towerswatson.com/en-US/Insights/Newsletters/Americas/insider/2016/09/more-cities-enact-paid-sick-leave-laws>; Seattle Finally Has a Plan to Give All Workers Paid Family Leave, Mar. 22, 2017, <https://www.thestranger.com/slog/2017/03/22/25034563/seattle-finally-has-a-plan-to-give-all-workers-paid-family-leave>; San Francisco and New York Pass New Paid Family Leave Laws, While California Increases Benefits Under its Leave Program, <http://wsandco.com/wp-content/uploads/2016/04/EmployeeBenefits-SFNYPaidLeave-041116.pdf>.

¹⁸ See, e.g., Predictive Scheduling Laws: Coming Soon to a Jurisdiction Near You, Aug. 4, 2017, <https://www.hrdiver.com/news/predictive-scheduling-laws-coming-soon-to-a-jurisdiction-near-you/448483/> (discussing laws in New York City, San Francisco, and Seattle).

¹⁹ Nat’l Emp. L. Proj., Ban the Box: U.S. Cities, Counties, and States Adopt Fair Hiring Policies, Aug. 1, 2017.

²⁰ See U.S. Chamber of Commerce, State Labor Law Reform: Tools for Growth, 2016, at 20-25 (calling for state preemption of municipal ordinances mandating higher minimum wage and/or paid sick leave, and preemption of

state floor, sixteen preempt local paid sick leave rules, with most preemptive measures adopted since 2013.²¹ Between 2015 and 2017, fifteen states preempted local predictive scheduling laws,²² and local ban-the-box laws are at risk as well.²³ Some of these statutes are particularly sweeping. Michigan’s so-called Death Star law²⁴ -- more formally, the Local Government Law Regulation Act of 2015²⁵ -- 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.²⁶

States have homed in on local environmental and public health rules. Nine preempt local nutrition regulations, such as calorie counts and other menu labeling rules; restrictions on promotional incentives (toys) with fast-food meals; or efforts to address “food deserts” (poor neighborhoods with few stores selling fruits or vegetables).²⁷ 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.²⁸ This is known colloquially as the “anti-Bloomberg bill” in ironic

local enforcement efforts against “wage theft,” that is, not paying workers what they are owed), https://www.uschamber.com/sites/default/files/documents/files/wfi_statelaborlawreport.pdf; American Legislative Exchange Council (ALEC), Living Wage Mandate Preemption Act (model law, approved 2002, reapproved 2013 and 2017), <https://www.alec.org/model-policy/living-wage-mandate-preemption-act/>.

²¹ See Grassroots Change Preemption Watch, <https://grassrootschange.net/preemption-watch/#/category/paid-sick-days>; Claire Zillman, The paid sick leave battle continues, state by state, *Fortune*, Feb. 11, 2015, <http://fortune.com/2015/02/11/paid-sick-leave-state-laws-bans>.

²² Von Wilpert, *supra*.

²³ See, e.g., Miss. Code Ann. 17-25-33; Gray, Republicans taking bite out of local control, stopping ordinances before they start, *Detroit Free Press*, Oct. 16, 2017 (noting bill that would prohibit local communities from telling employers what they can or cannot ask prospective employees during job interviews), <https://www.freep.com/story/news/politics/2017/10/16/republicans-taking-bite-out-local-control-stopping-ordinances-before-they-start/763587001/>; SeyfarthShaw, 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, July 21, 2017, <http://www.seyfarth.com/publications/OMM072117-LE> (Indiana enacted the measure, effective July 1, 2017).

²⁴ Bruchlawoffices, The Death Star Bill Has Become Law, Aug. 4, 2015, <http://bruchlawoffices.com/the-death-star-bill-has-become-law/>.

²⁵ M.C.L.A. §§ 123.1381-123.1396.

²⁶ See *id.*

²⁷ See Grassroots Preemption Watch, <https://grassrootschange.net/preemption-watch/#/category/nutrition>. See also ALEC, Food and Nutrition Act (model state law approved by ALEC Board, 2012), <https://www.alec.org/model-policy/food-and-nutrition-act/>.

²⁸ Miss. Code Ann. 75-29-901.

recognition of the public health efforts of New York City’s former mayor.²⁹ Other preempted public health subjects include pesticides (local regulation preempted in 43 states),³⁰ tobacco products (31 states bar a range of local measures concerning advertising, smoke-free indoor air, or youth access to vending machines);³¹ e-cigarettes (eight states);³² factory farms (thirteen states);³³ and fire sprinkler installation in new homes (sixteen states).³⁴

Perhaps the most surprising flash point in the new preemption era has been plastic bags. Concerned about the aesthetic, environmental, and clean-up costs of plastic bags, at least a dozen major cities and counties have either banned or taxed their use.³⁵ Some states, including California, Delaware, Illinois, Maine, and Rhode Island 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 Arizona, Florida, Idaho, Indiana, Iowa, Minnesota, Missouri, and Wisconsin barring local plastic bag regulation. The American City Council Exchange (“ACCE”) -- the local government offshoot of the American Legislative Exchange (“ALEC”), which has provided the template for many preemption laws -- has strongly embraced state preemption of local plastic bag regulation in the name of “business and consumer choice.”³⁶

²⁹ Holly Yan, No Soda Ban here: Mississippi passes ‘anti-Bloomberg’ bill, CNN, March 12, 2013, <http://www.cnn.com/2013/03/21/us/mississippi-anti-bloomberg-bill/index.html>. See also Kans.Stat. Ann. §12.16.137.

³⁰ See Pesticide Action Network, Reclaiming Local Control, <http://www.panna.org/policies-work/reclaiming-local-control>. See also ALEC, State Pesticide Preemption Act (model state law approved by ALEC board in 1995 and reapproved in 2013 and 2017), <https://www.alec.org/model-policy/state-pesticide-preemption-act/>.

³¹ Centers for Disease Control & Prevention, Map of Preemption on Advertising, Licensure, Smokefree Indoor Air and Youth Access, as of Sept. 30, 2017, <https://www.cdc.gov/statesystem/preemption.html>.

³² Grassroots Change Preemption Watch, <https://grassrootschange.net/preemption-watch/#/category/e-cigarettes>.

³³ Grassroots Change Preemption Watch, <https://grassrootschange.net/preemption-watch/#/category/factory-farms>. For critiques of the impact of the New Preemption on public health, see, e.g., Hodge, et al, Public Health Preemption Plus: Constitutional Affronts to Public Health Innovation, __ Ohio St. L.J. __ (2017) (forthcoming); Pomerantz & Pertschuk, State Preemption: A Significant and Quiet Threat to Public Health in the United States, 107 Am. J. Pub. Health 900 (2017).

³⁴ Grassroots Change, Preemption Watch, <https://grassrootschange.net/preemption-watch/#/category/fire-prevention>.

³⁵ See Nat’l Conf. State Legs., State Plastic and Paper Bag Legislation, July 5, 2017, <http://www.ncsl.org/research/environment-and-natural-resources/plastic-bag-legislation.aspx>. See also Angele Howe, Surfrider Foundation, State Preemption: Taking Away “Home Rule” on Plastic Pollution, June 9, 2017, <https://www.surfrider.org/coastal-blog/entry/state-preemption-taking-away-home-rule-on-plastic-pollution>.

³⁶ See American City County Exchange, Regulating Containers to Protect Business and Consumer Choice, Model Resolution finalized July 24, 2015, last amended Sept. 4, 2015, <http://www.acce.us/model-policy/regulating-containers-to-protect-business-and-consumer-choice/>. See also Mize, Big Cities in a Bigger State, 57 So. Tex. L. Rev. 311, 327 (2016) (noting that one Texas plastic bag ban proposal called itself the “Shopping Bag Freedom Act”).

Arizona's attorney general's enforcement of that state's plastic bag ban (yes, that's two "bans") 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.³⁷ Other state-local environmental conflicts include the hydraulic fracturing, or fracking, technology for extracting natural gas, with seven states now expressly banning local fracking regulation,³⁸ and state preemption of local regulation of polystyrene products (Styrofoam).³⁹

Anti-discrimination laws are another arena for preemption. With at least 225 cities and counties in 34 states banning employment discrimination on the basis of sexual preference or gender identity,⁴⁰ conservative state legislatures have begun to push back. In 2011, Tennessee became the first state to bar local laws extending anti-discrimination protections beyond those provided by state law,⁴¹ with Arkansas following in 2015,⁴² and North Carolina in 2016. The nationwide furor over North Carolina's so-called Bathroom Bill⁴³ -- enacted in response to a Charlotte ordinance that extended anti-discrimination protections to gay, lesbian and transgender people and allowed transgender people to select the bathroom consistent with their gender identity -- appears to have stalled efforts in other states for now,⁴⁴ but the issue is far from

³⁷ See, e.g., Dustin Gardner, Bisbee must repeal plastic-bag ban or lose funding, AG says, Oct. 24, 2017, <https://www.azcentral.com/story/news/politics/arizona/2017/10/24/bisbee-must-repeal-plastic-grocery-bag-ban-lose-funding-arizona-ag-says/795970001/>; Dustin Gardner, Bisbee repealing plastic-bag ban to dodge state budget hit, Oct. 31, 2017, <https://www.azcentral.com/story/news/politics/arizona/2017/10/31/bisbee-plastic-bag-ordinance-repeal-attorney-general-mark-brnovich-ruling/819584001/>.

³⁸ See, e.g., Briffault, et al, The Troubling Turn in State Preemption: The Assault on Progressive Cities and How Cities Can Respond, ACS Issue Brief, Sept. 2017, https://www.acslaw.org/sites/default/files/ACS_Issue_Brief_-_Preemption_0.pdf, at 7. See also Briffault & Reynolds, Cases and Materials on State and Local Government Law (West Acad. Pub., 8th ed., 2016) at 448-55, 471-74.

