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Preemption: The Continuing Challenge

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PREEMPTION: THE CONTINUING CHALLENGE

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I. INTRODUCTION

The decade of the 2010s witnessed the emergence and rapid spread of aggressive state preemption of local government actions. Characterized variously as "hyper preemption,"[1] "superpreemption,"[2] or more simply—by me in prior work—as the "new preemption"[3]—this form of preemption consists of intentional, extensive, and sometimes punitive state efforts to block local action across a wide range of domains—from firearms regulation to the treatment of immigrants, workplace equity to environmental protection, the scope of anti-discrimination laws to municipal broadband and the regulation of the sharing economy.[4]

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* Joseph P. Chamberlain Professor of Legislation, Columbia University School of Law. This Article grows out of the keynote talk delivered at the Local Autonomy and Energy Law Symposium of the Florida State University College of Law on February 21, 2020. My thanks to the organizers of the Symposium for the opportunity to participate in the Symposium, and to the other participants for their questions and comments. Since the paper was presented, the COVID-19 pandemic triggered a host of new state-local preemption conflicts. This article is limited to the state of the law in early 2020 when the talk was originally delivered. The preemption issues raised by the pandemic and other developments since 2020 require separate treatment.

1. Erin Scharf, *Hyper Preemption: A Reordering of the State-Local Relationship?*, 106 GEO. L.J. 1469, 1473 (2018).

2. Bradley Pough, *Understanding the Rise of Super Preemption in State Legislatures*, 34 J.L. & POL. 67, 69 (2018).

3. Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 1997 (2018).

4. *See, e.g., id.* at 1999–2004.

This new preemption has roots going back to the turn of this century, and began to build decades ago, but it took off most dramatically after the Republican takeover of many state governments in 2010, and began to draw substantial scholarly attention around 2017-2018.[5]

Preemption battles continue. The challenge posed by preemption to the structure of our state-local relationship continues to grow, even as preemption practices change, and our understanding of how to address the preemption problem evolves. Conservative states continue to add new restrictions on the local government ability to regulate—with respect to plastic bags,[6] e-cigarettes and other tobacco products,[7] telecommunications,[8] and agricultural practices[9]—and to enact new punitive measures, particularly targeting sanctuary cities.[10]

At the end of the decade the conservative preemptive thrust seemed to be plateauing. The 2018 elections resulted in a change in party control in some states, reducing the likelihood they will pass measures targeting progressive city initiatives. Some states, particularly Colorado, have repealed earlier preemptive laws.[11] A handful of state courts have also nipped at preemptive legislation, invalidating the most punitive parts of Florida's firearms preemption law,[12] or rejecting preemption challenges to local

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5. *See, e.g., id.* at 1997–2002. ALEXANDER HERTEL-FERNANDEZ, STATE CAPTURE: HOW CONSERVATIVE ACTIVISTS, BIG BUSINESSES, AND WEALTHY DONORS RESHAPED THE AMERICAN STATES AND THE NATION 238–42 (describing how state legislatures have preempted progressive local legislation) (Oxford Univ. Press 2019).

6. *See, e.g.*, Samantha Maldonado, et al., *Plastic Bags Have Lobbyists: They're Winning*, POLITICO (Jan. 20, 2020), https://www.politico.com/news/2020/01/20/plastic-bags-have-lobbyists-winning-100587.

7. *See, e.g.*, Sarah Milov, *How the Vaping Industry is Using a Defensive Tactic Pioneered Decades Ago by Big Tobacco*, TIME MAG. (Oct. 2, 2019), https://time.com/5688256/big-tobacco-vaping-preemption-laws/.

8. *See, e.g.*, Katie Kienheim, *Preemption Détente: Municipal Broadband Networks Face Preemption in 19 States, Community Networks*, INST. FOR LOC. SELF-RELIANCE (Aug. 8, 2019), https://muninetworks.org/content/preemption-detente-municipal-broadband-networks-face-barriers-19-states.

9. *See, e.g.*, Jennifer Pomeranz and Mark Pertschuk, *Key Drivers of State Preemption of Food, Nutrition, and Agriculture Policy: A Thematic Content Analysis of Public Testimony*, 33 AM. J. HEALTH PROMOTION 894 (2019).

10. *See, e.g.*, Rick Su, *The State Assault on Local Sanctuary Policies*, LOC. SOL. SUPPORT CTR. (Nov. 2018), https://www.abetterbalance.org/wp-content/uploads/2018/11/Sanctuary-Cities-White-Paper-FINAL-11.1.18.pdf.

11. *See, e.g.*, An Act Concerning the Repeal of the Prohibitions on a Local Government Establishing Minimum Wage Laws Within its Jurisdiction, 2019 Colo. Legis. Serv. Ch, 320 (H.B. 19-1210).

12. City of Weston v. Scott, 2019 WL 4806195 (Fla. 2d. Cir. Ct. 2019).

workplace equity laws in Minnesota.[13] However, it is far too soon to determine whether this is a counter-trend or a temporary blip.

We have also begun to see a reversal in the pattern of conservative states preempting progressive local measures, with some conservative localities resisting progressive state sanctuary policies,[14] and "Second Amendment sanctuaries" challenging new state gun regulations.[15] State marijuana legalization laws in California,[16] Michigan,[17] and Oregon[18] have been countered by a host of a restrictive local zoning ordinances and preemption litigation. More generally, concern that local zoning and land use regulations are driving up the cost of housing, along with growing efforts to get states to force their localities to open up more to affordable housing, are reminders that preemption questions should not be looked at solely through a localist frame.[19]

As the one who coined the "new preemption" phrase, I should also emphasize that the traditional—or classic—preemption involving judicial determinations of whether state laws actually conflict with local laws remains an important factor in sorting out state-local relations. There surely are at least as many classic preemption cases as new preemption cases. Indeed, new and classic preemption are often intertwined, as courts determine exactly what type of local action is preempted by state law.

