

# Hyper Preemption: A Reordering of the State–Local Relationship?

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*The role of cities in our federalist system is once again in the news. President Donald Trump’s executive order purporting to cut federal funding for “sanctuary cities” made headlines across the country. However, this federal–municipal showdown is part of a much larger story about the changing regulatory role of cities. Even as cities cast themselves as defiant against conservative federal policies, many are finding themselves in a much weaker position with respect to state policymaking.*

*Already, state legislators across the country are introducing bills that would cut state funding to local governments implementing “sanctuary city” policies. Such efforts are among the many preemption bills pending in statehouses across the country. Local governments, as creatures of state law, are required to conform to state law, and legislatures have used this power to block municipal regulatory policies.*

*Scholars have noted this uptick in preemption efforts and discussed the effect of particular preemption policies. This Article addresses an important and emerging trend in intrastate preemption. This new brand of preemption statutes seeks not just to curtail specific local policies but, rather, to chill local policymaking. These punitive statutes punish local governments or their public officials for taking policy positions and deny them access to the typical legal processes for determining the legality of local ordinances.*

*In this Article, I identify this phenomenon as “hyper preemption” and describe its various incarnations. I argue that these hyper preemption statutes are different than traditional preemption statutes, which focus on asserting state control over specific policy areas and often involve specifically local regulatory efforts. I then discuss legal and institutional limits on this hyper preemption model.*

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## TABLE OF CONTENTS

INTRODUCTION . . . . .	1471
I. TRADITIONAL PREEMPTION . . . . .	1474
A. LOCAL GOVERNMENTS HAVE RESTRICTED AUTHORITY UNDER STATE LAW . . . . .	1474
B. STATE-LEVEL PREEMPTION STATUTES FURTHER RESTRICT LOCAL AUTHORITY . . . . .	1476
1. State-Level Preemption in Practice . . . . .	1477
2. The Politics of Traditional Preemption Battles . . . . .	1479
C. PREEMPTION AS SUBSTANTIVE POLICY . . . . .	1480
D. RAISING THE STAKES OF TRADITIONAL PREEMPTION, STATES ARE INCREASINGLY PASSING MULTI-ISSUE PREEMPTION STATUTES. . . . .	1484
II. THE ROLE OF POLITICS IN TRADITIONAL PREEMPTION DEBATES . . . . .	1486
A. PREEMPTION IN “PARTISAN FEDERALISM”. . . . .	1486
B. POLICY JUSTIFICATIONS FOR LOCAL CONTROL . . . . .	1491
C. POLICY JUSTIFICATIONS FOR STATE CONTROL . . . . .	1493
III. HYPER PREEMPTION . . . . .	1494
A. HYPER PREEMPTION STATUTES . . . . .	1495
1. Broad Punitive Measures: Arizona’s S.B. 1487 . . . . .	1495
2. Narrow Punitive Measures: Sanctuary City Revenue Bans. . . . .	1498
4. Expanding Liability for Public Officials: Florida’s § 790.33 & S.B. 4 . . . . .	1501
5. Blanket Preemption . . . . .	1502
B. WHY HYPER PREEMPTION IS DIFFERENT . . . . .	1504
IV. HYPER PREEMPTION IN THE COURTS . . . . .	1507
A. TUCSON’S GUN ORDINANCE AND S.B. 1487 . . . . .	1509
B. THE SUPREME COURT DECISION . . . . .	1510
1. Jurisdictional Issues . . . . .	1510
2. Separation of Powers . . . . .	1511
3. Bond Requirement . . . . .	1513

2018]	HYPER PREEMPTION: REORDERING THE STATE–LOCAL	1471
	4. Substantive Preemption Claim . . . . .	1514
	C. STATE LAW CHALLENGES GOING FORWARD . . . . .	1515
	1. Substantive Preemption Law Remains Critical . . . . .	1515
	2. Legal Challenges to Hyper Preemption . . . . .	1516
	3. The Risks of Litigation: Thinking Offensively . . . . .	1517
	V. POLITICAL CHECKS ON HYPER PREEMPTION . . . . .	1518
	A. EXECUTIVE BRANCH RELUCTANCE AND OPPOSITION . . . . .	1518
	B. HYPER PREEMPTION DEPENDS ON POLITICALLY SALIENT ISSUES . . . . .	1519
	C. BIPARTISAN CHECKS ON HYPER PREEMPTION . . . . .	1520
	D. POLITICAL ADVANTAGES OF NARROW HYPER PREEMPTION . . . . .	1521
	CONCLUSION . . . . .	1522

## INTRODUCTION

In the wake of Donald Trump’s electoral victory, several big city mayors throughout the United States were quick to announce their readiness to fight threatened rollbacks to immigration rights and climate-change policy.

But for many urban politicians, the chief obstacle facing their policy agenda is not Washington, but other politicians from their own states. In recent years, state legislators have sought to limit local policymaking by passing increasingly broad state preemption statutes. Since January 2017, state legislators across the country have introduced dozens of bills that would cut state funding to local governments implementing “sanctuary city” policies.<sup>1</sup> Such efforts are among

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1. *See, e.g.*, H.R. 100, 2017 Leg., Reg. Sess. (Ala. 2017) (pertaining to funding for colleges and universities); H.R. 205, 30th Leg., 1st Sess. (Alaska 2017); S. 14, 91st Gen. Assemb., Reg. Sess. (Ark. 2017); Assemb. 1252, 2017–2018 Leg., Reg. Sess. (Cal. 2017); S. 281, 71st Gen. Assemb., 1st Reg. Sess. (Colo. 2017); H.R. 5272, 2017 Gen. Assemb., Reg. Sess. (Conn. 2017); S. 786, 119th Leg., Reg. Sess. (Fla. 2017); H.R. 697, 119th Leg., Reg. Sess. (Fla. 2017); H.R. 37, 154th Gen. Assemb., Reg. Sess. (Ga. 2017) (pertaining to funding for colleges and universities); H.R. 76, 64th Leg., 1st Reg. Sess. (Idaho 2017); H.R. 1030, 120th Gen. Assemb., 1st Reg. Sess. (Ind. 2017); H.R. Study B. 67, 87th Gen. Assemb., 2017 Sess. (Iowa 2017); H.R. 2275, 2017 Leg., Reg. Sess. (Kan. 2017); H.R. 501, 2017 Leg., Reg. Sess. (Ky. 2017); H.R. 676, 2017 Leg., Reg. Sess. (La. 2017); H.R. Paper 272, 128th Leg., 1st Reg. Sess. (Me. 2017); H.D. 598, 2017 Gen. Assemb., 437th Sess. (Md. 2017); H.R. 1107, 2017 Leg., 190th Gen. Court, (Mass. 2017); H.R. 4105, 99th Leg., Reg. Sess. (Mich. 2017); H.R. 4334, 99th Leg., Reg. Sess. (Mich. 2017); H.R. File 1664, 90th Leg., Reg. Sess. (Minn. 2017); S. 2710, 132d Leg., Reg. Sess. (Miss. 2017); H.R. 980, 99th Gen. Assemb., 1st Reg. Sess. (Mo. 2017); H.R. 611, 65th Leg., 2017 Sess. (Mont. 2017); S. 333, 79th Leg., Reg. Sess. (Nev. 2017); S. 2945, 217th Leg., 2d Reg. Sess. (N.J. 2017); Assemb. 2872, 239th Leg., Reg. Sess. (N.Y. 2017); S. 3698, 239th Leg., Reg. Sess. (N.Y. 2017); S. 145, 2017 Gen. Assemb., Reg. Sess. (N.C. 2017); H.R. 179, 132d Gen. Assemb., Reg. Sess. (Ohio 2017); S. 573, 56th Leg., 1st Reg. Sess. (Okla. 2017); H.R. 2921, 79th Leg. Assemb., Reg. Sess. (Or. 2017); S. 10, 201st Gen. Assemb., Reg. Sess. (Pa. 2017); H.R. 5093, 2017 Gen. Assemb., Jan. Sess. (R.I. 2017); S. 155, 110th Gen. Assemb., 1st Reg. Sess. (Tenn. 2017); H.R. 271, 110th Gen. Assemb., 1st Reg. Sess. (Tenn. 2017); S. 4, 85th Leg., Reg. Sess. (Tex. 2017) (effective Sept. 1, 2017); H.D. 2000, 2017 Leg., Reg. Sess. (Va. 2017); S. 275, 103d Leg., Reg. Sess. (Wis. 2017); Assemb. 190, 103d Leg., Reg. Sess. (Wis. 2017).

the many preemption bills pending in statehouses across the country.<sup>2</sup> Mark Pertschuk, director of Grassroots Change, an advocacy group that tracks state preemption laws, has suggested that “the number of issues on which states are asserting their rights has skyrocketed” in recent years,<sup>3</sup> an acceleration of preemption activity even amidst a decade-long trend of more state involvement in local policymaking. For example, since 2011, when Wisconsin became the first state to preempt local regulation of paid sick leave,<sup>4</sup> fifteen additional states have passed similar preemption statutes.<sup>5</sup> Also in 2011, Tennessee became the first state to preempt local anti-discrimination measures that exceed those required by state law.<sup>6</sup> Since 2011, two additional states, Arkansas and North Carolina, have adopted anti-discrimination preemption laws,<sup>7</sup> and similar bills have been introduced in other states.<sup>8</sup>

As a result of these preemption laws, local government efforts to reflect their residents’ policy preferences are increasingly stymied by state statutes. Local governments, as creatures of the state,<sup>9</sup> must conform to state law, and legislatures have used this power to block local government regulatory policies. Scholars have noted this uptick in preemption efforts and discussed the effect of particular preemption policies.<sup>10</sup> Rick Su’s work has also explored the ways in

2. For a list of recent preemption activity, see Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163 (2018).

3. Reid Wilson, *GOP Aims to Rein in Liberal Cities*, THE HILL (Jan. 5, 2017, 6:00 AM), <https://thehill.com/homenews/campaign/312766-gop-aims-to-rein-in-liberal-cities> [<https://perma.cc/7P7Z-4K6T>]; see also NAT’L LEAGUE OF CITIES, CITY RIGHTS IN AN ERA OF PREEMPTION: A STATE-BY-STATE ANALYSIS 3 (2017).

4. Vicki Shabo, *Preemption: A Growing, Calculated Threat to Democracy*, NAT’L P’SHIP FOR WOMEN & FAMILIES (Apr. 5, 2013), <http://www.nationalpartnership.org/blog/general/preemption-a-growing-calculated-threat-to-democracy.html> [<https://perma.cc/79UV-CYTS>].

5. *Preemption Watch*, GRASSROOTS CHANGE, <https://grassrootschange.net/preemption-watch/#/category/paid-sick-days> [<https://perma.cc/9893-N9RB>] (last visited Jan. 28, 2018).

6. NAT’L LEAGUE OF CITIES, *supra* note 3, at 10.

7. *Id.*

8. See Elizabeth Reiner Platt, *States Attempting to Preempt LGBT-Friendly Municipalities*, COLUM. L. SCH.: PUB. RTS./PRIV. CONSCIOUSNESS PROJECT (Feb. 11, 2016), <http://blogs.law.columbia.edu/publicrightspriateconscience/2016/02/11/states-attempting-to-preempt-lgbt-friendly-municipalities/> [<https://perma.cc/2B6A-T7UA>] (discussing other state efforts).

9. Rick Su, *Intrastate Federalism*, 19 U. PA. J. CONST. L. 191, 233 (2016) (describing cities as “mere creatures’ of the State” (citing *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907))).

10. See, e.g., Nadia S. Adawi, *State Preemption of Local Control over Intensive Livestock Operations*, 44 ENVTL. L. REP. NEWS & ANALYSIS 10506 (2014) (factory farming); Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82 (2013) (firearms); Paul A. Diller, *Why Do Cities Innovate in Public Health? Implications of Scale and Structure*, 91 WASH. U. L. REV. 1219 (2014) (public health); David M. Jaros, *Preempting the Police*, 55 B.C. L. REV. 1149 (2014) (regulation of police). There is a particularly voluminous literature on local fracking bans. See e.g., Colin C. Deihl et al., *Tug of War over Colorado’s Energy Future: State Preemption of Local Fracking Bans*, 44 ENVTL. L. REP. NEWS & ANALYSIS 10524 (2014); Stephen Elkind, *Preemption and Home-Rule: The Power of Local Governments to Ban or Burden Hydraulic Fracturing*, 11 TEX. J. OIL GAS & ENERGY L. 415 (2016); Keith B. Hall, *When Do State Oil and Gas or Mining Statutes Preempt Local Regulations?*, 27 NAT. RESOURCES & ENV’T 13 (2013); Roderick M. Hills, Jr., *Hydrofracking and Home Rule: Defending and Defining an Anti-Preemption Canon of Statutory Construction in New York*, 77 ALB. L. REV. 647 (2014); Jamal Knight & Bethany Gullman, *The Power of State Interest: Preemption of Local Fracking Ordinances in Home-Rule Cities*, 28 TUL. ENVTL. L.J. 297

which federalism challenges at the federal level are part of an ongoing struggle between state and local governments.<sup>11</sup> Richard C. Schragger's recent work has explored these efforts as part of a longer tradition of American hostility to cities,<sup>12</sup> and several state and local government scholars have highlighted the recent efforts of state policymakers to strip local authority.<sup>13</sup>

In the course of this increased interest in preemption of local policy, state lawmakers have also raised the stakes of preemption legislation. This new brand of preemption statutes, which I call "hyper preemption," seeks not just to curtail local government policy authority over a specific subject, but to broadly discourage local governments from exercising policy authority in the first place.<sup>14</sup> These preemption statutes punish local governments or their public officials for taking policy positions that only arguably violate state law and deny them access to the typical legal processes for determining the legality of local ordinances, or otherwise seek to transplant local policy authority without a substantive debate about why state control is preferable. In this way, hyper preemption changes the preemption conversation. Because one's views about preemption authority are often influenced by one's view of the substantive policy at stake, it can be difficult to ascertain consistent normative views about preemption authority. But rather than asking whether state versus local control is appropriate for a particular policy,

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(2015); Bruce M. Kramer, *The State of State and Local Governmental Relations as It Impacts the Regulation of Oil and Gas Operations: Has the Shale Revolution Really Changed the Rules of the Game?*, 29 J. LAND USE & ENVTL. L. 69 (2013); Gregory R. Nearpass & Robert J. Brenner, *High Volume Hydraulic Fracturing and Home Rule: The Struggle for Control*, 76 ALB. L. REV. 167 (2012); John R. Nolon & Steven E. Gavin, *Hydrofracking: State Preemption, Local Power, and Cooperative Governance*, 63 CASE W. RES. L. REV. 995 (2013); Uma Outka, *Intrastate Preemption in the Shifting Energy Sector*, 86 U. COLO. L. REV. 927 (2015); Alex Ritchie, *Fracking in Louisiana: The Missing Process/Land Use Distinction in State Preemption and Opportunities for Local Participation*, 76 LA. L. REV. 809 (2016); Shannon M. Roesler, *Federalism and Local Environmental Regulation*, 48 U.C. DAVIS L. REV. 1111 (2015); David B. Spence, *The Political Economy of Local Vetoes*, 93 TEX. L. REV. 351 (2014); Rachel A. Kitze, Note, *Moving Past Preemption: Enhancing the Power of Local Governments over Hydraulic Fracturing*, 98 MINN. L. REV. 385 (2013); Adam J. Loos, Comment, *When Prohibition Is Not Regulation: Analyzing the Court's Decision in Wallach v. Town of Dryden*, 16 N.E.3d 1188 (N.Y. 2014), 40 S. ILL. U. L.J. 121 (2015); W. Devin Wagstaff, Note, *Fractured Pennsylvania: An Analysis of Hydraulic Fracturing, Municipal Ordinances, and the Pennsylvania Oil and Gas Act*, 20 N.Y.U. ENVTL. L.J. 327 (2013); Bryan M. Weynand, Comment, *Placing the Seal on a Fractured Debate: How North Carolina Clarified Its Law of Hydraulic Fracturing and Can Strike the Right Balance with Preemption of Local Regulation*, 93 N.C. L. REV. 596 (2015).

11. Su, *supra* note 9, at 194.

12. See generally Schragger, *supra* note 2.

13. See, e.g., RICHARD BRIFFAULT ET AL., AM. CONST. SOC'Y, *THE TROUBLING TURN IN STATE PREEMPTION: THE ASSAULT ON PROGRESSIVE CITIES AND HOW CITIES CAN RESPOND* (2017).

14. Other scholars have drawn attention to the ways states are going beyond substantive preemption authority. James Hodge and co-authors, for example, have looked at what he calls "preemption plus" tactics in the context of public health preemption, James G. Hodge, Jr. et al., *Public Health "Preemption Plus,"* 45 J.L. MED. & ETHICS 156 (2017), and Richard Schragger has explored what he calls "punitive, deregulatory, and vindictive preemption," Schragger, *supra* note 2, at 1181–1182 (capitalization altered). Recently, a group of state and local scholars has called attention to the "troubling emergence of punitive preemption." See BRIFFAULT ET AL., *supra* note 13, at 9 (capitalization altered). These concepts overlap with hyper preemption. The focus of this Article is how these types of policies change traditional preemption law.

hyper preemption assumes that local voices should almost never take the lead in crafting substantive policy.

Hyper preemption also changes how cases about the limits of local authority are adjudicated. Under traditional preemption theories, such cases would come to the court when an aggrieved party sought to invalidate the local regulation under state law. In defending its local regulation, a city would bear its legal costs, but the key risk of losing the litigation was mostly the loss of the policymaking authority itself. Hyper preemption statutes threaten to raise the stakes of this litigation significantly.

In the face of this major shift in policy, more scholars and policymakers need to grapple with the ways preemption law is changing. This Article seeks to add to the growing literature in the area, first by describing this phenomenon of hyper preemption and its various incarnations, and second by arguing that these hyper preemption statutes represent a new and different threat to local authority than traditional preemption statutes. Traditional preemption legislation focused on asserting state control over specific policy areas and often revolved around local, rather than national, policy debates.

The Article proceeds in four parts. Part I provides background information on the relationship between state and local authorities, and describes the ways state statutory preemption of local authority has traditionally operated. Part II describes the new hyper preemption. Part III discusses legal challenges to these hyper preemption statutes, focusing on the challenges to the punitive preemption statutes recently passed in Arizona. Part IV uses Arizona's S.B. 1487 as a case study to explore political and institutional checks on hyper preemption and offers thoughts on where this trend is heading.

## I. TRADITIONAL PREEMPTION

Understanding how new forms of preemption legislation are reshaping the state–local relationship requires some background in local government law. Section I.A discusses the legal framework governing the relationship between local governments and states. Section I.B discusses the ways states have traditionally used their preemption authority to restrict local government policymaking. Section I.C considers how state legislators have increasingly adopted preemption itself as a *substantive* policy commitment, rather than using their preemption authority to enact substantive policy. Section I.D considers the ways states are employing their traditional preemption authority more aggressively.

### A. LOCAL GOVERNMENTS HAVE RESTRICTED AUTHORITY UNDER STATE LAW

There are over 90,000 local governments in the United States,<sup>15</sup> about forty percent of which are general-purpose governments like counties, municipalities,

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15. CARMA HOGUE, U.S. CENSUS BUREAU, GOVERNMENT ORGANIZATION SUMMARY REPORT: 2012 1 (2013), [http://www2.census.gov/govs/cog/g12\\_org.pdf](http://www2.census.gov/govs/cog/g12_org.pdf) [<https://perma.cc/HM3X-5R3S>].

and townships.<sup>16</sup> Within this multitude of local governments there are significant variations between states and within states.<sup>17</sup> Nevertheless, it is possible to identify some general trends.

Although “Our Federalism” includes relationships between the national government, state governments, and local governments,<sup>18</sup> the legal frameworks for these relationships differ dramatically. The U.S. Constitution is one of enumerated powers. As scholars have noted, state sovereignty is a thin concept in the modern constitutional order,<sup>19</sup> but courts still regularly refer to the interest of the sovereign state when considering federalism challenges.<sup>20</sup> There is no similar idea of local government sovereignty in any sphere.

Under the modern view, local governments are creatures of state law,<sup>21</sup> and the U.S. Constitution provides few, if any, substantive protections for local policy-making.<sup>22</sup> For the most part, local government authority is limited to those

16. *Id.* The remaining roughly sixty percent of local governments are special-purpose governments like school districts, water districts, transportation districts, and mosquito control districts that have discrete responsibilities for ensuring public welfare. *Id.*

17. See Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1126–27 (2007). Merely defining the scope of variations can be a challenge. For example, there are even disagreements about how many states provide local governments access to home rule. *Id.* at 1126–27 n.64.

18. *Younger v. Harris*, 401 U.S. 37, 44 (1971). For a discussion of federalism that includes local governments, see generally Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4 (2010).

19. See, e.g., Gerken, *supra* note 18, at 12–14 (“[S]ome observe that sovereignty is in short supply in ‘Our Federalism.’”).

20. See *Printz v. United States*, 521 U.S. 898, 925 (1997) (“[T]he Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs.”); *United States v. Lopez*, 514 U.S. 549, 567 (1995) (discussing the enforcement of Gun-Free School Zones as an application of the commerce power, and stating “we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.”); *New York v. United States*, 505 U.S. 144, 156 (1992) (“[I]f a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.”).

21. See Richard C. Schragger, *The Political Economy of City Power*, 44 FORDHAM URB. L.J. 91, 115–17 (2017) (discussing the decline in municipal corporate power and the dominance of John Forrest Dillon’s view); see also 1 JOHN FORREST DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS 448–49 (5th ed. 1911) (“It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in *express words*; second, those *necessarily or fairly implied* in or *incident* to the powers expressly granted; third, those *essential* to the accomplishment of the declared objects and purposes of the corporation, not simply convenient, but indispensable.”), quoted in Clayton P. Gillette, *In Partial Praise of Dillon’s Rule, or, Can Public Choice Theory Justify Local Government Law?*, 67 CHI.-KENT L. REV. 959, 963 n.12 (1991); *Cities 101—Delegation of Power*, NAT’L LEAGUE OF CITIES (Dec. 13, 2016), <http://www.nlc.org/resource/cities-101-delegation-of-power> [<https://perma.cc/UWD2-8NG7>] (describing Dillon’s Rule).