³⁹ See, e.g., Fl. Stat. Ann § 500.90. See Lance Dixon, Coral Gables sued over plan to keep Styrofoam ban, July 19, 2016, Miami Herald, <http://www.miamiherald.com/news/local/community/miami-dade/coral-gables/article90583302.html>.

⁴⁰ Human Rights Campaign, Cities and Counties with Non-Discrimination Ordinances that Include Gender Identity, as of Jan. 28, 2017, <https://www.hrc.org/resources/cities-and-counties-with-non-discrimination-ordinances-that-include-gender>.

⁴¹ Tenn. Code Ann. §4-21-102 (2012).

⁴² Ark. Code Ann. §§ 14-1-402-403. See also Alan Greenblatt, Arkansas Cities Pass LGBT Protections that Defy State's New Discrimination Law, Governing, May 11, 2015, <http://www.governing.com/topics/politics/gov-arkansas-discrimination-gay.html>.

⁴³ An Act to Provide for Single-Sex Multiple Occupancy Bathroom and Changing Facilities, N.C.G.S. § 143-422.11(b) (2016).

⁴⁴ See, e.g., Lauren McGaughy, The Texas Bathroom Bill is Dead – for Now, Aug. 15, 2017, www.dallasnews.com/news/texas-legislature/2017/08/15/transgender-texans-cautiously-optimistic-bathroom-bill-declared-dead-now.; Human Rights Watch, South Dakota Governor Pledges to Veto Anti-Gender Bill, Jan. 27, 2017, <https://www.hrw.org/news/2017/01/27/south-dakota-governor-pledges-veto-anti-transgender-bill>.

dead.⁴⁵ In a similar vein, as urban protests over public memorials to the Confederate side in the Civil War have mushroomed, so, too, have state laws barring local government actions to remove monuments within their borders.⁴⁶

Rounding out this overview, seventeen states preempt municipal broadband services,⁴⁷ 37 preempt local regulation of ride-sharing platforms,⁴⁸ three have displaced local regulation of home-sharing and short-term rentals;⁴⁹ 26 bar local rent control ordinances;⁵⁰ and eleven appear to have adopted measures intended to prevent local inclusionary zoning requirements for new housing developments.⁵¹ Some states now also now preempt local efforts to address the plight of animals raised in “puppy mills” – “commercial dog breeders infamous for keeping animals in poor conditions”⁵² – by barring local pet shops from selling animals raised in puppy mills.⁵³ Starting with Albuquerque, New Mexico in 2006, nearly two hundred cities and counties barred the sale of puppy mill-bred animals, thereby also encouraging the placement of rescue dogs. In 2016, however, Arizona and Ohio, preempted such local regulation of pet sales.⁵⁴

⁴⁵ See, e.g., Ray Sanchez, First days of 2017 bring new ‘bathroom bills,’ Jan. 7, 2017, www.dallasnews.com/news/texas-legislature/2017/08/15/transgender-texans-cautiously-optimistic-bathroom-bill-declared-dead-now (noting measures introduced or pending in eight states);

⁴⁶ See, e.g., Kaeli Subberwal, Several States Have Erected Laws to Protect Confederate Monuments, Huffington Post, Aug, 18, 2017, https://www.huffingtonpost.com/entry/states-confederate-statue-laws_us_5996312be4b0e8cc855cb2ab; Ala Code 41-9-230 (Alabama Memorial Preservation Act of 2017); Tenn. Code Ann. 4-1-412 (Tennessee Heritage Protection Act of 2016).

⁴⁷ See, e.g., Nat’l League of Cities, City Rights in an Era of Preemption,; A State-by-State Analysis 17-19, Feb. 22, 2017, <http://www.nlc.org/preemption>.

⁴⁸ Id. at 12-13.

⁴⁹ Id. at 15-16. See also Governing, Michigan Lawmakers Putting Limits on Local Authority, Oct. 16, 2017, <http://www.governing.com/topics/politics/Michigan-State-Lawmakers-Putting-Limits-on-Local-Authority.html>.

⁵⁰ NLC, supra, at 23.

⁵¹ See A Better Balance, State Preemption of Local Laws: A Preliminary Review of Substantive Areas, March 2017, <https://www.abetterbalance.org/wp-content/uploads/2017/08/State-Preemption-of-Local-Laws.pdf>.

⁵² Henry Grabar, Cities are Slowly Putting Puppy Mills Out of Business. These States Are Trying to Stop Them, Slate, Sept. 9, 2016, http://www.slate.com/blogs/moneybox/2016/09/09/cities_are_putting_puppy_mills_out_of_business_by_regulating_pet_stores.html. Cf. *Park Pet Shop, Inc. v. City of Chicago*, 872 F.3d 495, 500 (7th Cir. 2017) (noting “the social problems and economic costs associated with mill-bred pets”).

⁵³ Puppy mill animals may have health issues that lead owners to abandon them, with increased costs for local animal control and shelter programs. See, e.g., (Proposed) Memorandum of Amicus Curiae City of Tempe, *Puppies ‘N Love v. City of Phoenix*, filed June 28, 2017, Case No. CV 14-00073-PHX-DGC (U.S. D. Ct. D. Az.), <https://www.abetterbalance.org/resources/puppies-n-love-v-phoenix-amicus-brief-by-the-city-of-tempe/>.

⁵⁴ See Fischer, Ducey signs ‘puppy mill’ bill over objections of pet advocates, *Ariz. Cap. Times.*, May 19, 2016, (state’s action voided existing local laws in Phoenix and Tempe as well as one on hold in Tucson) <http://azcapitoltimes.com/news/2016/05/19/ducey-signs-puppy-mill-bill-over-objections-of-pet-advocates/>; Provance, Kasich signs weapons, puppy bills, Dec. 20, 2016, *The Blade* (preempting laws in Toledo and Grove City),

B. Punitive Preemption

Going beyond preemption's traditional focus on simply negating local laws, some states now punish local officials or local governments for having preempted policies.

(1) Personal Liability. A half-dozen states reinforced preexisting firearms preemption laws by threatening local officials with fines, civil liability, or removal from office for enacting or enforcing firearms measures.⁵⁵ In 2012, Kentucky created a private right of action for individuals and membership organizations affected by local gun ordinances 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.”⁵⁶ Florida has not criminalized preemption violations but it imposes civil penalties on any person who violates its gun preemption law by “enacting or causing to be enforced any local ordinance or administrative rule or regulation impinging upon [the state’s] exclusive occupation of the field.”⁵⁷ The penalties for “knowing and willful violations include civil fines on individual officials up to \$5000,⁵⁸ and removal from office by the Governor.⁵⁹ 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 also sue the local government for declaratory and injunctive relief and up to \$100,000 in damages.⁶⁰

Florida’s law has twice been the subject of litigation. In *Marcus v. Scott*,⁶¹ a Florida court held that it would be unconstitutional to apply the removal provision to county commissioners because a specific provision of the Florida constitution authorizes the governor only to suspend

<http://www.toledoblade.com/State/2016/12/20/John-Kasich-signs-weapons-puppy-bills-Toledo-pet-store-regulations-overridden.html>.

⁵⁵ See, e.g., Ariz. Rev. Stat. §13-3108 (removal from office); Miss. Code Ann. § 45-9- 53(5) (local officials subject to civil liability, including money damages and attorneys’ fees; public funds may not be used to indemnify officials for legal costs or penalties); Okla. Stat. tit. 21, § 1289.24(D) (same). See also Tartakovsky, *supra*, at 7.

⁵⁶ Ky. Rev. Stat. 65.870(5).

⁵⁷ Fla. Stat. § 790.33(3)(a).

⁵⁸ Fla. Stat. § 790.33(3)(c). As with other punitive measures, public officials sued under this provision may not have their legal costs or fines covered by public funds. *Id.* at § 790.33(d).

⁵⁹ Fla. Stat. § 790.33(3)(e).

⁶⁰ Fla. Stat. § 790.33(3)(f),

⁶¹ 2014 WL 3797314 (Fl. Cir. Ct. June 2, 2014)

commissioners, with the removal power vested in the state senate.⁶² The court, however, was careful to limit its decision to the special case of the county officials mentioned in the constitution; it did not address the legislature’s authority to require the removal of other local officers who violate the preemption law. In *Florida Carry, Inc. v. City of Tallahassee*,⁶³ gun rights organizations sued the city and individual members of the city commission, including the mayor for failing to repeal two unenforced city gun ordinances dating back to 1957 and 1984, dealing with the discharge of firearms in small lots and in city parks. 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. The gun rights groups, however, wanted the ordinances formally stricken from the city’s books. The Tallahassee City Commission took up the matter but voted to indefinitely table discussion of repeal. The gun groups then sued under the punitive preemption statute. The 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 city and city officials were entitled to summary judgement.⁶⁴ The court, however, declined to rule on the city officials’ argument that punitive preemption violated principles of local legislative immunity and free speech, finding that as no penalties had been imposed there was no need to address the issue.⁶⁵

In 2017, Texas included punitive provisions in its anti-sanctuary city law, providing, *inter alia*, for the removal from office of any local official who adopts, enforces, or endorses any local policy that prohibits or materially interferes with the enforcement of immigration laws.⁶⁶ A pending Florida anti-sanctuary also bill provides 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.⁶⁷

(2) Fiscal Sanctions Against Local Governments Arizona’s firearm preemption law subjects non-compliant local governments to fines of up to \$50,000 for knowing and willful

⁶² Id. at *3-*4.

⁶³ 212 So.3d 452 (Fla. App., Dist. 1, 2017)

⁶⁴ Id. at 459-465.

⁶⁵ Id. at 465-66.

⁶⁶ Tex. Gov’t Code § 752.0565.