Old and new preemption are essentially about the same subject: what principles ought to guide the allocation of powers and responsibilities between our state and local governments. I have been part of a group of local government law scholars—including Erin Scharff and Rick Su, who are part of today's

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13. Graco, Inc. v. City of Minneapolis, 937 N.W.2d 756 (Minn. 2020).

14. *See, e.g.*, City of Huntington Beach v. Becerra, 257 Cal. Rptr. 3d 458 (Cal. Ct. App. 4th Dist. 2020) (charter city seeking to enjoin provision of California Values Act (CVA) which restricts ability of local law enforcement agencies to inquire into immigration status, place individuals on an immigration hold, and use personnel or resources to participate in certain immigration enforcement activities). *See also* Brent Johnson, *Cape May County Sues State Over Immigration Order that Limits How Much County Can Help ICE* (Oct. 29, 2019), https://www.nj.com/politics/2019/10/cape-may-sues-state-over-murphys-immigration-order-that-limits-how-much-county-can-help-ice.html (county challenge to New Jersey law limiting local cooperation in enforcement of federal immigration law).

15. *See, e.g.*, Sheila Simon, *On Target? Assessing Gun Sanctuary Ordinances that Conflict with State Law*, 122 W.VA. L. REV. 817 (2020).

16. City of Riverside v. Inland Empire Patients Health and Wellness Ctr., Inc., 300 P.3d 494 (Cal 2013).

17. *See* Charter Twp. of York v. Miller, 915 N.W.2d 373, 374–75 (Mich. App. 2018); Deruiter v. Twp. of Byron, 926 N.W.2d 268, 269–77 (Mich. App. 2018).

18. Brown v. City of Grants Pass, 414 P.3d 898, 898-900 (Or. App. 2018).

19. *See, e.g.*, John Infranca, *The New State Zoning: Land Use Preemption Amid a Housing Crisis*, 60 B.C. L. REV. 823, 825–26, 828–29 (2019).

program, and Nestor Davidson, Paul Diller, Sarah Fox, Laurie Reynolds, and Richard Schragger—who wrestled with these issues as we prepared a set of "Principles of Home Rule for the 21st Century" for adoption by the National League of Cities.[20]

In my talk today, after a brief explanation of the legal framework of preemption and the basic features of the new preemption, I will focus on preemption developments in the roughly two years—2018 through early 2020—since the initial burst of legal scholarship on the new preemption appeared in 2018. This will review new preemptive measures by state legislatures, state court decisions dealing with preemptive measures, and the appearance of local conservative resistance to state legislation that advances progressive agendas. I will then conclude by considering the preemption principles proposed in The Home Rule NLC 21st Century Home Rule report to see what kind of state-local relationship those principles envision.

II. PREEMPTION: THE BASICS

Preemption refers to the problem that arises when two levels of government—for our purposes, a state and a local government within that state—each of which has authority to act with respect to the same subject adopt laws dealing with that common subject that are arguably in conflict.[21] Each preemption dispute has four questions baked into it. First, in the absence of the state-local conflict, would the state's law be valid? Second, and similarly, in the absence of the state-local conflict, would the local law be valid? Third, are the two laws actually in conflict? Fourth, and assuming the answers to the first three questions are all "yes," whose law prevails?[22]

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20. *See* Nat'l League of Cities, *Principles of Home Rule for the 21ST Century*, 4-5 (2020), https://www.nlc.org/wp-content/uploads/2020/02/Home-Rule-Principles-ReportWEB-2-1.pdf.

21. *See generally* RICHARD BRIFFAULT ET. AL., THE NEW PREEMPTION READER: LEGISLATION, CASES, AND COMMENTARY ON THE LEADING CHALLENGE IN TODAY'S STATE AND LOCAL GOVERNMENT LAW 1–2 (West Academic Pub. 2019) (laying out the basic structure of the preemption conflict).

22. *Id. See also* RICHARD BRIFFAULT, LAURIE REYNOLDS ET AL., CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW 553–55 (West Academic Pub. 9th ed. 2022) (summarizing issues of local power and state-local conflict).

A. State Authority

States typically have plenary authority to act on matters within their states, especially with respect to local governments.[23] The federal Constitution and federal laws may occasionally operate to restrict certain types of state actions.[24] State constitutional restrictions on state legislation, such as single-subject rules[25] or substantive restrictions like the Pennsylvania environmental protection article that led to the invalidation of the state's ban on local fracking restrictions, may curtail state legislative power.[26] In dealing with local governments, particular state constitutional limitations on special laws dealing with localities, on special commissions taking over municipal functions, and on unfunded mandates may also limit state power to act.[27] But generally, the answer to the question of state power is "yes."

B. Local Authority

The most important development in the last century with respect to state-local relations has been the rise of home rule. In the mid-nineteenth century, most states adhered to Dillon's Rule, that is, the rule that a local government has only those powers granted expressly by the state or necessarily implied or essential to effectuating the express grant.[28] Preemption was not much of an issue in a Dillon's Rule regime because there was not much to preempt. But beginning in the 1870s, states began to amend their constitutions to give some of their local governments relatively broad powers to act with respect to local or municipal matters. This came to be known as home rule.[29] Today the vast majority of states, acting either by constitutional amendment or by legislation, give many of their cities, and in some states some of their counties, home rule.[30] To be sure, the legal form of home rule and the scope

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23. *See, e.g.*, BRIFFAULT ET AL., *supra* note 21, at 2–3.

24. *See* BRIFFAULT, REYNOLDS ET AL., *supra* note 22, at 151–77.

