

IMPEDING INNOVATION: STATE PREEMPTION OF PROGRESSIVE LOCAL REGULATIONS

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The rhetoric surrounding the benefits of local governments has changed: In response to many cities passing progressive local regulations, state and federal legislators have shifted from emphasizing local control to promoting broad state preemption statutes designed to reduce local power. Additionally, as a result of the work of national interest groups, much of this state-level legislation has become increasingly homogenized. Although not an exclusively Republican state–Democratic city paradigm, most recent preemption legislation has in fact been in this context. Thus, as Democrats and progressives increasingly concentrate in cities, state preemption exacerbates existing state–city tensions and in the process stifles local experimentation and innovation.

This Note examines and identifies recent trends in the subject matter and tactics of recent preemption legislation. It assesses these trends using some of the purported benefits of federalism and localism theories. Ultimately, this Note seeks to highlight the intricacies of the current debate in order to emphasize the importance of local governments in enacting innovative solutions to local problems.

INTRODUCTION

In March 2016, the passage of the Public Facilities Privacy and Security Act (colloquially known as N.C. H.B. 2) brought North Carolina into national headlines.¹ N.C. H.B. 2 was multifaceted: It mandated that individuals use the bathroom correlating to the biological sex on their birth certificates, thus prohibiting transgender individuals from using the bathroom correlating to their gender identities.² It also redefined the state

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1. See, e.g., Dave Philipps, *North Carolina Bans Local Anti-Discrimination Policies*, N.Y. Times (Mar. 23, 2016), <http://www.nytimes.com/2016/03/24/us/north-carolina-to-limit-bathroom-use-by-birth-gender.html> (on file with the *Columbia Law Review*) (assessing N.C. H.B. 2). National media outlets also covered the political fallout associated with the passage of the bill, as numerous businesses refused to do business in the state. See, e.g., Katy Steinmetz, *The NBA Took the All-Star Game Away from Charlotte. Here's Why It Matters*, Time (July 24, 2016), <http://time.com/4419503/nba-all-star-game-charlotte-north-carolina-lgbt/> [<http://perma.cc/6U53-KY8N>] (listing the repercussions of N.C. H.B. 2, including the NBA deciding to hold its All-Star Game in another state, PayPal reversing its plan to bring jobs to the state, celebrities and artists cancelling performances in the state, and individuals in Hollywood refusing to film in the state).

2. See N.C. Gen. Stat. § 143-422.2 (Supp. 2016) (repealed 2017).

antidiscrimination law, implementing a policy that notably excluded any protections for sexual orientation or gender identity.³

While N.C. H.B. 2 is an important facet of the fight for legal protection for transgender individuals' rights, it also represents a piece of another equally important legal debate: the ability of local governments to pass progressive local ordinances and regulations designed to protect and support citizens within their borders. The North Carolina state legislature passed N.C. H.B. 2 in response to a progressive Charlotte ordinance expanding protection for LGBTQ individuals within the city.⁴ N.C. H.B. 2 explicitly prohibited municipalities from passing local antidiscrimination ordinances and banned municipalities from increasing the minimum wage within their borders.⁵

While N.C. H.B. 2 garnered substantial national attention, this state-local fight is not unique to North Carolina. In response to state and federal governments' inability or unwillingness to do so, many local governments have increasingly passed regulations and ordinances related to the minimum wage and the workplace,⁶ antidiscrimination,⁷ and environmental protection.⁸ In response, states have repeatedly sought to strike down local regulations in these areas. Although perhaps one of the most comprehensive preemption bills in the nation, N.C. H.B. 2 is not unique: Arkansas and Tennessee both have similar preemption laws explicitly banning cities from passing local antidiscrimination regulations protecting LGBTQ individuals.⁹ State preemption in other areas is rampant as well. For

3. See N.C. Gen. Stat. § 143-422.2(a) ("It is the public policy of this State to protect . . . the right and opportunity of all persons to seek, obtain and hold employment without discrimination or abridgement on account of race, religion, color, national origin, age, biological sex or handicap by employers which regularly employ 15 or more employees."). The 2016 revision added the word "biological" before "sex." Compare N.C. Gen. Stat. § 143-422.2 (2015), with N.C. Gen. Stat. § 143-422.2 (Supp. 2016).

4. See Charlotte, N.C., Ordinance 7,056 (Feb. 22, 2016). The Ordinance expanded protections to include protection on the basis of "sexual orientation, gender identity, [and] gender expression." *Id.* It further removed a provision that had excluded "[r]estrooms, shower rooms, bathhouses and similar facilities which are in their nature distinctly private" from the antidiscrimination law. *Id.*

5. See N.C. Gen. Stat. § 143-422(c); see also Philipps, *supra* note 1 (assessing N.C. H.B. 2).

6. See *infra* notes 107–117 and accompanying text (discussing local workplace and minimum wage regulations). As of July 10, 2017, forty localities had raised the minimum wage above state level. Minimum Wage Tracker, Econ. Policy Inst., <http://www.epi.org/minimum-wage-tracker/> [<http://perma.cc/4EZC-36CT>] (last updated July 10, 2017).

7. See *infra* notes 118–128 and accompanying text (discussing LGBTQ protections).

8. See *infra* note 103 (discussing environmental regulations and state preemption).

9. See Ark. Code Ann. § 14-1-403 (Supp. 2015) ("A county, municipality, or other political subdivision of the state shall not adopt or enforce an ordinance, resolution, rule, or policy that creates a protected classification or prohibits discrimination on a basis not contained in state law."); Tenn. Code Ann. § 7-51-1802 (2015) ("No local government shall by ordinance, resolution, or any other means impose on or make applicable to any person an anti-discrimination practice, standard, definition, or provision that shall deviate from, modify, supplement, add to, change, or vary in any manner from [state law] . . .").

example, at least twenty-two states preempt local regulations concerning the minimum wage and other labor concerns.¹⁰

State preemption of local regulations and ordinances represents a broader partisan divide currently taking place across various levels of government throughout the country. Many of these preemptive state laws can be traced to groups like the American Legislative Exchange Council (ALEC), a conservative nonprofit organization with close ties to legislators that proposes model bills often enacted at the state level.¹¹ While not all preemption bills are tied to ALEC, “[T]he overarching sentiment stressed by ALEC, that conservative causes will be best (and most swiftly) served by eliminating local control, has permeated the last two years of legislative sessions in many of the states in which the legislature switched party control in 2012.”¹²

There is, however, a fundamental contradiction in conservative organizations and individuals pushing for state preemption of local regulations: Until recently, these very groups have emphasized local control in certain areas to overcome *progressive* policies, particularly those the Obama Administration put in place.¹³ With a Republican presidential administration and largely Republican-led state legislatures, these groups are now seeking to quash the very local control for which they advocated.¹⁴ Yet, as

10. See Jay-Anne B. Casuga & Michael Rose, Are State Workplace Preemption Laws on the Rise?, Bloomberg BNA (July 19, 2016), <http://www.bna.com/state-workplace-preemption-n73014444995/> [<http://perma.cc/GM8R-C5PK>].

11. 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> (on file with the *Columbia Law Review*) (examining ALEC’s lobbying); see also Curtis L. Morrison, Fracker in the Rye: The Necessity of Federal Fracking Waste Regulation and a Fracking Waste Regulatory Commission, 37 Whittier L. Rev. 87, 109 (2015) (assessing ALEC’s “preemption strategy at the state level to defeat local progressive gains in issues like living wage laws and sick leave policies at the local level” and its similar fracking preemption strategy). For an example of a model bill, see generally Living Wage Mandate Preemption Act (Am. Legislative Exch. Council 2013), <http://www.alec.org/model-policy/living-wage-mandate-preemption-act/> [<http://perma.cc/MHT7-JEPK>].

12. Vanessa Zborek, “Yes, in Your Backyard!” Model Legislative Efforts to Prevent Communities from Excluding CAFOs, 5 Wake Forest J.L. & Pol’y 147, 173 (2015) (assessing the influence of ALEC’s preemption law tactics).

13. For example, U.S. Representative Paul Ryan, a Republican from Wisconsin and Speaker of the House of Representatives, has publicly stated: “[T]he principle of subsidiarity, which is really federalism, meaning government closest to the people governs best” is “how we advance the common good.” David Brody, Only on Brody File: Paul Ryan Says His Catholic Faith Helped Shape Budget Plan, CBN News (Apr. 10, 2012), <http://www1.cbn.com/thebrodyfile/archive/2012/04/10/only-on-brody-file-paul-ryan-says-his-catholic-faith> [<http://perma.cc/3JN9-WWXJ>].

14. An example of such rhetoric is that of Keith Faber, a Republican state senator from Ohio, who stated, “[W]hen we talk about local control, we mean state control.” Reid Wilson, GOP Aims to Rein in Liberal Cities, Hill (Jan. 5, 2017), <http://thehill.com/homenews/campaign/312766-gop-aims-to-rein-in-liberal-cities> [<http://perma.cc/XWB8-27AL>].

states increasingly seek to preempt local regulations, cities have sought to push back against states when possible.¹⁵

This Note examines recent trends in the state–local preemption dynamic to identify shifts in the subject matter and tactics of preemptive legislation.¹⁶ Numerous scholars have addressed the power of local cities to pass progressive legislation.¹⁷ While these analyses usually discuss state preemption as a potential roadblock, they typically do not fully address the nature of modern preemptive legislation.¹⁸ There has been little attempt to systematically address new trends in state preemption. While state preemption is admittedly a difficult problem to solve, this Note seeks to identify troublesome new state strategies and highlight avenues for judicial and public action.

Part I examines the limited power of cities and their relationship with states, focusing on the development of “home rule,” a term used to describe state constitutional or legislative schemes designed to empower local governments. It further discusses the nature of state preemption of local regulations. Finally, it observes the role of local governments within federalism and localism theories, with a particular emphasis on partisan dynamics. Part II analyzes trends in the most recent wave of preemptive legislation. It assesses the areas in which preemption laws are focused as well as new preemption tactics, which are becoming increasingly homogenized across states due to nationwide political efforts. It then highlights the troublesome implications of these laws. It asserts that state preemption restricts the power of local governments, threatens progressive innovation, and interferes with the democratic process. Finally, Part III suggests

15. See *infra* Part III (examining local attempts to overcome preemption).

16. See *infra* Part II (discussing the “new” forms of state preemption law).

17. See, e.g., Heather K. Gerken, *The Supreme Court, 2009 Term—Foreword: Federalism All the Way Down*, 124 *Harv. L. Rev.* 4, 10 (2010) [hereinafter Gerken, *Foreword*] (asserting that local governments and sublocal institutions, when serving as the “minority” relative to larger national political movements, provide “the democratic churn necessary for an ossified national system to move forward”); Olatunde C.A. Johnson, *The Local Turn; Innovation and Diffusion in Civil Rights Law*, 79 *Law & Contemp. Probs.*, no. 3, 2016, at 115, 136 (discussing the role of state and local governments in civil rights progress).