⁶⁷ Fla. H.B. 9 (2018), at proposed new section 908.206.

violations.⁶⁸ The Texas anti-sanctuary city law makes local governments civilly liable, with penalties of up to \$1500 for a first violation and \$25,500 for subsequent violations, with each day of a continuing violation constituting a separate violation.⁶⁹ Texas Governor Abbott has withheld from sanctuary jurisdictions previously awarded and allocated grant funds for programs that were designed for victims of family violence, veterans and other at-risk communities, and has refused grant applications from Travis County (Austin), including those unrelated to immigration matters, because of its sanctuary policy.⁷⁰ The proposed Florida anti-sanctuary city law would make non-compliant 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 for injuries or wrongful death sustained by victims of crimes committed by undocumented aliens on a finding that a locality's non-compliance with the law's requirements gave the alien access to the victim.⁷¹

The most punitive⁷² fiscal measure is surely Arizona's SB 1487,⁷³ which is not limited to a specific subject like firearms or sanctuary but authorizes the imposition of fiscal penalties across the board. The law provides that any state legislator may request the state attorney general – who must act within thirty days -- to investigate and report a claim that a local official action violates state law. On finding a violation, the attorney general must notify the offending local government and, if it “fail[s] to resolve the violation” within thirty days, the attorney general must notify the state treasurer “who shall withhold and redistribute [to other localities] state shared monies” until the violation is resolved. If the attorney general concludes merely that the local measure “may violate” state law, the attorney general must immediately bring a special action in the state supreme court to determine the issue. However, in order to contest the action, the defendant local government must “post a bond” equal to the state shared revenue it received in the past six months – arguably a harsher penalty than the future loss or revenues, and one

⁶⁸ Ariz. Rev. Stat. Ann. 13-3108(I).

⁶⁹ See Tex. Gov't Code, § 752.056.

⁷⁰ El Cenizo, *supra*, 264 F.Supp.3d at 790-91.

⁷¹ See Fl. HB 9 (2018), *supra*.

⁷² Less dramatic but still coercive if not punitive are the California law -- adopted in the aftermath of a state supreme court decision exempting charter city construction contracts from the state's prevailing wage law -- denying state construction funds to any charter city which, in the preceding two years, awarded a public works contract without requiring the contractor to comply with the state prevailing wage law, Cal. Lab. Code § 1782 (2); and the 2017 Michigan law cutting off from any local district that sues the state an amount of state aid equal to the district's litigation expenses, see Mich. Comp. L. A. §388.1764g.

⁷³ Ariz. Rev. Stat. Ann. 41-194.01.

virtually none of the state's localities would be able to meet.⁷⁴ "State shared monies" constitute roughly one-third of local revenues in Arizona; 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. As a result the state funds affected by SB 1487 are crucial to local fiscal health, and withholding funds would be an effective means of bludgeoning a recalcitrant locality into submission.⁷⁵

In the first eighteen months after its enactment, S.B. 1487 resulted in seven investigations into local practices or laws, concerning such subjects as firearms, medical marijuana, policing, truck regulation, and a plastic bag ban, with findings of violations in two cases (firearms and the plastic bag ban), and a "may violate" subsequently resolved by negotiation in a third.⁷⁶ The most significant case involved Tucson's ordinance, adopted in 2005, providing for the destruction of firearms the city had obtained through forfeiture or as unclaimed property. On the complaint of a state legislator from outside Tucson, the attorney general concluded the ordinance was preempted by a state law, enacted in 2013, directing that such firearms be sold. The city suspended enforcement but declined to amend or repeal its ordinance, contending disposal of firearms in police custody is a local matter and, instead, brought suit challenging both SB 1487's procedures and the finding of preemption. In 2017, in *State ex rel Brnovich v. City of Tucson*,⁷⁷ the state supreme court sustained the law and the attorney general's finding. The court rejected arguments that by enabling a single legislator to require the attorney general to undertake an investigation, and by providing that the attorney general may determine that a local measure violates state law with consequent loss of state shared revenue, SB 1487 violated state separation of powers principles.⁷⁸ The court criticized the requirement that cities contesting the attorney general's determination must post bond, noting "that requirement, if enforced, would likely dissuade if not absolutely deter a city from disputing the Attorney General's opinion," which, "in turn would displace this Court from its constitutionally assigned role . . . of interpreting

⁷⁴ Further discouraging any effort by a locality to challenge the attorney general's determination, Arizona also makes a local government that loses a lawsuit it brings against the state liable for the state's attorney's fees. Ariz. Rev. Stat. § 12-348.01

⁷⁵ See Githush, *State Shared Revenue in Arizona: An Assessment*. Mar. 13, 2010, <http://githush.blogspot.com/2010/03/state-shared-revenue-in-arizona.html>.

⁷⁶ See Arizona Attorney General, *SB 1487 Investigations*, <https://www.azag.gov/complaints/sb1487-investigations>.

⁷⁷ 399 P.3d 663 (Az. 2017).

⁷⁸ *Id.* at 667-71.

Arizona’s constitution and laws.”⁷⁹ But as the state had not sought a bond from Tucson, the court declined to rule on the constitutionality of the provision.⁸⁰ 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 and that its local interest in local public safety was greater than the state’s in regulating firearms and police behavior.⁸¹ 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 it could not afford to litigate the issue.

C. 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 are not allowed to govern at all.”⁸² 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.”⁸³ 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.⁸⁴ Texas’s Governor Abbott has said that the state should adopt a “ban across the board on municipal regulations.”⁸⁵ And the Florida legislature had before it in 2017 bills, reintroduced for 2018, that would expressly prohibit all local regulation of “businesses, professions, and occupations,” unless expressly authorized by state law;⁸⁶ or would prohibit all

⁷⁹ Id. at 672.

⁸⁰ Id. A separate opinion, joined by three justices, would have voided the bond provision as “incomplete and unintelligible.” Id. at 683.

⁸¹ Id. at 676-79.

⁸² Badger, Blue Cities Want to Make their Own Rules; Red States Won’t Let Them, N.Y., Times, July 6, 2017., <https://www.nytimes.com/2017/07/06/upshot/blue-cities-want-to-make-their-own-rules-red-states-wont-let-them.html>.

⁸³ Okla. SB 1289 (2016), <https://legiscan.com/OK/text/SB1289/2016>.

⁸⁴ See Grassroots Change, Ground Zero: Preemption in Texas, June 18, 2015, <https://grassrootschange.net/2015/06/ground-zero-preemption-in-texas/>.

⁸⁵ Vock, The End of Local Laws? War on Cities Intensifies in Texas, Governing, April 5, 2017, <http://www.governing.com/topics/politics/gov-texas-abbott-preemption.html>.

⁸⁶ Fla H.B. 17 (2017).

local regulation of “commerce, trade, and labor.”⁸⁷ The latter measure included a particularly insidious enforcement mechanism under which if one local government believes that another locality is violating the restriction it can complain to the state legislature, and if the legislature does not “ratify” the challenged local measure by the end of the regular legislative session the measure would be considered “nullified and repealed.” Although neither bill has become law, Florida’s House Speaker declared himself “certainly a big fan of the concept” of preempting local regulation of business.⁸⁸

These measures would effectively nuke local power and are an existential threat to local self-government. Although continued political support for local autonomy has so far prevented the enactment of these far-reaching proposals, the pressure on local governments remain strong. With conservative groups even at the local level celebrating the importance of state sovereignty and decrying “runaway local governments,”⁸⁹ such nuclear preemption remains a real possibility.

III. The Challenge of Defending Local Laws Against State 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 for at least some localities, typically allow their states 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 Constitutional Arguments

The United States Constitution does not recognize local governments, and the 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.⁹⁰

⁸⁷ Fla. S.B. 1158 (2017).

⁸⁸ Cotterell, Cities and Counties are playing defense in 2018 session, Tallahassee Democrat, Sept. 16, 2017, <http://www.tallahassee.com/story/news/politics/cotterell/2017/09/16/cotterell-cities-counties-playing-defense-session/105686982/>.

⁸⁹ See ACCE White Paper, Federalism, Dillon Rule and Home Rule, Jan. 2016, <http://www.acce.us/app/uploads/2016/06/2016-ACCE-White-Paper-Dillon-House-Rule-Final.pdf>.

⁹⁰ See, e.g., *Yursa v. Pocatello Educ. Ass’n*, 555 U.S. 353, 363-64 (2009); *Nixon v. Missouri Mun. League*, 541 U.S. 125, 133-34 (2004).

In effect, federalism trumps any claim of localism. Local governments have no constitutional rights against their states,⁹¹ and local residents have no federal constitutional claim to the rights, powers, boundaries, or even the very existence of their local governments.⁹² To be sure, 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,⁹³ but most preemption measures – such as those dealing with environmental or public health regulation or employee benefits -- lack such substantive constitutional implications. State laws barring local anti-discrimination ordinances present a closer case, but recent preemption measures have left in place protections against the kinds of discrimination that the Supreme Court has recognized as unconstitutional. Moreover, unlike the sweeping Colorado constitutional amendment barring all legal protections for gays and lesbians which the Court struck down in *Romer v. Evans* as motivated by the “bare desire” to harm a group,⁹⁴ the new anti-discrimination preemption statutes have been justified by the non-invidious value of having a uniform statewide standard for businesses that operate in more than one locality.⁹⁵

Some preemption measures have the effect of shifting decision-making authority from local governments with African-American or other minority group majorities to a white-dominated state government. Although the Supreme Court 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,⁹⁶ when the African-American-majority 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,⁹⁷ a federal district court rejected it, determining 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 failed to

⁹¹ See, e.g., *City of Trenton v. State of New Jersey*, 262 U.S. 182 (1923); *Williams v. Mayor & City Council of Baltimore*, 289 U.S. 36 (1933).

⁹² See, e.g., *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907).

⁹³ See, e.g., *Romer v. Evans*, 517 U.S. 620 (1996); *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982); *Gomillion v. Lightfoot*, 364 U.S.339 (1960). Local governments may be able to challenge state measures that violate federal laws. See, e.g., *Lawrence Co. v. Lead-Deadwood Schl Dist. No. 40-1*, 469 U.S. 256 (1985).

⁹⁴ *Romer*, supra, 517 at 634-35.

⁹⁵ See, e.g., *Protect Fayetteville v. City of Fayetteville*, 510 S.W.3d 258 (Ark. 2017).