25. *See* Richard Briffault, *The Single-Subject Rule: A State Constitutional Dilemma*, 82 ALB. L. REV. 1629, 1629, 1658–59 (2018-2019). Leach v. Commonwealth, 141 A.3d 426, 426–29 (Pa. 2016); Coop. Home Care, Inc. v. City of St. Louis, 514 S.W.3 571, 571 (Mo. 2017) (State constitutional single-subject rules led to the invalidation of state preemptive laws).

26. *See* Robinson Twp. v. Commonwealth, 83 A.3d 901, 901, 913, 940, 1000 (Pa. 2014).

27. *See* BRIFFAULT, REYNOLDS ET AL., *supra* note 22, at 358–90.

28. *Id.* at 390–93.

29. *Id.* at 408–13.

30. *See* DALE KRANE, ET AL., HOME RULE IN AMERICA: A FIFTY STATE HANDBOOK, at 476 tbl.A1, 477 tbl.A2 (2001).

of home rule power vary from state to state, and within some states, from city to city, and a few states still do not provide home rule at all.[31] But in most states, home rule has reversed Dillon's Rule and has resulted in considerable local regulatory authority over local matters. As a result, in most contemporary preemption disputes, local power to act—absent the arguable state law conflict—is not in dispute. Indeed, expanded local power and the increasingly activist use of that power may be said to be one of the sources of current preemption conflicts.

C. Is There a Conflict?

The principal dispute in classic preemption cases is whether the state and local laws are actually in conflict. Conflict can arise in several ways. First, there can be an express conflict; that is, "state law can expressly prohibit local laws on a certain subject,"[32] like the regulation of firearms or polystyrene products.[33] Even then, there can be questions of interpretation, such as whether a single-use plastic bag is a "container or package" within the meaning of the provision of the Texas Solid Waste Disposal Act barring local governments from prohibiting or restricting the sale or use of a container or package "for solid waste management purposes." The Texas Supreme Court in 2018 held that a single-use plastic bag is a container or package within the meaning of the state act, so that the ordinances of twelve different Texas cities restricting businesses from providing their customers with plastic bags were in conflict with the state law and preempted.[34] In a similar decision later that same year, the Texas Court of Appeals held that in the Texas Minimum Wage Act's express prohibition of municipal regulation of wages, the term "wages" also applied to paid sick leave. Therefore, the City of Austin's ordinance requiring employers to provide paid sick leave was in conflict with the state's law.[35]

State and local laws can also come into implied conflict.[36] This can occur in several ways. First, the local ordinance could operate as an obstacle to a state policy. Thus, the Colorado Supreme Court found that a local zoning ordinance prohibiting unrelated,

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31. *See* BRIFFAULT ET AL., *supra* note 21, at 3–6.
32. *Id.* at 6–7.
33. *Id.* at 6.
34. City of Laredo v. Laredo Merchs.' Ass'n, 550 S.W.3d 586 (Tex. 2018).
35. Tex. Ass'n of Bus. v. City of Austin, 565 S.W.3d 425 (Tex. App. 2018).
36. *See* BRIFFAULT ET AL., *supra* note 21, at 6–8.

registered sex offenders from living together in a single-family home in residential areas of the city "materially impede[d]" the state's efforts to place juvenile offenders in licensed groups homes.[37] Similarly, the Colorado court's decisions striking down local anti-fracking ordinances turned on the determination that the ordinances created an "operational conflict" with state law because they "materially impede[d] the effectuation of the state's interest" in "the efficient and responsible development of oil and gas resources."[38] Of course, whether a local restriction materially impedes a state policy—as opposed to, say, limiting the policy or diverting it to another locality—is contestable. The New York Court of Appeals held that a local ban on fracking was not an obstacle to state policy because the relevant state law addressed only the safety, technical, and operational aspects of oil and gas extraction, not whether a locality could use its zoning authority to bar fracking within the community.[39]

Alternatively, even though the relevant state law might not literally bar local action on a subject, a court might conclude that state regulation is so extensive that state law has occupied the field leaving no room for local legislation. Thus, in 2019 the Pennsylvania Supreme Court concluded that the state's regulation of public utilities was so pervasive that a local ordinance providing for municipal inspection of utility facilities located in municipal rights of way and imposing maintenance fees on utilities for the occupancy and use of those rights of way conflicted with state law, even though nothing in state law specifically barred either type of municipal measure.[40]

Finally, a particularly common form of implied preemption dispute is "floor or ceiling?," that is, whether the relevant state law simply sets a regulatory floor, with local governments allowed to go further, or whether the state law is both a floor and a ceiling precluding additional and more restrictive local regulation.[41] In other words, if the state sets a speed limit of sixty-five mph, can a city within the state lower the limit to thirty-five mph within the city? The two laws are not necessarily in conflict. A motorist who drives at thirty-five mph within the city complies with the state law, too. But if the state law is interpreted as authorizing

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37. City of Northglenn v. Ibarra, 62 P.3d 151, 160 (Colo. 2003).

38. City of Longmont v. Colo. Oil & Gas Ass'n, 369 P.3d 573, 577, 582, 585 (Colo. 2016); *cf.* City of Fort Collins v. Colo. Oil & Gas Ass'n, 369 P.3d 586 (Colo. 2016).