18. See, e.g., Paul Diller, *Intrastate Preemption*, 87 *B.U. L. Rev.* 1113, 1115 (2007) (examining implicit preemption in great detail, but asserting that “express preemption” gives courts a “relatively simple” task—“to determine whether the challenged ordinance falls within the subject matter that the legislature expressly preempted”). Professor Olatunde Johnson, however, provides a relatively in-depth examination of state preemption, noting the danger of what she calls “manufactured preemption” created in response to “local inclusionary legislation.” Johnson, *supra* note 17, at 136. Professor Johnson recognizes that “there are no simple solutions for these challenges.” *Id.* She expresses hope, however, that sometimes the merits as to local authority may succeed, and that success in one state may “help[] to mute arguments against adoption in another location.” *Id.* at 136–37. Nonetheless, she recognizes the possibility “that these arguments about deploying local power to address forms of inequality will not prevail.” *Id.* at 137.

possible solutions for rebutting the most troublesome laws, focusing on the role of courts and the public.

This Note does not, however, intend to imply that state preemption can *never* be beneficial, nor does it seek to outline the exact circumstances in which it may be beneficial. Instead, it focuses on trends developing in the state preemption field, points to the fundamental contradiction in the rhetoric of conservative legislators and organizations that push for these laws, and highlights many of the troublesome implications of these developments.

Although challenging preemptive legislation is a difficult legal task, this Note ultimately concludes that the judiciary serves a necessary function in outlining and protecting the boundaries of local governments. Further, by highlighting the nature of preemption legislation, the public may be better able to respond to aggressive preemptive tactics through the political process. This Note seeks to provide information and tools for individuals to challenge these laws on a case-by-case basis, and to further provide information and tools to enrich the political process—which is often the definitive solution to combat many state preemption laws. This Note emphasizes that as preemption laws have become increasingly homogenized across state lines, the importance of local governments to enact innovative solutions to local problems grows.

I. THE ROLE OF LOCAL GOVERNMENTS IN THE NATIONAL SYSTEM

Although local governments serve an important role in the national system, they have limited power relative to the state. This Part examines the development of the power of local governments¹⁹ and their ability to enact local ordinances and regulations. Section I.A examines the development of the relationship between state and local governments and how localities have gained increasing power. Section I.B explains the structure and mechanisms of preemptive legislation and briefly examines judicial interpretation of such legislation. Section I.C assesses the normative implications of the current state–local dynamic using federalism and localism theories as guides.

19. This Note will often refer to “cities” and “local governments” but does not intend to limit its analysis to these governmental structures. Other forms of local governments include towns, suburbs, and counties, each of which play an important role in local government theory. Legal theory typically focuses on the “city,” broadly defined to also include what is, in social science terms, typically considered a suburb. See Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 *Colum. L. Rev.* 346, 349 (1990) [hereinafter Briffault, *Our Localism: Part II*] (“[L]ocal government law does not distinguish within the category of municipal corporation between city and suburb, and legal theory generally has not taken the differences between cities and suburbs into account.”).

A. *The Development of Local Power*

Local governments have traditionally been viewed as “creatures of the [s]tate,” devoid of any inherent power.²⁰ Focusing on cities solely as “creatures of the [s]tate,” however, fails to fully consider the legal, practical, and political relationships between federal, state, and local governments, and “leads to the assumption that the legal system provides no place for local control.”²¹ While cities have admittedly *limited* control, many cities now have substantial power in certain aspects of self-autonomy and self-regulation; further, they act in important areas when the state fails to do so.²² This section examines the development of this power in order to provide a legal framework for assessing state preemption laws.

1. *The Limited Power of Cities.* — Within the constitutional framework, cities have admittedly limited power.²³ The U.S. Constitution does not discuss local government power, instead reserving all powers apart from those granted to the federal government to the states.²⁴ Early state and local government theory focused on the role of cities as subordinate to state power, an idea that continues to serve an important backdrop to state–local relations today.

In *Hunter v. City of Pittsburgh*, an early case defining local power, the U.S. Supreme Court asserted that “[m]unicipal corporations are political subdivisions of the [s]tate” and “[t]he [s]tate, therefore, at its pleasure may modify or withdraw all such powers . . . without the consent of the citizens, or even against their protest.”²⁵ The Court further asserted that “the [s]tate is supreme, and its legislative body, conforming its action to

20. See, e.g., *Coleman v. Miller*, 307 U.S. 433, 441 (1939) (“Being but creatures of the State, municipal corporations have no standing to invoke the contract clause or provisions of the Fourteenth Amendment of the Constitution in opposition to the will of their creator.”).

21. Briffault, *Our Localism: Part II*, *supra* note 19, at 392.

22. See Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 *Colum. L. Rev.* 1, 1 (1990) [hereinafter Briffault, *Our Localism: Part I*] (“Most local governments in this country are far from legally powerless. . . . State legislatures . . . have frequently conferred significant political, economic and regulatory authority on many localities. State courts . . . have repeatedly embraced the concept of strong local government Localism is deeply embedded in the American legal and political culture.”).

23. David J. Barron, *A Localist Critique of the New Federalism*, 51 *Duke L.J.* 377, 391 (2001) [hereinafter Barron, *Localist Critique*] (“In short, state constitutional law overwhelmingly favors expansive state supremacy over local governments.”); see also Matthew J. Parlow, *Progressive Policy-Making on the Local Level: Rethinking Traditional Notions of Federalism*, 17 *Temp. Pol. & C.R. L. Rev.* 371, 383–84 (2008) (explaining judicial interpretation of local governments’ powers throughout history).

24. U.S. Const. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

25. 207 U.S. 161, 178–79 (1907).

the state constitution, may do as it will.”²⁶ The Court thus focused on the idea that the state is entirely in control of local governments.²⁷

Early efforts to strengthen the role of the city in the constitutional system largely failed.²⁸ Instead, the Court repeatedly reaffirmed *Hunter*’s reasoning throughout the twentieth century, asserting that local governments have few constitutionally protected rights against the state and that citizens do not have a constitutional right to local government.²⁹ In 1978, the Supreme Court recognized that “[w]hile the broad statements . . . in *Hunter* have undoubtedly been qualified by the holdings of later cases[,] . . . the case continues to have substantial constitutional significance in emphasizing the extraordinarily wide latitude that States have in creating various types of political subdivisions and conferring authority upon them.”³⁰

Judicial assessment of local power has traditionally been guided by “Dillon’s Rule,” “a canon of construction and a rule of limited power” that focuses on the subservient nature of the city relative to the state.³¹ Under Dillon’s Rule, a municipal corporation’s powers are limited to those “granted in *express words*; . . . *necessarily implied or necessarily incident* to the powers expressly granted; . . . *absolutely essential* to the declared objects and purposes of the corporation,” and that “any fair doubt as to the existence of a power is resolved . . . against the corporation.”³² Although, as explained in the next section, many states now officially reject Dillon’s Rule, some scholars argue that it continues to influence courts in determining how expansively to read a local government’s powers.³³

26. *Id.* at 179.

27. *Id.*

28. One such effort, promoted by Thomas Cooley, was called “local constitutionalism.” See Barron, *Localist Critique*, *supra* note 23, at 391 (discussing Thomas Cooley’s promotion of local constitutionalism in the mid-1800s). Local constitutionalism was the argument “that local communities, by virtue of their familiarity with local needs, would play a critical extrajudicial role in securing what [Cooley] termed ‘constitutional freedom’ by forestalling state legislative efforts to favor private interests.” David J. Barron, *The Promise of Cooley’s City: Traces of Local Constitutionalism*, 147 *U. Pa. L. Rev.* 487, 492 (1999).

29. See Briffault, *Our Localism: Part I*, *supra* note 22, at 7–8 (discussing various cases in which the Supreme Court limited local power).

30. *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978) (citation omitted).

31. See Briffault, *Our Localism: Part I*, *supra* note 22, at 8–10 (describing the development and implementation of Dillon’s Rule). Dillon’s Rule was named after a mid-nineteenth-century judge, John Forrest Dillon, who served on the Iowa Supreme Court and United States Circuit Court, which would later become the Eighth Circuit. For additional background, see Hugh Spitzer, “Home Rule” Vs. “Dillon’s Rule” for Washington Cities, 38 *Seattle U. L. Rev.* 809, 813–16 (2015).

32. *Merriam v. Moody’s Ex’rs*, 25 Iowa 163, 170 (1868) (emphasis added); see also Spitzer, *supra* note 31, at 813–16 (explaining the development of Dillon’s Rule).

33. Briffault, *Our Localism: Part I*, *supra* note 22, at 8 (“Professor Frug and others contend that the Dillon’s Rule tradition still leads state courts to construe local government powers narrowly.”).

2. *Increasing Local Power.* — Home rule first emerged in 1875 as a counterweight to Dillon’s Rule’s heavy emphasis on state supremacy.³⁴ “Home rule” is used to describe a state delegation of power to a local government that allows the locality certain latitude in powers of self-government.³⁵ While there is now some level of home rule in almost every state, each state implements it in a unique manner, from constitutional provisions to complex statutory schemes explaining the nature of municipal powers.³⁶

Typically, if a state establishes home rule, the state constitution or state legislation will explicitly allow local governments to establish a charter under which the city may regulate local areas of concern.³⁷ While localities may still face state preemption, particularly in areas determined to be of statewide concern, home rule has substantially expanded the power of cities and has curtailed states’ abilities to interfere with some “local” activities.³⁸

Judicial interpretation of home rule powers serves an essential role in the state–local dynamic. As many scholars have noted, judicial interpretations of home rule powers vary across states.³⁹ Additionally, case law within

34. See Parlow, *supra* note 23, at 383–84 (discussing the development of home rule); see also Barron, *Localist Critique*, *supra* note 23, at 391–92 (examining the expansion of home rule in local constitutions).

35. See *Blanchard v. Berrios*, 72 N.E.3d 309, 317–18 (Ill. 2016) (“The shift in the balance of power away from State dominance and in favor of home rule is premised on the understanding that problems affecting units of local government and their residents should be addressed with solutions tailored to meet those local needs.”).

36. See Richard Briffault, *Home Rule for the Twenty-First Century*, 36 *Urb. Law.* 253, 253 (2004) [hereinafter Briffault, *Home Rule*] (“Home rule is a complex topic . . . tak[ing] many legal forms and follow[ing] many models.”).