⁹⁶ *Washington v. Seattle Sch’l Dist.*, supra.

⁹⁷ *Alabama: Law Bans Cities From Setting Minimum Wage*, N.Y. Times, Feb. 25, 2016, https://www.nytimes.com/2016/02/26/us/alabama-law-bans-cities-from-setting-minimum-wage.html?_r=0.

meet the high standard of proof of intentional discrimination required in the absence of a clear racial classification.⁹⁸ And, of course, some preemption measures, such as those dealing with firearms, can be justified as vindicating federal Second Amendment rights.

A handful of lower federal courts have suggested local governments have First Amendment rights, which might provide a basis for challenging sanctions imposed when local governments pass, or decline to repeal, laws that express their views about firearms, immigration, or plastic bags.⁹⁹ As Judge Posner put it, “[t]here 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.”¹⁰⁰ Similarly, in words that have taken on new resonance in the aftermath of *Citizens United*’s validation of corporate speech rights, Judge Jack Weinstein determined that “a municipal corporation, like any corporation, is protected under the First Amendment in the same manner as an individual.”¹⁰¹ 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,” so that “a curtailment of its right to speak might be thought a curtailment of the unquestioned First Amendment rights of those residents.”¹⁰² These cases, however, involved private challenges to local government litigation or lobbying, not local resistance to state restrictions. Moreover, in *Ysursa v. Pocatello Educ. Ass’n*, the Supreme Court rejected the very idea that municipal corporations may be assimilated to business corporations for First Amendment purposes.¹⁰³ Restating century-old black-letter law, the Court declared that unlike a private corporation, a “political subdivision . . . is a subordinate unit of government created by the State to carry out delegated governmental

⁹⁸ *Lewis v. Bentley*, ___ F.Supp.3d ___ (N.D. Ala. 2017), 2017 WL 432464, at *13. *Washington’s* “political process” theory of discrimination was undermined by *Schuetz v. Coalition to Defend Affirmative Action*, 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 achieve government policies that are in their interest, while still leaving open the possibility of an equal protection challenge to state laws that reduce local government powers for racially invidious reasons.

⁹⁹ See, e.g., *Creek v. Village of Westhaven*, 80 F.3d 186, 192 (7th Cir. 1996); *County of Suffolk v. Long Island Lighting Co.*, 710 F.Supp. 1387, 1396 (E.D.N.Y. 1989). Cf. *Donaggio v. Arlington Co.*, 880 F.Supp. 446 (E.D. Va. 1995 (right of cities and counties to take positions with respect to pending legislation not clearly protected by the First Amendment nor clearly barred by it).

¹⁰⁰ *Creek*, supra, 80 F.3d at 192.

¹⁰¹ *County of Suffolk*, supra, 710 F.Supp. at 1396.

¹⁰² *Creek*, supra, 80 F.3d at 192. See also Bendor, *Municipal Constitutional Rights: A New Approach*, 31 *Yale L. & Pol. Rev.* 389, 425-26 (2013) (making a similar freedom of association argument for municipal rights).

¹⁰³ 555 U.S. 353, 362-64 (2009).

functions. A private corporation enjoys constitutional protection . . . but a political subdivision, ‘created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator.’”¹⁰⁴ *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 the locality-as-association-of-its-residents theory.¹⁰⁵

The First Amendment could provide some protection for local officials. The First Amendment does not apply to a legislator’s vote,¹⁰⁶ but it does protect the speech of local officials, even on preempted issues. As the Supreme Court has observed, “[l]egislators have an obligation to take positions on controversial political questions so that their constituents can be fully informed by them.”¹⁰⁷ In *Spallone v. United States*, the Court was particularly 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. Noting 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 personal interest” in avoiding paying the fines, the Court found that would be a “perversion of the normal legislative process” and was far more troublesome than the imposition of sanctions on the city government.¹⁰⁸ *Spallone* ultimately turned on the equitable powers of federal district courts rather than the First Amendment per se.¹⁰⁹ Nonetheless, in *El Cenizo v. State*, the federal district court preliminarily enjoined on First Amendment grounds the provision of Texas’s anti-sanctuary law providing for the removal from office of local officials who “endorse” sanctuary policies. Moreover, the court enjoined all the penalties for “endorsement,” including the civil penalties for local governments.¹¹⁰ This is only one decision but it suggests that vague and overbroad language that goes beyond substantive

¹⁰⁴ *Id.* (citations omitted)

¹⁰⁵ Local government speech may implicate the First Amendment rights of local residents who oppose the government’s position. See, e.g., *Page v. Lexington Co. Schl. Dist. No. 1*, 531 F.3d 274 (4th Cir. 2008).

¹⁰⁶ *Nevada Comm’n on Ethics v. Carrigan*, 564 U.S. 117 (2011).

¹⁰⁷ *Bond v. Floyd*, 385 U.S. 116, 136 (1966).

¹⁰⁸ *Spallone v. United States*, 493 U.S. 265, 279-80 (1990).

¹⁰⁹ *Id.* at 274.

¹¹⁰ *City of El Cenizo v. State*, supra, 264 F.Supp.3d at 812-13, affirmed in pertinent part, *City of El Cenizo v. Texas*, 2017 WL 4250186 (5th Cir., Sept. 25, 2017) at *2 (declining to stay enforcement of injunction against penalties for “endors[ing]” sanctuary policies),

preemption and penalizes local expressive activity may trigger a mix of judicially-enforceable free speech and due process concerns.

B. State Law Arguments

(1) Legislative process and special state constitutional provisions.¹¹¹ 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. For example, many state constitutions require that each bill passed by the legislature address only a single subject. The Pennsylvania Supreme Court embraced a single-subject-rule argument in invalidating firearm preemption provisions which had been tucked into a bill dealing with the theft of “secondary metals” used by utilities and transportation agencies.¹¹² Similarly, the Missouri Supreme Court struck down the local minimum wage law that had been tacked on to a bill whose “core, original purpose” was the governance and operation of community improvement districts.¹¹³ So, too, many state constitutions prohibit “special acts” that target one or a small number of localities for regulation, while exempting others presenting similar issues.¹¹⁴ These limits on legislative process can provide local governments with protection against poorly drafted measures, but, ultimately can be overcome by a determined state legislative majority. Other state constitutional provisions provide arguments against particular preemptive measures, such as the protection against the punitive removal of county commissioners *Marcus v. Scott* found in the Florida constitutional section regulating the suspension of commissioners, or the express authorization for local minimum wage regulation that an Arizona court found in a voter-initiated constitutional amendment in that state.¹¹⁵ However, as the *Marcus* court indicated, these measures may provide only limited protections

¹¹¹ This discussion in this paragraph benefited greatly from the work of my colleagues in the Local Effort to Address Preemption (LEAP) Project, and are developed further in the ACS Issue Brief, supra.

¹¹² *Leach v. Pennsylvania*, 141 A.3d 81 (Pa. 2016).

¹¹³ *Cooperative Home Care, Inc. v. City of St. Louis*, 514 S.W.3d 571, 580 (Mo. 2017). See also *City of Cleveland v. State*, 989 N.E.2d 1072, 1083-87 (Ohio Ct. App. 2013) (labeling as “a classic instance of impermissible logrolling” a state law preempting local law regulating foods containing trans fats that had been tucked into another bill without the usual committee review process).

¹¹⁴ See *City of Normandy v. Greitens*, 518 S.W.3d 183 (Mo. 2017).

¹¹⁵ See *UFCW, Local 99 v. State of Arizona*, (Super. Co., Maricopa Co., Aug. 30, 2017), pslatwork.files.wordpress.com/2017/09/082917-az-maricopa-county-decision-rogers-re-preemption-m7977553.pdf.

for their local governments, which grow out of their very specific texts, and may lack broader generative force.¹¹⁶

(2) Home rule. At the heart of the local challenge to state preemption is home rule, the idea, grounded in the constitutions of the vast majority of states, that local governments have state-constitutionally-protected law-making status.¹¹⁷ The problem is that in nearly all states for most local regulatory measures, home rule fails to protect against preemption. The states' laws of state-local relations proceed from the same premises as the federal – that local governments are creatures of their states, possessing only those powers delegated to them by their states, and subject to plenary state authority to alter or abolish their powers, displace their actions, change their boundaries, or eliminate them altogether.¹¹⁸ State grants of authority to their localities were traditionally subject to the judicial canon of interpretation known as Dillon's Rule, that is, the principle that local governments possess only those powers expressly granted, necessarily implied in the express grant, or essential for the accomplishment of their state-prescribed purposes.¹¹⁹ Starting in the latter part of the nineteenth century, states began to add home rule amendments to their constitutions,¹²⁰ so that today in most states, all municipalities, or at least those above some low population threshold, enjoy home rule, and many states have extended home rule to their counties, too.¹²¹ But home rule has been far more effective in enabling local governments to take the initiative and adopt new measures without having to wait for specific or express authority from the state – in other words, undoing Dillon's Rule of limited delegation of power – than in protecting those local actions from state displacement.

The limited effect of home rule is ironic given that the first home rule amendments sought to combine initiative with immunity on the theory that if a matter was local enough for municipal action it was also local enough to be shielded from state preemption. The Supreme

¹¹⁶ See, e.g., *City of Miami Beach v. Florida Retail Fed., Inc.*, __ So.,3d __, 2017 WL 6346787 (D.Ct. App., 3d Dist., Dec. 17, 2017 (finding that voter-initiated amendment authorizing localities to adopt minimum wage above the federal or state minimum did not bar state legislation preempting local minimum wage regulation).

¹¹⁷ All but four states make some provision for home rule. See Krane, Riggs & Hull, *Home Rule in America: A Fifty-State Handbook* 476-478 (CQ Press 2001). Forty-five states provide for municipal home rule; Hawaii, which has county governments but not municipal governments, gives its counties home rule. *Id.* In forty-one states, home rule is provided for in the state constitution; in five states it is based solely on statute. *Id.*

¹¹⁸ See Briffault & Reynolds, *supra*, at 289-90.