39. Wallach v. Town of Dryden, 16 N.E.3d 1188 (N.Y. 2014).

40. PPL Elec. Utils.' Corp. v. City of Lancaster, 214 A.3d 639 (Pa. 2019).

41. *See* BRIFFAULT ET AL., *supra* note 21, at 8–10.

motorists to drive up to sixty-five mph, then a local measure requiring motorists not to drive faster than thirty-five mph is in conflict with the state law. This issue comes up all the time. In 2019, the Kansas Supreme Court held that a Topeka ordinance banning vaping by people under twenty-one was not in conflict with a state law that banned vaping by people under eighteen.[42] The state law set a regulatory floor, but local governments were allowed to be more restrictive. A Michigan court of appeals, also in 2019, reached the opposite result, finding that a county ordinance forbidding the sale of tobacco products to people under twenty-one was in conflict with the state law setting eighteen as the age of majority.[43] In that court's view, people eighteen and up had a state-protected right to buy tobacco products.[44]

The "floor or ceiling" question comes up in multiple other regulatory settings. In January 2020, the Supreme Court of Minnesota concluded that the Minneapolis ordinance setting a higher minimum wage than the state's was not in conflict with the state law because employers in the city could "comply with both the municipal regulation and the state statute" so that "the provisions are not irreconcilable, and therefore no conflict exists."[45] A 2018 Oregon court of appeals decision spotlights just how difficult making this determination can be. The court held that a local ordinance prohibiting a property owner from allowing or hosting a party where a minor consumed alcohol was in conflict with a similar state law because the local ordinance created a strict liability offense, whereas the state law applied only when the host knowingly allowed the minor to consume alcohol.[46] After a deep dive into the legislative history behind the statute, the court concluded that the legislature "deliberately chose to include a culpable mental state" and, thus, also made a "deliberate choice not to punish property owners" lacking the culpable mental state.[47] In other words, the state law set a ceiling on liability and preempted the stricter local law.

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42. Dwagfys Mfg., Inc. v. City of Topeka, 443 P.3d 1052 (Kan. 2019).
43. RPF Oil Co. v. Genesee Cnty., 950 N.W.2d 440 (Mich. Ct. App. 2019).
44. *Id.* at 446.
45. Graco, Inc. v. City of Minneapolis, 937 N.W.2d 756, 761 (Minn. 2020).
46. City of Corvallis v. Pi Kappa Phi, 428 P.3d 905, 912 (Or. Ct. App. 2018).
47. *Id.*

D. Who Wins in the Case of a Conflict?

The short answer is that unless the state law violates some specific state or federal constitutional command—like a special act ban or the Equal Protection Clause—the state usually wins. This is especially clear in the many states whose constitutional home rule provisions grant local governments broad powers to act in the first place but expressly revoke local power in case of conflict with state law.[48] In some states, most prominently California and Colorado, the constitutional home rule provision provides some protection from state displacement for local ordinances, particularly those dealing with local government structure, organization, and personnel.[49] But even in those states that build some provision for local immunity from conflicting state laws into their constitutions, the state courts have generally limited that protection to purely local matters, allowing the state frequently to prevail in the many matters that involve a mix of state and local concerns.[50]

As a result, most preemption cases turn on the question of whether there is a conflict, or, secondarily, whether there was some flaw in the state law. State legislation that clearly, comprehensively, and expressly bars local action is very likely to preempt local laws. Those have been among the defining features of the new preemption.

III. THE NEW PREEMPTION

Like classic preemption, new preemption involves state legislation that blocks local action. Although similar in kind, the new preemption is different in degree. Adopted across a wide range of areas—fracking, firearms, minimum wage and employment

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48. *See* BRIFFAULT, REYNOLDS ET AL, *supra* note 22, at 410–13.

49. *See, e.g.*, Fraternal Order of Police, Colo. Lodge No. 27 v. City & Cnty. of Denver, 926 P.2d 582 (Colo. 1996); State Bldg. & Constr. Trades Council v. City of Vista, 279 P.3d 1022 (Cal. 2012).

50. Thus, California courts have found that many state laws preempt local laws even with respect to regulation of the municipal work force, *see e.g.*, Marquez v. City of Long Beach, 32 Cal. App. 5th 552 (Cal. Ct. App. 2019) (holding that the state minimum wage law prevails against conflicting city charter provision); People *ex rel.* Seal Beach Police Officers Ass'n v. City of Seal Beach, 685 P.2d 1145 (Cal. 1984) (sustaining state law requiring home rule cities to "meet and confer" with public employee union). Colorado courts have held that state laws may displace local regulation of local streets and traffic. *See, e.g.*, Webb v. City of Black Hawk, 295 P.3d 480 (Colo. 2013) (explaining that an ordinance banning use of bicycles on most city streets was preempted by state law); City of Com. City v. State, 40 P.3d 1273 (Colo. 2002) (holding that state law preempts a conflicting city mechanism for enforcing traffic laws).

benefits, anti-discrimination laws, environmental protection, public health, and immigration law enforcement—these laws mark an unprecedented effort to roll back home rule and the growing policy-making role of local governments.[51] Specific targets include: local laws protecting employees from abrupt scheduling changes and ban-the-box laws limiting employer inquiries into the criminal records of prospective employees,[52] plastic bag bans,[53] calorie count and menu labeling rules,[54] pesticides,[55] tobacco products,[56] extending anti-discrimination protections to sexual preference and gender identity,[57] ridesharing platforms,[58] and the removal of Confederate monuments.[59]

Many of these measures are deregulatory and sweeping. Unlike older measures that tended to set a state standard but left open the question of the degree to which local governments could add to or vary from the state rule, the new preemption arises from state laws displacing local regulation of a subject without putting state regulation in its place.[60] The state legislature's program is not uniform statewide regulation instead of varying local rules but often no regulation at all. Many of these preemptive laws are also quite far-reaching. Michigan's so-called Death Star law of 2015—formally, the Local Government Labor Regulatory Limitation Act[61]—prevents local governments from addressing a wide range of employment issues including wages, benefits, paid or unpaid leave, work stoppages, fair scheduling, apprenticeships, employee background checks, and remedies for workplace disputes. The law does not so much occupy the field as achieve the blanket deregulation of it.