22. *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178–79 (1907) (“Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them . . . . The State, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the State is supreme, and its legislative body, conforming its action to the state constitution, may do as it will,

powers enumerated in the states' constitution and laws, and this authority is quite limited.

In the majority of states, a subset of local governments is eligible for "home rule."<sup>23</sup> Under home rule, state law grants localities some authority over local affairs and may limit the state's ability to interfere in local affairs.<sup>24</sup> In non-home rule states and non-home rule local governments within home rule states, state delegations of authority must be explicitly granted in statute or implied as necessary corollaries of statutory delegations.<sup>25</sup>

However, this difference between home rule jurisdictions and non-home rule jurisdictions is often of little practical significance. The implied powers of non-home rule jurisdictions can be quite broad. And even in home rule jurisdictions, local government authority is often limited.<sup>26</sup> As Edward Banfield and James Wilson note, under a narrow interpretation of home rule, "a city cannot operate a peanut stand at the city zoo without first getting the state legislature to pass an enabling law, unless, perchance, the city's charter or some previously enacted law unmistakably covers the sale of peanuts."<sup>27</sup>

#### B. STATE-LEVEL PREEMPTION STATUTES FURTHER RESTRICT LOCAL AUTHORITY

Even when local governments have the authority to act, this authority is almost always subject to state legislative preemption. For example, a city might decide that it wants to ban plastic grocery bags because of the litter created by the bags and the other negative environmental effects associated with plastic bags. It might

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unrestrained by any provision of the Constitution of the United States."); see also Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 916–17 (1994) ("[Federalism] subjects these localities to the plenary control of state government and precludes or limits the ability of the national government to set standards for local politics. Thus, if the electoral principle were under attack in certain states, and Americans decided at a national level that we needed to make sure that every locality held elections, federalism would constitute a barrier to the implementation of this policy."). This view of the local government in our constitutional order is somewhat contested. The Supreme Court has occasionally suggested other constitutional interests may limit state policymaking control over local governments. See, e.g., *Romer v. Evans*, 517 U.S. 620 (1996) (protecting Boulder's anti-discrimination ordinance against state law); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (suggesting some federal constitutional protections for cities); see also Richard C. Schragger, *Cities as Constitutional Actors: The Case of Same-Sex Marriage*, 21 J.L. & POL. 147, 167–77 (discussing constitutional home rule and providing a "localist" reading of *Romer*); Josh Bendor, Note, *Municipal Constitutional Rights: A New Approach*, 31 YALE L. & POL'Y REV. 389 (2013).

23. Timothy D. Mead, *Federalism and State Law: Legal Factors Constraining and Facilitating Local Initiatives*, in HANDBOOK OF LOCAL GOVERNMENT ADMINISTRATION 31, 36 (John J. Gargan ed., 1997). The chart that Mead presents does not include Nevada, which adopted limited home rule in 2015. NEV. REV. STAT. §§ 244.137–146 (2015).

24. JESSE J. RICHARDSON, JR., ET AL., IS HOME RULE THE ANSWER? CLARIFYING THE INFLUENCE OF DILLON'S RULE ON GROWTH MANAGEMENT 10–12 (The Brookings Institution Center on Urban and Metropolitan Policy, Discussion Paper, 2003), <https://www.brookings.edu/wp-content/uploads/2016/06/dillonsrule.pdf> [<https://perma.cc/EP5E-MD65>]. As discussed below, state statutory preemption provides a significant limit on the ability of local governments to act unimpeded by state law. See *infra* Section I.B.

25. EDWARD C. BANFIELD & JAMES Q. WILSON, CITY POLITICS 65 (1963).

26. Dillon's Rule and other limitations operate in many states that have some version of home rule. RICHARDSON ET AL., *supra* note 24, at 10–13.

27. BANFIELD & WILSON, *supra* note 25, at 65.



enact the ban under its city charter, an explicit grant of state authority, or an implied grant of authority based on its obligation to collect trash.<sup>28</sup> However, the state legislature can prohibit such a bag ban.<sup>29</sup>

### 1. State-Level Preemption in Practice

When such a bag ban was proposed in Laredo, Texas, local businesses challenged it, arguing that state law preempted the ban. The challengers argue that such ordinances are prohibited by a 1993 state law preventing Texas municipalities from regulating containers for solid waste management purposes.<sup>30</sup> Under Texas home rule law, “the Legislature may limit a home-rule city’s police power regarding a particular subject matter so long as that limitation appears with unmistakable clarity.”<sup>31</sup> Like so many legal concepts, “unmistakable clarity” is a matter of judgment. While the trial court found the law ambiguous as it applied to plastic bag regulations, the Texas Court of Appeals reached the opposite conclusion.<sup>32</sup> In late 2017, the Supreme Court of Texas granted Laredo’s petition for review.<sup>33</sup>

Some states offer greater home rule protection than Texas by protecting a sphere of purely local affairs and allowing statewide preemption only on matters of statewide or mixed state and local concern. But, as Richard Briffault notes, “the difficulties state courts experience in defining exclusive areas of local interest erode the legal protection of local autonomy” protected by this type of home rule.<sup>34</sup> For example, the New York State Constitution gives local governments the power to pass and implement legislation that secures “government, protection, order, conduct, safety, health and well-being of persons or property.”<sup>35</sup> In theory, this authority is expansive and gives cities broad discretion to regulate in

28. Several Texas cities have experimented with just such a ban and were met with mixed reviews and mixed success. See Sarah Coppola, *Austin’s Bag Ban Begins with Cheers, Grumbles*, MYSTATESMAN (Mar. 1, 2013, 11:47 PM), <http://www.mystatesman.com/news/local-govt-politics/austin-bag-ban-begins-with-cheers-grumbles/PH8U1F0D0URDvNjeeo9k4J/> [https://perma.cc/76C8-HAU9] (discussing Austin’s ban on disposable plastic bags); AARON WATERS, AUSTIN RES. RECOVERY, ENVIRONMENTAL EFFECTS OF THE SINGLE USE BAG ORDINANCE IN AUSTIN, TEXAS 22–23 (June 10, 2015), <http://www.austintexas.gov/edims/document.cfm?id=232679> [https://perma.cc/2SRS-87A2] (discussing mixed success of ban).

29. Cf. Jim Malewitz, *Laredo Plastic Bag Ban Tossed by Court*, TEX. TRIB., (Aug. 17, 2016, 7:00 PM), <https://www.texastribune.org/2016/08/17/court-ruling-strikes-blow-laredo-bag-ban-local-con/> [https://perma.cc/X99G-T8N9]. A “Shopping Bag Freedom Act” was proposed in the Texas state legislature but was never voted on by the House after it only narrowly made it out of committee. See H.R. 2416, 83d Leg., Reg. Sess. (Tex. 2013).

30. *Laredo Merchs. Ass’n v. City of Laredo*, No. 04-15-00610-CV, 2016 WL 4376627, at \*4 (Tex. App. Aug. 17, 2016).

31. *Id.*

32. *Id.* at \*8.

33. Order Granting Review, *City of Laredo v. Laredo Merchs. Ass’n*, No. 16-0748 (Tex. Sept. 1, 2017).

34. Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 16 (1990).

35. N.Y. CONST. art. IX, § 2(c)(ii)(10). Such authority has, however, been narrowly construed. See, e.g., *Good Humor Corp. v. City of New York*, 49 N.E.2d 153, 157 (N.Y. 1943) (finding that New York City’s effort to limit street peddling was not related to public health concerns).

the public interest,<sup>36</sup> but the authority is subject to supervision by New York State, which can preempt local regulations.<sup>37</sup> Although a literal reading of the statute suggests that the State's preemptive authority is limited when it seeks to restrict the activities of a particular jurisdiction,<sup>38</sup> New York courts have interpreted this limitation so narrowly that, in practice, state legislation can preempt almost any local ordinance. For example, in *Patrolmen's Benevolent Ass'n of the City of New York Inc. v. City of New York*, the court held that because the safety of *city residents* was an issue of statewide concern, the state had an interest in regulating the contract dispute process between New York City and its police union, and could do so even without a home rule message.<sup>39</sup> The court's holding limited the city's bargaining power in these negotiations by preempting the city's mediation laws for negotiating with public employee unions.<sup>40</sup>

State laws can also preempt local government efforts to regulate the use of municipal property. In Pennsylvania, for example, state law preempts local regulations involving guns.<sup>41</sup> Lower Merion Township, a suburb of Philadelphia,

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36. For example, under its authority to secure the health and well-being of persons, New York City's Department of Health passed the nation's first ban on restaurant use of trans fats. N.Y.C., N.Y., RULES OF THE CITY OF N.Y. tit. 24, § 81.08 (2007); *see also* N.Y.C. DEP'T OF HEALTH & MENTAL HYGIENE, THE REGULATION TO PHASE OUT ARTIFICIAL TRANS FAT IN NEW YORK CITY FOOD SERVICE ESTABLISHMENTS (2006), <http://www1.nyc.gov/assets/doh/downloads/pdf/cardio/cardio-transfat-bro.pdf> [<https://perma.cc/63NL-MXVL>]; Thomas J. Lueck & Kim Severson, *New York Bans Most Trans Fats in Restaurants*, N.Y. TIMES, Dec. 6, 2006, at A1, <https://www.nytimes.com/2006/12/06/nyregion/06fat.html> [<https://nyti.ms/2157u7z>]. The Department of Health also required that chain restaurants make calorie counts more prominent. N.Y.C., N.Y., RULES OF THE CITY OF N.Y. tit. 24, § 81.50 (2015). The regulation applies to restaurants that serve food standardized by portion size and content, and that are part of a chain of at least fifteen restaurants. *Id.*; *see also* N.Y.C. DEP'T OF HEALTH & MENTAL HYGIENE, UPDATED CALORIE LABELING RULE FOR FOOD SERVICE ESTABLISHMENTS: WHAT YOU NEED TO KNOW, <http://www1.nyc.gov/assets/doh/downloads/pdf/permit/cal-label-faq.pdf> [<https://perma.cc/AQS5-7VHM>].

37. N.Y. CONST. art. IX, § 2(c)(i) (“[E]very local government shall have power to adopt and amend local laws *not inconsistent* with the provisions of this constitution or any general law relating to its property, affairs or government . . . .” (emphasis added)).

38. The New York Constitution places limits on “special legislation,” or laws that only affect a particular jurisdiction. Special legislation can only be passed in emergency situations or at the request of the local government by means of a home rule message. N.Y. CONST. art. IX, § 2(b)(2). Home rule messages must be passed by a majority of a municipality's legislature and endorsed by the city's mayor or passed with the support of two-thirds of the municipality's legislature. *Id.* § 2(b)(2)(a); *see also* Laura D. Hermer, *Municipal Home Rule in New York: Tobacco Control at the Local Level*, 65 BROOK. L. REV. 321, 333 n.53 (1999) (“A home rule request is a message from the governing body of an affected municipality giving the legislature the municipality's consent to enact the legislation.”). Notably, even this emergency exemption does not apply to laws applicable only in New York City. N.Y. CONST. art. IX, § 2(b)(2)(b). For an example of the specific content of such a home rule message, *see* N.Y.C., N.Y. RES. No. 1346 (2008), <http://legistar.council.nyc.gov/View.ashx?M=F&ID=673846&GUID=D7E508EC-37A6-4304-9217-EC473BFCC34F> [<https://perma.cc/PH36-CFKS>] (home rule message on congestion pricing).

39. 767 N.E.2d 116, 121–22 (N.Y. 2001) (“We conclude that chapter 641 is a special law, but notwithstanding, the home rule procedural requirements were not triggered here because the statute was enacted in furtherance of and bears a reasonable relationship to a substantial State-wide concern.” (citations omitted)).

40. *Id.* at 124.

41. 18 PA. STAT. AND CONS. STAT. ANN. § 6120(a) (West 2016). Firearm regulation preemption statutes like Pennsylvania's are common. *See* Blocher, *supra* note 10, at 89 (discussing the relevance of

argued that it retained power under its charter to regulate the use of property owned by the township, and therefore could prohibit guns in its public parks.<sup>42</sup> This argument, however, was rejected by the state appellate court.<sup>43</sup> According to the court, the township did retain the ability to control its property as any private property owner, but the court concluded that the locality was not operating as a private property owner when it tried to ban guns in its parks because it could direct local police officers to enforce the prohibition.<sup>44</sup> The court found this use of law enforcement suggested the township was acting pursuant to its police power rather than in its capacity as a property owner, so there was no home rule protection for the township given preemptive state legislation.<sup>45</sup>

## 2. The Politics of Traditional Preemption Battles

Often preemption battles happen when an interest group loses a fight at the local level and so turns to the state to try its luck among a new set of policy-makers.<sup>46</sup> As Paul Diller writes, “[i]ntrastate preemption is best understood less as a matter of abstract logic and more as one weapon among many used by interest groups to oppose local polices they dislike.”<sup>47</sup>

Vertical federalism grants interest groups the option to forum shop and select the level of government most likely to be receptive to their particular interests.<sup>48</sup>

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localism to constitutional gun control debates and noting that “most states . . . have passed laws forbidding or simply limiting municipal gun control”).

42. *Firearm Owners Against Crime v. Lower Merion Twp.*, 151 A.3d 1172, 1179 (Pa. Commw. Ct. 2016).

43. *Id.* at 1179–80.

44. *Id.*

45. *Id.* at 1179. Even in states that allow municipalities to trump state law in a limited area of municipal affairs, the state may define what constitutes a purely local issue differently for purposes of divesting state authority than for purposes of allowing localities to act in the first instance. See LYNN A. BAKER ET AL., *LOCAL GOVERNMENT LAW* 353–54 (5th ed. 2014) (raising this issue and discussing California’s approach).

46. Of course, *anyone* who loses at the local level might seek recourse at the state level, but special interest groups are more likely to be organized to take advantage of multiple fora of influence than individuals. A subsequent win at the state level may reflect that the local loser has significant statewide support, or it may merely show the local loser’s ability to capture statewide politicians.

47. Diller, *supra* note 17, at 1133.

48. By vertical federalism, I mean the relationships between lower and higher levels of government (for example, sub-national government’s relationship with the federal government, or local government’s relationship with the sub-national governments). See Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493, 502 (2008) (describing vertical federalism as concerned with questions of “how power is or should be allocated between the federal and state tiers of government, and how to prevent the federal and state governments from encroaching on each other’s prerogatives”). Vertical federalism can be contrasted with horizontal federalism, which focuses on the relationship between sub-national governments or between localities. *Id.* at 503 (defining horizontal federalism as “encompassing the set of constitutional mechanisms for preventing or mitigating interstate friction that may arise from the out-of-state effects of in-state decisions”). To illustrate the distinction, contrast the vertical federalism issues surrounding Congress’s spending power and commandeering of state agents, where the federal government is interacting with state and local governments, see, e.g., *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012), with horizontal federalism cases involving state laws that have distinct implications for other states, which are often challenged under the Dormant Commerce Clause, see, e.g., *Comptroller v. Wynne*, 135 S. Ct. 1787 (2015). For more general discussions of horizontal federalism, see Heather K. Gerken & Ari Holtzblatt, *The Political Safeguards of Horizontal Federalism*, 113 MICH. L. REV. 57 (2014), and

For example, the state legislation at issue in *Patrolmen's Benevolent Ass'n*<sup>49</sup> passed because of the New York City police union's successful lobbying of the state legislature. As *The New York Times* reported when the legislation passed, "[f]or years, the police union in New York City has pushed a proposal that would allow it to take its contract disputes to a state panel, where union leaders hope to win large raises for city police officers."<sup>50</sup> News accounts at the time suggest the legislation was motivated less by statewide interest in New York City public safety than by union lobbying efforts.<sup>51</sup> The state legislature preempted a local government regulatory regime in order to help local police and firemen, at the city government's expense.

Those dissatisfied with the results of local policymaking may not always enjoy speedy recourse at the state legislature, but they can also seek recourse in the courts arguing that a prior statute preempted the local policy they seek to overturn. These challenges may be more frequent because of the lack of clarity in both state preemption doctrine and the statutes the courts are called upon to interpret.<sup>52</sup>

### C. PREEMPTION AS SUBSTANTIVE POLICY

Debates over preemption are not always partisan—local policy may be subject to intraparty disputes. In New York State, for example, preemption battles are often waged between New York City and Albany, irrespective of political affiliations. After the state passed legislation restricting New York City's ability to adjudicate pension disputes, the big political question was whether Governor Pataki—a Republican—would side with the Republican mayor of New York City, Rudy Giuliani, or the police union.<sup>53</sup> In 2008, Mayor Michael Bloomberg, a

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Brannon P. Denning, *Vertical Federalism, Horizontal Federalism, and Legal Obstacles to State Marijuana Legalization Efforts*, 65 CASE W. RES. L. REV. 567 (2015).

49. *Patrolmen's Benevolent Ass'n of the City of N.Y. Inc. v. City of New York*, 767 N.E.2d 116 (N.Y. 2001).

50. Michael Cooper, *State Panel May Disappoint Police on Pay, Experts Say*, N.Y. TIMES (Dec. 5, 1998), <https://nyti.ms/2hzdOo8>. City officials were critical of the state board's role in public sector bargaining, with one former Buffalo labor relations manager arguing that such arbitration rights effectively meant public sector unions did not have to bargain in good faith. Gregory D. Joos, *With the Help of the State, Police and Fire Unions Have It All Too Easy in Buffalo*, BUFFALO NEWS (May 18, 1997), <http://buffalonews.com/1997/05/18/with-the-help-of-the-state-police-and-fire-unions-have-it-all-too-easy-in-buffalo/> [<https://perma.cc/4SMZ-T4RB>]; see also Brian C. Anderson, *How 211 Nobodies Strangle New York*, CITY J. (1999), <https://www.city-journal.org/html/how-211-nobodies-strangle-new-york-11896.html> [<https://perma.cc/XE25-DV6A>] (quoting then-New York City budget director Robert Harding: "Once a municipal union strikes out at the bargaining table, it simply seeks relief in Albany.").

51. See, e.g., David Seifman, *Cop Union Trying Another End-Run on Rudy*, N.Y. POST, Oct. 31, 1998, at 10 ("The police union is quietly lining up its political ducks to pass a controversial bill in Albany—one Mayor Giuliani has been fighting for five years."); *Pataki Inks Arbitration Bill for New York City Police*, ASSOCIATED PRESS, Dec. 18, 1998 ("The police union, the Patrolmen's Benevolent Association, is a politically powerful force in Albany. This year, it threw its weight behind Pataki's reelection and over the past two years has contributed \$160,000 to state candidates and committees.").

52. See Diller, *supra* note 17, at 1116.

53. Michael Finnegan, *City May Lose Say on Cop & Fire Pay*, N.Y. DAILY NEWS (June 17, 1998), <http://www.nydailynews.com/archives/news/city-lose-fire-pay-article-1.802933> [<https://perma.cc/N7KM-VYQZ>].

Republican, who had been a Democrat leading up to his first election as mayor, and the Democratic City Council both supported efforts to create a congestion pricing system. Democratic Speaker of the Assembly Sheldon Silver—himself a representative from New York City—led the efforts to block the proposal, which was unpopular with his outer-borough constituents.<sup>54</sup> Similarly, Oregon’s Democratically-controlled<sup>55</sup> state legislature has preempted local regulation of genetically modified crops.<sup>56</sup>

The tobacco industry has also long used state preemption to curb local regulation.<sup>57</sup> In the late 1980s and early 1990s, local public health advocates turned to local governments to institute smoking restrictions and bans.<sup>58</sup> Health advocates’ success at the local level despite tobacco industry lobbying efforts pushed the industry to seek state preemption legislation.<sup>59</sup>

Nevertheless, in recent years, preemption debates have taken on a decidedly partisan tone. For example, the gun lobby, which has significantly more support among Republican officials than their Democratic counterparts,<sup>60</sup> has pushed broad state preemption of local gun control ordinances.<sup>61</sup> The legislation for which they advocate preempts not only local efforts to regulate gun ownership, but also local limits on gun use. For example, Florida’s broad preemption statute invalidated mid-twentieth-century ordinances that restricted the use of guns in public parks.<sup>62</sup> Such efforts, coupled with the gun lobby’s successes at preventing state-level regulation, hamper gun control efforts.

In addition, local policy efforts themselves have increased the partisan nature of preemption debates because local policy innovation has taken a decidedly

54. Nicholas Confessore, *Congestion Pricing Plan Dies in Albany*, N.Y. TIMES: CITY ROOM (Apr. 7, 2008, 3:01 PM), <https://cityroom.blogs.nytimes.com/2008/04/07/congestion-pricing-plan-is-dead-assembly-speaker-says> [<https://nyti.ms/2jKOTMq>].

55. See 2013 *State and Legislative Partisan Composition*, NAT’L CONFERENCE OF ST. LEGIS. (Jan. 31, 2013), [http://www.ncsl.org/documents/statevote/legiscontrol\\_2013.pdf](http://www.ncsl.org/documents/statevote/legiscontrol_2013.pdf) [<https://perma.cc/Z3YD-4H59>] (showing Oregon as a Democratically-controlled legislature in 2013).

56. S. 863, 77th Leg. Assemb., Spec. Sess. (Or. 2013) (GMO preemption bill).

57. See STANTON A. GLANTZ & EDITH D. BALBACH, TOBACCO WAR: INSIDE THE CALIFORNIA BATTLES 212–15 (2000) (“By December 1990, the industry had succeeded in getting six states to pass legislation preempting communities from passing ordinances pertaining to clean indoor air, youth access to tobacco, and other tobacco control measures.”). The tobacco industry had been pursuing preemption at various levels for decades, including persuading Congress to “preempt state and local regulation of cigarette labeling and advertising” in 1965. *Id.* at 213.

58. *Id.* at 157–81.

59. *Id.* at 244–45.

60. Cf. CENTER FOR RESPONSIVE POLITICS, *National Rifle Assn: All Recipients*, OPENSECRETS.ORG, <https://www.opensecrets.org/orgs/toprecips.php?id=d000000082&cycle=2016> [<https://perma.cc/6JEY-UJRV>] (last visited Jan. 30, 2018) (based on data released May 16, 2017).

61. See Blocher, *supra* note 10, at 133 (discussing the success of the gun lobby push for state-level gun control preemption).