37. Parlow, *supra* note 23, at 383; cf. Barron, *Localist Critique*, *supra* note 23, at 392 (asserting that home rule constitutional provisions serve a “power-granting function” by “enabling local governments to operate and exercise authority in the absence of a particularized grant of state power”).

38. Briffault, *Our Localism: Part II*, *supra* note 19, at 357–58 (describing how the role of the state in the development of local governments has evolved); Parlow, *supra* note 23, at 383–84 (describing expansions in local power).

39. See, e.g., Barron, *Localist Critique*, *supra* note 23, at 392 (asserting that these statutes “provide a constitutional defense against state assertions of preemptive power[.]” but that “[v]ery few state cases . . . have construed these home rule provisions in this fashion”). For examples of varying levels of home rule delegation, see, e.g., *Republic Waste Servs. of Tex., Ltd. v. Tex. Disposal Sys., Inc.*, 848 F.3d 342, 344–45 (5th Cir. 2016) (“[H]ome-rule cities have the full power of self-government and look to the Legislature . . . only for limitations on their powers. . . .’ Thus, ‘if the Legislature decides to preempt a subject matter normally within a home-rule city’s broad powers, it must do so with ‘unmistakable clarity.’” (quoting *S. Crushed Concrete, LLC v. City of Houston*, 398 S.W.3d 676, 678 (Tex. 2013))); *Blanchard*, 72 N.E.3d at 318 (stating that the Illinois Constitution was “drafted with the intent to give home rule units ‘the broadest powers possible’ under the constitution” and recognizing that the task of interpreting such a provision was left to the judiciary (quoting *City of Chicago v. StubHub, Inc.*, 979 N.E.2d 844, 850 (Ill. 2011))); *Ky. Rest. Ass’n v. Louisville/Jefferson Cty. Metro Gov’t.*, 501 S.W.3d 425, 427 (Ky. 2016) (stating that the Kentucky Constitution endows “permission for the General Assembly to afford cities the power to pass laws which are ‘in furtherance of a public purpose’” except when those laws

a state concerning the power of the city is not always clear or uniform and can obscure the boundaries of local governments' power to pass local regulations and ordinances.⁴⁰

It is important to note that home rule and Dillon's Rule are not mutually exclusive. Their existence demonstrates the tension between a view of the city as "a complex local polity, entitled to self-governance and capable of supporting a local political system" and as "an administrative arm of the state, and as such both a potential threat to individual liberty and a hierarchically subordinate institution subject to state control."⁴¹ Scholars and judges continually attempt to diagnose the appropriate role of the city and the extent of its power, oftentimes limiting or expanding the city's powers in unpredictable and inconsistent ways.⁴²

B. *State Preemption of Local Government Regulations*

Underlying home rule delegations is the idea that state law preempts conflicting local regulations and ordinances.⁴³ This section examines general forms of state preemption—express and implicit preemption—in order to provide background for examining the new turn in preemptive legislation discussed in Part II.

1. *Express Preemption.* — The nature of express preemption is relatively straightforward at the state level, subject to a few exceptions. Generally, if a state law prohibits local governments from enacting certain regulations, the state law prevails.⁴⁴ The limited nature of local power notwithstanding, many local governments have challenged the constitutionality of state preemption statutes. For example, localities may argue that a state preempt-

are in conflict with state law). Compare *Ky. Rest. Ass'n.*, 501 S.W.3d at 427, with *State Bldg. & Constr. Trades Council of Cal. v. City of Vista*, 279 P.3d 1022, 1026 (Cal. 2012) ("Charter cities are specifically authorized by our state Constitution to govern themselves, free of state legislative intrusion, as to those matters deemed municipal affairs.").

40. See, e.g., Spitzer, *supra* note 31, at 842–60 (asserting that judges have been incorrect in limiting the powers of Washington cities despite strong home rule provisions and that courts should strengthen their interpretations of the power of cities).

41. Briffault, *Our Localism: Part II*, *supra* note 19, at 391.

42. See Lynn A. Baker & Daniel B. Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, 86 *Denv. U. L. Rev.* 1337, 1338 (2009) ("How constitutional home rule can be reconciled with the *Hunter* principle is an enduring puzzle in American local government law.").

43. See 5 *McQuillin: The Law of Municipal Corporations* § 15:18 (3d ed.), Westlaw (database updated July 2017) ("[I]n any conflict between an ordinance and a statute the latter must prevail, unless under the statutes or law of the state the ordinance plainly and specifically is given predominance in a particular instance or as to a particular subject matter." (footnote omitted)).

44. See *supra* notes 34–42 (explaining the nature of home rule as a delegation of state power).

tion statute violates their home rule rights embodied in the state constitution or state legislation.⁴⁵ Alternatively, local governments may argue that state law violates federal law or the U.S. Constitution by imposing on the rights of their citizens.⁴⁶ While states typically enjoy substantial latitude, these strategies, which will be discussed further in Parts II and III, may prove useful in rebutting the general presumption of state preemptive power.

2. *Implied Preemption.* — Implicit preemption at the state level is more complicated than explicit preemption. While the focus of this Note is on express preemption, implied preemption plays an important role in the state–local dynamic. Private interest groups often bring lawsuits against local governments asserting that state law impliedly preempts local ordinances, typically in areas such as smoking regulation, the minimum wage, and environmental protection measures.⁴⁷

Most state courts have found *some* form of implied preemption in state legislation, but this varies in both degree and form across states.⁴⁸ While the exact contours of state preemption doctrine vary, federal conflict and field preemption—striking down an ordinance that conflicts with a provision of state law and striking down an ordinance if the state law occupies the “field,” respectively—provide important guides.⁴⁹ Most courts, however, do not follow this exact verbiage, as they have not accepted federal preemption classifications as a binding guide for state preemption

45. See *infra* notes 207–222 and accompanying text (discussing statutory and constitutional challenges).

46. One notable example is *Romer v. Evans*, in which the U.S. Supreme Court held that Amendment 2, an amendment to the Colorado Constitution designed to preempt local ordinances protecting individuals from discrimination based on sexual orientation, violated the Equal Protection Clause, in part because the amendment was “inexplicable by anything but animus toward the class it affects.” 517 U.S. 620, 620–21, 632 (1996).

47. See, e.g., Diller, *supra* note 18, at 1133–40 (assessing implied preemption as a tool of private interest groups pursuing favorable state policies).

48. *Id.* at 1141 (“[A]ll but one state—Illinois—recognize some form of implied preemption. Most states subdivide implied preemption into categories similar to those used by the United States Supreme Court—‘conflict’ and ‘field.’” (footnote omitted)).

49. *Id.* at 1140–41 (discussing local and state preemption doctrine relative to the federal preemption doctrine). Diller also notes exceptions to this rule, which tend to depart from this model based on the wording of their state constitutions’ delegations of home rule. *Id.* at 1140 n.121. Because the Oregon Constitution, for example, states that “[t]he legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the State of Oregon,” the Oregon Supreme Court “presumes that the state legislature intended to preempt cities in the criminal field but applies the opposite presumption in the civil context.” *Id.* (first quoting Or. Const. art. XI, § 2; then citing *State v. Tyler*, 7 P.3d 624, 627 (Or. Ct. App. 2000)). Conversely, Georgia’s Constitution has a “uniformity clause” prohibiting “local laws ‘in any case for which provision has been made by an existing general law,’ except that the state legislature may ‘authorize local governments by local ordinance or resolution to exercise police powers which do not conflict with general laws.’” *Id.* (quoting Ga. Const. art. III, § VI, para. IV(a)).

analyses.⁵⁰ State courts thus have greater freedom to develop their own implicit preemption case law and greater latitude to determine the contours of implicit preemption.

As a result of this state-by-state assessment, courts often come to opposite conclusions about implied preemption in analyzing similar legislation. For example, the Supreme Court of Kentucky recently held that a local minimum wage *higher* than the state minimum wage by definition conflicts with state law, as “[a]n ordinance . . . cannot forbid what a statute expressly permits.”⁵¹ By contrast, using a similar line of reasoning to that Kentucky court’s dissent,⁵² the New Mexico Supreme Court recently upheld a local minimum wage law, saying that a state minimum wage law for “all workers” served as a “floor for all workers” rather than “the *only* permissible minimum wage.”⁵³ These two cases demonstrate how courts differ in their reading of implied preemption in cases with similar facts and how local governments may struggle to determine the contours of their power.⁵⁴

While this Note focuses on the increase in express preemption strategies, it is important to note that implicit preemption has been and continues to be a significant aspect of the state–local dynamic. While scholars have analyzed ways to rebut implicit preemption,⁵⁵ the shift toward express preemption of local ordinances demands further discussion.⁵⁶

C. *Federalism, Localism, and Politics: The Modern Role of Local Government*

In promoting preemption laws, states and lobbying organizations often focus on “states’ rights” and the necessity of statewide policies.⁵⁷

50. Utah is the only state that has accepted this model for state preemption. *Id.* at 1141. Other states, however, look to whether local regulations “substantially interfere” with state laws or whether they prohibit or permit something the state does not. *Id.* at 1142–57.

51. *Ky. Rest. Ass’n v. Louisville/Jefferson Cty. Metro. Gov’t*, 501 S.W.3d 425, 428 (Ky. 2016) (internal quotation marks omitted) (quoting *City of Harlan v. Scott*, 162 S.W.2d 8, 9 (Ky. Ct. App. 1942)).

52. *Id.* at 432 (Wright, J., dissenting) (“[T]he statute does not state that the minimum wage shall be or cannot be more than a set amount. Instead, the statute provides that the wages shall be paid ‘at a rate of not less than.’ This law . . . provides a floor . . . rather than a ceiling . . .”).

53. *New Mexicans for Free Enter. v. City of Santa Fe*, 126 P.3d 1149, 1159 (N.M. 2005).

54. Judges, of course, also decide cases by weighing state precedent, home rule delegations of power, and other enacted statutes.

55. See, e.g., Parlow, *supra* note 23, at 385 (arguing that courts should avoid finding implicit preemption to allow for local government progress).

56. See *infra* Part II (discussing new forms of express preemption).

57. See, e.g., Ariz. Governor Doug Ducey, Arizona State of the State Address (Jan. 11, 2016), <http://azgovernor.gov/governor/news/2016/01/watch-arizona-state-state-address> [<http://perma.cc/VL7N-TLNG>] (“I also encourage all our cities and towns to put the brakes on ill-advised plans to create a patchwork of different wage and employment laws. If these political subdivisions don’t stop, they’ll drive our economy off a cliff.”); cf. Gerken, Foreword, *supra* note 17, at 72 (“Arguments in favor of [federal] preemption, for instance, usually dwell on the importance of uniformity, accountability, and clear lines of authority.”).