¹¹⁹ *Id.* at 327.

¹²⁰ In some states, a form of local home rule may result from judicial decisions. See, e.g., *State v. Hutchinson*. 624 P.2d 1116 (Utah 1980).

¹²¹ See Krane, et al, *supra*.

Court referred to St. Louis’s protected status under Missouri’s pioneering constitutional home rule amendment as an “imperium in imperio,”¹²² and the term “imperio” continues to be used to describe home rule that combines local initiative with immunity. *Imperio* home rule, however, largely failed to protect local laws from preemption. These amendments typically empowered local governments to pass laws concerning “local” or “municipal” matters, but then left the meaning of “local” or “municipal” undefined. The scope of home rule became a matter for the courts, which often read those terms relatively narrowly. 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.¹²³ Local and state concerns often overlap, and courts typically held that if some state concern was present state law would prevail over an inconsistent local law.¹²⁴ In some *imperio* states, the constitution provides more specific protections for local control over certain subjects, most commonly the structure of the local government; the relationship between the local government and its workforce; or local-government-owned property and public works.¹²⁵ But there is little textual protection from preemption for local power to regulate private behavior.

And that is in the *imperio* states. Reflecting the perception that the *imperio* model did not provide an adequate basis for local initiative, let alone immunity, in the mid-twentieth century home rule proponents developed a new template that protected initiative at the cost of giving up on immunity. Under this so-called “legislative” home rule approach, home rule governments enjoy all the initiative the state legislature could delegate to them, subject to the power of the legislature to deny or take away a power. Today more than half of state home rule amendments have embraced the “legislative” model.¹²⁶ In these states, Dillon’s Rule is still undone, but there is no textual protection from preemption.¹²⁷

¹²² *St. Louis v. Western Union Tel. Co.*, 149 U.S. 465, 468 (1893).

¹²³ See Briffault & Reynolds, *supra*, at 347.

¹²⁴ See, e.g., *City of LaGrande v. Public Employes Retirement Board*, 576 P.2d 1204 (Ore. 1978); *Adler v. Deegan*, 251 N.Y. 467 (1929).

¹²⁵ See, e.g., *State Bldg & Const. Trades Council v. City of Vista*, 279 P.3d 1022 (Cal. 2012); *Town of Telluride v. San Miguel Valley Corp.*, 1845 P.3d 161 (Colo 2008); *Strode v. Sullivan*, 236 P.2d 48 (Az. 1951).

¹²⁶ Krane et al, *supra*, at 14.

¹²⁷ See Briffault & Reynolds, *supra*, at 347-48.

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.¹²⁸ But where state law clearly articulates an intent to preempt, home rule typically provides little protection for local governments.

A handful of state supreme courts are somewhat more protective of local laws. The California Supreme Court has sought to harmonize state and local power by limiting preemption to situations where the state law addresses not only a matter of statewide concern but is “reasonably related” to the state concern and “narrowly tailored” to avoid unnecessary interference with local governance.¹²⁹ However, even in this *imperio* state local governments have been able to prevail against clearly preemptive state laws only in cases involving local government political structure and elections,¹³⁰ or local government employment and contracts,¹³¹ and not in cases involving private sector regulation.¹³² The Arizona Supreme Court in the Tucson SB 1487 case specifically rejected California’s approach and similar decisions from other states that involved an element of state-local balancing.¹³³

Potentially more promising is the Ohio Supreme Court’s requirement that a state law preempting local regulation cannot merely block local action but must include some substantive replacement regulation. Ohio, like many states, provides that a local law may be preempted only by a “general” state law,¹³⁴ but whereas most states treat “general” as meaning “broadly applicable” or “not narrowly targeting an arbitrarily small subset of local governments,” the Ohio courts have held that in the preemption context a “general” law must not only have uniform application throughout the state, but must also “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

¹²⁸ See, e.g., *Watson v. City of Seattle*, 401 P.3d 12 (Wash. 2017); *Wallach v. Town of Dryden*, 23 N.Y.3ed 728 (N.Y. 2014); *City of Riverside v. Inland Empire Patients Health & Wellness Ctr., Inc.* 300 P.3d 494 (Cal. 2013).

¹²⁹ *Cal. Fed. Sav. & Loan Ass’n v. City of Los Angeles*, 812 P.2d 916, 918, 929 (Cal. 1991).

¹³⁰ *Johnson v. Bradley*, 841 P.2d 990 (Cal. 1992).

¹³¹ See *State Bldg & Const. Trades Council v. City of Vista*, supra.

¹³² See *Cal. Fed.* supra.

¹³³ See *Brnovich*, supra, 399 P.3d at 679.

¹³⁴ Ohio Const., Art. XVIII, § 3 (“Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.”).

similar regulations.”¹³⁵ As a result, Ohio courts have rejected state laws purporting to preempt local regulation of foods containing trans fats,¹³⁶ local regulation of towing companies,¹³⁷ or “local-hire” requirements on certain local construction contracts,¹³⁸ and burdening local use of cameras to enforce traffic laws.¹³⁹ 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 appellate court found in upholding Cleveland’s longstanding Fannie Lewis Law, which directs that twenty percent of the work hours on large public construction projects be performed by city residents,¹⁴⁰ the 2016 ban on local governments’ local-hire 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.”¹⁴¹

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 of Ohio,¹⁴² possibly because its non-intuitive reading of “general law” is quite different from the way all other state courts have interpreted that phrase. Nonetheless, the Ohio court is clearly on to something. Stripping local governments of regulatory authority over a subject without adopting a substantive state rule for that subject is not only a denial of local immunity but inconsistent with the local initiative which is at the heart of home rule and with the idea home rule embodies that local governments are and ought to be a meaningful part of a state’s governance structure. In Part IV, I will suggest that even if other states do not adopt Ohio broad reading of “general law” they consider developing similar doctrines that will provide a more muscular protection for local action.

¹³⁵ See *City of Canton v. State*, 766 N.E.2d 963, 969-70 (Ohio 2002).

¹³⁶ *City of Cleveland v. State*, 989 N.E.2d 1072 (Ohio Ct. App. 2013).

¹³⁷ *City of Cleveland v. State*, 5 N.E.3d 644 (Ohio 2014)

¹³⁸ *City of Cleveland v. State* ___ N.E.3d ___, 2017 WL 6055031 (Ohio Ct. App., Dec. 7, 2017).

¹³⁹ *City of Dayton v. State*, 87 N.E.3d 176 (Ohio 2017); *City of Toledo v. State*, 56 N.E.3d 997, (Ohio Ct. App. 2016).

¹⁴⁰ The twenty percent requirement applies only to work hours performed by Ohio residents. There is no limit on the work of non-Ohio residents. In addition, four percent of the resident work hours must be performed by low-income people. *Id.* at *1.

¹⁴¹ *Id.* at *8. The court also rejected the argument that the state law was supported by the state constitutional provision authorizing the legislature to promote the welfare of employees, finding that the preemption measure was aimed at benefiting contractors, not employees. *Id.* at *5.

¹⁴² My January 2, 2018 Westlaw review of references to the foundational *Canton* decision found that all sixty court citations to the case came from Ohio courts; all six references in administrative filings were from Ohio; all 44 references in trial court documents and 137 of 138 references in appellate court documents were in Ohio cases.

(3) Protections against punitive preemption. Although with the limited exceptions just noted most states provide local governments with little protection from preemption, there are state-law arguments for invalidating punitive preemptive measures, particularly civil or criminal liability for local officials. The vast majority of state constitutions include a provision, analogous to the federal Speech or Debate Clause, immunizing state legislators from suit for their votes, statements made in legislative debate, or other actions in connection with their legislative work.¹⁴³ These provisions do not by their terms apply to local legislators, but at least one state supreme court has so applied it. As the Washington Supreme Court explained, although the state constitution’s Speech or Debate 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 members of a city council.¹⁴⁴ Other state courts have held that the common law legislative privilege that predated and inspired the Speech or Debate Clause¹⁴⁵ applies to members of local legislative bodies.¹⁴⁶ This privilege may extend to executive branch officials, such as mayors, who participate in the local legislative process or to local administrative bodies with executive powers.¹⁴⁷

The case for the extension of protection is clear. As the Arizona Supreme Court explained, no “good reason [has been] advanced for the proposition that city or town council members should be more inhibited in debate than state or federal legislators. Many local lawmakers . . . legislate on matters of more immediate importance to their electorate than state or

¹⁴³ See Steven F. Huefner, *The Neglected Value of the Legislative Privilege in State Legislatures*, 45 *Wm. & Mary L. Rev.* 221 (2003) (forty-three state constitutions include provisions analogous to the Speech or Debate Clause). Even the state constitutions without a general Speech or Debate Clause include some constitutional protection for legislators from arrest or civil process while the legislature is in session, which has been used to provide a broader privilege. See *id.* at 236-37 n. 54.

¹⁴⁴ *Matter of Recall of Moore v. Call*, 749 P.2d 674, 677 (Wash. 1988). See also *In re Kent Co. Adequate Public Facilities Ordinance Litigation*, 2008 WL 859342, *2 (Del Ct. Chancery 2008) (county officials enjoy absolute legislative immunity following the “policies animating such protection” under the state speech or debate clause; but immunity does not create a testimonial privilege).

¹⁴⁵ See Huefner, *supra*, at 230-35.

¹⁴⁶ See, e.g., *Sanchez v. Coxon*, 854 P.2d 126, 128-31 (Az. 1993); *Montgomery Co. 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); *State v. Holton*, 997 A.2d 828 (Md. Ct Spec Apps. 2010). Cf. *Zutz v. Nelson*, 788 N.W.2d 58, 65 (Minn. 2010) (declining to extend privilege to deliberations of unelected member of a watershed district board but noting that a “more persuasive argument can be made, perhaps, for extending absolute privilege to deliberations of elected county and municipal bodies”). See also *Smith v. Martin*, 331 S.W.3d 637 (Ky. 2011) (applying state statute providing local legislators with absolute privilege for statements made in legislative debate).