A second striking feature of the new preemption has been the imposition of punitive measures against local governments and local officials.[62] Traditionally, preemption operated simply by nullifying the preempted local rules. However, a number of states

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51. *See* BRIFFAULT ET AL., *supra* note 21, at 17–51.

52. *See* Briffault, *supra* note 3, at 1999.

53. *See* BRIFFAULT ET AL., *supra* note 21, at 24, 27–28.

54. *See id.* at 22, 31–33.

55. *See id.* at 24–25.

56. *See id.* at 20–21.

57. *See id.* at 40–41.

58. *See id.* at 29–31.

59. *See id.* at 41–43; *see also* State v. City of Birmingham, 299 So. 3d 220, 224, 237–38 (Ala. 2019).

60. *See* BRIFFAULT ET AL., supra note 21, at 11–12.

61. MICH. COMP. LAWS. ANN. § 123.1381 (West 2015).

62. *See* Briffault, supra note 3, at 1997.

now authorize punishing local governments or local officials just for adopting, enforcing, or even supporting preempted laws. These punishments range from fines, civil liability or removal from office for the officials to fiscal penalties—such as loss of state aid, fines, or civil liability to private plaintiffs who claim to have been injured by the preempted laws—for the local governments. Most of these punitive measures target local firearms regulation or so-called sanctuary city measures. But Arizona's law—known as S.B. 1487[63]—applies across the board by cutting off state aid to any locality that declines to repeal a measure that the state attorney general determines—in response to a state legislator's complaint—is in conflict with state law. In the first four years following S.B. 1487's enactment, the attorney general opened thirteen investigations of local laws.[64] The resulting threats of state aid cutoffs led Tucson to repeal its ordinance providing for the destruction of any firearms confiscated by the police as part of ordinary law enforcement efforts, and the city of Bisbee's repeal of its plastic bag ban.[65] So, too, the state attorney general "saved" Tempe's dark money disclosure campaign finance reform by effectively neutering its key provisions.[66]

Although there are also preemption disputes between Democratic states and Democratic cities, the preponderance of new preemption actions and proposals have been advanced by Republican-dominated state governments, embrace conservative economic and social causes, and respond to relatively progressive city regulations.[67] Indeed, the new preemption may be seen as testimony to both the increasingly progressive cast of local law-making, particularly in (although not limited to) larger cities, and the emergence of conservative Republican state governments—including in states with large cities—in the aftermath of the 2010 and 2014 elections. Legislatures in these states adopted the deregulatory, anti-local model laws developed by the pro-business American Legislative Exchange Council, industry and trade groups, and other organizations like the National Rifle Association in response to new forms of regulation adopted or considered by

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63. ARIZ. REV. STAT. ANN. § 41-194.01 (2016).

64. *SB 1487 Investigations*, ARIZ. ATT'Y GEN., https://www.azag.gov/complaints/sb1487-investigations.

65. Briffault, *supra* note 3, at 2006–07.

66. ARIZ. ATTORNEY GEN. Arizona Attorney General, Investigative Report No. 19-001, Re: City of Tempe Ordinance O2017.51 (Campaign Finance Disclosures) (Apr. 10, 2019), https://www.azag.gov/sites/default/files/docs/complaints/sb1487/19-001/19-001_Investigative_Report-FINAL.pdf.

67. *See generally* BRIFFAULT ET AL., supra note 21.

many cities.[68] Although there is nothing inherently conservative-liberal (or Republican-Democratic) about the state-local relationship, the new preemption has clearly been shaped by the interacting partisan and ideological polarizations of our time—much as the change in the state of play of political forces at the state level after the 2018 election affected the more recent developments to which I will now turn.

IV. RECENT DEVELOPMENTS

The last few years have witnessed three developments—continued conservative preemption measures in some states; a turn away from preemption in a few others; and the emergence of a new liberal state-conservative locality dynamic in the areas of immigration law enforcement and firearms regulation.

A. Continuing Preemption

States continue to preempt local minimum wage laws,[69] local plastic bag and polystyrene container regulations,[70] local regulation of tobacco products (including youth smoking and e-cigarettes),[71] local regulation of agricultural operations,[72] and local regulation of multiple aspects of telecommunications.[73] At least twelve states preempted local adoption of sanctuary city policies,[74] and more states now back up their sanctuary policies with punitive measures, such as the cut-off of state discretionary funds and grants[75] and the removal of noncompliant local officials.[76] Florida's 2019 punitive preemption law is not limited to local sanctuary policies but requires the award of damages and costs against a local government if any local ordinance is

68. *See* Briffault, *supra* note 3, at 1997–98, 2001.

69. *See, e.g.*, N.D. CENT. CODE. §§ 34-06-23(1)(c), 34-14-09(2) (2019).

70. *Preemption Laws,* PLASTIC BAG LAWS.ORG, https://www.plasticbaglaws.org/preemption.

71. *See, e.g.*, UTAH CODE ANN. § 76-10-116 (West 2020).

72. *See, e.g.*, MO. ANN. STAT. § 192.300 (West 2020) (blanket preemption of county regulations that impose standards or requirements on an agricultural operation that are more stringent than any state rule).

73. *See, e.g.*, FLA. STAT. ch. 2019–131 (2020).

74. *See* Catherine E. Shoichet, *Florida just banned sanctuary cities. At least 11 other states have too*, CNN, (June 14, 2019), https://www.cnn.com/2019/05/09/politics/sanctuary-city-bans-states/index.html.

75. *See, e.g.*, ARK. CODE ANN. § 14-1-103 (West 2020).