62. Fla. Carry, Inc. v. City of Tallahassee, 212 So. 3d 452, 462 (Fla. Dist. Ct. App. 2017) (“[T]he Legislature rendered the ordinances at issue null and void.”).

liberal turn. In an era of increased political polarization<sup>63</sup> marked by geographic political sorting, urban residents are more liberal than their suburban, exurban, and rural counterparts.<sup>64</sup> Mayors of large urban areas increasingly cast themselves as policy entrepreneurs, and local civic leaders across the country have become adept at using local law to push a policy agenda that would have little traction at the state capitol.<sup>65</sup> Some of these officials are responding to voters from jurisdictions that have long been liberal havens in red country—think Austin, Texas, and New Orleans, Louisiana. Others, like Tallahassee, Florida, and Denton, Texas, are probably not on many short lists of progressive cities.<sup>66</sup> Yet Tallahassee’s elected officials had to defend themselves against the imposition of civil penalties for their failure to repeal an unenforced gun control ordinance that conflicted with Florida’s gun control preemption law,<sup>67</sup> and Denton’s residents adopted a local fracking ban, only to have that ban overturned by state law.<sup>68</sup>

As a result, cities have led the charge on public health issues by taxing sugar-sweetened beverages, requiring restaurants to release nutritional information, and banning trans fats.<sup>69</sup> Environmental activists have also turned to cities to regulate factory farming, fracking, and carbon emissions.<sup>70</sup> Cities have also adopted

63. See, e.g., Jessica Bulman-Pozen, *Executive Federalism Comes to America*, 102 VA. L. REV. 953, 957–59 (2016); Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 YALE L.J. 804, 818–20 (2014).

64. Schragger, *supra* note 21, at 128–31.

65. *Id.* at 129–30 (discussing municipalities pushing for social welfare policies such as living wage movement and sanctuary cities).

66. Typical rankings, such as those by *The Washington Post* and Livability, exclude both cities from the ranks of the “Most Liberal.” Amber Phillips, *The 10 Most Liberal and Conservative Cities in the U.S. — As Judged by Campaign Donors*, WASH. POST: THE FIX (Dec. 14, 2015), [https://www.washingtonpost.com/news/the-fix/wp/2015/12/14/the-10-most-liberal-and-conservative-cities-in-the-u-s-as-judged-by-campaign-donors/?utm\\_term=.c3d9bbc61ee6](https://www.washingtonpost.com/news/the-fix/wp/2015/12/14/the-10-most-liberal-and-conservative-cities-in-the-u-s-as-judged-by-campaign-donors/?utm_term=.c3d9bbc61ee6) [<https://perma.cc/78RG-WRZ9>]; *2016 Best Cities for Liberals*, LIVABILITY (2016), <http://livability.com/top-10/political-cities/best-cities-for-liberals/2016> [<https://perma.cc/ENU2-RVKQ>]. The startup Crowdpc, from whom *The Washington Post* drew their data, considers both Tallahassee, Florida, and Denton, Texas, to be conservative cities. See *How Liberal or Conservative is Your Hometown?* — *Tallahassee, FL*, CROWDPAC, <https://www.crowdpac.com/games/lookup/hometown?name=Tallahassee,FL> [<https://perma.cc/RX55-7LD7>] (last visited Jan. 30, 2018) (listing Tallahassee as “0.3C” on a scale where 10.0L is the most liberal, 0.0 is politically neutral, and 10.0C is the most conservative); *How Liberal or Conservative is Your Hometown?* — *Denton, TX*, CROWDPAC, <https://www.crowdpac.com/games/lookup/hometown?name=Denton,TX> [<https://perma.cc/ZNL8-XGGX>] (last visited Jan. 30, 2018) (listing Denton as “3.8C”).

67. See *infra* notes 189–197 and accompanying text.

68. Jim Malewitz, *Dissecting Denton: How One City Banned Fracking*, TEX. TRIB. (Dec. 15, 2014, 7:00 PM) <https://www.texastribune.org/2014/12/15/dissecting-denton-how-texas-city-banned-fracking/> [<https://perma.cc/9EJP-E6CK>] (describing the local effort in Denton to ban hydraulic fracturing); Jim Malewitz, *Texas Drops Suit Over Dead Denton Fracking Ban*, TEX. TRIB. (Sept 18, 2015, 11:00 AM) <https://www.texastribune.org/2015/09/18/texas-drops-suit-over-dead-denton-fracking-ban/> [<https://perma.cc/7A7K-G4Q5>] (“The Texas General Land Office has dropped its lawsuit against the North Texas city’s obliterated ban on hydraulic fracturing . . .”); see also TEX. NAT. RES. CODE ANN. § 81.0523 (West 2015) (statute preempting local oil and gas regulations).

69. See Diller, *supra* note 10, at 1237–41.

70. See *supra* note 10 (including factory farming and the extensive literature on fracking); Judith Resnik, Joshua Civin & Joseph Frueh, *Ratifying Kyoto at the Local Level: Sovereignism, Federalism, and Translocal Organizations of Government Actors (TOGAs)*, 50 ARIZ. L. REV. 709 (2008) (discussing carbon emissions).

innovations in elections<sup>71</sup> and working conditions,<sup>72</sup> and they remain the vanguard for protecting the LGBT community.<sup>73</sup> While there are both Republican voters and Republican office-holders who support these measures, the bulk of support for such proposals comes from cities with clear Democratic majorities.<sup>74</sup>

Of course, local-government efforts are not reliably liberal. For example, local governments weighed in on *both* sides of the immigration debate,<sup>75</sup> and some local governments have adopted policies hostile to expansion of claims for LGBT civil rights.<sup>76</sup> Local governments have also adopted exclusionary zoning policies and fought state efforts to mandate inclusionary zoning.<sup>77</sup> But it is liberal policymaking by cities that has invited pushback from Republican-controlled state legislatures.

71. TODD DONOVAN & HEATHER SMITH, WASH. ST. INST. FOR PUB. POL'Y, PROPORTIONAL REPRESENTATION IN LOCAL ELECTIONS: A REVIEW 6 (1994) [http://www.wsipp.wa.gov/ReportFile/1181/Wsipp\\_Proportional-Representation-in-Local-Elections-A-Review\\_Full-Report.pdf](http://www.wsipp.wa.gov/ReportFile/1181/Wsipp_Proportional-Representation-in-Local-Elections-A-Review_Full-Report.pdf) [<https://perma.cc/9H4J-VXVM>] (discussing local representation systems and the few cities that have chosen to use alternate methods: New York, New York, Philadelphia, Pennsylvania, West Hartford, Connecticut, and Rome, New York, among a few others).

72. Matt Crawley, *Paid Sick Leave Legislation Taking States, Municipalities by Storm*, MULTISTATE: INSIDER (July 21, 2016), <https://www.multistate.us/blog/insider/2016/07/paid-sick-leave-legislation-taking-states-municipalities-by-storm> [<https://perma.cc/928Q-JRG3>].

73. Richard C. Schragger, *Cities As Constitutional Actors: The Case of Same-Sex Marriage*, 21 J.L. & POL. 147, 148–50 (2005).

74. See *Paid Sick Time Legislative Successes*, BETTER BALANCE, <http://www.abetterbalance.org/resources/paid-sick-time-legislative-successes/> [<https://perma.cc/X5ME-DRZX>] (last updated Oct. 5, 2017) (cities with paid sick leave legislation include: San Francisco, Washington, D.C., Seattle, Long Beach, Portland, Jersey City, Seatac, Newark, New York, Passaic, East Orange, Paterson, Irvington, Trenton, Montclair, Oakland, Tacoma, Philadelphia, Bloomfield, Emeryville, Pittsburgh, Elizabeth, New Brunswick, Spokane, Plainfield, Santa Monica, Minneapolis, Los Angeles, San Diego, Montgomery County, Maryland, Cook County and Chicago, Berkeley, Saint Paul, and Morristown); Diller, *supra* note 10, at 1273–74 tbl. 2 (providing table that shows cities that have adopted the most public health policies: New York, Baltimore, Boston, Philadelphia, and San Francisco); DONOVAN & SMITH, *supra* note 71 (discussing local representation systems in New York, Philadelphia, West Hartford, and others).

75. For discussions of both conservative and liberal local immigration ordinances, see Justin Peter Steil & Ion Bogdan Vasi, *The New Immigration Contestation: Social Movements and Local Immigration Policy Making in the United States, 2000–2011*, 119 AM. J. SOC. 1104, 1109 (2014) and Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 569, 577 (2008).

76. See, e.g., Linda Greenhouse, *Justices Leave Intact Anti-Gay Measure*, N.Y. TIMES (Oct. 14, 1998), <http://www.nytimes.com/1998/10/14/us/justices-leave-intact-anti-gay-measure.html> [<https://nyti.ms/2zpPPuK>] (discussing the 1993 measure's route through court and its subsequent affirmation by the 6th Circuit); Edward Walsh, *Challenge to Gay Rights*, WASH. POST (Oct. 30, 1993), [https://www.washingtonpost.com/archive/politics/1993/10/30/challenge-to-gay-rights/754f5bb4-3f62-4851-b38e-d1279db87a0b/?utm\\_term=.2fc33fc7b194](https://www.washingtonpost.com/archive/politics/1993/10/30/challenge-to-gay-rights/754f5bb4-3f62-4851-b38e-d1279db87a0b/?utm_term=.2fc33fc7b194) [<https://perma.cc/RN3M-FWTF>] (discussing the 1993 vote on amending the Cincinnati City Charter to prohibit the government from enacting a policy that protects against discrimination based on sexual orientation); see also BRAD SEARS, NAN D. HUNTER & CHRISTY MALLORY, DOCUMENTING DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION AND GENDER IDENTITY IN STATE EMPLOYMENT 13-43 to 13-54 (2009), <https://williamsinstitute.law.ucla.edu/research/discrimination/documenting-discrimination-on-the-basis-of-sexual-orientation-and-gender-identity-in-state-employment/> [<https://perma.cc/846WS42L>] (presenting a list of local ordinances that limit LGBT civil rights from 1974–2009).

77. See Sharon Perlman Krefetz, *The Impact and Evolution of the Massachusetts Comprehensive Permit and Zoning Appeals Act: Thirty Years of Experience with a State Legislative Effort to Overcome Exclusionary Zoning*, 22 W. NEW ENG. L. REV. 381 (2001).

States have passed laws preventing local governments from establishing higher minimum wages than the state,<sup>78</sup> regulating factory farming,<sup>79</sup> prohibiting fracking,<sup>80</sup> banning plastic bags,<sup>81</sup> and requiring employers to provide paid sick days.<sup>82</sup> As other scholars and journalists note, many of these preemption ordinances are drafted by the American Legislative Exchange Council (ALEC), a business-backed think tank for conservative lawmakers that provides model legislation.<sup>83</sup> For conservative lawmakers, preemption of local regulation is a perfect tool for an anti-regulatory agenda. As Richard Schragger notes, much of the substantive preemption in these areas simply strips localities of authority without establishing a statewide regulatory regime.<sup>84</sup> Richard Briffault describes such efforts as “deregulatory preemption.”<sup>85</sup>

D. RAISING THE STAKES OF TRADITIONAL PREEMPTION, STATES ARE INCREASINGLY PASSING MULTI-ISSUE PREEMPTION STATUTES

To the extent that traditional preemption politics reflected efforts of local interest groups to score a victory at the state level that was unavailable at the local level, traditional preemption statutes often focused on a single policy issue. In contrast, it is now increasingly common for states to pass statutes preempting local policymaking on a variety of issues simultaneously. H.B. 2, North Carolina’s now infamous “Public Facilities Privacy & Security Act,” is

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78. See, e.g., FLA. STAT. ANN. § 218.077 (West 2015) (stating that no local ordinance may establish a minimum wage different than the state or federal minimum wage); see also Jay-Anne B. Casuga & Michael Rose, *Are State Workplace Preemption Laws on the Rise?*, BLOOMBERG BNA (July 19, 2016), <https://www.bna.com/state-workplace-preemption-n73014444995/> [<https://perma.cc/2LFL-6QM2>] (indicating that, as of 2016, nineteen states had labor wage preemption laws and eleven more were considering proposed legislation for wage preemption).

79. See, e.g., An Act Relating to the Right to Farm, 2011 Idaho Sess. Laws 229 (amending IDAHO CODE ANN. § 22-4504 (West 1994) to explicitly nullify any local ordinances passed regarding agriculture or agriculture facilities).

80. See, e.g., OKLA. STAT. ANN. tit. 52, § 137.1 (West 2015) (stating that local ordinances may establish reasonable regulations on incidentals to fracking and oil business but may not effectively ban oil or gas business in their jurisdiction).

81. See, e.g., MICH. COMP. LAWS ANN. § 445.592 (West 2016) (providing that no local government may regulate, tax, or prohibit plastic bags).

82. See, e.g., MISS. CODE ANN. § 17-1-51 (West 2013) (stating that no local governments may pass regulation requiring mandatory minimum sick days for employees).

83. See, e.g., *Living Wage Mandate Preemption Act*, AM. LEGISLATIVE EXCH. COUNCIL, <https://www.alec.org/model-policy/living-wage-mandate-preemption-act/> [<https://perma.cc/2WNN-2Z36>] (last visited Mar. 1, 2018) (model preemption act for preempting local living wage laws). An overwhelming majority of ALEC’s 2000-plus legislator-members are Republican. See Mike McIntire, *Conservative Nonprofit Acts as a Stealth Business Lobbyist*, N.Y. TIMES (Apr. 21, 2012), [http://www.nytimes.com/2012/04/22/us/alec-a-tax-exempt-group-mixes-legislators-and-lobbyists.html?\\_r=0](http://www.nytimes.com/2012/04/22/us/alec-a-tax-exempt-group-mixes-legislators-and-lobbyists.html?_r=0) [<https://nyti.ms/2jEpXXx>]. In states where legislators lack large professional staffs, lobbyists like ALEC are critical to drafting and researching legislation. Liz Essley Whyte & Ben Wieder, *Lobbyists Turn Their Attention to State Capitals*, USA TODAY (Feb. 11, 2016, 10:15 PM) <http://www.usatoday.com/story/news/politics/2016/02/11/lobbyists-turn-their-attention-state-capitals/80200392/> [<https://perma.cc/7DDS-FPP4>].

84. Schragger, *supra* note 2, at 1182-83.

85. *Id.* (quoting Richard Briffault, Presentation at Fordham Law School (June 2017)).



an example of a multiple-subject preemption bill.<sup>86</sup> The state enacted the bill in response to Charlotte's ordinance extending nondiscrimination protections to its transgendered residents and visitors, and the public attention on the bill has focused on the statewide ban on individuals' ability to use bathrooms that correspond to their own gender identities.<sup>87</sup> However, H.B. 2 also preempted local authority to set a local minimum wage, to regulate child labor and certain aspects of municipal employment,<sup>88</sup> and to establish local nondiscrimination policies more broadly.<sup>89</sup>

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86. H.R. 2, 2016 Gen. Assemb., 2d Extra Sess. (N.C. 2016), <http://www.ncleg.net/Sessions/2015E2/Bills/House/HTML/H2v0.html> [<https://perma.cc/UT7F-LDC8>]. Schragger describes these efforts as retaliatory preemption:

Retaliatory preemption occurs when state law preempts more local authority than is necessary to achieve the state's specific policy goals, when the state threatens to withhold funds in response to the adoption of local legislation, or when the state threatens all cities with preemptive legislation in response to one city's adoption of a particular policy or ordinance.

Schragger, *supra* note 2, at 1183. He notes: "Not only did the legislature preempt Charlotte's local transgender access ordinance, it also preempted all other North Carolina's cities' anti-discrimination, contracting, and minimum wage laws." *Id.* Although I agree that the scope of H.B. 2's preemption was partially motivated by vindictiveness, preemption in these areas is also a common policy goal in legislatures under Republican control, and it might be equally accurate to describe Charlotte's activities as presenting an opportunity for the legislature to pass a broad preemption bill that otherwise likely would have still had significant support in the statehouse. In other words, although the law swept more broadly than necessary to reverse Charlotte's transgender rights protections, that broad sweep may represent a substantive antiregulatory policy commitment as much as a tactical decision to retaliate against liberal cities.

87. See, e.g., Alicia Adamczyk, *North Carolina's Anti-LGBT Law Is Costing the State Hundreds of Millions of Dollars*, TIME (Sept. 19, 2016), <http://time.com/money/4499488/north-carolina-hb2-bathroom-bill-losing-business/> [<https://perma.cc/52MV-27DF>] ("North Carolina passed HB2, a controversial law that bans transgender people from using the public bathroom of their choosing; instead they must use the bathroom of the gender on their birth certificate."); Mark Berman & Sandhya Somashekhar, *North Carolina Lawmakers Leave 'Bathroom Bill' in Place*, WASH. POST (Dec. 22, 2016), [https://www.washingtonpost.com/news/post-nation/wp/2016/12/21/north-carolina-lawmakers-gather-to-consider-repealing-bathroom-bill/?utm\\_term=.e797c78e9665](https://www.washingtonpost.com/news/post-nation/wp/2016/12/21/north-carolina-lawmakers-gather-to-consider-repealing-bathroom-bill/?utm_term=.e797c78e9665) [<https://perma.cc/2HXN-BCCG>] (referring to H.B. 2 as the law "regulating transgender people's use of public restrooms"); David A. Graham, *The End of North Carolina's HB2?*, ATLANTIC (Dec. 19, 2016, 11:48 AM), <https://www.theatlantic.com/politics/archive/2016/12/the-end-of-north-carolina-hb2/511052/> [<https://perma.cc/GT2Y-YPD7>] (calling H.B. 2 the "bathroom bill"); Steve Harrison, *HB2, Bathroom Safety Emerges as NC Campaign Issue. What Are the Facts?*, CHARLOTTE OBSERVER (Oct. 28, 2016, 5:25 PM), <http://www.charlotteobserver.com/news/politics-government/article111146872.html> [<https://perma.cc/M2EF-EJ2Q>] ("HB2 mandated that people use the bathroom that matches the sex on their birth certificate in government buildings, like schools, airports and libraries."); Jonathan M. Katz, *What Happened to North Carolina?*, N.Y. TIMES MAG. (Oct. 7, 2016), <https://www.nytimes.com/2016/10/07/magazine/what-happened-to-north-carolina.html> [<https://nyti.ms/2jMQYHP>] (referring to the bathroom bill that "stripped legal protections for lesbians, gays and transgender people and made it illegal for transgender people to use public restrooms that don't match the sex listed on their birth certificates"); Joanna Walters, *North Carolina 'Bathroom Bill' Blocking LGBT Protections Unlikely to See Repeal*, GUARDIAN (Dec. 23, 2016, 2:20 PM), <https://www.theguardian.com/us-news/2016/dec/23/north-carolina-lgbt-bathroom-hb2-repeal> [<https://perma.cc/9584-2UHE>] (H.B.2 "dictates that transgender people in North Carolina must use the public bathroom that matches the gender stated on their birth certificate – not the gender they identify as.").

88. H.R. 2, 2016 Gen. Assemb., 2d Extra Sess. (N.C. 2016) (amending in Part II the "Wage and Hour Act," § 95-25.1).

89. *Id.* (amending §§ 143-422.2, 143-422.3, and adding in Part III the "Equal Access to Public Accommodations Act," §§ 143-422.11 to -422.13).

This trend of multi-issue preemption continues. In 2015, Michigan enacted a broad preemption statute that prevents local governments from regulating many aspects of employment, including wages, benefits, application questions, and legal remedies for violations of state wage and hour claims.<sup>90</sup> This legislation prevents local governments from enacting “ban-the-box” ordinances that would prohibit employers from asking about criminal history, ordinances that would seek to ensure employees had predictable, regular schedules to make childcare arrangements easier for working parents, paid sick day requirements, and higher local minimum wages, among other policies.<sup>91</sup> Iowa’s H.B. 295, passed in 2017, preempted not only a similar range of local regulations on employment, but also local regulation of plastic bags and take-out containers.<sup>92</sup>

Such multi-issue preemption bills suggest an increasingly hostile attitude among legislators toward local authority. These preemption bills are not enacted as part of a state regulatory bill contemplating trade-offs between statewide uniformity and local discretion, nor are they narrow preemption statutes crafted at the request of constituents who lost local political battles. Rather, multi-issue preemption legislation strips local authority to regulate in multiple issue areas, without replacing local regulations with a unified statewide regulatory framework. To the contrary, the statewide framework is deregulatory, and often explicitly so.

Nevertheless, even these multi-issue preemption bills are legally similar to traditional preemption legislation. Like those traditional preemption efforts, this legislation declares certain policy areas are out-of-bounds for local governments to regulate. The scope of the declaration is just much larger.

## II. THE ROLE OF POLITICS IN TRADITIONAL PREEMPTION DEBATES

### A. PREEMPTION IN “PARTISAN FEDERALISM”

Preferences about “state” versus “local” control often do not reflect institutional commitments to a particular division of governmental power. Rather, advocates advance their own substantive policy commitments by considering which level of government is most likely to enact their preferences.<sup>93</sup> Thus, although

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90. Municipalities—Local Government Labor Regulatory Limitation Act, MICH. COMP. LAWS. ANN. §§ 123.1381–123.1396 (West 2015).

91. *Id.* For information on these policy ideas blocked by the Michigan law, see generally Christina O’Connell, *Ban the Box: A Call to the Federal Government to Recognize a New Form of Employment Discrimination*, 83 *FORDHAM L. REV.* 2801, 2830–31 (2014) (discussing the effects of different legislation adopted in states); Charlotte Alexander, Anna Haley-Lock & Nantiya Ruan, *Stabilizing Low-Wage Work*, 50 *HARV. C.R.-C.L.L. REV.* 1, 36 n.206 (2015) (discussing San Francisco’s 2014 “Fair Scheduling and Treatment of Formula Retail Employees Ordinance,” the first local scheduling stability ordinance); Rebeccah Golubock Watson, Note, *Defending Paid Sick Leave in New York City*, 19 *J.L. & POL’Y* 973, 980 (2010) (describing the New York City Paid Sick Time Act); Darin M. Dalmat, Note, *Bringing Economic Justice Closer to Home: The Legal Viability of Local Minimum Wage Laws Under Home Rule*, 39 *COLUM. J.L. & SOC. PROBS.* 93 (2005) (discussing the history of local minimum wage laws and the legal basis for local authority).