Conversely, many scholars have argued that innovation at the local level can serve a beneficial role in promoting progressive policy changes.⁵⁸ This section discusses the changing political climate and influence of partisanship on state and local decisionmaking. Building upon this, it will demonstrate a few of the potential benefits of local control in the modern system, many of which are drawn from normative goals traditionally attributed to federalism.⁵⁹

1. *Partisanship in the Federal System.* — Politics and political power serve an important role in the state preemption dynamic. While preemption laws are not limited to Republican legislatures,⁶⁰ the contemporary political structure in many states reflects a clear partisan divide: Republican state legislators typically seek to limit the power of Democrat-run cities.⁶¹

This has been exacerbated by two key trends: the increase in Republican-led state legislatures⁶² and the purported concentration of Democrats shifting to urban areas.⁶³ In analyzing this latter trend, author and commentator Bill Bishop asserts that “[l]ittle, if any, of this political migration was by design,” but rather that individuals “have clustered in communities of sameness, among people with similar ways of life, beliefs,

58. See *infra* section I.C.2 (discussing the role of local innovation).

59. See Barron, *Localist Critique*, *supra* note 23, at 378 (explaining that new federalism ideologies promote “responsive and participatory government . . . ; foster[] diversity and experimentation by increasing the fora for expressing policy choices and creating a competition for a mobile citizenry; and provid[e] a check against tyranny by diffusing power that would otherwise be concentrated”).

60. Shaila Dewan, *States Are Blocking Local Regulations, Often at Industry’s Behest*, N.Y. Times (Feb. 23, 2015), <http://www.nytimes.com/2015/02/24/us/govern-yourself-state-lawmakers-tell-cities-but-not-too-much.html> (on file with the *Columbia Law Review*).

61. See Joel Rogers, *Foreword: Federalism Bound*, 10 Harv. L. & Pol’y Rev. 281, 297 (2016) (“[M]any states, especially among those twenty-two GOP-controlled ones, are using state preemption to block even modest local efforts at constructive reform policy areas in health, environment, civil rights, wage-setting and government reform, among other policy areas.”).

62. See 2016 District-by-District State Legislative Control, Nat’l Conference of State Legislatures (Dec. 7, 2016), <http://www.ncsl.org/research/elections-and-campaigns/district-by-district-state-legislative-control.aspx> [<http://perma.cc/7S8R-KJC9>] (“Following the [2016] election, as the maps below reflect, there were 4,169 Republican state legislators and 3,131 Democratic state legislators.”); see also Emily Badger, *Blue Cities Want to Make Their Own Rules. Red States Won’t Let Them.*, N.Y. Times (July 6, 2017), <http://www.nytimes.com/2017/07/06/upshot/blue-cities-want-to-make-their-own-rules-red-states-wont-let-them.html?mcubz=1> (on file with the *Columbia Law Review*) (stating that the Republican Party “controls more state legislative seats than at any time in the postwar era”); Morgan Cullen, *Historical Legislative Election Trends Encouraging for GOP*, Nat’l Conference of State Legislatures (Oct. 30, 2014), <http://www.ncsl.org/blog/2014/10/30/historical-legislative-election-trends-encouraging-for-gop.aspx> [<http://perma.cc/S36Z-B986>] (discussing the “Republican tsunami” that “swept through America’s state legislatures in the 2010 midterm elections,” and stating that “[i]f historical trends continue, the political landscape should be encouraging to Republicans”).

63. See generally Bill Bishop, *The Big Sort* (2008) (assessing how like-minded Americans tend to cluster together and how this has impacted politics).

and, in the end, politics.”⁶⁴ In particular, after 1976, “the trend was for Republicans and Democrats to grow more geographically segregated.”⁶⁵ Bishop asserts that “high-tech cities”—growing “tech-rich and innovative cities”⁶⁶—have become concentrated centers of largely Democratic populations.⁶⁷ In contrast, “low-tech cities”—particularly manufacturing towns and rural areas—have become increasingly conservative and Republican-dominated.⁶⁸ The role of the local preemption dynamic thus falls into a greater framework of partisan conflict. The partisan divide at the national level has affected the way that individuals view the federal government, states, and themselves. Political-party identification serves an important role in both national and state identification.⁶⁹ In this respect, Professor Jessica Bulman-Pozen argues that modern federalism provides a forum for national political conflict, as national party identity takes precedence over state-based identity.⁷⁰

Local governments play a significant but understudied role in this dynamic.⁷¹ Similar to the federal–state dynamic—in which states emphasize federalism when the opposite political party forms the majority of the federal government⁷²—local governments emphasize the importance of local control when their policies don’t align with state objectives.⁷³ Local governments can thus allow individuals to channel partisan identification within their state. Facing an increasingly divisive partisan landscape, local governments may serve as important centers for minority political affiliation.⁷⁴

64. *Id.* at 5.

65. *Id.* at 9.

66. *Id.* at 7 (explaining Bishop’s terminology of high-tech and low-tech cities and towns).

67. *Id.* at 153.

68. *Id.* (“Before 1990, people living in low-tech cities described themselves as slightly more liberal than the national average, but after 1990 an increasing number labeled their politics as conservative. . . . Manufacturing cities and rural areas [have grown] more Republican.”).

69. See Jessica Bulman-Pozen, *Partisan Federalism*, 127 *Harv. L. Rev.* 1077, 1109 (2014) (“Ultimately, a focus on partisanship suggests that state-based identification may be shifting and partial—and, perhaps paradoxically, a means of expressing national identity—but nonetheless a significant buttress of American federalism.”).

70. *Id.* at 1080–81 (asserting that “our contemporary federal system generates a check on the federal government and fosters divided citizen loyalties . . . because it provides durable and robust scaffolding for partisan conflict”).

71. See *id.* at 1146 (“Partisan federalism might also enrich our thinking about local government law.”).

72. *Id.* at 1119 (“It is not surprising, then, that polls on Americans’ views of federalism show that support for state and federal governments varies depending on which party holds office.”).

73. See *infra* section II.B (describing the partisan divide between states and cities).

74. For an informative analysis on the ways in which disaggregated local governments can allow for political minorities to influence decisionmaking and policy, see generally Heather K. Gerken, *Dissenting by Deciding*, 57 *Stan. L. Rev.* 1745, 1748 (“Disaggregated

2. *Traditional “Federalism” Goals: Local Innovation and Democracy.* — Although traditional federalism theory focuses on state power, scholars have increasingly looked to localities to serve similar normative benefits.⁷⁵

Federalism is often touted for its ability to spur innovation and experimentation. In a dissent often cited in support of the benefits of federalism, Justice Louis Brandeis quipped that “[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”⁷⁶ While some states continue to serve as laboratories of experimentation,⁷⁷ many states have become gradually more embroiled in the national partisan debate, passing increasingly homogenized legislation based on *party* goals, rather than state realities.⁷⁸

In contrast, many local governments have shown a willingness to pursue innovative policies, in hopes of improving constituents’ livelihoods and spurring broader political change.⁷⁹ Local governments are closely connected to their constituents and thus may be better able to experiment with solutions to a variety of issues affecting local communities, particularly socioeconomic inequality and discrimination.⁸⁰ Professor R.A. Lenhardt suggests that progressive cities that seek to further civil rights projects should be viewed as “equality innovators,” asserting that “[t]heir on-the-ground experience with the realities of race and its operation in the twenty-first century arguably places them in a better position than courts to develop innovative approaches to the structural racial inequities with which so many municipalities must grapple.”⁸¹

Many scholars have stressed that federalism—and now localism—may better allow for democratic communication and representation. Local governments may allow for constituents to more easily participate in the political process, and a subsequent sense of “citizen effectiveness” may

institutions create the opportunity for global minorities to constitute local majorities. . . . *Dissenting by deciding* occurs when would-be dissenters—individuals who hold a minority view within the polity as a whole—enjoy a local majority on a decisionmaking body and can thus dictate the outcome.”).

75. See, e.g., Parlow, *supra* note 23, at 371 (“[C]onceptually speaking, the principles underlying federalism seem logically to apply not only to the relationship between the federal government and the states, but also to that between the states and local governments.”).

76. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

77. See Bulman-Pozen, *supra* note 69, at 1128 (“In time, moreover, such bottom-up partisan activity [at the state level] can force federal politicians’ hands or make it attractive for them to take a position they once feared might amount to political suicide.”).

78. See *infra* section II.B (describing the partisan divide).

79. See, e.g., Johnson, *supra* note 17, at 118–22 (discussing the role of some state and local governments in civil rights progress).

80. Parlow, *supra* note 23, at 371 (asserting that local governments “may prove even more fruitful agents for social change and policy innovation than the state or federal levels of government”).

81. R.A. Lenhardt, *Localities as Equality Innovators*, 7 *Stan. J. C.R. & C.L.* 265, 269 (2011).

spur further political participation.⁸² Local governments hold meetings in closer proximity to their constituents—often meeting in city hall as compared to states’ legislators in Washington, D.C. or even state capitals, which may be a great distance from major cities.⁸³ Additionally, local officials are inherently responsive to fewer people; thus, it may be easier for these officials to effectively represent their constituents.⁸⁴

Admittedly, close proximity and a smaller representative body do not *always* lead to better representation. The scholars discussed in this section do, however, suggest that local governments have the *potential* to be more representative bodies and may be able to tailor local solutions to local needs.

As many states and local governments are divided on partisan terms, thus causing many state legislatures to be largely unrepresentative of constituents in cities,⁸⁵ the concerns underlying the federalism debate—and the localism scholarship that followed—should cause one to pause.⁸⁶ In fact, federalism and localism support honoring this divide. Local democracy and innovation, however, require some level of local autonomy.⁸⁷

82. See Briffault, *Home Rule*, supra note 36, at 258 (“Local government provides citizens with opportunities for participation in public decision making, opportunities that are simply unavailable in larger units of government.”); see also Parlow, supra note 23, at 373 (“Local governments provide opportunities for public participation in the decision- and policy-making processes that are more difficult, if not impossible, at the state and federal levels of government.”).

83. See Parlow, supra note 23, at 374 (noting the availability of public participation in local governments versus state and federal legislatures). For example, North Carolina, the source of N.C. H.B. 2, is the twenty-eighth largest state in the country. See State Area Measurements and Internal Point Coordinates, U.S. Census Bureau, <http://www.census.gov/geo/reference/state-area.html> [<http://perma.cc/HZY3-2SND>] (last visited August 15, 2017). Charlotte, the source of the city ordinance that led to N.C. H.B. 2, has a population of approximately 840,000 people and is located approximately 165 miles and two hours and twenty-five minutes away from North Carolina’s state capital by car. See Distance from Raleigh, NC to Charlotte, NC, Distance Between Cities, <http://www.distance-cities.com/distance-raleigh-nc-to-charlotte-nc> [<http://perma.cc/Q2T7-Q6LX>] (last visited Aug. 15, 2017); QuickFacts: Charlotte, North Carolina, U.S. Census Bureau, <http://www.census.gov/quickfacts/table/PST045215/3712000> [<http://perma.cc/YP9T-9KDW>] (last visited Aug. 15, 2017) (estimating the 2016 population of Charlotte, N.C. to be 842,051).