¹⁴⁷ See, e.g., *Humane Soc. of NY v. City of New York*, 188 Misc.2d 735, 738 (Sup. Ct. N.Y. Co. 2001).

federal legislators. Such legislation should be based on all relevant information—both favorable and unfavorable—and subjected to the most vigorous debate possible.”¹⁴⁸ So, too, a Maryland court concluded that the state had conferred upon local legislative bodies “the same responsibilities for debating and setting public policy that are vested in legislative bodies generally. . . . The 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.”¹⁴⁹ The United States Supreme Court reasoned similarly in holding local legislators absolutely immune for their legislative activities from civil rights liability under 42 U.S.C. § 1983. As the Court put it in *Bogan v. Scott-Harris*, “[r]egardless of the level of government, the exercise of legislative discretion should not be inhibited or distorted by the fear or personal liability.”¹⁵⁰

To be sure, these case involved either private suits against local legislators or a prosecution in which there was no state law withdrawing common law legislative immunity. With the possible exception of the Washington Speech or Debate holding, these decisions turned on common law precedents or protective state statutes that could potentially be undone by an explicit state punitive preemption law. Nevertheless, they point the way to an argument that a respect for local democracy requires that local government officials be protected from punishment for their legislative acts.

The case for protection of local governments from punitive financial penalties, such as the loss of state shared revenue in Arizona, large fines, or civil liability to individuals or organizations for adhering to preempted laws, is more difficult. Certainly, 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

¹⁴⁸ Sanchez, *supra*, 854 P.2d at 130.

¹⁴⁹ State v. Holton, *supra*, 997 A.2d at 369-70.

¹⁵⁰ *Bogan v. Scott-Harris*, 523 U.S. 44, 52 (1998). The Court noted that immunity also attaches to officials outside the legislative branch when they perform legislative functions. *Id.* at 55.

to cut off all Medicaid funding – including funding for pre-existing services -- from states that decline to expand their Medicaid programs is a compelling analogy. As the Court determined in *NFIB v. Sebelius*, although “Congress may use its spending power to create incentives for States to act in accordance with federal policies,” it could not coerce the states into compliance.¹⁵¹ The loss of some federal funding for not participating in a federal program was not impermissibly coercive but the cut-off of over ten percent 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 to acquiesce.”¹⁵² Surely, the threat built into Arizona’s SB 1487 to cut off one-third of local revenues is a gun to the head as well.

To date, only two state courts have considered the *NFIB* analogy in cases involving a threatened cut-off of state funds for localities. In *City of El Centro v. Lanier*,¹⁵³ a California appellate court rejected the argument that a new 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.” The California Supreme Court had recently held that, as a matter of home rule, charter cities could not be required to abide by the state’s prevailing wage laws; the new cut-off was plainly an effort to use a financial incentive to circumvent the supreme court decision. Although the dissenting judge in *El Centro* found the funding cut-off law would “diminish[] the vigor with which the home rule doctrine protects local prerogatives,”¹⁵⁴ the majority determined that in the absence of evidence that municipalities were “dependen[t] on state funding or financial assistance for municipal projects,” the financial coercion argument failed on the facts.¹⁵⁵ In similar circumstances, 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 state law’s enforcement, the state legislature enacted a budget that reduced payments to local governments that failed to abide by the enjoined state photo-monitoring law.¹⁵⁶ An appellate court found the “city would be required to choose

¹⁵¹ *NFIB v. Sebelius*, 567 U.S. 519, 577-78 (2012).

¹⁵² *Id.* at 580-81.

¹⁵³ 245 Cal. App. 4th 1494 (Cal. Ct. App. 2016).

¹⁵⁴ *Id.* at 1516.

¹⁵⁵ *Id.* at 1507.

¹⁵⁶ *City of Toledo v. State of Ohio*, 72 N.E.2d 692 (Ohio Ct. App. 2017). State funding was reduced by an amount equal to the civil fines the local government had billed to drivers whose traffic violations were caught by the traffic cameras. *Id.* at 694.

between compliance with the constitutional statute or face a loss of state funding for its noncompliance.”¹⁵⁷ The court, however, ultimately rested its decision not on home rule concerns but on separation of powers -- as an “end-run around the trial court’s injunction,” the state budget unconstitutionally intruded on the prerogatives of the judicial branch.¹⁵⁸

These cases point to the seeds of arguments for broader local challenges to some forms of state preemption, particular the more punitive and sweeping measures and those that would displace local regulations without providing substantive state rules in their place. But these arguments point to the different challenge of persuading state courts why they build on these theories to defend local initiatives from the more egregious forms of state preemption. That is the focus of the next Part.

IV. The New Preemption and the Legal Status of Local Governments

The rise of the New Preemption raises anew the place of local government in our system. 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 considerable local role in practice, have provided for home rule in their constitutions or through general enabling legislation. Yet, as Part III found, 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,”¹⁵⁹ the traditional legal laissez-faire approach risks jeopardizing the ability of local governments to play their key role in our system.

The legal status of local governments can be bolstered and local governments provided greater protection against state preemption, and that this can be done without falling into the trap

¹⁵⁷ Id at 699.

¹⁵⁸ Id.

¹⁵⁹ Ehrenhalt, What Do States Have Against Cities, Anyway? Governing November 2017, <http://www.governing.com/columns/assessments/gov-urban-penalty-legislatures-cities.html>.

set by the *imperio* model of trying to determining what is “state” and what is “local.” With so many public policy arenas combining both state and local concerns, that approach, like its dual federalism analogue is bound to fail, as it largely has in nearly all states. Instead, I suggest that the empowered local self-government which is at the core of home rule necessarily places some limits on state preemption. Laws that punish local officials or governments for exercising their home rule powers or that broadly sweep away local law-making 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 the state’s 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 also respecting the state’s overarching authority to preempt when it sets state-wide policy or addresses the costs local actions impose on non-local residents or the state as a whole.

The case for greater protection for local self-government draws together the normative values associated with local self-determination, the significance of its widespread practice, and the recognition it has received in state constitutionalism. 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.’ . . .” Federalism secures the freedom of the individual. It allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power.”¹⁶⁰ To be sure, notwithstanding the reference to “local policies,” the Court was talking about the states. But the Court’s federalism cases regularly conflate federalism with the value of “local” self-governance and local

¹⁶⁰ Bond v. United States, 564 U.S. 211, 221 (2011), citing and quoting Gregory v. Ashcroft, 501 U.S. 452, 458 (1991). See also United States v. Morrison, 529 U.S. 598, 617-18; Gerken, Foreword: Federalism All the Way Down, 124 Harv. L. Rev. 4, 6 (2010) (“federalism promotes choice, competition, participation, experimentation, and the diffusion of power”).

governmental accountability to local electorates,¹⁶¹ and many of the federalism cases dealt with local governments.¹⁶² The Court's normative concerns with responsiveness to diverse needs in a heterogeneous society, innovation and experimentation, citizen involvement in democratic processes, competition for a mobile citizenry apply even more to local governments than states.¹⁶³ Ironically, it is the very responsiveness of local governments to citizen engagement, their attentiveness to distinctly local preferences and concerns, their use of local regulations to compete for a mobile citizenry, 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 that the Court has invoked to give federalism normative force.

Local decision-making is not merely honored by judicial rhetoric but is widely practiced and has become central to our governmental structure. Most of the subnational governance that federalism protects actually occurs at the local level. As the Supreme Court explained in holding that local elections are required to comply with the one person, one vote principle, “the 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.”¹⁶⁴ Moreover, as the Court has repeatedly pointed out in cases dealing with the local role in education, “local control . . . affords citizens an opportunity to participate in decision-making, permits the structuring of school programs to fit local needs, and encourages ‘experimentation,

¹⁶¹ 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”); *United States v. Lopez*, 514 U.S. 549, 567-68 (1995) (same); *New York v. United States*, 505 U.S. 144, 168 (1992) (value of government being “responsive to the local electorate’s preferences”).

¹⁶² See, e.g., *Printz v. United States*, 521 U.S. 898 (1997); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *National League of Cities v. Usery*, 426 U.S. 833 (1976).

¹⁶³ See Richard Briffault, “What About the ‘Ism’” Normative and Formal Concerns in Contemporary Federalism, 47 *Van. L. Rev.* 1303, 1312-16 (1994)

¹⁶⁴ *Avery v. Midland Co.* 390 U.S. 474, 481 (1968).

innovation, and a healthy competition.”¹⁶⁵ State supreme courts, too, have celebrated the importance of “effective local self-government, as an important constituent part of our system of government,” particularly when “the nature of those problems varies from county to county and city to city.”¹⁶⁶

Thus, such critical public services as public safety and law enforcement, water supply, management of waste removal and disposal, public health and hospitals, maintenance of streets and roads, housing and community development, and land use regulation are primarily local matters. Virtually all fire fighters and the public servants dealing with water supply, solid waste, sewage, and housing and community development work for local governments, as do the vast majority of police officers and most government workers in the health and hospital sector. Indeed, of the 14.5 million state and local employees, nearly 75% work for local governments.¹⁶⁷ The key role of local governments, particularly cities and counties run by locally accountable elected officials, in policing both underscores their place in our governance structure and points toward some of the policies that have drawn preemptive attack. Unlike the states, cities and counties can make no claim to being sovereigns, but their central role in policing, including the power to make arrests and use deadly force, indicates they regularly exercise some of the attributes of sovereignty.¹⁶⁸ So, too, their special role in maintaining public safety and their daily encounters with crime and disorder have made them more attentive to the connections between violence and the widespread availability of firearms, as well as the need to work with members of immigrant communities – two of the major sources of state-local tension.

More generally, as both democratically elected governments and service providers that regularly have to deal with 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,

¹⁶⁵ *Milliken v. Bradley*, 415 U.S. 717, 742 (1974), quoting and citing *San Antonio Ind. Schl. Dist. v. Rodriguez*, 411 U.S. 1, 50 (1973).