92. H.R. 295, 87th Gen. Assemb., Reg. Sess. (Iowa 2017).

93. In describing the instrumental role of preemption in partisan debates, I do not mean to abandon the institutionalist perspective or suggest that principled institutionalism is impossible. Rather, my account is descriptive. I provide it not merely because I think it accurately describes much of the current

criticism of preemption statutes may be couched in institutional concerns over local control, it is often a convenient (and politically neutral) way to express disapproval of the state's *substantive* policy stance. Those hostile to local control, including ALEC's local government counterpart, note the irony that advocates rallying around "local control" to protest state law preemption of local fracking bans would likely support a statewide ban on fracking.<sup>94</sup> These "local control" advocates may have little sympathy for localities that argue that a statewide fracking ban ignores their communities' need for jobs and revenue. This does not mean that protesters lack consistent substantive policy commitments; there are rational reasons for advocates to adopt both positions simultaneously. The point is that local control may be a fig leaf for other policy commitments.

Although the current political climate suggests that progressive policies have more support at the local level, this need not be the case. Historically, much of the legal infrastructure of the Jim Crow order was organized at the local level. Local zoning laws prevented families of color from living in white neighborhoods.<sup>95</sup> Local police enforced social norms of segregation and declined to enforce criminal sanctions against white violence.<sup>96</sup> As discussed above, there are recent examples of local conservative policies, including Hazelton, Pennsylvania's adoption of local sanctions against undocumented immigrants and Cincinnati's charter amendment prohibiting the city from adopting civil-rights laws that protect members of the LGBT community.

In this context of a hyper partisan electorate, debates about preemption at the local-state level reflect partisan conflicts at the national-state level. Jessica Bulman-Pozen highlighted the ways in which the assertion of federal or state power reflects partisan dynamics.<sup>97</sup> She defines this "partisan federalism" as "political actors' use of state and federal governments in ways that articulate, stage, and amplify competition between the political parties, and the affective individual processes of state and national identification that accompany this dynamic."<sup>98</sup> As she notes, "[f]ederalism provides the institutional terrain for disputes that are

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debate but also to ensure critical readers can hold my own feet to the fire to the extent that I attempt to preserve an institutionalist perspective.

94. JON D. RUSSELL & AARON BOSTROM, AMERICAN CITY COUNTY EXCHANGE, WHITE PAPER: FEDERALISM, DILLON RULE AND HOME RULE 9 (2016), <https://www.alec.org/app/uploads/2016/01/2016-ACCE-White-Paper-Dillon-House-Rule-Final.pdf> [<https://perma.cc/D48V-S2ZQ>]. While there may be real procedural values in the safeguards of home rule, the arguments about local control often feel substantive rather than procedural. In this way, debates about home rule can parallel debates about U.S. constitutional federalism. *See, e.g.,* Hills, *supra* note 10, at 658.

95. Marisa Bono, *Don't You Be My Neighbor: Restrictive Housing Ordinances as the New Jim Crow*, 3 MOD. AM., 29, 30 (Summer-Fall 2007) (discussing the history of racial zoning during the Jim Crow era).

96. STETSON KENNEDY, JIM CROW GUIDE TO THE U.S.A.: THE LAWS, CUSTOMS AND ETIQUETTE GOVERNING THE CONDUCT OF NONWHITES AND OTHER MINORITIES AS SECOND-CLASS CITIZENS 83-84, 106-07 (U. of Ala. Press 2011) (1959) (discussing police enforcement of housing segregation and non-enforcement of protections against violence).

97. *See generally* Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077 (2014).

98. *Id.* at 1080.

substantive in nature.”<sup>99</sup> Bulman-Pozen suggests state-based identities take on a partisan veil in reaction to national political success or failure.<sup>100</sup>

For example, California Democrats have pushed a “California” identity in response to the election of President Trump. Over sixty-one percent of California voters voted for Hillary Clinton,<sup>101</sup> and the leaders of the California legislature went so far as to issue a joint statement distancing themselves from national politics after the election.<sup>102</sup> California’s elected leaders have promised to challenge many of President Trump’s policies in court. Thus, more “liberal states” are now engaged in an “institutional flip-flop,” arguing that executive powers are limited.<sup>103</sup> Republican state leaders advanced such arguments during the Obama years.<sup>104</sup>

Bulman-Pozen acknowledges that characterizing California as liberal or Texas as conservative masks the number of “losing” voters in each of these states.<sup>105</sup> She argues that partisan federalism might provide an opportunity for partisan losers at the state level to identify with state actions elsewhere. For example, she suggests Texas Democrats may have cheered California’s efforts to fill the gap on climate change policy during the Bush presidency, while Massachusetts Republicans may have admired Arizona’s defiant immigration policy during the Obama years.<sup>106</sup>

At the same time, partisan federalism may also push political identity vertically—down from the state to the local level. Certainly Austin has long prided itself as being outside the mainstream of Texas politics, but Texas’s other major cities—Dallas, Houston, El Paso, and San Antonio—are also Democratic. As Bulman-Pozen notes, Democrats in Texas may have cheered the success of their national party during the Obama years, but the difference between state and local politics may have made local political identity more salient as well.<sup>107</sup>

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99. *Id.*

100. *Id.*

101. ALEX PADILLA, STATEMENT OF VOTE, NOVEMBER 8, 2016 GENERAL ELECTION (2016), <http://elections.cdn.sos.ca.gov/sov/2016-general/sov/2016-complete-sov.pdf> [<https://perma.cc/U2WJ-8ANT>] (last visited Jan., 30 2018).

102. Kevin de León & Anthony Rendon, *Joint Statement from California Legislative Leaders on Result of Presidential Election* (Nov. 9, 2016), <http://sd24.senate.ca.gov/news/2016-11-09-joint-statement-california-legislative-leaders-result-presidential-election> [<https://perma.cc/J7EA-PLF9>] (“Today, we woke up feeling like strangers in a foreign land, because yesterday Americans expressed their views on a pluralistic and democratic society that are clearly inconsistent with the values of the people of California.”).

103. Eric A. Posner & Cass R. Sunstein, *Institutional Flip-Flops*, 94 TEX. L. REV. 485, 486–87 (2016).

104. This is not to say liberals abdicated arguments about the limits of the executive power under President Obama. In the intelligence context, for example, many liberals were quite concerned about Obama’s use of executive power. However, in the context of federalism and states’ rights, liberal states often filed amicus briefs supporting the federal government’s exercise of power. *See* Bulman-Pozen, *supra* note 97, at 1107.

105. *Id.* at 1130–33.

106. *Cf. id.*

107. *Id.* at 1117 & n.179.

Although Bulman-Pozen focuses on the conflict between state and national governments in the United States, much of her analysis would seem to apply equally well to disputes about local power *within* the states. Rick Su's recent work explores intrastate disputes, suggesting that federalism itself is often the framework used to adjudicate these intrastate disputes.<sup>108</sup> As Su notes, claims of federal supremacy may be a local government's strongest legal argument for resisting state authority.<sup>109</sup> Nevertheless, the battle between state and local authority must begin with state preemption of local policy. In this sense, preemption provides "the institutional terrain for disputes that are substantive in nature."<sup>110</sup>

Preemption arguments may therefore be particularly susceptible to institutional flip-flops, much like arguments over "the legitimate authority of the President, Congress, and the Supreme Court" and "the proper relationship between the national government and the states."<sup>111</sup> As Cass Sunstein and Eric Posner note, often "responses [to these questions] seem to depend on the answer to a single (and apparently irrelevant) question: who currently controls the relevant institutions."<sup>112</sup> Acknowledging that some perceived flip-flops may actually reflect differences in the issues, they suggest these flip-flops originate as tactical decisions (should the Republican majority abandon the filibuster?) and involve motivated reasoning (we trust the President, so we believe he has the authority to act).<sup>113</sup>

There are also potential institutional flip-flops over local control, which has long been a policy value for conservative lawmakers. In fact, liberal critiques of the increasing preemption regime have frequently noted the irony of conservative lawmakers resisting federal intervention while meddling at the state level.<sup>114</sup>

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108. Su, *supra* note 9, at 206.

109. *Id.* at 208.

110. Bulman-Pozen, *supra* note 97, at 1080.

111. Posner & Sunstein, *supra* note 103, at 486.

112. *Id.*

113. *Id.* at 491–92.

114. See, e.g., Don Hazen & Steven Rosenfeld, *The Other Right-Wing Tidal Wave Sweeping America: Federal and State Preemption of Local Progressive Laws*, SALON (Feb. 28, 2017, 9:59 AM), [https://www.salon.com/2017/02/28/the-other-right-wing-tidal-wave-sweeping-america-federal-and-state-preemption-of-local-progressive-laws\\_partner/](https://www.salon.com/2017/02/28/the-other-right-wing-tidal-wave-sweeping-america-federal-and-state-preemption-of-local-progressive-laws_partner/) [<https://perma.cc/KD2D-HGJZ>] (quoting Mark Pertschuk, of Grassroots Change and Preemption Watch: "Take a place like Texas where we've done a lot of work, and 10 years ago, most legislators, especially Republican legislators, would never have dreamed of preempting local authority because there is a deep tradition of local control . . . . One out of 100 Republicans that have addressed this issue [honestly] have made a nod to the fact that this is a blatant violation of conservative values. Mostly, it's pure politics."); Mathew Ryan, *Conservative Value Abandoned by Conservative Legislatures*, HARV. C.R.-C.L.L. REV.: AMICUS BLOG (Oct. 26, 2015), <http://harvardcrcl.org/conservative-value-abandoned-by-conservative-legislatures/> [<https://perma.cc/A58U-U472>] ("Conservative lawmakers often promote the virtues of local control. And in many cases, I agree with them. Local control can promote democratic accountability, allow for flexible policy amongst diverse communities, breed laboratories of innovation, and disperse power. All of these justifications seem like a perfectly good reason to allow for municipalities to pass minimum wage laws—and other policies—without state capitals telling these cities how to plan their lives. Either that, or conservatives 'abandon the American Revolution,' and admit they only support local control when it fits their politics.").

Conservatives sometimes try to explain this inconsistency by focusing on the differences between the state and local powers under the Constitution.<sup>115</sup> The persuasiveness of this distinction depends on what is valuable about federalism. If it is simply a commitment to the constitutional text, this distinction is fine, so far as it goes, but then why the focus on the value of local control? Or, to ask the question differently, if local control is a good, why isn't it good all the way down?<sup>116</sup>

It is possible the answer is merely tactical. "Local control" is good insofar as conservative lawmakers think they reliably control state government, but it is less good at the municipal level, where they perceive liberals to be similarly entrenched. Motivated reasoning may also play a role in this debate; local control becomes a stand-in for control by someone with similar policy preferences.

If, as Posner and Sunstein suggest, one of the checks on institutional flip-flops is the likelihood of institutional reversal,<sup>117</sup> then flip-flopping may come to characterize the preemption debate. At the national level, at least, there is a tendency for the Presidency to regularly switch parties, and with control of the Senate often existing only by a thin margin, the Senate also moves relatively easily between parties. Political entrenchment at the local level, however, seems harder to undo. Yes, New York City has had both Republican and Democratic mayors, but its political representation in the state house and city council seem to be fixed.<sup>118</sup> In other states, the political tilt of urban areas is even more firmly established<sup>119</sup>—think Austin or Tucson. Further, it is possible state lawmakers, often subject to term limits, may be less likely to care about the institutional responsibilities created by repeat relationships. Because state lawmakers are in office for shorter periods of time, they may not develop the same concern over the possibility that political power will flip, undermining support for procedural rules that limit the power of majoritarian views.

This analysis suggests the difficulty of creating policy-neutral arguments for or against state preemption of local law. The perceived appropriateness of preemption will often depend on one's views about the importance of the state's policy goals as weighed against the need for local majorities' ability to implement their own policy preferences. For almost everyone, sometimes state preemption will be a good idea, and at other times, local control will be preferable.

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115. RUSSELL & BOSTROM, *supra* note 94, at 2–3.

116. *Cf.* Gerken, *supra* note 18, at 22–25.

117. *Cf.* Posner & Sunstein, *supra* note 103, at 532–33.

118. *See* CHARLES BRECHER ET AL., POWER FAILURE: NEW YORK CITY POLITICS AND POLICY SINCE 1960 60–61 (1993) (describing Democratic dominance on the New York City Council since 1949, when proportional representation was abolished).

119. *See, e.g.*, Phillip Bump, *There Really Are Two Americas. An Urban One and a Rural One.*, WASH. POST: THE FIX (Oct. 21, 2014), <https://www.washingtonpost.com/news/the-fix/wp/2014/10/21/there-really-are-two-americas-a-urban-one-and-a-rural-one> [<https://perma.cc/TX4Q-BGCJ>]; Louis Jacobson, *Why Democrat Governors and Republican Mayors Have Become Rare*, GOVERNING (July 16, 2015), <http://www.governing.com/topics/politics/gov-political-party-success-president-governor-congress-mayor.html> [<https://perma.cc/HA4Y-B55T>]; Anthony Williams, *Stop One-Party Rule in Big Cities*, CITYLAB (Oct. 15, 2017), <https://www.citylab.com/solutions/2017/10/stop-one-party-rule-in-big-cities/542940/> [<https://perma.cc/ENU8-BZEZ>].

Acknowledging that debates about local versus state control will almost never be resolved as pure questions of principle, however, does not mean there are not some substantive policy concerns weighing both toward and against local control.<sup>120</sup> In the next section, I consider these principles.

#### B. POLICY JUSTIFICATIONS FOR LOCAL CONTROL

Preemption—and hyper preemption—are only troubling developments if there is some value to local control. In this section, I highlight three arguments for local control. First, local control may allow a divided populace a better chance of maximizing policy preferences. Second, and relatedly, local control may better be able to respond to problems that are local in nature. Third, local control may offer additional “laboratories of democracy.”<sup>121</sup>

First, allowing localities to pursue their own policy goals allows local residents to maximize their policy preferences. In his now-classic article, *A Pure Theory of Local Expenditures*, Charles Tiebout offers a model of residential choice that justifies variation in local policies.<sup>122</sup> According to Tiebout, taxpayers sort themselves among various localities based on their preference for the bundle of goods each locality offers and the tax payments required to support that bundle of goods.<sup>123</sup> Because different taxpayers will have different preferences about which goods they prefer and at what prices, the existence of multiple jurisdictions ensures that a wider range of taxpayer preferences can be honored.

As many scholars have observed, the simplifications of the Tiebout model elide many complexities of residential choice.<sup>124</sup> Nevertheless, this simplified model makes clear that there are costs to uniform policies when preferences are heterogeneous. Further, although Tiebout’s own model focuses on local government decisions to raise and spend revenue, residents may also have heterogeneous *regulatory* preferences. Such sorting only functions where local governments have sufficient authority to enact the policy preferences of their residents and prospective residents.

For example, Joseph Blocher has argued that both gun control laws and constitutional and statutory limits on those laws should be sensitive to local preferences.<sup>125</sup> He notes sharp divides between rural and urban communities with regard to gun ownership patterns and norms. Urban residents are both less likely to own guns and more likely to support gun control than those who live

120. By institutional factors, I mean factors not motivated by substantive policy or political concerns.

121. Cf. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory . . .”).

122. Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 419–20 (1956).

123. *Id.*

124. See generally THE TIEBOUT MODEL AT FIFTY (William A. Fischel, ed., 2006) (compiling works by prominent scholars, including several discussing the limits of Tiebout’s model).

125. See, e.g., Blocher, *supra* note 10.

in rural communities.<sup>126</sup> Respecting those differences may make good political sense.

Second, local control may improve substantive policymaking by allowing local ordinances to reflect local needs. We do not expect rural areas to have the same zoning restrictions on domestic animals that we expect in urban communities. Density creates problems for urban farmers that have little parallel in rural America. Nor do rural communities have the same problems of congestion and traffic, so we would not expect them to adopt policies aimed at mitigating these problems.

Even in such highly politicized policy areas, these differences may prove policy-relevant. For example, in the gun control context, as Blocher notes, the reasons that urban residents prefer gun control are not only cultural.<sup>127</sup> Those living in urban areas are also significantly more likely to be victims of gun violence.<sup>128</sup> Regulating rural behavior to solve urban problems makes little sense.

State law could make these differentiations in policy, but that necessarily means that rural state legislators are voting on policies that affect urban residents and urban state legislators are voting on policies that affect rural residents. Allowing local communities to make policy themselves helps ensure those crafting the policies are stakeholders in the affected communities.

Third, allowing space for local government policymaking is another way our federalist system encourages innovation.<sup>129</sup> Some local jurisdictions have budgets that exceed those of some small states and thus have the institutional capacity to experiment just as well as states. And even smaller jurisdictions have the capacity to experiment with policies that require less administrative capacity, as they have done with smoking and plastic bag bans.<sup>130</sup>

Further, as Paul Diller has argued, local governments may actually be better suited to experimentation than state governments because there are fewer “vetogates”—opportunities for lobbyists to block policy experiments.<sup>131</sup> For example, unlike state legislatures, which are almost all bicameral, local government experimentation can be put in place with the vote of the city council.<sup>132</sup> Diller suggests that lobbyists may find it difficult to fight a policy battle

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126. *Id.* at 85–86.

127. *Id.* at 100–01 (discussing higher rates of gun crimes in urban areas).

128. *Id.*

129. *Cf.* *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Susan Rose-Ackerman famously argued that free riding would limit these experiments, at least at the state level. *See* Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. LEGAL STUD. 593, 594 (1980). Empirical work, however, has found only mixed evidence to support this prediction. Brian Galle & Joseph Leahy, *Laboratories of Democracy? Policy Innovation in Decentralized Governments*, 58 EMORY L.J. 1333 (2009) (evaluating criticisms of Ackerman’s argument). For example, Ackerman’s article doesn’t consider the incentive that local officials seeking to make a statewide or national name for themselves might have to pursue innovative policies. *Id.* at 1382.

130. Ryan Phelps, *An Empirical Investigation Into the Local Decision to Ban Smoking*, 31 J. APPLIED ECON. & POL’Y 35, 36 (Summer 2012) (discussing attributes of localities most likely to pass local smoking bans).

131. Diller, *supra* note 10, at 1266–67.

132. *Id.* at 1266.



on multiple local fronts and that the relatively lower costs of local elections make it easier for policy entrepreneurs to gain political influence.<sup>133</sup>

Brandeis's account of the role of sub-federal jurisdictions as successful laboratories focused on their usefulness at the national level.<sup>134</sup> However, local policy ideas can proliferate not just vertically, but also horizontally. Recently, for example, we have seen localities sharing their policy ideas for combatting obesity and reforming police.<sup>135</sup> Two decades ago, localities were on the forefront of recognizing the equality of same-sex relationships by offering gay couples the opportunity to register for domestic partnership.<sup>136</sup>

There are real benefits to allowing localities to engage in policymaking. By allowing greater variation in public policy, local policymaking may allow greater alignment between voters and their policy preferences. Further, local policymaking may be better in situations where locals and local officials have ground-level expertise in both the scope of the problem and in developing solutions. Finally, because of the multiplicity of local governments, local policymaking allows for significant policy experimentation. Nevertheless, I discuss in the next section the disadvantages of allowing localities to make policy, especially when such policymaking undermines statewide legal uniformity.

### C. POLICY JUSTIFICATIONS FOR STATE CONTROL

State-level control offers the advantage of uniformity and, with it, an easing of compliance and enforcement burdens which may outweigh the value of local control. In the absence of state-level control, state policymakers may be concerned about the externalities that local policies impose on those outside the local jurisdiction. Finally, states may learn from local policy experiments in ways that suggest the state as a whole may benefit from a uniform policy.

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133. *Id.* at 1260–61. Of course, the flip side of this argument about costs is that special interest groups can also more easily capture local elected officials because of low turnout, low visibility elections. *Id.* The empirical literature certainly suggests this is a problem in local democracy, but I'm not aware of any studies comparing these tradeoffs directly. *Cf.* Jackie Filla & Martin Johnson, *Local News Outlets and Political Participation*, 45 URB. AFF. REV. 679, 680 (2010) (arguing that access to local government news affects voter turnout in municipal elections); Zoltan L. Hajnal & Paul G. Lewis, *Municipal Institutions and Voter Turnout in Local Elections*, 38 URB. AFF. REV. 645, 648 (2003) (arguing that coinciding local elections with national elections will help with voter turnout and coverage).

134. *New State Ice Co.*, 285 U.S. at 311 (Brandeis, J., dissenting).

135. *Bipartisan Mayors Call on Congress to Save Community Oriented Policing Services (COPS) Ahead of Congressional Markup*, U.S. CONF. MAYORS, <https://www.usmayors.org/2017/07/13/bipartisan-mayors-call-on-congress-to-save-community-oriented-policing-services-cops-ahead-of-congressional-markup/> [<https://perma.cc/NAJ8-Z7VY>] (July 13, 2017) (discussing the COPS program and the development and sharing of innovative community policing strategies); *Childhood Obesity Prevention*, U.S. CONF. MAYORS, <https://www.usmayors.org/childhood-obesity-prevention/> [<https://perma.cc/5BFE-GYMF>] (last visited Jan. 31, 2018) (discussing the process for receiving grants, sharing best practices, and participating in the sixth year of the program); *Community Control Over Police Surveillance*, ACLU, <https://www.aclu.org/feature/community-control-over-police-surveillance> [<https://perma.cc/P9WV-6XEV>] (last visited Jan. 31, 2018) (describing the cities that have participated in the Community Control Over Police Surveillance effort to take local control over the use of body cameras).

136. Sanford N. Katz, *Domestic Partnership Laws*, 1997 INT'L SURV. FAM. L. 485, 490–91 (discussing local ordinances' impact on domestic partnerships).