84. See Richard Briffault, *The Rise of Sublocal Structures in Urban Governance*, 82 *Minn. L. Rev.* 503, 505 (1997) (“The small size of local units makes it easier for citizens to voice their views to their local government and their fellow local citizens, to respond to each other’s concerns, and to deliberate concerning important local public matters.”).

85. See Bulman-Pozen, supra note 69, at 1131.

86. As noted, some scholars, such as Heather Gerken, specifically emphasize the power of local and sublocal entities to embody federalism norms. See Gerken, *Foreword*, supra note 17, at 8.

87. See Briffault, *Home Rule*, supra note 36, at 258 (“[L]ocal democracy requires some measure of local autonomy, of home rule. People will . . . participate in local government decision making only if local governments have real power over matters important to local people. Local democracy thus requires local autonomy, much as local autonomy advances the prospects for local democracy.” (footnote omitted)).

Without any local power, communication with local legislatures and local attempts to innovate will be fruitless.

II. NEW PREEMPTION: THE LINK BETWEEN HOME RULE, THE JUDICIARY, AND FUNDING

Having thus established the background legal framework and potential normative benefits of local control, this Part discusses preemption trends.⁸⁸ Section II.A examines the most recent wave of preemption laws generally, which suggests that there has been a distinct shift in both the number and subject area of these preemption laws. Section II.B categorizes how these laws have shifted in form, asserting that they have become increasingly coercive and punitive. Section II.C assesses the normative and legal implications of such laws. By providing an in-depth assessment of the recent shift in preemption law tactics, a task that has largely been ignored in the scholarly literature, this Part highlights the changing legislative schemes municipalities are facing.

A. *Preemption Strategies: A Shift in Subject Matter*

This section examines the main areas of municipal regulation and state preemption and how these areas have shifted based on political changes at the federal, state, and local levels. Although it does not attempt to account for every piece of preemptive legislation, this section describes general trends in the subject matter and amount of preemptive legislation. As the following section demonstrates, there was a wave of preemption of local gun and smoking regulations throughout the late-twentieth century.⁸⁹ While states continue to preempt regulations in these areas, the beginning of the twenty-first century has featured a shift to new areas of concern as well, with many states preempting local environmental, anti-discrimination, and labor regulations.⁹⁰

1. *Early Preemption: Gun and Smoking Regulations.* — While the ability of states to preempt local ordinances is not a new development,⁹¹ in the late-twentieth century, often prompted by the work of lobbyists and organizations like ALEC, states passed a wave of preemptive legislation designed

88. While this Note does not purport to be an exhaustive study of all state preemption laws, it draws on previous scholarly works as well as news reports, state legislative materials, and recent lawsuits to assess recent trends in preemption laws.

89. See *infra* section II.A.1 (describing early preemption areas). Much of this Note, in fact, discusses strategies in gun preemption laws, which are still being passed and amended today, as these strategies may be further expanded to all forms of state preemption laws. See *infra* notes 153–166 and accompanying text.

90. See *infra* section II.A.2 (discussing recent areas of preemption legislation).

91. See *supra* notes 34–42 (describing the relationship between state and local governments).

to create “uniform policies.”⁹² At the time, legislation largely focused on the regulation of two areas: guns and smoking.⁹³

For instance, in the 1980s, states began passing legislation to limit local governments’ ability to enact gun regulation.⁹⁴ This legislation went against a long tradition of deference to local regulation of firearms, as many local governments adopted regulations to combat higher rates of gun violence in urban areas.⁹⁵ Largely supported by organizations like the National Rifle Association, almost all states now preempt local gun regulation, although to varying extents.⁹⁶

In the 1980s, many state governments also passed legislation preempting local smoking regulations.⁹⁷ By the late 1990s, more than half of states had enacted some form of preemption of tobacco and smoking regulation.⁹⁸ Unlike gun regulation, however, there have been significant strides to *reduce* the number of state laws preempting local smoking and tobacco regulations, in part due to grassroots efforts to repeal such laws and in part due to efforts by federal agencies like the Centers for Disease Control.⁹⁹ Between 2004 and mid-2017, at least seven states repealed legislation preempting local indoor smoking regulations, leaving twelve states with either express preemption or court-interpreted implicit preemption in the

92. See *supra* notes 11–15 and accompanying text; see also Dewan, *supra* note 60 (asserting that “disparate industries are banding together to back the same [preemptive] laws, through either the business-funded American Legislative Exchange Council, known as ALEC, or shared lobbyists”).

93. See *infra* notes 97–101 and notes 153–166 (discussing smoking preemption and gun preemption, respectively).

94. See Joseph Blocher, *Firearm Localism*, 123 *Yale L.J.* 82, 133–36 (2013) (describing the development of state preemption laws in the gun control space beginning in the 1980s).

95. *Id.* at 108–21 (describing the historical deference to local regulation of guns in urban areas).

96. See *infra* notes 153–166 (discussing gun preemption). Almost all states have gun preemption legislation. Connecticut, Hawaii, Massachusetts, New Jersey, and New York are the only states without express preemption of local gun regulation. Preemption of Local Laws, Law Ctr. to Prevent Gun Violence, <http://smartgunlaws.org/gun-laws/policy-areas/other-laws-policies/preemption-of-local-laws/> [<http://perma.cc/V9Z4-PAXM>] (last visited Aug. 15, 2017). California and Nebraska have “provisions expressly preempting local regulation of one or more aspects of firearms or ammunition but otherwise permit[] broad regulation of firearms and ammunition at the local level.” *Id.* All other states have broad preemption statutes. *Id.*

97. See Peter D. Enrich & Patricia A. Davidson, *Local and State Regulation of Tobacco: The Effects of the Proposed National Settlement*, 35 *Harv. J. on Legis.* 87, 91–92 (1998) (“[T]he tobacco industry has deployed its influence at state houses around the country to seek passage of legislation forbidding local efforts to regulate tobacco sales and use.”).

98. *Id.* at 92.

99. See Jean C. O’Connor et al., *Preemption of Local Smoke-Free Air Ordinances: The Implications of Judicial Opinions for Meeting National Health Objectives*, 36 *J.L. Med. & Ethics* 403, 403, 407–08 (2008) (assessing the movement away from state preemption of local tobacco ordinances).

area.¹⁰⁰ Additionally, twenty-seven states now explicitly *allow* local regulation of smoking in certain public and private spaces.¹⁰¹

Thus, these two areas traditionally subject to state preemption provide important insight into the dynamic between state and local relations. Regulation in these areas reflects the power of interest groups, the role of political change, and the promise of progressive local government action. Further, it demonstrates that preemption laws are not necessarily permanent: Areas determined to be appropriately within state control have shifted in the past and continue to do so in response to political change.

2. *Preemption Shifts: New Areas and More Widespread Legislation.* — Recent trends indicate a shift in the focus area of preemptive legislation, as well as a more rapid adoption of such legislation.¹⁰² Local governments have passed ordinances in a variety of areas, three of the most prominent

100. See Ctrs. for Disease Control & Prevention, STATE System Preemption Fact Sheet 2–3 (2017), <http://data.cdc.gov/download/uu8y-j6ga/application/pdf> [http://perma.cc/9GAK-WQWJ] (“As of June 30, 2017, 12 states have laws or court decisions in effect that explicitly preempt local ordinances from restricting smoking in government worksites, private worksites, restaurants, or bars.”).

101. *Id.* at 3.

102. See, e.g., Johnson, *supra* note 17, at 136 (discussing “manufactured preemption” of local ordinances by the state, including recent legislative trends); see also Fred Barbash, North Carolina’s ‘Bathroom Law’ and the GOP Drive to Disempower Upstart Local Governments, *Wash. Post* (Apr. 15, 2016), http://www.washingtonpost.com/news/morning-mix/wp/2016/04/15/behind-north-carolinas-bathroom-law-and-a-host-of-others-democrats-see-republican-big-government-at-work/?utm_term=.f6751623a5b3 [http://perma.cc/S93H-J8CL] (“Increasingly, [local decisions] are not being left to local people”); Emma Green, The Ideological Reasons Why Democrats Have Neglected Local Politics, *Atlantic* (Jan. 4, 2017), <http://www.theatlantic.com/politics/archive/2017/01/the-ideological-reasons-why-democrats-have-neglected-local-politics/512024/> [http://perma.cc/AJ8V-P5TK] (“Preemption on LGBT issues is fairly new”).

being environmental policy,¹⁰³ labor law,¹⁰⁴ and antidiscrimination protections.¹⁰⁵ The reasons for these changes appear to be based in the current political landscapes at the federal, state, and local levels. As this subsection demonstrates, there has been little change at the national level as Congress has been unwilling or unable to address many of these cities' concerns. Additionally, while many individuals look to their state legislature to act in the face of federal inaction, "a substantial minority of any state's population will not identify politically with the party in power at the state level."¹⁰⁶ Thus, many groups have sought to pursue their own agendas at a local level.

Labor and employment law is one area that has seen a rise of preemptive state legislation. The federal government has not raised the minimum wage beyond \$7.25 per hour since 2009,¹⁰⁷ and the Family Medical Leave Act provides up to twelve weeks of unpaid leave.¹⁰⁸ Although numerous interest groups and individuals have advocated for federal legislation increasing the minimum wage and associated benefits, there has been little

103. For a review of plastic bag bans and taxes passed by cities, see generally Jennie R. Romer & Leslie Mintz Tamminen, *Plastic Bag Reduction Ordinances: New York City's Proposed Charge on All Carryout Bags as a Model for U.S. Cities*, 27 *Tul. Envtl. L.J.* 237 (2014) (discussing various ordinances regulating plastic bags around the country). For recent insights into municipal bans on fracking, many of which have faced preemption challenges at the state level, see Uma Outka, *Intrastate Preemption in the Shifting Energy Sector*, 86 *U. Colo. L. Rev.* 927, 954–76 (2015) (assessing the role of local governments in fracking preemption, and asserting that, while the boundaries of local control are unclear, local governments nonetheless play an important role in regulation); Victoria M. Scozzaro, Note, *Home-Rule Hope: A Community Guide to Keeping Hydraulic Fracturing off Local Property*, 18 *Vt. J. Envtl. L.* 84, 86–95 (2016) (discussing "hope" for the ability of home rule to ban fracking on local property); see also Dan Frosch, *Colorado High Court Rules Local Bans on Fracking Are Illegal*, *Wall St. J.* (May 2, 2016), <http://www.wsj.com/articles/colorado-high-court-rules-local-bans-on-fracking-are-illegal-1462208729> (on file with the *Columbia Law Review*) (assessing a Colorado decision finding that state law preempted local fracking bans); *From Fracking Bans To Paid Sick Leave: How States Are Overruling Local Laws*, NPR: Fresh Air (Apr. 6, 2016), <http://www.npr.org/2016/04/06/473244707/from-fracking-bans-to-paid-sick-leave-how-states-are-overruling-local-laws> [<http://perma.cc/FV4P-CJ2Y>] (assessing state preemption of local laws, including fracking bans).