76. *See, e.g.*, FLA STAT. ANN. § 908.107 (West 2019).

determined by a court to have been preempted by state law.[77] Other preemptive measures enacted by Florida in 2019 include laws that limit the authority of cities and counties to establish inclusionary housing policies,[78] and preempt local regulation of vegetable gardens on residential properties.[79] Texas was another state actively engaged in preemption in 2019. Among other preemptive measures, the Lone Star State passed laws prohibiting municipalities from requiring disclosure of information related to the value or cost of construction, prohibiting improvement of a residential dwelling as a condition for obtaining a building permit,[80] and limiting local regulation of building products, materials, or methods of construction.[81]

B. Preemption May Be Peaking in Some States

Despite this ongoing preemptive activity, it may be that the push for deregulatory preemption has peaked; a host of bills focused on preemption of local regulation of businesses, local workplace and labor laws, and local anti-discrimination protections failed to pass in 2019 in Florida,[82] Pennsylvania,[83] Texas,[84] and West Virginia.[85] More importantly, some states pulled back from preemption and repealed preemptive measures. Arkansas repealed part of the state law preempting municipal broadband.[86] Colorado became the first state to repeal minimum wage preemption[87] while also enacting legislation allowing localities to raise the age for the sale of tobacco products to 21

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77. *See* FLA. STAT. § 57-112 (2019).

78. *See* FLA. STAT. §155.04151 (2019).

79. *See* FLA. STAT. ANN. § 604.71 (West 2019).

80. *See* TEX. LOC. GOV'T CODE ANN. § 214.907 (West 2019).

81. *See* H.B. 2439, 86th Leg., Reg. Sess. (Tex. 2019) (adding Title Z, chapter 3000 to the Government Code).

82. *See* H.B. 3, 2019 Sess., Reg. Sess. (Fla. 2019) (preempting of local occupational and professional licensing, died in the Senate Community Affairs Committee).

83. *See* H.B. 331, 2019 Sess., Reg. Sess. (Pa. 2019) (comprehensive preemption of municipal labor regulation, died in committee) https://www.legis.state.pa.us/cfdocs/billinfo/billinfo.cfm?syear=2019&sind=0&body=H&type=B&bn=331.

84. *See, e.g.*, S.B. 2486, 86th Leg., Reg. Sess. (Tex. 2019) (preempting local fair scheduling laws, died in chamber); S.B. 2487, 86th Leg., Reg. Sess. (Tex. 2019) (preempting local regulation of paid sick leave family leave, died in chamber).

85. *See* H.B. 2708, 2019 Sess., Reg. Sess. (W. Va. 2019) (preempting a host of local workplace and labor standards, antidiscrimination measures, and consumer protection regulations. Bill died in committee.) http://www.wvlegislature.gov/Bill_Status/bills_history.cfm?year=2019&sessiontype=RS&input=2708.

86. *See* S.B. 150, 92nd Gen. Assemb., Reg. Sess. (Ark. 2019).

87. *See, e.g.*, Colo. Gen. Assemb. H.B. 19-1210, 2019 Reg. Sess. (Colo. 2019).

and to tax and regulate tobacco products.[88] And, strikingly, given the prominence of the Colorado Supreme Court's fracking preemption decisions, a new state law gives local governments a role in the process of approving oil and gas drilling sites and requires the state's oil and gas conservation commission to give greater priority to public health, safety, and environmental concerns.[89]

So, too, there has been some push back on preemption in the courts. In an important decision, the Circuit Court for Leon County Florida held that Florida's punitive preemption law violated long-established principles of legislative immunity, government function immunity, and the state constitution's provision for the governor's removal of local officials.[90] As previously noted, the Minnesota Supreme Court rejected the claim that local minimum wage and paid sick leave ordinances were preempted by less protective state laws. The California Supreme Court determined that the state law permitting telephone companies to use public rights of way does not preempt a local measure conditioning approval of a permit to use a public right of way on aesthetic considerations.[91] And, in a particularly intriguing case, the Nevada Supreme Court determined that the state law banning local regulation of firearms did not preempt a library district law.[92] The district banned possession of a firearm on its premises.[93] The Court held that because the state law specifically targeted only counties, cities, and towns but did not mention library district's ban was not preempted.[94]

However, other recent cases indicate that the courts continue to be an uncertain line of defense against preemption. As previously noted, the Texas Supreme Court sustained the state's plastic bag ban preemption law, and the Pennsylvania Supreme Court found broad state preemption of local public utility and agricultural manure regulation. In 2019, the Alabama Supreme Court found that Birmingham's placement of a plywood screen around a Confederate memorial violated the state's Memorial Preservation Act.[95] The Eleventh Circuit dismissed a federal

88. Colo. Gen. Assemb. H.B. 19-1033, 2019 Reg. Sess. (Colo. 2019).
89. Colo. Gen. Assemb. S.B.19-181, 2019 Reg. Sess. (Colo. 2019).
90. City of Weston v. Scott, 2018 Fla. Cir. LEXIS 9770, *5 (Fla. 2d. Cir. Ct. 2019).
91. T-Mobile W. LLC v. City and Cnty. of S.F., 438 P.3d 239, 250 (Cal. 2019).
92. Flores v. Las Vegas-Clark Cnty. Libr. Dist., 432 P.3d 173, 173 (Nev. 2018).
93. *Id.* at 174.
94. *Id.* at 176–77.
95. State v. City of Birmingham, 299 So. 3d 220, 227–28 (Ala. 2019).

constitutional challenge to Alabama's preemption of Birmingham's minimum wage law.[96] The Ohio Supreme Court, which developed a preemption doctrine that is relatively protective of local governments, determined that Cleveland's requirement that contractors on municipal public works projects hire a portion of their work force from city residents was preempted.[97]

C. Conservative "Sanctuaries"

Perhaps the most significant development in the preemption arena has been the increasingly salient efforts of conservative communities to push back against liberal states. These have focused on the two of the hottest hot-button issues—immigration and guns. In New Jersey, Ocean and Cape May Counties sued in federal court to enjoin the state attorney general's Immigrant Trust Directive limiting local law enforcement cooperation with federal immigration officials.[98] The counties contended the state's action was preempted by the federal constitution and statutes and also violated the state's home rule protections.[99] The court rejected the federal preemption claims and declined to exercise jurisdiction over the supplemental state law claim.[100]

In California, the City of Huntington Beach challenged the California Values Act (CVA), a state law that restricts the ability of local law enforcement agencies to inquire into immigration status, place individuals on an immigration hold, or use local personnel or resources to participate in certain immigration enforcement activities. The city contended that the CVA infringes on the authority of charter cities under the state constitution—which is probably the most locally-protective in the country—to create, regulate, and govern their police forces. The Orange County

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96. Lewis v. Governor of Alabama, 944 F.3d 1287, 1292 (11th Cir. 2019).