Even when arguments in favor of local control are persuasive, local control may increase compliance and enforcement costs. For example, tax scholars are often critical of the complexity imposed when local jurisdictions implement their own sales and income tax bases. Businesses may face significant compliance costs when the tax base differs across municipal boundaries.<sup>137</sup> Gun control advocates may face similar claims about the difficulties facing gun owners as they move through jurisdictions with different rules regarding gun possession.<sup>138</sup>

And to the extent local policymaking's value derives from the ability of localities to innovate and experiment, this justification also suggests reasons to limit local autonomy. If a local policy experiment is successful, its success may argue for expanding the policy to cover the entire state. For example, the success of local smoking bans portended statewide bans that were to come in the decades following these local experiments.<sup>139</sup> The experience of local governments offered proof that limiting smoking in restaurants would not have the catastrophic consequences on restaurant sales that had been predicted by those trying to defeat these bans. Once the experiments proved successful, state policymakers saw no reason to allow localities to opt-out.<sup>140</sup>

In offering this account of some of the normative arguments made in favor of and against local control, I recognize that this discussion is all-too-brief. Nevertheless, in thinking about debates about the proper scope of local autonomy, these normative arguments should be among the main topics of debate. In the context of any given policy dispute, the resonance of these arguments may differ, and compliance costs associated with the loss of statewide uniformity may be significant or practically non-existent. I argue in the next section that the emerging trend of hyper preemption short-circuits this debate and presumes local policymaking should always be discouraged.

### III. HYPER PREEMPTION

If policy preemption is an old story, its variant in the emerging trend of hyper preemption has not received the attention it deserves. Rather than simply asserting state authority over a specific policy area, presumably after some debate about the merits of the policy in question, these statutes try to dissuade cities from exercising their policymaking authority in the first place. In this Part, I first offer a

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137. Erin Adele Scharff, *Powerful Cities?: Limits on Municipal Taxing Authority and What to Do About Them*, 91 N.Y.U. L. REV. 292, 332–33 (2016).

138. See Blocher, *supra* note 10, at 138 (discussing the difficulties of implementing firearm localism).

139. Charles R. Shipan & Craig Volden, *Bottom-up Federalism: The Diffusion of Antismoking Policies from U.S. Cities to States*, 50 AM. J. POL. SCI. 825, 840 (2006) (discussing the statistical analysis of local smoking ban effects on state policies and concluding that a snowball effect is seen when state legislatures are more professional and able to learn from local actions).

140. By the same token, if the experiment runs and it's a failure, why should state law continue to allow localities to experiment with bad policies? It may be harder to agree on metrics of failure than metrics of success. For example, even if long-run data suggest that changes in soda taxes do not affect rates of chronic conditions associated with obesity, advocates may still argue that revenue from the soda tax provides important funding.

typology of various hyper preemption statutes, and then I discuss the ways these statutes differ from traditional policy preemption.

#### A. HYPER PREEMPTION STATUTES

Under general preemption principles, if a city passes an ordinance that possibly conflicts with state law, it is almost always possible for an affected party to challenge that ordinance. This is the process by which business interests have traditionally used the courts to challenge local regulation.<sup>141</sup> The case would make its way through the state courts slowly, and the locality would bear the costs of its legal representation. The plaintiff would argue that the locality was without the power to craft the regulation or that the regulation was in conflict with an existing state law. The locality would argue that there was no such conflict, or that the state statute itself was unconstitutional—either as an infringement of state home rule law or under a different constitutional provision.

Hyper preemption changes this typical adjudicative process in a variety of ways. Some proposed hyper preemption statutes include broad punitive measures, which apply a fiscally-disabling sanction whenever a locality is deemed in violation with state law. So far, only Arizona has passed such a sweeping hyper preemption statute. Another category of legislation—narrow punitive measures—applies similarly fiscally-disabling sanctions, but only to a discreet area of state preemption law. The numerous sanctuary city bills adopted and proposed by state legislatures are examples of this narrow punitive preemption. Some hyper preemption statutes target public officials for their role in adopting or supporting local laws in conflict with state law. Finally, “blanket preemption” gives broad preemptive effect to state law. I consider each of these types of hyper preemption in turn.

##### 1. Broad Punitive Measures: Arizona’s S.B. 1487

Broad punitive measures impose significant fiscal sanctions on localities who have adopted policy positions that state authorities conclude violate state law. Arizona’s S.B. 1487, the only such broad punitive measure to be enacted by a state legislature, short circuits the traditional legal process for determining preemption challenges. The statute grants Arizona’s attorney general extraordinary powers both to determine whether a locality has violated state law and to punish such violations.<sup>142</sup> Under this new law, any member of the state legislature can report a city, town, or county to the attorney general if that member believes the locality has adopted an “ordinance, regulation, order, or other official action” that is contrary to Arizona law.<sup>143</sup>

The Arizona attorney general’s online complaints page now provides information for reporting violations of S.B. 1487, alongside information about reporting

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141. Diller, *supra* note 17, at 1142–53 (discussing doctrinal distinctions in state preemption doctrine and offering numerous cases where business interests have challenged local regulations).

142. See S. 1487, 52d Leg., 2d Reg. Sess. (Ariz. 2016).

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

consumer fraud, Medicaid fraud, violations of state open-meeting laws, and other, more typical complaints.<sup>144</sup> The attorney general's office has even created a two-page form for members of the legislature to fill out documenting suspected violations.<sup>145</sup>

Under S.B. 1487, once a complaint is formally filed, the attorney general has thirty days to investigate it and make a written report.<sup>146</sup> If the attorney general determines that there has been no violation of state law, the investigation is closed.<sup>147</sup> But if the attorney general determines there is a violation, the locality is given thirty days to cure.<sup>148</sup> If it chooses not to, or if the attorney general concludes the locality's efforts to cure are insufficient, S.B. 1487 *requires* the attorney general to direct the state treasurer to withhold state-shared revenue.<sup>149</sup> State-shared revenue is revenue collected by state taxes that state law earmarks to support local governments.<sup>150</sup> In Tucson, state-shared revenue represents about a quarter of the city's general revenue fund.<sup>151</sup> If the city still doesn't correct the violation, the state treasurer is instructed to redistribute this money to other localities.<sup>152</sup> The statute provides no judicial review of the attorney general's conclusion that the locality has violated state law.

In cases where the attorney general concludes there is a close question and, in the words of the statute, there "may" be a violation, the attorney general is required to file a special action in the Arizona Supreme Court to resolve the issue on an expedited basis.<sup>153</sup> Even here, however, localities are put at a disadvantage. The statute requires the challenged locality to post a bond equal to half its annual state-shared revenue as part of this special action,<sup>154</sup> although the legislation does not specify the consequences of a failure to post the bond.<sup>155</sup> To give a sense of the size of this bond posting, the bond exceeds

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144. *Complaints*, ARIZ. ATT'Y GEN., <https://www.azag.gov/complaints> [<https://perma.cc/PB3E-PLCL>] (last visited Feb. 9, 2018).

145. *Legislator Request for Attorney General Investigation of Alleged State-Law Violations by County, City, or Town*, ARIZ. ATT'Y GEN. (Aug. 2016), [https://www.azag.gov/sites/default/files/sites/all/docs/complaints/new/Legislator%20Request%20Form%20ARS%2041-194\\_011.pdf](https://www.azag.gov/sites/default/files/sites/all/docs/complaints/new/Legislator%20Request%20Form%20ARS%2041-194_011.pdf) [<https://perma.cc/NG97-YZWQ>].

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

147. § 41-194.01(B)(3).

148. § 41-194.01(B)(1).

149. §§ 41-194.01(B)(1)(a), 42-5029(L), 43-206(F).

150. See ARIZONA SENATE RESEARCH STAFF, ISSUE BRIEF: STATE SHARED REVENUES (2006), [www.azleg.gov/briefs/senate/state%20shared%20revenues.pdf](http://www.azleg.gov/briefs/senate/state%20shared%20revenues.pdf) [<https://perma.cc/S32H-FGRA>].

151. Complaint at 5, *City of Tucson v. Arizona*, C20165733 (Ariz. Super. Ct. Dec. 12, 2016).

152. §§ 41-194.01(B)(1)(a), 42-5029(L), 43-206(F).

153. § 41-194.01(B)(2).

154. *Id.*

155. See *id.* As a result of this ambiguity, at least three members of the Arizona Supreme Court found this part of the statute unenforceable because it was unintelligible. *State ex rel. Brnovich v. City of Tucson*, 399 P.3d 663, 683 (Ariz. 2017).

Tucson's reserve fund by about \$5 million.<sup>156</sup>

The message of S.B. 1487: don't try any funny business in an area that *might* be preempted by the state. It is consistent with the message Arizona Governor Doug Ducey delivered in his 2016 State of the State address only a few weeks before then-Arizona Senate President Andy Biggs introduced S.B.1487.<sup>157</sup> In the speech, Governor Ducey told cities "to put the brakes on ill-advised plans to create a patchwork of different wage and employment laws" and suggested he would "use every constitutional power of the executive branch and leverage every legislative relationship to protect small businesses and the working men and women they employ—up to and including changing the distribution of state-shared revenue."<sup>158</sup> S.B. 1487 does exactly this.

With so much revenue at stake, local governments will be tempted to back away from innovations that are within their authority. For example, state laws are not always perfectly drafted, and they may leave ambiguity as to whether particular local policies are or are not preempted. As City Councilwomen Kate Gallego (Phoenix), Lauren Kuby (Tempe), and Regina Romero (Tucson) wrote in a joint editorial, "It is hard to predict how one elected official might go about interpreting compliance with state statute, particularly in a politically charged environment . . . . However, to local communities the message is clear: Cities and towns shall not run afoul of the Ducey administration's agenda."<sup>159</sup>

S.B. 1487 is already chilling local policy innovation. Councilwoman Kuby had led the effort to regulate plastic bags in Tempe.<sup>160</sup> In response to a bag fee adopted by Bisbee and proposals in front of the Tempe City Council, the state preempted local authority to regulate the use of plastic bags.<sup>161</sup> Kuby subsequently challenged that state law in court.<sup>162</sup> Ultimately, the court found Kuby lacked standing to challenge the state law, as Tempe never enacted the potentially conflicting ordinance.<sup>163</sup> The judge in Kuby's case recognized that S.B. 1487 presented a significant obstacle to the plastic bag ban preemption ever being challenged, saying of cities, "[i]t's as if they're damned if they do and damned if they

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156. Complaint at 9, *City of Tucson v. Arizona*, C20165733 (Ariz. Super. Ct. Dec. 12, 2016).

157. Yvonne Wingett Sanchez & Alia Beard Rau, *Bill Targets Local Governments that Violate State Law*, ARIZ. REPUBLIC (Feb. 1, 2016, 7:38 PM), <http://www.azcentral.com/story/news/arizona/politics/2016/02/01/bill-targets-local-governments-violate-state-law/79667158/> [<https://perma.cc/EH2R-JFED>].

158. *Id.*

159. Kate Gallego, Lauren Kuby & Regina Romero, *Our Turn: Andy Biggs' Bill Is Political Blackmail*, ARIZ. REPUBLIC (Feb. 14, 2016, 6:48 PM), <http://www.azcentral.com/story/opinion/op-ed/2016/02/14/our-turn-andy-biggs-bill-political-blackmail/80287872/> [<https://perma.cc/BRX2-APLP>].

160. Darren DaRonco, *Tempe Councilwoman Sues Arizona over Law Blocking Plastic-Bag Bans*, ARIZ. REPUBLIC (Sept. 30, 2015, 3:35 PM), <http://www.azcentral.com/story/news/local/tempe/2015/09/30/tempe-councilwoman-sues-state-plastic-bags-lauren-kuby/73107130/> [<https://perma.cc/56U3-W3GW>].

161. Alia Beard Rau, *Ducey Signs Travel-ID, Plastic Bag Bills*, ARIZ. REPUBLIC (April 14, 2015, 9:37 AM), <https://www.azcentral.com/story/news/arizona/politics/2015/04/14/ducey-signs-travel-plastic-bag-bills/25752817/> [<https://perma.cc/4HWF-RC9B>].

162. Complaint, Kuby v. State, CV2015-011434 (Ariz. Super. Ct. Sept. 30, 2015).

163. Minute Entry, Kuby v. State, CV2015-011434 (Ariz. Super. Ct. Oct. 13, 2016).

don't.”<sup>164</sup> This fall, an Arizona lawmaker filed an S.B. 1487 complaint against the City of Bisbee for its plastic bag regulation. Immediately after the attorney general concluded the bag policy violated Arizona law, Bisbee rescinded the policy.<sup>165</sup>

## 2. Narrow Punitive Measures: Sanctuary City Revenue Bans

While the broad sweep of Arizona's S.B. 1487 has not been copied by other states, the idea of withholding state-shared revenue for violations of state law has caught on around the country—especially in the context of sanctuary cities. With much legal uncertainty over President Trump's plan to cut federal funds to sanctuary cities, states are stepping in and trying to condition state aid on local cooperation with federal immigration officials. These bills require local law enforcement to cooperate with immigration officials and impose a level of cooperation that the federal government could not. While the specifics of each state's legislation differ, the basic contours of the legislation are: (1) a prohibition on local governments or their public officials from setting policies that would limit their cooperation with federal immigration officials; and (2) monetary penalties for localities whose violations are confirmed.

Some states already have penalties for enacting sanctuary city policies. Arizona's S.B. 1070, for example, established civil fines of up to \$5,000 for each day that a locality was in violation of state law requiring local law enforcement to cooperate with federal immigration officers and enforce immigration law.<sup>166</sup> When Phoenix was debating whether to become a sanctuary city, the mayor and city attorney focused on the penalties in S.B. 1070—not the penalties in S.B. 1487—in recommending against the petition requesting Phoenix become a sanctuary city.<sup>167</sup>

State legislatures in Florida, Idaho, Iowa, Michigan, Pennsylvania, Nevada, Tennessee, Virginia, and Wisconsin have considered versions of these bills.<sup>168</sup> Some of these bills are more symbolic than anything and unlikely to be enacted.

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164. Howard Fischer, *Court Halts Lawsuit over Plastic Bag Ban*, ARIZ. CAPITOL TIMES (Oct. 14, 2016, 3:11 PM) <http://azcapitoltimes.com/news/2016/10/14/court-halts-lawsuit-over-plastic-bag-ban/> [https://perma.cc/3YKG-AV8P].

165. Dustin Gardiner, *Bisbee Repealing Plastic-Bag Ban to Dodge State Budget Hit*, ARIZ. REPUBLIC, (Oct. 31, 2017, 4:07 PM), <http://www.azcentral.com/story/news/politics/arizona/2017/10/31/bisbee-plastic-bag-ordinance-repeal-attorney-general-mark-brnovich-ruling/819584001/> [https://perma.cc/E46C-KQTX].

166. ARIZ. REV. STAT. ANN. § 11-1051 (2010).

167. Christina Estes, *Phoenix City Council Rejects Sanctuary City Request*, KJZZ (Feb. 16, 2017, 2:39 PM), <http://kjzz.org/content/436434/phoenix-city-council-rejects-sanctuary-city-request> [https://perma.cc/D784-EU5X]; Kathy Ritchie & Matthew Casey, *Phoenix Mayor: Phoenix Can't Legally Become A "Sanctuary City,"* KJZZ (Feb. 12, 2017, 9:56 AM), <http://kjzz.org/content/433975/phoenix-mayor-phoenix-cant-legally-become-sanctuary-city> [https://perma.cc/8GN5-LR2M].

168. S. 786, 119th Leg., Reg. Sess. (Fla. 2017); H.R. 76, 64th Leg., 1st Reg. Sess. (Idaho 2017); Sanctuary Policy Prohibition Act, H.R. 4105, 99th Leg., Reg. Sess. (Mich. 2017); S. 333, 2017 Leg., 79th Reg. Sess. (Nev. 2017); S. 10, 201st Gen. Assemb., Reg. Sess. (Pa. 2017), S. 4, 85th Leg., Reg. Sess. (Tex. 2017); S. 155, 110th Gen. Assemb., 1st Reg. Sess. (Tenn. 2017); H.D. 2236, 2017 Leg., Reg. Sess. (Va. 2017); S. 275, 103d Leg., Reg. Sess. (Wis. 2017).

Virginia's bill, for example, simply declares that the "General Assembly shall reduce state funding to the extent permitted by state and federal law to any locality found to have violated" its sanctuary city ban but provides no method by which that reduction could happen.<sup>169</sup> In any event, Virginia's Democratic governor, Terry McAuliffe, vetoed the bill.<sup>170</sup> In Idaho, no localities have expressed interest in becoming sanctuary cities,<sup>171</sup> and Democratic control of the legislature will likely prevent enactment of these bills in Nevada.<sup>172</sup> But four states have passed bills punishing sanctuary cities and campuses in the 2017 legislative session: Georgia, Indiana, Mississippi, and Texas.<sup>173</sup>

The federal government cannot require such cooperation without running afoul of the anti-commandeering case law,<sup>174</sup> but there is no anti-commandeering principle under state law. For example, Michigan's proposed bill prohibits local governments from "enact[ing] or enforce[ing] any law . . . that limits or prohibits a[n] . . . officer . . . from communicating or cooperating with appropriate federal officials concerning the immigration status of an individual in this state."<sup>175</sup> The proposed Michigan law then instructs the state treasurer to withhold state revenue sharing funds from local governments that fail to comply with this order.<sup>176</sup>

These bills often go further. For example, Michigan's bill would also require city councils to provide written notice to every member of the jurisdiction's police department of their obligation to cooperate on enforcement of immigration laws, and further requires law enforcement who suspect an arrestee is "not legally present in the United States" to report the arrestee to U.S. Immigration and Customs Enforcement (ICE) officials.<sup>177</sup>

Only one state's legislative proposal seems to require judicial review before imposing these sanctions. Florida's proposed legislation would have required a judicial process for determining whether a locality has violated the state sanctuary city ban, but it would have imposed its fine (of at least \$1,000 a day)

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169. H.D. 2236, 2017 Leg., Reg. Sess. (Va. 2017).

170. *McAuliffe Vetoes Anti-Sanctuary Cities Bill*, U.S. NEWS & WORLD REPORT (Mar. 27, 2017, 5:43 PM), <https://www.usnews.com/news/best-states/virginia/articles/2017-03-27/mcauliffe-vetoes-anti-sanctuary-cities-bill> [https://perma.cc/QK56-CPEH].

171. Natalie Shaver, *New Idaho Bill Would Ban Sanctuary Cities*, KTVB (Jan. 31, 2017, 6:17 AM), <http://www.ktvb.com/news/politics/new-idaho-bill-would-ban-sanctuary-cities/394555042> [https://perma.cc/PM8T-WXCP].

172. *See 2017 State and Legislative Partisan Composition*, NAT'L CONFERENCE OF ST. LEGIS. (Aug. 4, 2017, 10:00 AM), [http://www.ncsl.org/portals/1/documents/elections/Legis\\_Control\\_2017\\_March\\_27\\_11am.pdf](http://www.ncsl.org/portals/1/documents/elections/Legis_Control_2017_March_27_11am.pdf) [https://perma.cc/X5KM-TP6N].

173. GA. CODE ANN. § 20-3-10 (West 2017); IND. CODE §§ 5-2-18.2-2.2 to 5-2-18.2-6 (2017); MISS. CODE ANN. § 25-1-119 (West 2017); TEX. GOV'T CODE ANN. § 752.053 (West 2017).

174. *Printz v. United States*, 521 U.S. 898, 933 (1997) (finding that requiring state officials to implement federal policies was commandeering state resources for federal use); *New York v. United States*, 505 U.S. 144, 161 (1992) (deciding that a take title provision was commandeering the state governments by compelling them to comply with a national policy).

175. Sanctuary Policy Prohibition Act, H.R. 4105, 99th Leg., Reg. Sess. (Mich. 2017).

176. *Id.* (stating that the treasurer "shall withhold the total annual payment amount that the local unit of government receives under the Glenn Steil state revenue sharing act of 1971").

177. *Id.*

retroactively from the date the local policy was put in place.<sup>178</sup> Florida's law also prohibits a locality from receiving any state grant funding for a five-year period beginning the date the locality is adjudicated to be in violation of the statute.<sup>179</sup>

Of these bills, Texas's S.B. 4<sup>180</sup> has received the most attention, with extensive national news coverage of the law.<sup>181</sup> The Texas law also includes sanctions targeting public officials as discussed below.<sup>182</sup> The legal challenges brought under S.B. 4 have been brought under the federal Constitution. The district court issued a broad preliminary injunction concluding that various provisions of the law violated constitutional requirements of due process, undermined freedom of expression, required local governments to potentially engage in unlawful detentions, and contravened the supremacy of Congress in determining immigration policy.<sup>183</sup> A three-judge panel of the Fifth Circuit partially reversed the preliminary injunction in late September, allowing portions of S.B. 4 to go into effect.<sup>184</sup> The panel suggested that the possibility that the state's law could be read to require cooperation in cases where the detainees themselves are unlawful did not support a successful *facial* challenge to the law, and that Congress's plenary immigration authority does not prevent states from requiring local officials to cooperate with immigration authorities.<sup>185</sup> However, the court upheld the injunction as it applied to sanctions for public officials endorsing sanctuary policies and to penalties imposed on localities who limit cooperation with immigration authorities.<sup>186</sup>

Because S.B. 4 raises First Amendment concerns and deals with two complex areas of federal policy (Fourth Amendment requirements and immigration authority), litigants have focused on federal constitutional arguments. Punitive preemption efforts may be most active in legal areas that implicate federal constitutional rights, but not all preemption bills will be subject to federal constitutional challenges. For instance, state bills affecting local environmental regulations or

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178. S. 786, 119th Leg., Reg. Sess. (Fla. 2017).

179. *Id.*

180. S. 4, 85th Leg., Reg. Sess. (Tex. 2017); *see also* TEX. GOV'T CODE ANN. § 752.053 (West 2017) (codifying the key provisions of S.B. 4 after it was passed and signed into law).