104. See *infra* notes 107–117 and accompanying text.

105. See *infra* notes 118–192 and accompanying text.

106. Bulman-Pozen, *supra* note 69, at 1131 (discussing the influence of partisanship on federalism and stating that "[t]hroughout the country, cities tend to be blue, while rural areas tend to be red"); see also Campbell Robertson & Richard Fausset, *Southern Cities Split with States on Social Issues*, *N.Y. Times* (Apr. 15, 2016), <http://www.nytimes.com/2016/04/16/us/southern-cities-move-past-states-on-liberal-social-issues.html> (on file with the *Columbia Law Review*) (discussing the divergence between cities and states in the south with regard to progressive social concerns).

107. Minimum Wage, U.S. Dep't of Labor, <http://www.dol.gov/general/topic/wages/minimumwage> [<http://perma.cc/T2J4-ZYZX>] (last visited Aug. 15, 2017).

108. Leave Benefits, U.S. Dep't of Labor, <http://www.dol.gov/general/topic/benefits-leave> [<http://perma.cc/7FVU-DT9L>] (last visited Aug. 15, 2017).

movement in this area.¹⁰⁹ Instead, local governments have responded by passing ordinances to increase minimum wages and paid sick days.¹¹⁰ As of July 10, 2017, forty localities had raised the minimum wage above the state level.¹¹¹ As of March 15, 2016, twenty-three cities and five states had enacted paid sick leave requirements.¹¹²

In response, numerous states have passed preemption legislation. Before the 2017 legislative sessions began, at least “22 states preempted local minimum wage ordinances, 15 states preempted paid leave ordinances, and 14 states preempted both minimum wage and leave ordinances.”¹¹³ This trend shows no signs of decline: As of April 2017, twenty-one states had introduced new preemption bills related to employment, totaling approximately sixty different bills.¹¹⁴ While much of this has been in response to local regulation, some states have adopted *preemptive* preemption legislation before any local governments have even attempted to regulate the space. For instance, six months before the Cleveland, Ohio City Council was to hold a public vote on whether or not to increase the

109. See Kate Andrias, *The New Labor Law*, 126 *Yale L.J.* 2, 6–10 (2016) (describing labor movements on a national level).

110. See Josh Eidelson, *Arizona Has a Plan to Get Revenge on Its Pro-Worker Cities*, *Bloomberg Businessweek* (Mar. 15, 2016), <http://www.bloomberg.com/news/articles/2016-03-15/help-workers-risk-losing-money-for-cops> (on file with the *Columbia Law Review*) (describing recent local initiatives). See generally Andrias, *supra* note 109 (describing the “new labor law” of the twenty-first century). For an outline of minimum wage laws nationally, see generally *Minimum Wage Tracker*, *supra* note 6.

111. The following localities have raised their minimum wages above the state level: Albuquerque, New Mexico; Berkeley, California; Bernalillo County, New Mexico; Birmingham, Alabama; Chicago, Illinois; Cook County, Illinois; Cupertino, California; El Cerrito, California; Emeryville, California; Flagstaff, Arizona; Las Cruces, New Mexico; Los Altos, California; Lexington, Kentucky; Los Angeles, California; Los Angeles County, California; Malibu, California; Milpitas, California; Montgomery County, Maryland; Mountain View, California; Nassau, Suffolk, and Westchester Counties, New York; New York City, New York; Oakland, California; Palo Alto, California; Pasadena, California; Portland, Maine; Portland Urban Growth Boundary, Oregon; Prince George’s County, Maryland; Richmond, California; San Diego, California; San Francisco, California; San Jose, California; San Leandro, California; San Mateo, California; Santa Clara, California; Santa Fe City, New Mexico; Santa Fe County, New Mexico; Santa Monica, California; SeaTac, Washington; Seattle, Washington; Sunnyvale, California; and Tacoma, Washington. *Minimum Wage Tracker*, *supra* note 6.

112. Eidelson, *supra* note 110.

113. Lauren Doroghazi, *Heat Between Cities and States Rises as Local Preemption Continues*, *MultiState* (Apr. 18, 2017), <http://www.multistate.us/blog/heat-between-cities-and-states-rises-as-local-preemption-continues> [<http://perma.cc/QTN3-U8YM>].

114. *Id.*

minimum wage to \$15,¹¹⁵ the state passed legislation banning local governments from enacting their own minimum wages.¹¹⁶ Similarly, the Arizona state legislature adopted “proactive” legislation: Despite no local governments having adopted regulations of the sort, the state legislature banned local governments from restricting companies’ abilities to set work schedules.¹¹⁷

A similar dynamic has occurred in the antidiscrimination space. This is an area that has seen increasing tension between various branches of the federal government, state governments, and local administrations.¹¹⁸ Similar to the way in which local governments were instrumental in the push for gay marriage, local governments have sought increased protections and rights for LGBTQ individuals in the workplace.¹¹⁹ For example, at least 225 cities and counties have passed ordinances prohibiting “gender identity” discrimination in both public and private employment.¹²⁰

115. See Leila Atassi, Special Election for Phased-in \$15 Minimum Wage Proposal Set for May 2 in Cleveland, *Cleveland.com* (Sept. 12, 2016), http://www.cleveland.com/metro/index.ssf/2016/09/special_election_for_phased-in_1.html [<http://perma.cc/X8H3-MHSJ>] (last updated Sept. 13, 2016) (examining the minimum wage debate in Cleveland).

116. See Jeremy Plezer, Gov. John Kasich Signs Bill Blocking Cleveland’s \$15 Minimum Wage Proposal, *Cleveland.com* (Dec. 19, 2016), http://www.cleveland.com/open/index.ssf/2016/12/gov_john_kasich_signs_bill_blo.html [<http://perma.cc/G9MK-25TN>] (“Ohio Gov. John Kasich on Monday signed legislation blocking next year’s special election vote on whether to raise Cleveland’s minimum wage to \$15 per hour Senate Bill 331 prohibits communities in the state from raising the minimum wage beyond the state’s minimum wage rate”). The bill also “sets state standards for where pet stores can buy dogs and cats, bans bestiality in the state, limits the ability of communities to block the installation of new wireless microantennas, and prohibits poultry from running onto neighboring properties.” *Id.*

117. See Howard Fischer, Bill Preempting Cities from Imposing Business Mandates Passes, *Ariz. Capitol Times* (May 9, 2011), <http://azcapitoltimes.com/news/2016/05/09/bill-to-preempting-cities-from-business-mandates-passes/> [<http://perma.cc/KG69-SG6Q>] (“HB 2191 is designed to stop communities here from adopting regulations like one in San Francisco which penalizes companies for changing the schedules within 14 days of the work day.”).

118. See generally Terri R. Day & Danielle Weatherby, LGBT Rights and the Mini RFRA: A Return to Separate But Equal, 65 *DePaul L. Rev.* 907, 917–18 (2016) (assessing tensions between federal, state, and local governments in the development of LGBT rights after the Supreme Court declared gay marriage to be a constitutionally protected right in *Obergefell v. Hodges*); Everdeen Mason et. al., The Dramatic Rise in State Efforts to Limit LGBT Rights, *Wash. Post* (June 10, 2016), <http://www.washingtonpost.com/graphics/national/lgbt-legislation/> (on file with the *Columbia Law Review*) (last updated June 29, 2017) (“Since 2013, legislatures have introduced 348 bills, 23 of which became law. According to data collected by the American Civil Liberties Union and analyzed by The Washington Post, the number of bills introduced has increased steadily each year.”).

119. See Johnson, *supra* note 17, at 136–37 (assessing local governments’ progress in pushing for broader rights for the LGBTQ community).

120. See, e.g., Cities and Counties with Non-Discrimination Ordinances that Include Gender Identity, Human Rights Campaign, <http://www.hrc.org/resources/cities-and-counties-with-non-discrimination-ordinances-that-include-gender> [<http://perma.cc/MQ6F-BKSS>] (last visited Aug. 30, 2017).

As a response to local movements, as well as shifts on the national level—the Supreme Court’s decision in *Obergefell v. Hodges* declaring marriage between same-sex couples to be constitutionally protected being one particularly salient example¹²¹—many states have resisted the movement for increased protection of LGBTQ individuals.¹²² For instance, many states have enacted religious freedom reformation acts (RFRAs), designed to explicitly allow individuals to discriminate against LGBTQ individuals based on religious beliefs.¹²³ In addition, Arkansas,¹²⁴ Tennessee,¹²⁵ and North Carolina¹²⁶ all have explicitly preempted local ordinances designed to protect LGBTQ individuals, and numerous legislatures have proposed similar bills.¹²⁷ Legislation in this area appears to be growing at an increasing

121. See 135 S. Ct. 2584, 2589 (2015).

122. See Mason et al., *supra* note 118 (“There was a spike again after January 2015, when the Supreme Court announced it would make a ruling on *Obergefell v. Hodges* The number of marriage refusal bills introduced rose 200 percent that year, but only three passed.”).

123. The American Civil Liberties Union (ACLU) originally supported state RFRAs, designed to support religious freedom from state and local imposition. See Mason et al., *supra* note 118 (explaining state RFRAs and their development). Yet, as state RFRAs become increasingly used to justify discrimination against members of the LGBTQ community, there has been a movement to limit them. See Louise Melling, Opinion, ACLU: Why We Can No Longer Support the Federal ‘Religious Freedom’ Law, *Wash. Post* (June 25, 2015), http://www.washingtonpost.com/opinions/congress-should-amend-the-abused-religious-freedom-restoration-act/2015/06/25/ee6aaa46-19d8-11e5-ab92-c75ae6ab94b5_story.html?utm_term=.06bfcd7fa6fc (on file with the *Columbia Law Review*). This legislation, even without an express preemption clause, supersedes local protection given to LGBTQ individuals. For a thorough examination of such legislation, see Day & Weatherby, *supra* note 118, at 919–21 (observing the rise of state RFRAs).