¹⁶⁶ See, e.g., *State v. Hutchinson*, 624 P.2d 1116, 1120, 1126 (Utah 1980).

¹⁶⁷ See American FactFinder, 2016 Annual Survey of Public Employment and Payroll, <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk>. See also Krane et al, *supra*, at 3.

¹⁶⁸ See, e.g., Smith, *Local Sovereign Immunity*, 116 *Colum. L. Rev.* 409 (2016); Kazis, *Special Districts, Sovereignty, and the Structure of Local Police Services*, 48 *Urb. L.* 417 (2016). See also Aaron Saiger, *Local Government as Choice of Agency Form*, 77 *Ohio St. L.J.* 423, 427 (2016) (noting “the political and historical association of locality and sovereignty”).

especially for low income residents, cities and counties may be more aware of the need to address the public health costs of gun violence, obesity and food deserts, pesticide use, or lack of medical leave – all areas where local responsiveness to local responsibilities have triggered conflicts with states. Local responsibility for garbage pick-ups, street cleaning, and parks may have heightened city and county awareness of and need to address 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 ones¹⁶⁹ – to take a leadership role through the adoption of smart growth and resiliency initiatives in addressing the ostensibly non-local problem of climate change.¹⁷⁰ The local firefighting role may make local governments more interested in mandating sprinklers, just as the local responsibility for stray animals may contribute to a concern with puppy mills.

Local dependence on local resources to pay for local programs¹⁷¹ also contributes both to the practice of local autonomy and to the policies local governments pursue, often in surprising ways.¹⁷² Expansive anti-discrimination laws, for example, may reflect not simply responsiveness to larger urban populations of LGBT residents, but the desire to attract “creative class” residents by signaling a city values equality and diversity¹⁷³ so that state preemption “laws make it harder for cities to succeed in a global economy that rewards diversity and a liberal approach to immigration.”¹⁷⁴ Moreover, the need to maintain a viable tax base provides local governments

¹⁶⁹ See, e.g., Greenblatt, *The City Preparing for Climate Change Without Ever Saying the Words*, *Governing*, November 2017, <http://www.governing.com/topics/transportation-infrastructure/gov-tulsa-climate-change-resilience-adaptation-flooding.html>.

¹⁷⁰ See, e.g., Nicola and Foster, *Comparative Urban Governance for Lawyers*, 42 *Ford. Urb. L. J.* 1, 19, 22 (2014); Lewyn, *How Often Do Cities Mandate Smart Growth or Green Buildings?* 43 *Real Est. L.J.* 211 (2014). Cf Ivo Daalder, *Why Cities Need Their Own Foreign Policy*, *Politico*, June 6, 2017, (noting the “self-interest” of cities in responding to climate change), <https://www.politico.com/magazine/story/2017/06/06/why-cities-need-their-own-foreign-policies-215234>.

¹⁷¹ See U.S. Census, *American FactFinder, State and Local Government Finances by Level of Government and by State, 2014-15* (indicating that roughly 65% of local general revenue is own-source revenue). https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=SLF_2015_00A1&prodType=table.

¹⁷² Cf. Caruso, *Associational Standing for Cities*, 47 *Conn. L. Rev.* 59, 61 (2014) (“the myriad ways in which municipal governments interact with their residents each day give them an excellent vantage point for recognizing patterns of harm affecting their communities”).

¹⁷³ See, e.g., Stahl, *supra*, 44 *Ford. Urb. L.J.* at 134; Finck, *The Role of Localism in Constitutional Change: A Case Study*, 30 *J.L. & Pol.* 53, 72, n.210 (2014). Cf. Greenblatt, *Beyond North Carolina’s LGBT battle*, *supra* (quoting urbanist Bruce Katz that “states [are] impeding the ability of cities to realize their full economic potential”).

¹⁷⁴ Stahl, *supra*, at 154.

with 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. In short, many of the seemingly radical measures undertaken by local governments reflect the point made by one Madison, Wisconsin council member that “municipal governments are about getting stuff done.”¹⁷⁵

Of course, the values of local autonomy are far from uncontested, and the extent of local powers is at least formally contingent on state policies that are always subject to change. Local autonomy has costs, as local actions can have extra-local 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 the “good guys.” As the explosion of attention to police violence in the aftermath of the deaths of African-American men in Ferguson, Missouri, Staten Island, New York, Baltimore, Maryland and elsewhere indicates, local governments can be abusive,¹⁷⁶ and local responsiveness to local concerns can result in exclusionary zoning, segregation, and enhanced inter-local inequality. The scope of local autonomy has long been a matter of state law, subject to an ongoing renegotiation of the state-local relationship. Nonetheless, local autonomy has become more than a matter of political values and government practices. It has legal significance due to the widespread state constitutional authorization of home rule.

Home rule grew out of a pre-existing practice of local self-governance,¹⁷⁷ responded to both the expansion of local responsibilities in the late nineteenth century and threats to local autonomy in that era,¹⁷⁸ and provided a firmer legal foundation for local autonomy. As Professor Baker and Dean Rodriguez put it, “home 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, municipal governments.”¹⁷⁹ Indeed, “state constitutions typically contemplate that significant regulatory

¹⁷⁵ See Grabar, Shackling, *supra*.

¹⁷⁶ See, e.g., Jonathan Chait, Why the Worst Governments in America are Local Governments, *New York Magazine*, Sept. 7, 2014, <http://nymag.com/daily/intelligencer/2014/09/ferguson-worst-governments.html>.

¹⁷⁷ See Krane, et al, *supra*, at 8 (“the custom and practice of local self-governance was strong and pervasive” in the colonial and revolutionary eras).

¹⁷⁸ See, e.g., Howard Lee McBain, *American City Progress and the Law 1-4* (Columbia University Press 1918).

¹⁷⁹ Baker & Rodriguez, *Home Rule and Judicial Scrutiny*, 86 *Dev. U. L. Rev.* 1337, 1354 (2009).

and administrative power would be exercised by municipal governments”¹⁸⁰ – and in some states by county governments, too. As Dean Rodriguez has pointed out, this “is a deliberate strategy to create opportunities for local governments to employ their ‘local knowledge’ to make innovative policy.”¹⁸¹ Local exercise of the police power, including the regulation of private behavior, to promote local health, safety, and welfare is of the essence of home rule.¹⁸²

To be sure, home rule does not create a state-local analogue to federalism. Unlike the states in the federal union, local governments are not “indestructible,” but are subject to boundary change and abolition. Local governments are not formally represented in the structure of state governments. Moreover, states have inherent and plenary law-making authority and local governments do not. Yet, in one fundamental sense, federalism and the state-constitutional localism reflected by home rule are similar: they operate less by guaranteeing the nominally lower level of government immunity from an otherwise constitutional action of the other (with some exceptions in *imperio* states for local control of local government structure and personnel), and more by assuring independent law-making capacity for that lower level. In other words, even without formal immunity protections from state preemption local home rule matters and 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 essential to local government’s place in our system.

This approach to preemption would turn not on whether a matter is “primarily state” or “primarily local” -- a question which has long resisted, and is likely to long continue to resist, consistent, principled, neutral decision-making – but instead on whether a state law unduly impinges on the local capacity for self-governance. It responds, and seems well-suited, to the challenge presented by the new preemption’s attack on local regulatory capacity. More concretely, it could be applied in the following ways:

First, and most clearly, it would require the invalidation of punitive preemption, such as the firearms and sanctuary city laws making local officials criminally or civilly liable for voting for or administering laws subject to preemption. As the state Speech or Debate Clause and

¹⁸⁰ Rodriguez, *State Constitutional Failure*, 2011 U. Ill. L. Rev. 1243, 1258 (2011).

¹⁸¹ *Id.* at 1271-72.

¹⁸² See, e.g., *Cooperative Home Care, Inc. v. City of St. Louis*, 514 S.W.3d 571, 586-87 (Mo. 2017).

common law immunity cases indicate, few actions can have a greater chilling effect on local government than threatening local officials with fines or the loss of office simply for supporting certain local measures whether or not subject to preemption, or for administering or enforcing them before they are held to be preempted. Preemption alone should be enough to vindicate the state's interest, with penalties applied only, if at all, to officials who attempt to enforce local laws, notwithstanding judicial determinations of preemption. To say that local legislators expose themselves to civil or criminal liability or removal from office for proposing or voting for certain measures chills both local self-government and the debate that is appropriate for any subject of state-local conflict.¹⁸³ A Palm Beach county official noted that the county had been exploring possible gun regulatory measures, but Florida's statute providing for the removal of officials who approved firearms laws, "stopped us in our tracks. . . . Once our jobs were at stake, we dropped the plan entirely."¹⁸⁴ Similarly, excessive financial penalties for local governments – like the withdrawal of state shared revenue and bond posting requirements of Arizona's S.B. 1487, or the large civil fines for harms notionally resulting from preempted laws -- go beyond protecting state policy supremacy and undermine the ability, if not the willingness, of local governments to undertake the law-making 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, "[t]he 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."¹⁸⁵ It is one thing for cities to lose the legal battle over whether they have the authority to adopt certain regulations, but it is 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. To be sure, states should be free to 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

¹⁸³ See also Howard Lee McBain, *Law and the Practice of Municipal Home Rule 29-45* (Columbia University Press 1916) (noting that even before the adoption of home rule state constitutions had been amended to protect local selection of and control over local officials).

¹⁸⁴ See Palazzolo, *supra*.

¹⁸⁵ Gardner, Bisbee repealing plastic-bag ban to dodge state budget hit, *The Republic*, Oct. 31, 2017, <https://www.azcentral.com/story/news/politics/arizona/2017/10/31/bisbee-plastic-bag-ordinance-repeal-attorney-general-mark-brnovich-ruling/819584001/>.

conduct penalize local law-making, and that is inconsistent with the local autonomy provided by home rule.