181. *See, e.g.*, Dakin Andone, *Texas Senate Oks Bill to Effectively Abolish Sanctuary Cities*, CNN (Feb. 8, 2017, 10:03 PM), <https://www.cnn.com/2017/02/07/us/texas-sanctuary-city-fight/index.html> [<https://perma.cc/8AVA-4XPE>]; Ray Bogan, *Sanctuary Cities Bill Puts Texas County in Tight Spot*, FOX NEWS (May 5, 2017), <http://www.foxnews.com/politics/2017/05/05/sanctuary-cities-bill-puts-texas-county-in-tight-spot.html> [<https://perma.cc/D5GZ-RZML>]; *Federal Judge Blocks Enforcement of Texas' 'Sanctuary Cities' Law*, FOX NEWS (Aug. 30, 2017), <http://www.foxnews.com/us/2017/08/30/federal-judge-blocks-enforcement-texas-sanctuary-cities-law.html> [<https://perma.cc/SSK9-57UD>]; Richard Gonzales, *Federal Judge Temporarily Blocks SB4, Texas Law Targeting Sanctuary Cities*, NAT'L PUB. RADIO (Aug. 30, 2017, 11:11 PM), <https://www.npr.org/sections/thetwo-way/2017/08/30/547459673/federal-judge-temporarily-blocks-sb4-texas-law-targeting-sanctuary-cities> [<https://perma.cc/D2YA-GYBQ>]; Sophie Tatum, *Federal Judge Temporarily Blocks Controversial Texas Immigration Bill*, CNN (Aug. 30, 2017, 11:03 PM), <https://www.cnn.com/2017/08/30/politics/federal-judge-temporarily-blocks-sb4/index.html> [<https://perma.cc/FLJ2-248G>].

182. *See infra* Section III.A.4.

183. *City of El Cenizo v. Texas*, 264 F. Supp. 3d 744 (W.D. Tex. 2017).

184. *City of El Cenizo v. Texas*, 885 F.3d 332 (5th Cir. 2017).

185. *Id.* at 346, 357.

186. *Id.* at 353.



employment conditions may not present any federal constitutional issues, especially if the drafters of such punitive preemption legislation learn from the particular legal shoals in which Texas has found itself as it defends S.B. 4.

#### 4. Expanding Liability for Public Officials: Florida’s § 790.33 & S.B. 4

Florida Revised Statute § 790.33 exemplifies another type of hyper preemption: laws that hold public officials civilly liable for their official acts—or even the acts of their predecessors. If a locality is found to have violated the state’s fire-arm preemption law, the local public officials face personal fines of up to \$5,000 and damages of up to \$100,000.<sup>187</sup> The law also bars localities from using public funds to defend public officials and allows the governor to remove the elected official from office for preemption violations.<sup>188</sup>

Tallahassee Mayor Andrew Gillum and other Tallahassee officials are litigating the reach of this statute.<sup>189</sup> A Florida non-profit that advocates gun ownership rights sued the city and its public officials.<sup>190</sup> They complained that the city had failed to repeal, and continued to publish, various gun control ordinances that violated the state preemption statute.<sup>191</sup> All parties agree that Tallahassee has not enforced its gun control ordinances.<sup>192</sup> Rather, the plaintiff’s claim was that § 790.33 required the city to repeal the ordinances—an act that the Tallahassee City Council had considered, but not done.<sup>193</sup> Tallahassee officials counter-claimed that § 790.33 was unconstitutional under Florida law.<sup>194</sup>

Florida’s Court of Appeals for the First Circuit affirmed the trial court holding that Tallahassee’s failure to repeal the ordinances did not violate the Florida statute.<sup>195</sup> The opinion parses the statute’s bar on the “promulgation” of ordinances that violate the state gun control preemption law and concludes that promulgation does not include the publishing of a previously adopted ordinance.<sup>196</sup> The court refused to reach the question of whether the sanctions authorized by § 790.33 were valid.<sup>197</sup>

Texas’s S.B. 4 anti-sanctuary city bill similarly contains restrictions on the speech of elected officials. The law prohibits a local entity from endorsing “a policy under which the entity or department prohibits or materially limits the enforcement of immigration laws,”<sup>198</sup> and it defines a “local entity” to include “an officer

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187. FLA. STAT. § 790.33(3)(c), (f) (2017).

188. § 790.33(3)(d)–(e).

189. Kriston Capps, *A Florida Mayor Fights the Gun Lobby*, CITYLAB (Jan. 6, 2017), <https://www.citylab.com/equity/2017/01/a-florida-mayor-fights-the-gun-lobby/512345/> [<https://perma.cc/372T-GQ6A>].

190. Complaint, *Fla. Carry, Inc. v. City of Tallahassee*, No. 2014CA001168, 2015 WL 13612020 (Fla. Cir. Ct. May 2, 2014).

191. *Id.* at 5–7.

192. *Fla. Carry, Inc. v. City of Tallahassee*, 212 So. 3d 452, 456 (Fla. Dist. Ct. App. 2017).

193. *Id.*

194. *Id.*

195. *Id.* at 465–66.

196. *Id.* at 464–65.

197. *Id.* at 466.

198. TEX. GOV’T CODE ANN. § 752.053 (West 2017).

or employee of or a division, department, or other body that is part of a municipality, county, or special district or authority, including a sheriff, municipal police department, municipal attorney, or county attorney; and a district attorney or criminal district attorney.”<sup>199</sup> Plaintiffs challenging S.B. 4 asserted that this provision was unconstitutional under the First Amendment.<sup>200</sup> The district court issued a preliminary injunction barring enforcement of this provision,<sup>201</sup> finding plaintiffs would likely succeed on the merits of both their overbreadth and vagueness challenges.<sup>202</sup> The court concluded that, under the law, “any written or oral statement at any time, in any place, and in any manner could be prohibited”—including making statements during meetings, to newspapers or during campaigns. Thus, “engaging in various forms of protected speech is clearly sanctionable under SB 4.”<sup>203</sup> Further, the court noted, even “the Bill’s author struggled to explain the meaning of the endorsement prohibition.”<sup>204</sup> The Fifth Circuit upheld the district court’s injunction as to these provisions.<sup>205</sup>

The Texas litigants’ success suggests that liability for public officials may be the hyper preemption tactic most vulnerable to legal challenge. It is also the tactic that most embodies the shift from traditional preemption to hyper preemption. Under the norms of traditional preemption local governments were often restricted in the policies they could adopt, but they and their officials could still take symbolic action and engage in debates about the issues. Public official liability makes explicit the goal of hyper preemption tactics: silencing local governments.

## 5. Blanket Preemption

More radical hyper preemption proposals have been introduced but have yet to be enacted. At least three states have considered “blanket preemption” legislation that would severely curtail local control.<sup>206</sup> For example, last year, Oklahoma Senator Josh Breechen introduced S.B. 1289, a bill that would have granted field preemptive effect to *all* state statutes.<sup>207</sup> The proposed law stated: “Unless expressly authorized by state statute, a municipality, including those governed by a charter, shall not implement an ordinance, resolution, rule, or regulation that conflicts with or is more stringent than a state statute regardless of when the statute takes effect.”<sup>208</sup> Thus, the bill would preempt local authority even in areas

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199. § 752.051(5)(B)–(C).

200. Memorandum in Support of Plaintiffs’ Application for Preliminary Injunction at 28–30, *City of El Cenizo v. Texas*, 264 F. Supp. 3d 744 (W.D. Tex. 2017) (No. 5:17-cv-404-OLG), 2017 WL 5472161.

201. *City of El Cenizo v. Texas*, 264 F. Supp. 3d 744, 812–13 (W.D. Tex. 2017).

202. *Id.* at 781–84.

203. *Id.* at 780–81.

204. *Id.* at 778–79.

205. *City of El Cenizo v. Texas*, 885 F.3d 332, 353 (5th Cir. 2017).

206. AMS. FOR NONSMOKERS’ RIGHTS, THE EVOLVING FACE OF PREEMPTION: NEW TACTICS TO LIMIT LOCAL CONTROL 2–3 (2016), <http://www.protectlocalcontrol.org/docs/EvolvingPreemption.pdf> [https://perma.cc/3SQC-R9CP].

207. S. 1289, 55th Leg., 2d Reg. Sess. (Okla. 2016).

208. *Id.*

where the legislature passing the original statute intended not to preempt local authority. Similar bills have been introduced in Texas and West Virginia.<sup>209</sup>

Oklahoma and West Virginia already have relatively weak local governments. Although Oklahoma allows municipalities to obtain home rule authority by seeking a municipal charter, its courts still interpret municipal authority narrowly.<sup>210</sup> In West Virginia, “[a]s a result of the constraints on their structural, functional, and fiscal autonomy, local governments . . . face significant difficulties in governing.”<sup>211</sup> In contrast, cities in Texas have long enjoyed expansive home rule authority.<sup>212</sup> And yet, blanket preemption portends a major *structural* change in the city-state relationship in all three states.

Blanket preemption proposals make little sense. These statutes are likely to create significant legal confusion, as they give retroactive preemptive effect to *all* state laws without any sort of reasoned decision making as to whether uniform state law or local control is appropriate for a particular policy area. The institutional factors discussed above for choosing between state and local control are given no weight under blanket preemption. Further, if blanket preemption statutes became law, the problems Paul Diller has identified in implied intrastate preemption doctrine would create endless litigation around existing—and widely accepted—local ordinances.<sup>213</sup> As Diller suggests, in determining whether a state law has implicitly preempted local authorities, state courts apply their “tests inconsistently, sometimes upholding local authority and sometimes constricting it, creating a confusion that invites preemption challenges that might never be brought if the law were clearer.”<sup>214</sup>

It is not clear how much support these blanket preemption statutes have in the legislatures that have considered them, even among ostensible supporters. In a recent white paper, the anti-preemption Americans for Nonsmokers’ Rights (ANR) observed that the Texas blanket preemption proposal was not enacted, but that an aggressive bill preempting local regulation of the oil and gas industry was.<sup>215</sup> ANR observed that the target of the legislature’s ire was local efforts to regulate fracking. ANR suggested that the “strategy evidently is to start with a bill that would preempt everything, and then to reach a ‘compromise’ to preempt only some issues.”<sup>216</sup> In this way, blanket preemption becomes a strategic position for those advocating preemption legislation.

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209. AMS. FOR NONSMOKERS’ RIGHTS, *supra* note 206, at 2–3.

210. David R. Morgan et al., *Oklahoma*, in HOME RULE IN AMERICA: A FIFTY-STATE HANDBOOK 341, 341–42 (Dale Krane et al. eds., 2001).

211. Kenneth A. Klase, *West Virginia*, in HOME RULE IN AMERICA: A FIFTY-STATE HANDBOOK, *supra* note 210, at 445, 451.

212. Charldean Newell & Victor S. DeSantis, *Texas*, in HOME RULE IN AMERICA: A FIFTY-STATE HANDBOOK, *supra* note 210, at 399, 399–407.

213. Diller, *supra* note 17, at 1133–57.

214. *Id.* at 1116.

215. AMS. FOR NONSMOKERS’ RIGHTS, *supra* note 206, at 2–3.

216. *Id.* at 3.

Of course, it is also possible there is no strategic game being played. Blanket preemption may equally reflect a principled commitment to limited local government autonomy.

#### B. WHY HYPER PREEMPTION IS DIFFERENT

These hyper preemption statutes are different from traditional preemption because their goal is not merely to establish state control over a policymaking space. Traditional preemption allows local governments to test the boundaries of that state-controlled space and determine their remaining authority. A debate could be had, within the context of a particular substantive area, whether state-wide interests outweighed arguments for local control. But hyper preemption legislation not only limits local policymaking, it also prevents local governments from challenging the limits in court. In effect, state legislatures are telling local governments to close down their policy shops, and are choosing to ignore (or override) the policy preferences of local voters. Policy innovation diminishes because the risks of losing a legal battle are too great.

In arguing that these hyper preemption statutes represent a new and unique threat to local autonomy, I recognize that many of these tactics are frequently used in other contexts, sometimes controversially. For example, despite the limits *National Federation of Independent Business v. Sebelius* put in place on the congressional spending power, Congress's power of the purse is still broad.<sup>217</sup> Congress may still set forth eligibility criteria for its funding programs, so long as such criteria are related to the program goals.

For example, the Department of Education has authority under Title IX of the Civil Rights Act to restrict funding to state and local schools that discriminate on the basis of race and gender. When the Obama Administration suggested that North Carolina's H.B. 2<sup>218</sup> ran afoul of Title IX,<sup>219</sup> North Carolina did not suggest that it was willing to forego those dollars for the sake of its commitment to state policy; instead, it challenged the Administration's interpretation in court.<sup>220</sup> In

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217. 567 U.S. 519, 580 (2012) (holding that Medicaid expansion was coercive and therefore unconstitutional).

218. See *supra* note 87 and accompanying text.

219. See Letter from Catherine E. Lhamon, Assistant Sec'y for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ. & Vanita Gupta, Principal Deputy Assistant Attorney Gen. for Civil Rights, U.S. Dep't of Justice, Dear Colleague Letter on Transgender Rights 1 (May 13, 2016), <https://www.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf> [<https://perma.cc/2T87-6S4R>]; Press Release, Dep't of Justice, U.S. Departments of Justice and Education Release Joint Guidance to Help Schools Ensure the Civil Rights of Transgender Students (May 13, 2016), <https://www.justice.gov/opa/pr/us-departments-justice-and-education-release-joint-guidance-help-schools-ensure-civil-rights> [<https://perma.cc/YF38-HKWZ>] (press release number 16-568); Scott Horsley, *White House Sends Schools Guidance On Transgender Access to Bathrooms*, NAT'L PUB. RADIO (May 13, 2016, 5:02 AM), <http://www.npr.org/sections/thetwo-way/2016/05/13/477896804/obama-administration-to-offer-schools-guidance-on-transgender-bathrooms> [<https://perma.cc/7G4Y-4235>].

220. Elaina Athans, *Reaction Swift to Obama School LGBT Bathroom Directive*, ABC11.COM (May 14, 2016), <http://abc11.com/politics/reaction-swift-to-obama-school-lgbt-bathroom-directive/1336369/> [<https://perma.cc/RPH5-Q5NZ>] (citing Governor Pat McCrory's official statement in response); Jeff Reeves, *McCrory Responds to Obama's Transgender Public School Restroom Guidelines*, WNCN.COM

contrast, Texas Lieutenant Governor Dan Patrick did suggest that Texas was willing to forego federal dollars.<sup>221</sup>

These tactics, however, are different in the state preemption context because they are superfluous. The state does not need these additional tools to assert the state's policy prerogatives. The federal government *needs* the spending power to entice states to participate in Medicaid,<sup>222</sup> provide educational services to students with disabilities,<sup>223</sup> or raise their drinking age to twenty-one.<sup>224</sup> Congress can't require any of this directly. States, however, face virtually no limits on their authority to force their policy prerogatives on recalcitrant cities.<sup>225</sup> Thus, states should not need to threaten local governments with cuts to their state share revenues or other state financial support to prevent violations of valid preemption statutes.

Nevertheless, the increasing prominence of state hyper preemption legislation suggests state lawmakers no longer find preemption a sufficiently powerful tool. Why this is the case, however, is far from clear. Though state legislatures sometimes consider it necessary to hold local officials personally liable to ensure compliance with certain state laws, states have not seen fit to hold local officials personally liable for state laws generally. Moreover, if what concerns the legislature is the possibility that invalid local laws will go unchallenged, then the legislature could take a less punitive approach. For example, state law could authorize the attorney general to seek a declaratory judgment on the validity of the

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(May 12, 2016, 9:50 PM), <http://wncn.com/2016/05/12/obama-to-issue-decree-on-transgender-access-to-school-restrooms/> [<https://perma.cc/9ZGB-XPKV>].

221. Patrick Svitek, *With "Bathroom Bill," Lt. Gov. Dan Patrick Plows into "Tough Fight,"* TEX. TRIB. (Jan. 7, 2017, 12:00 AM), <https://www.texastribune.org/2017/01/07/bathroom-bill-patrick-plows-tough-fight/> [<https://perma.cc/9MPY-HKJW>] ("Well, in Texas, he can keep his 30 pieces of silver. We will not be blackmailed by the president of the United States.").

222. However, as Justice Ginsberg noted in her dissent in *Sebelius*, Congress could have elected to use its spending power to fully federalize the delivery of healthcare to low-income Americans. Nat'l Fed'n of Indep. Bus. v. *Sebelius*, 567 U.S. 519, 630 (2012) (Ginsberg, J., dissenting) ("In 1965, Congress elected to nationalize health coverage for seniors through Medicare. It could similarly have established Medicaid as an exclusively federal program. Instead, Congress gave the States the opportunity to partner in the program's administration and development.").

223. *Cf.* *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 232 (2009) ("The Individuals with Disabilities Education Act (IDEA or Act) requires States receiving federal funding to make a 'free appropriate public education' (FAPE) available to all children with disabilities residing in the State." (citations omitted)). It seems unlikely that Congress could directly require states to provide such an education. *See, e.g., United States v. Lopez*, 514 U.S. 549, 564 (1995) (describing education as an area "where States historically have been sovereign").

224. *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) ("Here, Congress has acted indirectly under its spending power to encourage uniformity in the States' drinking ages. As we explain below, we find this legislative effort within constitutional bounds even if Congress may not regulate drinking ages directly.").

225. In part this difference arises because of fundamental differences in the conception of government power under state constitutions compared to federal constitutions. The federal government has only the powers provided for it under the federal constitution. States, on the other hand, are deemed to have inherent sovereignty to act, and state constitutions are therefore documents that limit state plenary power. *See* JOHN MARTINEZ & MICHAEL E. LIBONATI, *STATE AND LOCAL GOVERNMENT LAW: A TRANSACTIONAL APPROACH* 6 (2000).

ordinance. Hyper preemption penalties, then, are a tactic that exists separately from the state's authority to preempt local policy decisions. Traditional preemption legislation can instantiate the state's policy preferences, rendering such penalties unnecessary as preemption measures.

State lawmakers have argued that they need these tools to keep local governments in check. After all, it is not possible to arrest a city.<sup>226</sup> It is, however, possible to hold local officials in contempt for refusing to follow a court order, and it is not clear why this would not be a sufficient sanction. Lawmakers also have not put forward significant evidence of local governments undermining state laws in ways that traditional preemption doctrine cannot address. Rather, hyper preemption limits local policymaking prospectively, and preemptively discourages local governments from broadly construing or testing the limits of their authority.

Blanket preemption creates these limits directly by limiting local policymaking on all issues on which state law already speaks. Punitive preemption policies do so indirectly by reminding cities of their limited fiscal capacity. Indeed, the threats to city finances are significant given other state-imposed restrictions on local finances (and especially local property taxes); local governments would not be able to replace this lost revenue absent some significant philanthropic intervention. As generous as Michael Bloomberg is, it is hard to imagine him footing the bill for a locality's general revenue for even a quarter of the year.

The retrospective nature of some of the penalties forces cities to double down on the risks. For example, Florida's proposed sanctuary city statute would bar cities with preemption violations from receiving state funds for five years. Even if local officials believe they have a good legal argument that the state law is invalid—for example, that no law can require cities to comply with constitutionally-invalid ICE detainees—the consequences of losing that argument under Florida law are substantial.

Further, these hyper preemption statutes limit local governments' ability to use their lawmaking authority symbolically or as an organizing tool. Legislation at the state and local level often functions in this way.<sup>227</sup> One could imagine, for

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226. Of course, it is possible for states to assert emergency powers over cities. Federal courts have subjected local law enforcement agencies to independent monitoring. For example, the Oakland Police Department has been subject to court appointed monitoring of the terms of a civil rights settlement since 2010. See *The Negotiated Settlement Agreement*, POLICE DEP'T, CITY OF OAKLAND, <http://www2.oaklandnet.com/government/o/OPD/a/publicreports/DOWD004998> [<https://perma.cc/6DRP-ZU24>] (last visited Mar. 1, 2018). Further, state governments often have extensive powers over local governments in the case of fiscal calamity. See PEW CHARITABLE TRUSTS, *THE STATE ROLE IN LOCAL GOVERNMENT FINANCIAL DISTRESS* 15–16 (2013), [http://www.pewtrusts.org/~media/assets/2016/04/pew\\_state\\_role\\_in\\_local\\_government\\_financial\\_distress.pdf](http://www.pewtrusts.org/~media/assets/2016/04/pew_state_role_in_local_government_financial_distress.pdf) [<https://perma.cc/8KGP-SVGW>] (discussing state intervention options).

227. For example, Cass Sunstein notes that local laws forbidding littering are rarely enforced. Rather, he suggests that “they have an important effect in signaling appropriate behavior and in inculcating the expectation of social opprobrium and, hence, shame in those who deviate from the announced norm.” Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2032 (1996); see also Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339, 341 (2000) (noting the attitudinal theory “implies that local ordinances will have a greater expressive effect than state or national legislation because most approval and disapproval occur locally, where others observe us”).

example, Phoenix officials voting to make the city a sanctuary city, even while acknowledging that state law would limit the extent of the sanctuary the city could offer to undocumented immigrants. And yet, under S.B. 1487, even that declaration could trigger serious financial consequences.<sup>228</sup>

All this suggests that state lawmakers increasingly find their power to preempt local authority insufficient. Rather, state statutes and legislative proposals increasingly add coercive restrictions to preemption provisions, although these punitive measures are not necessary; preemption provisions alone would limit local authority. Measures placing financial penalties on recalcitrant cities and their elected officials, and the interest in broad preemption authority evidence a desire to do more than limit local authority over a specific substantive area. These measures are instead designed to discourage localities from engaging in policy-making in the first place, and to dissuade them from litigating preemption questions in state courts.

#### IV. HYPER PREEMPTION IN THE COURTS

In this Part, I focus on the challenge to Arizona's S.B. 1487.<sup>229</sup> Although state constitutional law differs across jurisdictions, the S.B. 1487 litigation suggests many of the types of state constitutional arguments that litigants in other states could use to challenge hyper preemption statutes. I focus on S.B. 1487 both because it is one of the first hyper preemption statutes to have a challenge reach a final judgment and because the challenges to S.B. 1487 were based solely on state law claims.

Other scholars have done important work raising potential federal constitutional and statutory challenges to hyper preemption statutes. For example, leading local government scholars have written an issue brief for the American Constitution Society (ACS) that identifies potential federal constitutional challenges to preemption legislation,<sup>230</sup> and Richard Schragger has discussed these challenges in his recent work.<sup>231</sup> Federal constitutional challenges to Texas's S.B. 4 have also received significant attention in popular press discussions of hyper

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Also, anti-apartheid activists used local divestment ordinances as an organizing tool. See Andrea L. McArdle, *In Defense of State and Local Government Anti-Apartheid Measures: Infusing Democratic Values into Foreign Policymaking*, 62 TEMP. L. REV. 813, 814–15 (1989) (describing the active role of subnational governments in the anti-apartheid movement and noting that local divestment ordinances served as “formalized expressions of a community’s outrage at South African policies” despite their “at most indirect” effect on business investment decisions). Similarly, sanctuary city legislation may also be seen as having primarily expressive value. See Trevor George Gardner, *The Promise and Peril of the Anti-Commandeering Rule in the Homeland Security Era: Immigrant Sanctuary as an Illustrative Case*, 34 ST. LOUIS U. PUB. L. REV. 313, 332–34 (2015).