124. See Ark. Code Ann. § 14-1-403(a) (2015) (“A county, municipality, or other political subdivision of the state shall not adopt or enforce an ordinance, resolution, rule, or policy that creates a protected classification or prohibits discrimination on a basis not contained in state law.”).

125. See Tenn. Code Ann. § 7-51-1802 (2017) (“No local government shall by ordinance, resolution, or any other means impose on or make applicable to any person an anti-discrimination practice, standard, definition, or provision that shall deviate from, modify, supplement, add to, change, or vary in any manner from [state law]”).

126. See N.C. Gen. Stat. § 143-422.2(c) (Supp. 2016) (repealed 2017) (“General Statutes supersede and preempt any ordinance, regulation, resolution, or policy adopted or imposed by a unit of local government or other political subdivision of the State that regulates or imposes any requirement upon an employer pertaining to the regulation of discriminatory practices in employment”); see also *supra* notes 1–5 (discussing N.C. H.B. 2). After months of public debate, North Carolina repealed H.B. 2. However, the legislation adopted in its place “effectively maintains a key feature of HB2 by leaving regulation of bathroom access solely in control of the Legislature” and “prevents local governments, until December 2020, from passing or amending their own nondiscrimination ordinances relating to private employment and public accommodation.” See Jason Hanna et al., North Carolina Repeals ‘Bathroom Bill,’ *CNN* (Mar. 30, 2017), <http://www.cnn.com/2017/03/30/politics/north-carolina-hb2-agreement/index.html> [<http://perma.cc/FKJ4-TQQQ>].

127. See Elizabeth Reiner Platt, States Attempting to Preempt LGBT-Friendly Municipalities, *Blog: Pub. Rights/Private Conscience Project* (Feb. 11, 2016), <http://blogs.law.columbia.edu/publicrightspriateconscience/2016/02/11/states-attempting-to-preempt-lgbt-friendly->

rate,¹²⁸ and without a federal response from the legislature, executive, or judiciary, it seems likely to continue.

B. *Preemption Strategies: A Shift in Form*

In addition to a distinct shift in legislative focus areas, there has also been a shift in preemption *tactics* that has received little, if any, scholarly attention. Traditional preemption legislation typically follows a pattern: The statute will prohibit localities from enacting regulations and ordinances in a given area and often nullifies any existing ordinances.¹²⁹ Recent preemption legislation seems to incorporate new tactics, however, which this section parcels into three categories: provisions designed to hold local governments fiscally accountable,¹³⁰ provisions designed to hold local officials personally liable,¹³¹ and provisions designed to structurally alter the ability of local governments to contest state preemption.¹³² State legislation does not always fall solely into one category—in fact, many laws contain provisions in some or all of these categories. Nonetheless, by identifying and categorizing strategies of preemptive legislation, this section provides insight into the potential legal problems with these tactics in order to provide ways that localities and other individuals may rebut such legislation.¹³³

1. *Fiscal Impediments: Local Government Accountability.* — Recent trends, both in traditional and new areas of preemption legislation, suggest a shift toward more aggressively penalizing local governments for enacting regulations contrary to state goals. This subsection demonstrates this trend by focusing on existing legislation in two states and proposed legislation in two others, each of which seeks to penalize localities and reduce their ability—and willingness—to pass local regulations.

For example, Arizona's extensive preemption bill, Act of March 16, 2016 (known as Ariz. S.B. 1487), imposes harsh monetary consequences for local governments that pass ordinances deemed to be in violation of

municipalities/ [http://perma.cc/MN4S-FCNR] (“[In 2016,] legislators have introduced bills in Michigan, Texas, West Virginia, Missouri, Indiana, and North Carolina that would have preempted local efforts to pass antidiscrimination protections. . . . Preemption bills are currently pending in Oklahoma and Virginia, and more may pop up as state legislative sessions continue.”).

128. See Mason et al., *supra* note 118 (discussing the increasing rates of anti-LGBTQ legislation).

129. See, e.g., Tenn. Code Ann. § 7-51-1802 (prohibiting local governments from supplementing the state antidiscrimination law, which notably does not protect individuals from discrimination based on sexual orientation, and stating that all existing ordinances in that area are void).

130. See *infra* section II.B.1.

131. See *infra* section II.B.2.

132. See *infra* section II.B.3.

133. For strategies on ways to challenge state preemptive laws, see *infra* Part III.

state law.¹³⁴ As will be explained further in section II.B.3, the structural impediments imposed by this law substantially add to the coercive nature of the monetary provisions.¹³⁵ While it is impossible to view the penalty provisions in the Arizona bill in complete isolation from the structural changes it imposes, this subsection seeks to emphasize the fiscal penalties, as they demonstrate the coercive effect that high monetary penalties have on local regulation.

Specifically, under Ariz. S.B. 1487, if the State Attorney General decides that a local act conflicts with state law, the locality has thirty days to repeal it or the state will “withhold and redistribute state shared monies.”¹³⁶ Alternatively, if the State Attorney General finds that the act “*may*” violate state law, the local government may challenge this determination in court only if it “post[s] a bond equal to the amount of state shared revenue paid to the county, city or town.”¹³⁷ Because these penalties are imposed before any adjudication about the validity of the regulation, these provisions are likely to reduce the ability of local governments to ever challenge the State Attorney General’s position.¹³⁸

A recent California statute, California Labor Code Section 1782 (known as Cal. section 1782)¹³⁹ demonstrates a different use of funding control—how a state can use funding to legislate in areas deemed to be exclusively “municipal affairs.”¹⁴⁰ Although California and its major cities do

134. See Ariz. Rev. Stat. Ann. § 41-194.01 (2016). For background, see Jude Joffe-Block, *Arizona Law Targets City Governments by Cutting Off Funds*, NPR (Dec. 19, 2016), <http://www.npr.org/2016/12/19/506199963/arizona-law-targets-city-governments-by-cutting-off-funds> [<http://perma.cc/T5MJ-A4HK>]. Under the Arizona Constitution, cities of more than 3,500 people can adopt their own charters to regulate and manage local concerns. Ariz. Const. art. 13, § 2.

135. Among other structural impediments, the Arizona law endows the State Attorney General with substantial decisionmaking power to individually determine the legality of a local ordinance. See *infra* section II.B.3.

136. Ariz. Rev. Stat. Ann. § 41-194.01.

137. *Id.* (emphasis added).

138. Because the State chose to waive the bond in this case, as the statute allows, Tucson was able to challenge the law. See *State ex rel. Brnovich v. City of Tucson*, No. CV-16-0301-SA, 2017 WL 3526556, at *7 (Ariz. Aug. 17, 2017). In response to the law, the Arizona Supreme Court ruled in favor of the State, holding that “a generally applicable state statute on this subject controls over a conflicting municipal ordinance.” *Id.* at *1. Although the court upheld the statute in this case, the holding was limited, and the court did not rule on the constitutionality of the provision itself, particularly the ability of the state to withhold local government dollars. See *id.* at *4 & n.2. It further questioned the constitutionality of the bond provision. *Id.* at *6–7; see also Janice Yu & Bud Foster, *Update: AZ Supreme Court Rules in State’s Favor in Lawsuit over Destruction of Seized Guns*, Tucson News Now (Aug. 17, 2017), <http://www.tucsonnewsnow.com/story/36154456/az-supreme-court-expected-to-rule-in-lawsuit-over-destruction-of-seized-guns> [<http://perma.cc/7GT8-NZNB?type=image>] (explaining the decision).

139. Cal. Lab. Code § 1782 (West 2014).

140. See *City of El Centro v. Lanier*, 200 Cal. Rptr. 3d 376, 382 (Ct. App. 2016) (examining the validity of Cal. section 1782, a law designed to “provide a financial incentive” to local governments if they choose to enact state policies).

not fall into the Republican state–Democratic city paradigm,¹⁴¹ the controversy surrounding Cal. section 1782 provides insight into state encroachment of municipal power even in a state with traditionally strong home rule.¹⁴²

After the California Supreme Court declared the payment of prevailing wages¹⁴³ in city contracts to be a “municipal affair” entirely “exempt from state regulation,”¹⁴⁴ the state legislature passed Cal. section 1782 as an “incentive” for localities to pay the state prevailing wage.¹⁴⁵ Cal. section 1782 not only prohibits state funding for public construction projects for which the city doesn’t pay the prevailing wage,¹⁴⁶ but it also prohibits state funding for construction projects to any city that has not paid the prevailing wage for a public contract “within the *prior two years*.”¹⁴⁷ Thus, the California law, while not a typical example of express preemption of a local ordinance, ties local decisionmaking to state funding in a way that ultimately reduces—or removes—the power of the local government.¹⁴⁸

These statutes demonstrate the ways in which states are tying local government funding to policymaking in increasingly coercive ways. In addition to these statutes, a number of proposed pieces of legislation expressly allow for local or sublocal entities, typically school boards, to be held civilly liable for enacting certain transgender-friendly regulations. For example, proposed legislation in Texas mandates that individuals use bathrooms based on their biological sex and prohibits local governments from enacting conflicting policies.¹⁴⁹ Local governments or school boards that

141. See *supra* notes 60–74, 91–128 and accompanying text (explaining the contemporary state–local dynamic that accompanies most progressive legislation at the local level).

142. See *Lanier*, 200 Cal. Rptr. 3d at 380 (explaining that the California Constitution allows for strong home rule by providing that “the ordinances of charter cities *supersede* state law with respect to ‘municipal affairs’” as long as these are not areas of “statewide concern” (emphasis added) (first quoting Cal. Const. art. XI, § 5; then quoting *Traders Sports, Inc. v. City of San Leandro*, 112 Cal. Rptr. 2d 677, 683 (Ct. App. 2001))).

143. Prevailing wages are wages set by the state government based on the type of project, typically as determined by collective bargaining agreements. See *State Bldg. & Constr. Trades Council of Cal. v. City of Vista*, 279 P.3d 1022, 1024 (Cal. 2012).

144. *Id.* at 1027.

145. See *Lanier*, 200 Cal. Rptr. 3d at 381 (stating that the law was passed in response to *Vista* and examining its requirements); see also Cal. Lab. Code § 1782 (West 2014).

146. Cal. Lab. Code § 1782(a), (c).

147. *Id.* § 1782(b) (emphasis added). It provides an exception if the “charter city’s failure to include the prevailing wage or apprenticeship requirement in a particular contract was inadvertent and contrary to a city charter provision or ordinance that otherwise requires compliance with this article.” *Id.*

148. See *Lanier*, 200 Cal. Rptr. 3d at 392–93 (Benke, J., dissenting) (“[B]y permitting the Legislature to do indirectly what our Supreme Court has said it may not do directly, [the majority] creates a precedent that will inhibit municipal innovation in any number of other fields.”).