Second, what I have dubbed “nuclear preemption”—the wholesale denial of local law-making over broad fields like the regulation of businesses; or commerce, trade, or labor; or any field in which the state has also engaged in law-making; or requiring legislative consent for local action in these areas – would be subject to invalidation as inconsistent with home rule. These proposals would, in effect, eliminate local initiative by either returning enormous areas of local concern to the states or reinstating Dillon’s Rule of limited local delegation. They, thus, threaten to undo the grant of police power authority at the heart of home rule. 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 a certainly a preemption measure that makes local action dependent 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.

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 requirement. Such measures are aimed not at determining which level of government – state or local – shall control a field, but simply with denying local power to act. That is inconsistent with the home rule model of authorizing local action unless inconsistent with state policy. This sense that displacement without replacement is less the resolution of competing state and local concerns and more unambiguously anti-local underlies the Ohio 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. The problem with the Ohio doctrine is not its effect but its rationale. It is not clear why a law that regulates local governments but is general in the sense that it applies throughout the state – the traditional meaning of general law – is not a general law. But such a law does seem inconsistent with the spirit and practice of home rule, even home rule narrowly defined as local initiative without a protection against substantive preemption. This approach could, arguably, be end-run by state laws that declare as a matter of substantive state policy that a matter or practice should not be regulated at all but left to private ordering, although that has apparently not so far been the response of the Ohio legislature to the

Ohio courts. But even that would have the value of having the legislature go on 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 such rule. Requiring the legislature to openly embrace deregulation rather than merely denigrate local regulation could have political consequences favorable to local concerns.

Finally, a greater respect for the constitutional commitment to local law-making capacity could 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 decision-making more than is necessary to achieve the state's goals.¹⁸⁶ Although labelled by the Arizona Supreme Court as "balancing,"¹⁸⁷ this does not involve the weighing and comparing of the strengths of the competing substantive state and local concerns implied by balancing. It accepts the superior state position but requires states to take the value of local decision-making into account and tailor its laws to avoid unnecessary interference with local self-governance. The goal here, as with standards for preemption generally, is to be able to harmonize the state's ability to set state-wide 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 necessary to achieve the state's substantive goals, then the state would still prevail.

Admittedly, these four 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 address, inter alia. the extra-local 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. Indeed, historically, local governments, have

¹⁸⁶ See, e.g., *California Fed. Sav. & Loan Ass'n v. City of Los Angeles*, 812 P.2d 916 (Cal. 1991)

¹⁸⁷ See *Brnovich*, supra, 399 P.3d at 670.

done relatively well in state legislatures although divisions in large urban delegations may have rendered big cities less politically effective.¹⁸⁸ On the other hand, current patterns of partisan polarization, compounded by gerrymandering may have undermined urban political strength at the state level, generating a greater need for state constitutional protection.¹⁸⁹

V. 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 smaller government and 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.”¹⁹⁰ So, too, in Texas, the *Houston Chronicle* remarked “on the glaring contradiction of conservative champions of local control seeking to override municipal ordinances they don’t like.”¹⁹¹ Indeed, the American City Council Exchange (“ACCE”), the local government spin-off from the American Legislative Change (“ALEC”), consists of local officials who have championed limits on local power and emphasized local subordination to the states.¹⁹² Conservative state legislators have not been shy about asserting that “[w]hen we talk about local control we mean state control,”¹⁹³ and emphasizing that federalism is short-hand way for the values of 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 United *States* of America. We are not the United Towns of Florida. We’re not the United Counties of Florida.”¹⁹⁴

¹⁸⁸ See, e.g., Gamm & Kousser, No Strength in Numbers: The Failure of Big-City Bills in American State Legislatures, 1880-2000, 107 *Am. Pol. Sci. Rev.* 663 (2013); Burns, Evans, Gamm & McConaughy, Urban Politics in the State Arena, 23 *Stud. Am. Pol. Dev.* 1 (2009).

¹⁸⁹ See Diller, *supra*.

¹⁹⁰ Graham, North Carolina Overturns LGBT-Discrimination Bans, *The Atlantic*, March 24, 2016, <https://www.theatlantic.com/politics/archive/2016/03/north-carolina-lgbt-discrimination-transgender-bathrooms/475125/>

¹⁹¹ See Mize, *supra*, 57 *So. Tex. L. Rev.* at 339.

¹⁹² See Riccardi, US conservatism expands to final frontier: City Hall, AP, July 27, 2017, <https://www.apnews.com/d0ce048058d343b28fc90382926636e2>; ACCE White Paper, Federalism, Dillon Rule, and Home Rule, <https://www.alec.org/app/uploads/2016/01/2016-ACCE-White-Paper-Dillon-House-Rule-Final.pdf>.

¹⁹³ See Florida, City vs. State: The Story So Far, *CityLab*, June 13, 2107, <https://www.citylab.com/equity/2017/06/city-vs-state-the-story-so-far/530049/>.

¹⁹⁴ See Badger, *supra*.

Dean Heather Gerken has observed that “federalism” (and presumably she would add localism) “has no political valence,”¹⁹⁵ 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 who has had to deal with an aggressively preemptive legislature 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.”¹⁹⁶ So, are the concerns raised by the new preemption, particularly by progressives, really about local autonomy or is local autonomy really only a means to the end of advancing certain progressive policies? If, as Professor Stahl has argued, “it is unlikely that voters and legislators will see the question of local power as anything but a partisan issue,”¹⁹⁷ should these issues – of firearms, workplace equity, discrimination, immigration law enforcement, or public health – be argued on substantive policy lines rather than as matters of state vs local?

Certainly, as the bemusement of some commentators concerning progressive localists and conservative anti-localists indicates, there is no necessary connection between local autonomy and progressive values. Local governments, or at least some of them, have been and continue to be associated with a range of non-progressive policies, including anti-immigrant,¹⁹⁸ anti-union,¹⁹⁹ anti-evolution,²⁰⁰ anti-medical marijuana,²⁰¹ exclusionary zoning,²⁰² and abusive law enforcement.²⁰³ As Judge Barron has pointed out, there was an important conservative strand in the late nineteenth/early twentieth century home rule movement that saw home rule as a means of limiting the scope of local government action.²⁰⁴ So, too, states are not ineluctably

¹⁹⁵ Gerken, *A User’s Guide to Progressive Federalism*, 45 *Hofstra L. Rev.* 1087, 1087 (2017).

¹⁹⁶ See Goodman, *Republican Legislatures Move to Preempt Local Government*, *Washington Post*, April 8, 2012, https://www.washingtonpost.com/national/republican-legislatures-move-to-preempt-local-government/2012/04/08/gIQA9iww2S_story.html?utm_term=.c70f35f5175e.

¹⁹⁷ Stahl, *supra*, 44 *Ford. Urb.L.J.* at 175.

¹⁹⁸ See, e.g., *Lozano v. City of Hazelton*, 724 F.3d 297 (3rd Cir. 2013).

¹⁹⁹ See Grabar, *Shackling*, *supra* (noting local adoption of right to work laws and limits on municipal collective bargaining).

²⁰⁰ *Kitzmiller v. Dover Area Schl. Dist*, 400 F.Supp.2d 707 (M.D. Pa. 2005).

²⁰¹ *City of Riverside*, *supra*.

²⁰² See, e.g., *Briffault & Reynolds*, *supra*, at 515-33.

²⁰³ See Chait, *supra*.

²⁰⁴ See David Barron, *Reclaiming Home Rule*, 116 *Harv. L. Rev.* 2255, 2288-2301 (2008).

conservative. A sharp turn of the political wheel in a half-dozen “purple” states could change the “valence” of the preemption issue.²⁰⁵

Nevertheless, I think there are reasons to support local autonomy apart from the defense of “progressive localism.” Without rehearsing all the usual claims for local decision-making, including the classics -- protection of liberty,²⁰⁶ the economic efficiency that may result from interlocal competition,²⁰⁷ and the enhanced opportunities for political participation²⁰⁸ -- two arguments for preserving some space for local autonomy are particularly salient in our current period of intense polarization.

First, local autonomy deals with polarization by devolving policy-making to different communities with different populations, conditions, preferences and concerns. Instead of having to resolve hotly contested issues involving firearms, immigrants, workplace equity, or even plastic bags or sugary drinks on a statewide basis, with the result that large numbers of people on the losing side will be aggrieved and subject to rules they oppose (or unable to implement policies with broad support in their communities), local autonomy permits 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 different ways of addressing disputed issues and the development of some real world evidence of how new approaches work in practice. Would tighter firearms regulations promote or impair personal security? Do sanctuary laws assist or undermine the health, safety and welfare of communities with large numbers of immigrants? Do living wage, family leave and predictive scheduling laws burden or benefit the local economy? Do plastic bag bans provide real sanitation and environmental improvements or are they an unnecessary nanny state burden on consumers? One way to find out the answers to these and other questions that are focal points of the new preemption is to let local governments try and see the results. Even in an era in which “alternative facts” sometimes are given the same weight as real facts, knowledge of how contested regulatory programs work could be useful in

²⁰⁵ But see Diller, *supra* (arguing that due to the combination of the concentration of Democrats in big cities and partisan gerrymandering, conservative Republican control of state legislatures is likely to persist); Stahl, *supra* (making a similar argument, albeit focused primarily on gerrymandering).

²⁰⁶ Tocqueville, *Democracy in America*, chap 5.

²⁰⁷ Tiebout, *A Pure Theory of Local Expenditures*, 64 *J. Pol. Econ.* 416 (1956).

²⁰⁸ Frug, *The City as a Legal Concept*, 93 *Harv. L. Rev.* 1057 (1980).

lowering the partisan temperature and de-polarizing certain issues. But for this to happen, local governments need to be given some space to try new programs.

To be sure, local autonomy has its limits. Measures that have significant extralocal effects, unduly 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 decision-making by progressives and conservatives alike. Opponents should fight these policies on the merits but not by undermining the capacity for local self-government.

This is surely naïve. 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 and the controversy it has aroused 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 opportunities to be effective policy-makers.