228. ARIZ. REV. STAT. ANN. § 41-194.01(B) (2016) (codifying S.B. 1487, 52d Leg., 2d Reg. Sess. (Ariz. 2016)). If Phoenix once again declared itself a sanctuary city, it might run afoul of S.B. 1070’s requirements that local law enforcement cooperate with federal immigration authorities. See ARIZ. REV. STAT. ANN. § 11-1051 (2010).

229. S. 1487, 52d Leg., 2d Reg. Sess. (Ariz. 2016).

230. BRIFFAULT ET AL., *supra* note 13.

231. Schragger, *supra* note 2.

preemption.<sup>232</sup> But not all hyper preemption measures will be subject to successful federal law claims.

The authors of the ACS Issue Brief also suggested potential state court challenges to preemption, including claims that preemption statutes violate home rule, claims that preemption statutes violate anti-special legislation provisions of state constitutions, and claims of procedural violations, such as statutory single-subject requirements.<sup>233</sup> These authors caution, however, that home rule authority is limited in most jurisdictions, and procedural violations can be overcome by reenactment following correct procedures.<sup>234</sup>

These scholars also discuss particular challenges to hyper preemption bills, noting that the Arizona Supreme Court did not directly address the constitutionality of S.B. 1487's punitive provisions.<sup>235</sup> The issue brief, however, did not discuss the specific state law challenges to these provisions. By focusing on state-court challenges to S.B. 1487, I hope to suggest possible state law claims that might limit hyper preemption. I also want to highlight the limits of these legal challenges.<sup>236</sup>

S.B. 1487 was at issue in two different cases involving the City of Tucson. In the first case, Arizona Attorney General Mark Brnovich filed a special action with the Arizona Supreme Court alleging that Tucson's policy of destroying certain handguns ran afoul of the state law that prohibited the destruction of publicly-owned guns.<sup>237</sup> In the second, Tucson sought a declaration in state superior court that S.B. 1487, the state's gun destruction law, was unconstitutional.<sup>238</sup> The state supreme court ultimately accepted the special action and found Tucson's gun ordinance preempted by a valid state law in an opinion that upheld parts of S.B. 1487 and failed to address other constitutional challenges.<sup>239</sup> As a result, Tucson's separate civil suit was rendered moot.

In section IV.A, I first describe Arizona's "personhood for guns" law and Tucson's gun ordinance. I then discuss, in section IV.B, the Arizona Supreme Court opinion. I conclude in section IV.C by exploring some of the legal issues that remain.

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232. See *supra* note 181 and accompanying text.

233. BRIFFAULT ET AL., *supra* note 13, at 11–13.

234. *Id.*

235. *Id.* at 15.

236. In focusing on S.B. 1487, however, I do not canvass the full range of state law claims against hyper preemption measures. Because S.B. 1487 contains no criminal sanctions or sanctions on public officials, I do not discuss claims that may be raised against hyper preemption statutes that do include such sanctions. Suffice to note that those statutes may raise federal as well as state constitutional concerns, including concerns about vagueness, denying due process, immunity from liability for legislative activities, and the First Amendment. See BRIFFAULT ET AL., *supra* note 13. As the litigation on Texas's S.B. 4 suggests, I think such measures are actually more susceptible to legal challenge than laws leveraging state funding. It seems likely that more states will focus on such funding provisions in future hyper preemption legislation.

237. *State ex rel. Brnovich v. City of Tucson*, 399 P.3d 663, 667 (Ariz. 2017).

238. Complaint at 28, *City of Tucson v. State*, C20165733 (Ariz. Super. Ct. Dec. 12, 2016).

239. *Brnovich*, 399 P.3d at 679.



## A. TUCSON'S GUN ORDINANCE AND S.B. 1487

Like many state laws, Arizona law prohibits local governments from regulating the use of firearms.<sup>240</sup> More recently, Arizona enacted a law that prohibits local governments from destroying guns that come into the governments' possession.<sup>241</sup> The statute requires localities to sell their unwanted firearms to federally-licensed firearm dealers.<sup>242</sup>

The City of Tucson, however, had a policy of destroying certain handguns that came into its possession. Tucson's practice was codified in § 2-142 of the Tucson Code, passed in 2005 by the Tucson City Council as Tucson City Ordinance No. 10146.<sup>243</sup> The ordinance allowed the destruction of weapons acquired as crime evidence if those weapons failed to serve a law enforcement purpose and could not be repurposed for police work.<sup>244</sup>

Tucson's gun ordinance may have been an impetus for S.B. 1487.<sup>245</sup> Members of the legislature felt they did not have the ability to ensure compliance with their laws and described their frustration colorfully.<sup>246</sup> Some state legislators seemed not to understand that the Arizona constitution restricted their authority over charter cities and counties.<sup>247</sup> One member of the legislature even compared the state's need to crush independently-minded cities to the North's need to subdue the Confederacy.<sup>248</sup>

Thus, it is unsurprising that one of the first two complaints filed under S.B. 1487 was against Tucson. Representative Mark Finchem filed a complaint with the attorney general's office in October 2016 specifying the ordinance that he

240. ARIZ. REV. STAT. ANN. § 13-3108 (2017).

241. §§ 12-941–12-945, 13-3105(A), 13-3108(F).

242. § 12-945.

243. TUCSON, ARIZ., CODE § 2-142 (2005).

244. *Id.*

245. See Jonathan Clark, *Editorial: State Overreach*, NOGALES INT'L, Dec. 29, 2017, [http://www.nogalesinternational.com/opinion/editorial/editorial-state-overreach/article\\_e68f5f88-ebea-11e7-a87e-034e4edb6782.html](http://www.nogalesinternational.com/opinion/editorial/editorial-state-overreach/article_e68f5f88-ebea-11e7-a87e-034e4edb6782.html) [<https://perma.cc/K3PZ-KCGU>] (“In an effort to stop the City of Tucson from destroying guns seized by police, the Republican-dominated state government passed a law in 2016 that allows the legislature to withhold funds . . . .”); Jude Joffe-Block, *State Law to Punish Cities Sparks Legal Fight*, KJZZ (Dec. 19, 2016, 3:45 PM), <https://theshow.kjzz.org/content/411085/state-law-punish-cities-sparks-legal-fight> [<https://perma.cc/5ERL-8VFAQ>] (“For example, Tucson has some local gun-safety ordinances. [State Senator] Smith is of the opinion the ordinances violate an Arizona law that says gun regulation can only be set at the state level. So Smith and his Republican colleagues passed a new preemption law this year, known as SB 1487, that they say will force cities to follow Arizona law.”).

246. *House Commerce—March 9, 2016: Hearing Before the H. Commerce Comm.*, 52d Leg., 2d Reg. Sess. (Ariz. 2016), [http://azleg.granicus.com/MediaPlayer.php?view\\_id=13&clip\\_id=17223&meta\\_id=352904](http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=17223&meta_id=352904) [<https://perma.cc/U6AS-3DZ3>].

247. *Senate Government—February 17, 2016: Hearing Before the S. Gov't Comm.*, 52d Leg., 2d Reg. Sess. (Ariz. 2016), [http://azleg.granicus.com/MediaPlayer.php?view\\_id=26&clip\\_id=16879](http://azleg.granicus.com/MediaPlayer.php?view_id=26&clip_id=16879) [<https://perma.cc/QX93-P2SF>].

248. *House Commerce—March 9, 2016: Hearing Before the H. Commerce Comm.*, 52d Leg., 2d Reg. Sess. (Ariz. 2016), [http://azleg.granicus.com/MediaPlayer.php?view\\_id=13&clip\\_id=17223&meta\\_id=352904](http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=17223&meta_id=352904) [<https://perma.cc/U6AS-3DZ3>].

claimed violated state law.<sup>249</sup> A month later, on November 14, Attorney General Brnovich completed his investigation.<sup>250</sup> He concluded that the ordinance “may violate” state law, determining that the ordinance conflicts with state law and is “likely” not a matter of purely local concern such that the city could enforce its ordinance despite conflicting state law.<sup>251</sup> Brnovich found that the state likely had an interest in both protecting the Second Amendment and in the statewide market for legal guns, which Tucson’s ordinance affected.<sup>252</sup> Brnovich then gave the city an opportunity to “cure” its possible violation.<sup>253</sup>

On December 6, the Tucson City Council voted unanimously to challenge Attorney General Brnovich’s finding and the constitutionality of S.B. 1487 more broadly.<sup>254</sup> It also voted to suspend the destruction of firearms during the pendency of these legal challenges.<sup>255</sup> That same day, the attorney general filed a Special Action Petition at the Arizona Supreme Court.<sup>256</sup>

A week later, Tucson filed its own lawsuit in Pima County Superior Court.<sup>257</sup> In its filing, Tucson claimed that its state-shared revenue is a bit over \$115 million—almost a quarter of its annual budget—and, should the state withdraw these funds, the city would be unable to pay for essential services, make its debt service payments, and properly fund its pension obligations.<sup>258</sup>

In early January 2017, the Arizona Supreme Court issued an order granting oral argument in the special action, on a wide-range of issues raised by the litigants.<sup>259</sup> In its order, the court reserved the question of its jurisdiction until after oral argument.<sup>260</sup> The court held oral argument on February 14, and it issued its opinion finding Tucson’s ordinance preempted by state law on August 17, 2017.<sup>261</sup>

## B. THE SUPREME COURT DECISION

### 1. Jurisdictional Issues

Although hyper preemption legislation typically makes its punitive provisions reasonably clear, it is often less precise as to enforcement mechanisms and

249. Petition for Special Action at 8 & n.1, State *ex rel.* Brnovich v. City of Tucson, 399 P.3d 663, 667 (Ariz. 2017) (No. CV-16-0301-SA).

250. *Id.*

251. MARK BRNOVICH, INVESTIGATIVE REPORT RE: CITY OF TUCSON ORDINANCE REQUIRING DESTRUCTION OF FIREARMS BY TUCSON POLICE DEPARTMENT, No. 16-002 at 1–2 (2016), <https://www.azag.gov/sites/default/files/sites/all/docs/complaints/CLD-Complaints/16-002%20-%20Investigative%20Report%20-%202011-14-2016.pdf> [<https://perma.cc/3JEQ-X39X>].

252. *Id.* at 2.

253. *See Brnovich*, 399 P.3d at 669.

254. Complaint at 20, City of Tucson v. State, C20165733 (Ariz. Super. Ct. Dec. 12, 2016).

255. *See Brnovich*, 399 P.3d at 667.

256. *Id.*

257. Complaint, City of Tucson v. State, C20165733 (Ariz. Super. Ct. Dec. 12, 2016).

258. *Id.* at 5–7.

259. Order, State *ex rel.* Brnovich v. City of Tucson, 399 P.3d 663 (Ariz. 2017) (No. CV-16-0301-SA).

260. *Id.*

261. *Brnovich*, 399 P.3d 663 (Ariz. 2017).

appellate rights. Arizona's S.B. 1487, for example, created two different procedures distinguished by whether the attorney general finds that a city *has* violated state law or merely that it *may have* violated state law.<sup>262</sup> The statute itself, however, does not lay out a standard for the attorney general to use in distinguishing between those two cases.<sup>263</sup> The Arizona Supreme Court interpreted these jurisdictional issues to invite more judicial review of the attorney general's conclusions.<sup>264</sup>

Tucson argued that the state supreme court did not have jurisdiction to hear the special action because the law only provided for a special action in cases where the attorney general found that a city ordinance "may violate" state law.<sup>265</sup> Here, Tucson argued the state's filings indicated that the attorney general believed Tucson's ordinance did violate state law, and as a result, a special action was unavailable. The court rejected that argument and adopted a broad reading of its jurisdiction.<sup>266</sup> According to the court, the attorney general should only reach a "does violate" conclusion "when existing law clearly and unambiguously compels that conclusion."<sup>267</sup> Because there was no case law directly addressing the constitutionality of the state's gun control preemption law, the court held that the attorney general's "may violate" conclusion—and, with it, the court's jurisdiction—was appropriate.<sup>268</sup>

This jurisdictional holding permits the court to hear the special action, but it also significantly limits the attorney general's authority under S.B. 1487 to withhold funds from a locality prior to judicial review of the alleged conflict between state and local law. The court suggests that unless state law is clear and unambiguous, the attorney general should seek a special action prior to withholding funds.

The city also argued that the statute's mandatory jurisdiction over these special actions violated the Arizona constitution's vesting of procedural authority with the judiciary because it concerned procedural, rather than substantive, rulemaking authority.<sup>269</sup> The court rejected this argument as well, finding no conflict between the statute's mandatory jurisdiction and the court's procedural rules.<sup>270</sup>

## 2. Separation of Powers

One key question about hyper preemption legislation—and specifically punitive hyper preemption measures—is whether its enforcement mechanisms and

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

263. *Id.*

264. *Brnovich*, 399 P.3d at 669.

265. *Id.* at 670. Tucson preferred to litigate the case by directly challenging the constitutionality of S.B. 1487 in state trial court, presumably because it wanted the opportunity to develop a record as to the adverse consequences of S.B. 1487's punitive provisions. *Cf.* Complaint, City of Tucson v. State, C20165733 (Ariz. Super. Ct. Dec. 12, 2016) (evidencing, insofar as this action was filed by the City of Tucson, the City's preference for a trial court level adjudication).

266. *Brnovich*, 399 P.3d at 670.

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.* at 671.

penalties violate state separation of powers doctrine. In particular, punitive hyperpreemption provisions often dictate enforcement actions in ways that suggest undue legislative interference with executive branch functions. Moreover, because under some proposals executive branch officials determine whether localities have violated state law, there are questions about whether the legislation requires the executive branch to take on judicial functions. The Arizona Supreme Court was unreceptive to these separation of powers arguments.

As the court characterized Tucson's argument, the city suggested that S.B. 1487 violated the state constitution's separation of powers doctrine "by directing the Attorney General to investigate alleged violations upon a single legislator's request and, if the Attorney General concludes that a local ordinance 'may violate' state law, requiring him to file a special action in this Court 'to resolve the issue.'"<sup>271</sup> Arizona courts evaluate separation of powers claims under a four-part test that looks to "(1) the essential nature of the power being exercised; (2) the legislature's degree of control in the exercise of that power; (3) the legislature's objective; and (4) the practical consequences of the action."<sup>272</sup>

The court held that the powers S.B. 1487 vested in the attorney general to investigate violations and distribute appropriations were "essentially executive functions."<sup>273</sup> While Tucson argued that *requiring* the attorney general to investigate alleged violations of state law inappropriately interfered with that office's enforcement discretion, the court found no separation of powers violation, because the legislative branch had the authority only to initiate complaints.<sup>274</sup> The executive "retains [the] discretion to apply independent legal analysis and judgment when opining whether a municipal action violates state law," so legislative control was minimal.<sup>275</sup> Further, the court found that the focus of the legislature's ire was recalcitrant cities, not executive authority, and that the law's practical consequences were unlikely to "interfere with executive powers or prerogatives."<sup>276</sup>

The court dismissed the city's arguments that S.B. 1487 infringed on the courts' judicial powers. Because the court construed the attorney general's authority to find violations of state law narrowly, the court rejected arguments that the statute required the executive to abrogate judicial authority.<sup>277</sup>

The court did not specifically address Tucson's argument that the law violates the state constitutional requirement that the legislature direct the use of tax dollars. Tucson had argued in its superior court complaint that the law ran afoul of this constitutional requirement by directing the attorney general to change the distribution of state-shared revenues based on the office's finding of state law

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271. *Id.* at 668.

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.* at 669.

violations, and it reasserted this argument before the Arizona Supreme Court.<sup>278</sup> The court's separation of powers analysis, however, suggests it would be unsympathetic to this argument; the court observed in passing that disbursing appropriations was an executive function.<sup>279</sup>

To be sure, states' separation of powers doctrines vary, and other state courts could reach different conclusions on similar facts. However, to the extent that these doctrines are generally not well-developed at the state level, holdings from other jurisdictions may be particularly influential. In this sense, the Supreme Court of Arizona's rejection of these separation of powers arguments bodes poorly for the success of such challenges elsewhere.

### 3. Bond Requirement

As I argued above, one of the goals of hyper preemption legislation is to discourage local governments from litigating questions of preemption in state courts.<sup>280</sup> The text of S.B. 1487 seemed to require a local government to put up a bond equal to six months of its state-shared revenue to challenge the state's findings in a special action.<sup>281</sup> In its lower court brief, Tucson represented that merely posting such a bond would require it to cut city services, as the bond amount exceeded the city's reserve fund. The city also argued that such a bond requirement violated due process by interfering with Tucson's ability to litigate.<sup>282</sup>

The court, however, declined to address Tucson's argument that S.B. 1487's bond requirement was unconstitutional. The state had not required Tucson to post bond to defend itself in the special action, and the court therefore concluded that the question of whether the statute required the court to order such a bond absent the state's request was not before it. The majority, however, expressed concerns about the size of the bond, observing, "we share the City's concerns regarding the bond's purpose, basis, practical application, and constitutionality."<sup>283</sup>

Three justices joined a concurrence that would have reached the validity of the bond requirement. The concurrence would have held the bond requirement "unintelligible and unenforceable."<sup>284</sup> As the concurrence aptly argued, poor legislative draftsmanship rendered the provision impossible to understand for several reasons, including the fact that the statute did not specify any consequences for failing to post the bond.<sup>285</sup> However, the concurrence also signaled skepticism that

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278. Tucson attached a copy of its superior court complaint to its reply to the petition for special action, and in its brief requested that the court allow additional briefing on the constitutional issues. Appendix to Motion to Dismiss Petition and Response to Petition for Special Action, *State ex rel. Brnovich v. City of Tucson*, 399 P.3d 663 (Ariz. 2017) (No. CV-16-0301-SA) (Exhibit 1: Complaint, *City of Tucson v. State*, C20165733 (Ariz. Super. Ct. Dec. 12, 2016)); Respondent's Supplemental Brief at 13–17, *State ex rel. Brnovich v. City of Tucson*, 399 P.3d 663 (Ariz. 2017) (No. CV-16-0301-SA).

279. *Brnovich*, 399 P.3d at 668.

280. See *supra* Section III.B.

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

282. Complaint at 8–10, *City of Tucson v. State*, C20165733 (Ariz. Super. Ct. Dec. 12, 2016).

283. *Brnovich*, 399 P.3d at 671.

284. *Id.* at 685 (Gould, J., concurring in part and in the result).

285. *Id.* at 683.

the size of the bond posed a constitutional problem and instead suggested that such a provision, if amended for clarity, could be enforceable.<sup>286</sup>

Because the Arizona Supreme Court did not reach the issue, the constitutionality of the bond provision remains an open question. A fair reading of the court's opinion, however, suggests some judicial concern with bond provisions that might limit local governments' access to courts. Much like the court's holding on the jurisdictional issue, the court expressed a willingness to interpret S.B. 1487 as retaining for the court the primary role in defining the scope of the state's preemptive authority.<sup>287</sup>

#### 4. Substantive Preemption Claim

The bulk of the court's opinion focused on the substantive question of preemption. The court ultimately concluded that Tucson's gun ordinance was preempted by state law.<sup>288</sup> Tucson itself had admitted that its ordinance contravened state law, but maintained that the state law was an invalid exercise of state authority given the city's charter status.<sup>289</sup>

Arizona's constitution provides the opportunity for any city with a population greater than 3,500 to adopt a charter, and Arizona's home rule jurisprudence has long suggested that "[t]he purpose of the home rule charter provision of the Constitution was to render the cities adopting such charter provisions as nearly independent of state legislation as was possible."<sup>290</sup> As a result, Arizona courts have held that state legislation implicating a matter of "strictly local municipal concern . . . [has] no application to a city which has adopted a home rule charter."<sup>291</sup> Nevertheless, such charter cities remain subject to state law that implicates statewide concerns or mixed questions of state and local concern.

The court found that the state's gun destruction law "implicate[d] the state's police power in several respects: the disposition of forfeited or unclaimed property, the conduct of law enforcement officers, including their handling of unclaimed property, and the regulation of firearms."<sup>292</sup> Although the court had previously held that a city's disposition of real property was a matter of purely local concern, the court rejected Tucson's efforts to apply that rule to all city-owned property, including personal property like guns.<sup>293</sup> The court read its previous decisions narrowly, rejecting the view that prior precedent had held the disposition of *all* property a matter of purely local concern.<sup>294</sup> Instead, the court read its prior cases as holding that the Arizona legislature had not intended to restrict

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286. *Id.* at 684.

287. *Id.* at 671–72 (majority opinion).

288. *Id.* at 675.

289. *Id.* at 673.

290. *Id.* (quoting *City of Tucson v. Walker*, 135 P.2d 223, 226 (Ariz. 1943)).

291. *Id.* (quoting *City of Tucson*, 135 P.2d at 226).

292. *Id.* at 675.

293. *Id.* at 677–78.

294. *Id.* at 678.

charter city authority to dispose its real property.<sup>295</sup>

The court's opinion signaled a narrow reading of charter city authority to pursue policies that conflict with state law. The majority did, however, disavow a separate concurrence arguing that charter authority does not provide *any* immunity from conflicting state law.<sup>296</sup> Further, the opinion affirmed that at least one area—local elections—was a subject of purely local concern.<sup>297</sup> Nevertheless, it is hard to read the court's opinion and discern additional subjects that would qualify as purely local matters. The court's substantive preemption decision, much more than its treatment of S.B. 1487, will most impact local autonomy, and restrict local policymaking, going forward.