97. City of Cleveland v. State, 136 N.E.2d 466, 478 (Ohio 2019).

98. *See* Vince Conti, *NJ Immigration Tension: County, Sheriff Sue AG,* CAPE MAY COUNTY HERALD (Oct. 16, 2019), https://www.capemaycountyherald.com/news/government/article_231209ea-f04b-11e9-b8f1-5b4d18e2c720.html.

99. County of Ocean v. Grewal, 475 F. Supp. 3d 355, 365–66 (D.N.J. 2020).

100. *See id.* at 386. The court did make one ruling of significance for state and local government law when it determined that the counties had standing to raise the federal supremacy arguments against its state. *See id.* at 367–70. As the court noted, federal courts traditionally held that a local government lacks standing to bring a federal constitutional claim against the state that had created it. *Id.* at 367-68. However, several courts of appeals—including the Second, Fifth, and Tenth—have allowed local governments to bring Supremacy Clause claims against their state, with the Ninth Circuit continuing to adhere to the no-standing rule. *Id.* at 369-70. The issue had not been resolved in New Jersey's circuit—the Third—when the court ruled in favor of the counties on the standing question. *See id.* at 369-70.

Superior Court initially found in favor of the city,[101] but the court of appeal reversed[102] and sustained the application of the CVA to charter cities on the theory, set out in the legislature's findings, that it advances the statewide concerns of public safety, public health, the treatment and welfare of immigrants, and the protection of constitutional rights.[103] The court further held that uniform application of the CVA throughout the state, including within charter cities, was necessary to ensure it achieved its statewide concerns.[104] The court determined that the law intruded on municipal control of the police only to the extent necessary to achieve its goals.[105]

Even more striking has been the rise of "Second Amendment sanctuaries."[106] Due to political changes in which some state legislatures, beginning around 2013 and spreading more rapidly in 2018, became more receptive to firearm regulation a host of local communities have declared themselves to be Second Amendment sanctuaries. As with immigrant sanctuaries, the meaning of sanctuary is ambiguous. Some of the local resolutions are no more than symbolic expressions of discontent with new or proposed state laws. Others call for passive noncooperation, with local officials directed not to enforce state gun regulations. Given that most state laws rely on local officials for enforcement, this could seriously handicap state gun regulation, much as local noncooperation limits federal immigration law enforcement. A handful of local actions go further and sketch out forms of active resistance, such as treating thousands of local residents as part of law enforcement or the (armed) militia.[107] As of early 2020, none of these Second Amendment sanctuary measures have been challenged, so their legal effectiveness is uncertain, and there have been no state efforts to preempt or punish these resisting localities.[108] However, the spread of the movement to include perhaps one-quarter of

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101. City of Huntington Beach v. State, 2018 WL 756962 (Cal. Super. Orange Co. 2018).

102. City of Huntington Beach v. Becerra, 257 Cal. Rptr. 3d 458, 489 (Cal. Ct. App. 4th Dist. 2020).

103. *Id.* at 481–487.

104. *Id.* at 484–485.

105. *Id.* at 486–489.

106. *See* Richard Briffault, *"Sanctuary" and Local Government Law*, DUKE CENTER FOR FIREARMS LAW (May 6, 2020), https://sites.law.duke.edu/secondthoughts/2020/05/06/sanctuary-and-local-government-law/.

107. *See generally* Jennifer Mascia, *Second Amendment Sanctuaries, Explained*, THE TRACE (Jan. 14, 2020), https://www.thetrace.org/2020/01/second-amendment-sanctuary-movement/.

108. *Id.*

American counties and nearly two hundred cities, towns, or townships is impressive.[109] The Second Amendment sanctuary movement surely underscores the fact that localism has no inherent political valence, and that any principles of preemption need to get past the red state-blue city frame that has shaped recent preemption analysis.[110]

V. PRINCIPLES FOR PREEMPTION

So, are there politically neutral principles of preemption? Are there principles that respect the importance of local self-government and the democratic values local government can advance, while recognizing that states can also play an important role in advancing democratic values and, especially, in addressing the costs—external effects, exclusionary goals, parochial values, and Madisonian-style factional misconduct—that come with localism? I would like to conclude with a brief discussion of the effort, of which I have been a part, which resulted in the National League Cities' Principles of Home Rule for the 21st Century.[111] These Principles of Home Rule give significant attention to preemption and make the following recommendations.

First, that any preemption of a home rule government—these principles are tied to home rule rather than local government status generally—must be express.[112] The Principles explicitly address the floors or ceilings problem and provide that a state standard or requirement must be treated as a floor unless the state clearly provides otherwise. This obviates the difficulty of determining whether when a state adopts a rule or restriction it intends to protect the ability of an individual or firm to engage in all behavior not barred by the rule, or the state has only set a minimum level of regulation, with local governments allowed to go further. It accepts the fact that the often-criticized "patchwork

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109. See Briffault, *supra* note 106.