### C. STATE LAW CHALLENGES GOING FORWARD

#### 1. Substantive Preemption Law Remains Critical

For those concerned about hyper preemption, the most positive way to view the outcome in S.B. 1487 is that the Arizona Supreme Court interpreted the attorney general's authority under the statute quite narrowly. The most punitive portions of S.B. 1487 are triggered by the attorney general's finding that an ordinance does (rather than "may") violate state law. Such a finding begins the thirty-day cure period, after which the statute directs the attorney general to begin withholding state shared revenues.<sup>298</sup> However, the supreme court's analysis in *City of Tucson* suggests that a "does violate" finding is only appropriate "when existing law clearly and unambiguously compels that conclusion."<sup>299</sup> The court held that such a standard is not met when "the issue is not settled by existing case law."<sup>300</sup> As the court went on to observe, "[o]therwise, it is this Court's responsibility 'to resolve the issue' via a process that, as the State notes, is 'akin to a standard declaratory judgment action.'"<sup>301</sup>

In so holding, the state supreme court may have taken some of the teeth out of S.B. 1487. It would seem that, unless a previous court decision dealt with a state law and an ordinance that were on all-fours with the ordinance at issue, the court retains its primary role in determining the ordinance's validity. S.B. 1487 may have created a fast-track for reviewing the validity of local ordinances that arguably violate state law through the existence of the statute's special action, but that fast-track may not pose significant fiscal risk to cities. Cities would likely prefer that such disputes be adjudicated via the normal dispute resolution channel of trial and appellate court, to allow them to develop the record and to have more time to negotiate a favorable settlement, but the special action at least offers some judicial review prior to enforcement.

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295. *Id.*

296. *Id.* at 674–75.

297. *Id.* at 677.

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

299. *Brnovich*, 399 P.3d at 670.

300. *Id.*

301. *Id.* (citations omitted).

To the extent that such challenges are mostly resolved through special actions, the central problem facing localities will not be the threat of state shared revenue withholding but, rather, the state supreme court's narrow interpretation of local authority.

## 2. Legal Challenges to Hyper Preemption

The preceding analysis assumes that the attorney general will follow the supreme court's guidance and not aggressively seek to use her authority to find violations of state law. As I discuss in Part V, political checks may encourage some attorneys general to remain circumspect in their response to legislative complaints, but political checks may not always be enough to outweigh the political win scored when a recalcitrant city is forced to adhere to the preferences of those holding statewide offices.

Courts may look less favorably, however, on attempts by the executive branch to impose hyper preemption sanctions prior to judicial review. In resolving the *Tucson* case, the court repeatedly asserted its own authority to determine the validity of state law.<sup>302</sup> To the extent S.B. 1487 lacks a clear opportunity for local governments to judicially appeal a decision by the attorney general that its ordinance violates state law, the court seems likely to read such a right into the statute and to delay enforcement of sanctions until the judiciary has had its own chance to opine on the conflicting statute and ordinance. Further, the opinion expresses skepticism about the constitutionality of the statute's bond requirement<sup>303</sup>—further evidence that the court take seriously the need for cities to be heard in court.

On the other hand, the court's opinion in *State ex rel. Bronvich v. Tucson* suggests that separation of powers challenges to punitive preemption legislation may be less successful. Although every state's separation of powers doctrine will differ slightly, state-level separation of powers doctrine is much less developed than its federal counterpart, and cities may not be best positioned to contest these violations. After all, they are not directly harmed by the alleged violations, and in some states there may be issues of standing for cities raising separation of powers challenges.

Finally, the Arizona Supreme Court opinion provides little guidance for those seeking to challenge hyper preemption legislation as disproportionately punitive. Tucson's complaint in superior court did make an argument that pulling *all* state shared revenue as a result of *any* statutory violation created a problem,<sup>304</sup> but it did not advance this argument in the special action.<sup>305</sup>

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302. See, e.g., *id.* at 669 (“In either case, the Court must decide, or at least retains discretion to decide, the issue.”).

303. *Id.* at 671.

304. Complaint at 5, *City of Tucson v. State*, C20165733 (Ariz. Super. Ct. Dec. 12, 2016).

305. See Respondent's Supplemental Brief, *State ex rel. Bronvich v. City of Tucson*, 399 P.3d 663 (Ariz. 2017) (No. CV-16-0301-SA).



### 3. The Risks of Litigation: Thinking Offensively

Finally, those seeking to challenge hyper preemption laws should think about the risks of creating unfavorable precedent. The risk is not simply that state courts will uphold the constitutionality of many hyper preemption techniques. Rather, as the Tucson litigation suggests, when courts hear hyper preemption cases, they are also likely to resolve the underlying substantive preemption issue. Prior to the court's holding, there was a colorable—perhaps even persuasive—argument that, under existing case law, Tucson had the right, as a charter city, to dispose of its own guns how it pleased. But not a single justice on the Arizona Supreme Court concluded that Tucson's gun ordinance concerned a matter of purely local concern.<sup>306</sup> It is this holding that really threatens local policy autonomy. Charter cities in Arizona have been left with scarcely more than a fig leaf of charter authority to resist statewide laws.

Other state constitutions and courts may provide slightly more protection for local authority, but the shifting composition of state supreme courts may signal that in many states a rollback of local authority is likely. Republican domination of state governorships has also led to conservative majorities on many state supreme courts.<sup>307</sup> In Arizona, only one sitting justice was appointed by a Democratic governor, and current Governor Doug Ducey—a Republican—recently succeeded in his efforts to get two seats added to the Arizona Supreme Court.<sup>308</sup> This “court-packing” plan would make it difficult for a future Democratic governor to create a court with more ideological balance.

Further, even successful litigation of these issues poses the risk of hollow victories. Not only will many substantive preemption provisions stand, but the state also has perfectly legal mechanisms to stymie local authority—not the least of which is its ability to reallocate intergovernmental transfers.

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306. See *State ex rel. Brnovich v. City of Tucson*, 399 P.3d 663.

307. Cf. Billy Corriher, *Big Business is Still Dominating State Supreme Courts*, CTR. FOR AM. PROGRESS (Sept. 1, 2016, 2:13 PM), <https://www.americanprogress.org/issues/courts/reports/2016/09/01/143420/big-business-is-still-dominating-state-supreme-courts/> [<https://perma.cc/E7P2-4463>]. For example, all five members of Indiana's Supreme Court were appointed by Republican governors. Rick Callahan, *Indiana Governor Names Judge Goff to State Supreme Court*, U.S. NEWS & WORLD REPORT (June 12, 2017, 3:10 PM), <https://www.usnews.com/news/best-states/indiana/articles/2017-06-12/indiana-governor-to-announce-state-supreme-court-pick> [<https://perma.cc/6JHK-M7RW>]. Georgia considered a court packing plan that would add two seats to their seven-seat supreme court. Alex Kotch, *Conservatives Jockey to Tighten Grip on State Supreme Courts Across the South*, FACING SOUTH (Mar. 4, 2016), <https://www.facingsouth.org/2016/03/conservatives-jockey-to-tighten-grip-on-state-supr.html> [<https://perma.cc/5N8L-7BUR>].

308. Yvonne Wingett Sanchez, *Gov. Doug Ducey Signs Legislation to Expand Arizona Supreme Court*, ARIZ. REPUBLIC (May 18, 2016, 11:35 AM), <http://www.azcentral.com/story/news/politics/arizona/2016/05/18/gov-doug-ducey-signs-legislation-expand-arizona-supreme-court/84544008/> [<https://perma.cc/Z25H-PBFB>].

## V. POLITICAL CHECKS ON HYPER PREEMPTION

Aside from the legal challenges to hyper preemption, there are also political and institutional checks on these efforts.<sup>309</sup> In this Part, I consider some factors that might check hyper preemption statutes and suggest the ways these checks will shape this phenomenon going forward. In particular, I argue that Arizona's broad punitive preemption may well be an outlier and that more-targeted punitive preemption bills are more likely to be the norm. As I discuss below, executive branches may not be interested in constantly enforcing state prerogatives against local officials. In addition, hyper preemption tactics make more political sense in the context of politically salient issues, and without narrowing hyper preemption tactics to particular political issues, conservative lawmakers risk giving a weapon to future liberal attorneys general.

## A. EXECUTIVE BRANCH RELUCTANCE AND OPPOSITION

Under a broad preemption statute like S.B. 1487, state lawmakers are given remarkable discretion. They can pick which complaints to file and, in doing so, consider the political consequences of doing so. S.B. 1487 provides the attorney general with less discretion: the attorney general must investigate all complaints.<sup>310</sup> This may not be a great position for a politician with further political ambitions: finding a violation of a statute risks having to cut off significant state funding from a local budget, but not finding a violation may alienate those seeking to rally political opposition to a local government policy.

Other state hyper preemption proposals put state executive branch officials in similar positions. For example, Michigan's proposed sanctuary city legislation instructs the state treasurer to withhold state shared revenue if a local government fails to cooperate with federal immigration enforcement, as required under state law.<sup>311</sup>

Not all hyper preemption legislation grants the executive branch such authority. Under Texas's S.B. 4 the attorney general is required to file a civil suit in state court if a potentially meritorious complaint is filed against a local jurisdiction's immigration policy.<sup>312</sup> Moreover, not all attorneys general may make the same political calculations. Texas Attorney General Ken Paxton, for example, understands his political base to be hyper-conservative, and believes that attacking

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309. Richard Schragger's discussion of preemption offers an excellent discussion on political checks on preemption more broadly. *See generally* Schragger, *supra* note 2. He discusses the ways preemption efforts are affected by the national political landscape, *id.* at 1165–67, limited by business interests, *id.* at 1228–30, and could be potentially defeated by an urban–suburban coalition, *id.* at 1230–32. Those arguments, in my view, are targeted at defeating “anti-urban” preemption more broadly. In a political landscape where substantive preemption legislation will remain popular, my arguments focus on limits on hyper preemption measures specifically. I suggest, however, that legal challenges to hyper preemption may often fall back on traditional substantive preemption.

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

311. H.R. 4105, 99th Leg., Reg. Sess. (Mich. 2017).

312. S. 4, 85th Leg., Reg. Sess. (Tex. 2017).

Texas's liberal cities is a consistently winning political formula.<sup>313</sup> As a result, this institutional check may not manifest itself in all states.

Nevertheless, as more state legislatures consider adopting hyper preemption statutes, it is worth considering the ways in which statewide elected officials might be indirect allies in narrowing or defeating such proposals.

#### B. HYPER PREEMPTION DEPENDS ON POLITICALLY SALIENT ISSUES

Prior to the resolution of the Tucson litigation, legislators filed only two complaints with the attorney general: the complaint against Tucson and a complaint against the Town of Snowflake, which was dismissed as moot by the Arizona Attorney General.<sup>314</sup> As of late February 2018, six additional complaints have been filed in the wake of the supreme court decision.<sup>315</sup> Of those six, the attorney general found one violation of state law, issued one “may violate” report, and found that three complaints were without merit; the one other complaint remains open.<sup>316</sup> The first post-litigation complaint challenged the Phoenix Police Manual's instructions as to when and where law enforcement should ask about immigration status.<sup>317</sup> The second complaint challenged Bisbee's ordinance banning plastic bags.<sup>318</sup> The attorney general found that the Phoenix Operating Orders were readily reconciled with state requirements, and, thus, did not violate state law.<sup>319</sup> After finding Bisbee in violation, the city abandoned its ordinance

313. Lauren McGaughy, *Texas AG Ken Paxton Will Seek Re-Election as He Fights Criminal Indictments*, DALLAS MORNING NEWS (Oct. 25, 2017) <https://www.dallasnews.com/news/texas-politics/2017/10/25/texas-ag-ken-paxton-will-seek-re-election-fights-criminal-indictments> [<https://perma.cc/U4U2-N36Z>] (“[Paxton] has targeted cities like Austin for local laws that ban plastic bags.”); Ken Paxton, *Texas AG: Sanctuary Cities Ignore the Rule of Law*, BREITBART (Dec. 3, 2016), <http://www.breitbart.com/texas/2016/12/03/texas-ag-sanctuary-cities-ignore-rule-law> [<https://perma.cc/X539-FR2F>] (“We cannot allow individuals to avoid justice and accountability. We cannot allow sanctuary cities to harbor these criminals. We cannot allow city officials to skirt the law at their whim.”); Press Release, Attorney Gen. of Tex. Ken Paxton, AG Paxton Joins Lawsuit to Protect Property Rights of Short-Term Rental Owners in Austin (Oct. 5, 2016), <https://www.texasattorneygeneral.gov/news/releases/ag-paxton-joins-lawsuit-to-protect-property-rights-of-short-term-rental-own> [<https://perma.cc/P33R-M5S4>] (“‘This blatant overreach by local government infringes upon the constitutional rights of people who own and stay at short-term rentals,’ Attorney General Paxton said. ‘The city of Austin’s draconian ordinance defies logic and common sense, and must be struck down.’”).

314. Letter from Brunn W. Roysden III, Assistant Attorney Gen., State of Ariz., to Paul Boyer, State Representative, State of Ariz. (Nov. 1, 2016), [https://www.azag.gov/sites/default/files/sites/all/docs/press-release/press-release-files/2017\\_Files/Orders/Ltr%20to%20Rep%20Boyer%20Closing%20Snowflake%20File%2011-1-2016.pdf](https://www.azag.gov/sites/default/files/sites/all/docs/press-release/press-release-files/2017_Files/Orders/Ltr%20to%20Rep%20Boyer%20Closing%20Snowflake%20File%2011-1-2016.pdf) [<https://perma.cc/ZB4F-KQX2>].

315. *SB1487 Investigations*, ARIZ. ATT’Y GEN.’S OFFICE, <https://www.azag.gov/complaints/sb1487-investigations> [<https://perma.cc/S55H-G222>] (last visited Mar. 1, 2018). In addition, one complaint was filed while the Tucson litigation was pending, but that complaint was withdrawn. *Id.*

316. *Id.*

317. MARK BRNOVICH, INVESTIGATIVE REPORT RE: CITY OF PHOENIX POLICE OPERATIONS ORDER 4.48, No. 17-002 (2017), <https://www.azag.gov/sites/default/files/sites/all/docs/complaints/CLD-Complaints/17-002%20-%20Investigative%20Report%20-%2010-16-2017.pdf> [<https://perma.cc/5LNU-KKQC>].

318. MARK BRNOVICH, INVESTIGATIVE REPORT RE: CITY OF BISBEE ORDINANCE O-13-14 REGULATING DISPOSABLE CARRYOUT BAGS, No. 17-003 (2017), <https://www.azag.gov/sites/default/files/sites/all/docs/complaints/CLD-Complaints/FINAL%20-%2017-003%20Investigative%20Report%20-%2010-23-2017.pdf> [<https://perma.cc/SR29-WA2W>].

319. BRNOVICH, *supra* note 317, at 7.

rather than risk losing state funds.<sup>320</sup> A third complaint challenged Phoenix Police Department's "Transparency Protocol," which governs the department's dissemination of information following office-involved shootings and other critical incidents.<sup>321</sup> A state lawmaker challenged this policy as a violation of privacy protections afforded to law enforcement employees by state law,<sup>322</sup> but the attorney general concluded there was no violation of the relevant statute.<sup>323</sup> The remaining three complaints deal with a city's grant of tax exemptions, a town's regulation of trucking on municipal roads, and a county's requirement of an animal control inspection under its zoning ordinances. In other words, of the first eight complaints that the attorney general investigated, half have dealt with highly contentious issues of local control involving the politically salient issues of firearms, immigration, environmental policies, and police department responses to officer shootings.

It is no surprise that some complaints deal with high profile preemption violations. What is more interesting is that there has yet to be a rash of complaints about more run-of-the-mill issues, driven by local losers in zoning disputes and other principally local matters. Without impugning the good faith of localities, I suspect that, given lawmakers' penchant for writing broad and sometimes unclear statutes, there are many arguable cases of local governments failing to fully comply with state law.

Legislators will likely be loath to file S.B. 1487 complaints against the jurisdictions they represent. If they have ambitions for statewide office, they may also be reluctant to cause severe sanctions to be imposed on other jurisdictions. Moreover, S.B. 1487 sanctions may simply be too great to be used in the ordinary course of policy disputes. On certain highly contentious issues, for example gun control or immigration, the political salience of the underlying policy dispute may make filing the complaint a political win. However, this may not be the case for many potential violations.

The problem for the drafters of S.B. 1487 is that not all members of the legislature will make such careful political calculations. As the number of S.B. 1487 complaints grows norms may change around filing such complaints. It is entirely possible that there has not yet been time for it to become a routine political tool. Indeed, nothing in the statute, prevents this exact outcome.

#### C. BIPARTISAN CHECKS ON HYPER PREEMPTION

The trend toward hyper preemption threatens more than progressive policies that have support at the local but not state level. Rather, this trend threatens home

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320. Gardiner, *supra* note 165.

321. MARK BRNOVICH, INVESTIGATIVE REPORT RE: PHOENIX POLICE DEPARTMENT'S CRITICAL INCIDENT TRANSPARENCY PROTOCOL, No. 17-004 (2017), <https://www.azag.gov/sites/default/files/sites/all/docs/complaints/CLD-Complaints/201712041150.pdf> [<https://perma.cc/5CQB-S274>].

322. *Id.* at 1.

323. *Id.* at 3.

rule more generally; there are reasons to object to these policies even if you support state preemption policies substantively.

First, laws like S.B. 1487 that punitively target cities for any violation of state law may result in complaints, investigations, and legally-required enforcement actions against violations of state law that are unrelated to the public-policy disputes that are at the heart of the preemption movement. One could easily imagine a legion of complaints driven by developers as they object to city council decisions about development deals.<sup>324</sup> Although ensuring localities comply with state laws governing local zoning power is a valid goal, it makes little sense for a developer with the ear of a member of the state legislature to be able to wield the threat of an S.B. 1487 complaint. The potential penalty may be vastly disproportionate to the locality's violation (if any).

Second, although large urban centers are bastions of liberal political support, S.B. 1487 applies to all localities equally, and there is no necessary political valence to living in an incorporated area. In Arizona, for example, S.B. 1487 applies equally to the liberal strongholds of Tucson, Tempe, and Bisbee, as it does to much more conservative cities like Mesa, Gilbert, and Scottsdale. It is almost unimaginable that Scottsdale would pass an ordinance that the conservative state legislature would target for preemption on substantive policy grounds. Yet Scottsdale understood that S.B. 1487 threatened it, and opposed the measure.<sup>325</sup>

Supporters of S.B. 1487 may see it as helping them advance their particular substantive policy agenda, but the text of the statute does not ensure that will be the case. As a result, and as Scottsdale seems to have understood, any potential violation of state law invites a potential nuclear option. Losers in local political disputes now have this weapon in their arsenal. Not only can they seek a preemption statute from the state, but that preemption statute becomes more difficult to challenge in court by virtue of the punitive provisions of S.B. 1487.

#### D. POLITICAL ADVANTAGES OF NARROW HYPER PREEMPTION

Narrow hyper preemption statutes avoid many of these difficulties and are therefore more likely to be enacted.<sup>326</sup> Many of the institutional and political limits on broad hyper preemption statutes like S.B. 1487 apply with less force to more typical hyper preemption efforts that apply only to a single preemption statute.

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324. I am indebted to Richard Briffault for this point. The Attorney General has just referred the first such complaint to the Arizona Supreme Court after a state legislator complained about the City of Tempe's grant of development tax incentives. MARK BRNOVICH, INVESTIGATIVE REPORT RE: CITY OF TEMPE ORDINANCES 02017.39 AND 02017.48 AUTHORIZING LAND AND IMPROVEMENT LEASES, No. 18-001 at 11 (2018), <https://www.azag.gov/sites/default/files/sites/all/docs/complaints/CLD-Complaints/18-001/FINAL%20-%2018-001%20Investigative%20Report.pdf> [<https://perma.cc/5NB8-2MTP>].

325. CITY OF SCOTTSDALE, LEGISLATIVE UPDATE: WEEK OF MARCH 14-18, 2016 (2016), <http://www.scottsdaleaz.gov/Assets/ScottsdaleAZ/Government+Relations/Legislative+Updates/03-18-16-legislative-update.pdf> [<https://perma.cc/Z8E4-T8AD>].

326. See *supra* Section III.A.2.

For example, consider the new wave of bills targeting local law enforcement policies with respect to undocumented immigrants.<sup>327</sup> In this context, the salience of state-level policy goals may be much greater than the salience of the question of local government authority. The laws are not “targeting cities,” but instead targeting local efforts to support “criminal aliens.”

Further, such laws are less subject to the risks of institutional flip-flop. Should the statehouse flip parties, the new party in power could not use these narrow hyper preemption statutes to pursue a new set of substantive policy objectives.

As a result, it seems likely that these narrow hyper preemption statutes will spread unless successful state constitutional law challenges can be brought against them. But it is possible that many punitive preemption provisions may be difficult to challenge. If the local ordinance does not violate state law, localities may find their challenges to the underlying hyper preemption statute moot, as happened in Tallahassee’s attempt to challenge Florida’s sanctions against public officials who supported gun control.<sup>328</sup> And as suggested by the S.B. 1487 litigation, to the extent a locality’s ordinance is preempted by state law, there’s strong incentive for the locality to repeal the ordinance with alacrity. In this sense, the “success” of hyper preemption statutes may be difficult to measure insofar as tracking which policy proposals are abandoned (or never created) can be challenging where hyper preemption disincentivizes creative local policymaking.

#### CONCLUSION

Hyper preemption laws put localities in a difficult position. As one Arizona judge put it, cities are “damned if they do and damned if they don’t.”<sup>329</sup> They are threatened with severe (and often disproportionate) financial sanctions for drafting ordinances that challenge the limits of state preemption law, even when—but for the threat of sanctions—they would otherwise have acted within the bounds of their allocated policymaking authority.

Perhaps if the difference between matters of “statewide” and “local concern” were more clearly delineated in the case law, this would be less of a problem. But these categories are porous: it is an open question whether an ordinance is addressing a matter of local or statewide concern. In addition, state legislation is not always a model of clarity and precision; in some cases, it may be unclear whether the state law actually preempts local authority. In either situation, however, cities must think twice before litigating given the uncertain nature of their legal claim and the significant revenue penalties for pursuing it.

State lawmakers seem likely to introduce and pass record numbers of preemption statutes. Some of those statutes already reflect hyper preemption principles, and there may be legal and political reasons to believe such efforts constitute overreach. But if such proposals do become law, they will dramatically reshape the relationship between the state and its local governments.

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327. See *supra* note 168.

328. See Fla. Carry, Inc. v. City of Tallahassee, 212 So. 3d 452, 462 (Fla. Dist. Ct. App. 2017)

329. Fischer, *supra* note 164.