110. Further underscoring this point has been the rise of "sanctuary cities for the unborn"—cities and counties in Florida, New Mexico, Texas, Utah and perhaps elsewhere that have declared their hostility to abortions within their jurisdiction. *See generally* Emily Wax-Thibodeaux, *Anti-Abortion Law Spreads in East Texas as Sanctuary City for the Unborn Movement Expands*, WASHINGTON POST (Oct. 1, 2019), https://www.washingtonpost.com/national/antiabortion-law-spreads-in-east-texas-as-sanctuary-city-for-the-unborn-movement-expands/2019/09/30/cfef46d8-daf1-11e9-bfb1-849887369476_story.html; Harmeet Kaur, *Small Towns in Texas are Declaring Themselves "Sactuary Cities for the Unborn"*, CNN (Jan. 25, 2020), https://www.cnn.com/2020/01/25/us/sanctuary-cities-for-unborn-anti-abortion-texas-trnd/index.html.

111. *See generally* Nat'l League of Cities, *supra* note 20.

112. *Id.* at 24, 45.

quilt" of varying local regulations is simply the flip side of the diversity and experimentation that local self-government is intended to encourage.

Although a complete ban on implied preemption has its critics[113]—after all, there are some situations in which a parochial local law is an obstacle to the effectuation of a state program and may have external effects for other local governments—it is a straightforward means of promoting local self-government without challenging ultimate state supremacy. The state legislature may still preempt; it just has to show that it clearly intends to do so. Perhaps the main effect of an express preemption requirement will be to prevent private individuals or firms from making preemption arguments to block local regulations in situations where it is not at all clear that the state government actually intended to preempt local action.

Given that the ban on implied preemption still permits express preemption, the issue remains whether and how to craft limits on a state's authority to expressly preempt local action. That, after all, is what the challenge of the new preemption is all about–express preemption.

So, the second NLC recommendation proposes a set of requirements that a preemptive measure must meet. Instead of attempting to distinguish between local and state—or predominantly local and predominantly state—interests as some state courts have tried to do,[114] the NLC Principles propose that a state may preempt only if the state law is (a) narrowly tailored to advancing a substantial statewide interest, and is (b) a general law, as defined by a further four-part test that requires not simply that the law apply statewide but that it be a police, sanitary or similar regulation that prescribes a rule for citizens generally rather than a measure targeting local governments.[115]

This test essentially staples together the preemption standard developed and repeatedly applied by the California Supreme Court over the last three decades that a state law, to be preemptive, must be narrowly tailored to advancing a statewide interest[116] with the Ohio Supreme Court's distinctive and more stringent

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113. *See, e.g.*, Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1157–5859 (2007).

114. *See, e.g.*, City of Northglenn v. Ibarra, 62 P.3d 151, 155 (Colo. 2003).

115. Nat'l League of Cities, *supra* note 20, at 56–59.

116. *See, e.g.*, State Bldg. & Const. Trades Council v. City of Vista, 279 P.3d 1022 (Cal. 2012); Johnson v. Bradley, 841 P.2d 990, 1000 (Cal. 1992).

definition of "general law."[117] Both tests have had some success in providing some protection for local governments from preemption, although the 2019 Ohio Supreme Court decision holding Cleveland's local-hire-preference law preempted[118] demonstrates they provide no guarantees. But at least these tests require the state—or the person or firm making the preemption claim—to show that preemption advances the state's interest in promoting the interests of its people and that it is no more of an intrusion into local self-government than it needs to be.

To be sure, the different parts of the test—and the fact that both prongs need to be satisfied may be challenged as placing too great a restriction on the ability of states to implement comprehensive solutions to regional or statewide problems. Moreover, the concept of "substantial statewide interest" is quite open-ended. It is far from clear what interests will qualify. Indeed, the Principles would give the courts an important role in making that determination and, thus, in deciding whether a state law is preemptive. However, the judicial concern would not be with the state legislature's intent—which is the focus of the implied preemption analysis—but, rather, whether a law intended to preempt may be permitted to do so in light of its goals and its impact on the state-local balance. Rather than the traditional regime in most states of judicial deference to a legislative determination to preempt, preemption would require a judicial determination that would consider the consequences of preemption for local self-government.

To that extent this new model of preemption—which has only just been proposed and which, I hasten to add, is the law nowhere right now—is a return to the older vision of home rule known as *imperium in imperio*.[119] The first home rule amendments, adopted in the late nineteenth century, sought to give home rule cities not only the broader powers to act traditionally denied them under Dillon's Rule but also to protect such local initiatives concerning local or municipal matters from state displacement. That turned out not to work too well. State courts were reluctant to give "local" or "municipal" broad meanings in state-local conflict cases. Those decisions had the effect of narrowing the meaning of "local" or "municipal" even when only the local initiative power was at issue. The new form of home rule developed in the middle of the

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117. *See, e.g.*, City of Dayton v. State, 87 N.E.3d 176, 192 (Ohio 2017); City of Canton v. State, 766 N.E.2d 963, 966 (Ohio 2002).

118. City of Cleveland v. State, 136 N.E.3d 466, 466 (Ohio 2019).

119. *See* BRIFFAULT, REYNOLDS ET AL, *supra* note 22, at 409–10.

twentieth century sought to address this problem by giving local governments broad powers to act—all the power the legislature could delegate is presumptively delegated—subject to the state's power to take back local authority.[120]

That solution worked well enough for a time, but the new preemption has raised the question of whether there needs to be some constraint on the state's ability to take back power back from its local governments. It may be that the only legally enforceable way to do that is by the adoption of constitutional constraining principles that invite judicial enforcement. Perhaps now with home rule better established and with language that does not link the constraint on preemption to the existence of a "local" or "municipal" subject, this would work out better for local self-government than before. We will have to wait and see if any state adopts these Principles, and how they work.

120. *Id.* at 410–13.