149. See S.B. 6, 85th Leg., Reg. Sess. (Tex. 2017) (“The school district or open-enrollment charter school may not provide an accommodation that allows a person to use

violate this provision can be fined between \$1,000 and \$1,500 for the first violation and between \$10,000 and \$10,500 for the “second or a subsequent violation,” with “[e]ach day . . . constitut[ing] a separate violation.”¹⁵⁰ Similar legislation has been proposed in Alabama.¹⁵¹ By imposing a severe penalty on these entities, this law would effectively remove any local regulation in the area and may hamper the ability of local governments to challenge such legislation as against the state or U.S. Constitution without risking severe penalties.¹⁵²

2. *Fiscal and Criminal Impediments: Personal Accountability.* — In addition to passing legislation holding entities fiscally liable, many states have passed legislation to *personally* penalize local officials for passing regulations the state legislature determines to be beyond local governments’ power. This tactic is currently most prominent in either new or amended gun legislation. Although gun regulation is an “early” form of preemption legislation,¹⁵³ the threat of personal accountability may not be limited to this area in the future and may present a threat in “new” forms of regulation as well.¹⁵⁴

The personal liability provisions of these statutes largely focus on fiscal liability. They may hold individuals personally liable, require the payment of attorney’s fees and costs in any lawsuits, and prohibit localities from financing their legislators’ defenses. For example, Mississippi amended its preemptive firearm regulation statute (Miss. section 45-9-53) in 2014 to add a provision that “[a]ny elected county or municipal official” whose jurisdiction passes an ordinance in violation of the statute “may be civilly liable in a sum not to exceed One Thousand Dollars (\$1,000.00), plus all reasonable attorney’s fees and costs incurred by the party bringing the suit.”¹⁵⁵ Further, the statute provides that the local government may not

a multiple-occupancy bathroom or changing facility accessible to students that is designated for the biological sex opposite to the person’s biological sex.”).

150. *Id.*

151. See S.B. 1, 2017 Leg., Reg. Sess. (Ala. 2017) (prohibiting local governments from allowing individuals to use bathrooms based on gender identity rather than biological sex, and providing for a “fine of not less than two thousand dollars (\$2,000) for the first violation” and “three thousand five hundred (\$3,500) for each subsequent violation”).

152. This stands in stark contrast to the case *Gloucester County School Board v. G.G.*, in which the Supreme Court was to determine whether a school board’s refusal to allow individuals to use the bathroom aligning with their gender identity would be permitted. See Petition for Writ of Certiorari at 1–3, *Gloucester Cty. Sch. Bd. v. G.G.*, 137 S. Ct. 1239 (2016) (No. 16-273), 2016 WL 4610979. See also *infra* section II.C.3 and accompanying text (discussing the relationship between state preemption legislation and federal legislative and constitutional challenges).

153. See *supra* section II.A.1 (discussing older waves of preemption legislation). For an in-depth look at local gun preemption, see generally Blocher, *supra* note 94, at 133–36 (describing the development of state preemption laws and advocating for a return to primarily local control of gun legislation).

154. See *supra* section III.A.2 and accompanying text (discussing new areas of preemption legislation).

155. Miss. Code Ann. § 45-9-53(5)(c) (2015).

use “[p]ublic funds” to “defend or reimburse officials who are found by the court to have violated this section.”¹⁵⁶

Similarly, the Florida state legislature recently amended a statute that prohibits any local regulations of firearms and ammunition (Fla. section 790.33) to include a provision holding individuals personally liable for acts deemed to be in contravention of state law.¹⁵⁷ If a court finds that a local government’s violation of the statute was “knowing and willful,” it “shall assess a civil fine of up to \$5,000 against the . . . local government official or officials or administrative agency head under whose jurisdiction the violation occurred.”¹⁵⁸ It further prohibits the use of public funds to defend such an individual¹⁵⁹ and provides that the Governor may unilaterally remove the individual from office.¹⁶⁰

A 2012 Kentucky law (Ky. section 65.870) features similar gun preemption language, but goes a step beyond both Miss. section 45-9-53 and Fla. section 790.33.¹⁶¹ Under Ky. section 65.870, local governments are prohibited from passing any gun regulations.¹⁶² If a local entity violates this law, individuals harmed by the local ordinance or regulation may file suit against the local government or individual who passed it.¹⁶³ In addition to the imposition of attorney’s fees and costs as well as expert witness fees and expenses to the prevailing party,¹⁶⁴ if a “public servant” supported an illegal ordinance, he or she “shall” be found in violation of a Kentucky statute against official misconduct, a misdemeanor.¹⁶⁵ The Kentucky statute thus goes beyond the Mississippi and Florida legislation by *criminalizing* the passage of local regulations.

Each of these pieces of legislation, while slightly different in form, is designed to hold local officials personally responsible for the legislative acts of the local or sublocal entity. As will be assessed in the following subsection, these concerns threaten democratic values, accountability, and local innovation.¹⁶⁶

3. *Structural Impediments.* — Perhaps the most alarming form of preemption legislation is that designed to structurally alter the power of cities. Given the increasingly coercive nature of state preemption legislation, structural alterations may take a variety of forms in the future. The

156. *Id.*

157. See Fla. Stat. § 790.33(3)(a) (2017).

158. *Id.* § 790.33(3)(c).

159. *Id.* § 790.33(3)(d).

160. *Id.* § 790.33(3)(e).

161. See Ky. Rev. Stat. Ann. § 65.870 (West 2012).

162. *Id.* § 65.870(1).

163. *Id.* § 65.870(4).

164. *Id.*

165. *Id.* § 65.870(6) (“A violation of this section by a public servant shall be a violation of either KRS 522.020 [Official Misconduct in the First Degree] or 522.030 [Official Misconduct in the Second Degree], depending on the circumstances of the violation.”).

166. See *infra* section II.C.

three elements focused on here—the ability to swiftly remove local officials for preemption violations, the delegation of the assessment of a local regulation’s legality to one individual, and the reduction of a locality’s ability to challenge state preemption—demonstrate the negative implications structural penalties may have for home rule, innovation, and democracy, discussed further in section II.C.

For example, under Fla. section 790.33, the civil liability provisions of which are discussed above,¹⁶⁷ the Governor may single-handedly remove individuals from local office if they pass regulations he or she deems to be in contravention of the state preemption statute.¹⁶⁸ Thus, local officials are left to fear their removal from office if they pass local regulations later deemed to be illegal.

Ariz. S.B. 1487¹⁶⁹ is perhaps the most troubling manifestation of this form of structurally based legislation. The structural impediments of the law are fundamentally tied to their fiscal implications, discussed in detail above.¹⁷⁰ Under Ariz. S.B. 1487, Arizona legislators may submit a form¹⁷¹ to the State Attorney General if they believe that a local “ordinance, regulation, order or other official action” is in violation of state law or the Arizona Constitution.¹⁷² If the Arizona Attorney General believes the local ordinance violates state law, the local government has thirty days to either change or withdraw the local ordinance or lose all state funding.¹⁷³

Alternatively, if the State Attorney General finds that the act “*may*” violate a provision of state law or the Arizona Constitution, the State Attorney General “shall file a special action in Supreme Court to resolve the issue.”¹⁷⁴ The local government, however, must “post a bond equal to the amount of state shared revenue paid to the county, city or town” to challenge the decision in court.¹⁷⁵ By delegating discretionary power to one individual and implementing a high barrier to entry to access the court, Ariz. S.B. 1487 substantially reduces the power of local governments

167. See supra notes 157–160 and accompanying text.

168. Fla. Stat. § 790.33(3)(e) (2017).

169. See supra notes 134–138 and accompanying text (discussing the fiscal impediments in S.B. 1487); see also Joffe-Block, supra note 134 (discussing Arizona’s preemption law). Under the Arizona Constitution, cities of more than 3,500 people can adopt their own charters to regulate and manage local concerns. Ariz. Const. art. 13, § 2.

170. See supra notes 134–137.

171. See Legislator Request for Attorney General Investigation of Alleged State-Law Violation by County, City, or Town, Office of Az. Att’y Gen. Mark Brnovich (Aug. 2016), http://www.azag.gov/sites/default/files/sites/all/docs/complaints/new/Legislator%20Request%20Form%20ARS%2041-194_01.pdf [<http://perma.cc/H6B7-S3D7>].

172. Ariz. Rev. Stat. Ann. § 41-194.01 (2016).

173. *Id.* (allowing for the State Attorney General to instruct the State Treasury to “withhold and redistribute state shared monies from the [local government]”).

174. *Id.* (emphasis added).

175. *Id.*

to obtain judicial review. Thus, localities will be less able to determine the precise confines of local government power and state preemptive power.¹⁷⁶

C. *Assessing Preemption Tactics*

The legislation discussed in section II.B demonstrates the various ways that preemption laws are increasing in scope and incorporating increasingly coercive tactics. While many of these tactics have been used largely in the *older* areas of preemption legislation, particularly gun legislation, cities should be prepared for the convergence of these trends. While some areas of state preemption may ultimately be beneficial,¹⁷⁷ the tactics described herein threaten dangerous outcomes on the political process and individual rights. State preemption laws designed to punish local governments and local officials threaten to stymie any form of local progress toward protecting individual rights. While legislation designed to penalize local governments is troublesome, it is the latter two categories—personal liability and structural impediments—that present the most dangerous implications for innovation, experimentation, and the democratic process.¹⁷⁸

1. *Innovation and Experimentation.* — By passing innovative regulations, many local governments have replaced states as “laborator[ies]” willing to try “novel social and economic experiments.”¹⁷⁹ Yet, the preemption legislation discussed in sections II.A and II.B will likely have a chilling effect on local regulation and will significantly reduce local governments’ abilities to explore innovative goals.

Legislation that punishes localities for enacting regulations in certain areas threatens local innovation by tying the viability of the local government’s survival to following state policies. Although it varies, an average of

176. See *infra* notes 186, 196–198 and accompanying text (discussing the implications of Ariz. S.B. 1487 on innovation and democracy).

177. Although a complete comparison is beyond the scope of this Note, looking to federal preemption trends may further serve to enhance the debate about state preemption of local regulations. For example, federal preemption may help the federal government establish “uniform, effective standards for national industries and markets.” See, e.g., John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. Cal. L. Rev 1311, 1347 (1997). For the content of preemption laws, state legislators and state courts will need to balance the need for uniform policies at the state level with the power of local governments to increase individual rights and the collective good of the people.

178. In an oft-cited piece, Professor Heather Gerken argues for a greater conception of federalism “all the way down,” in that local governments and sublocal entities such as “juries, zoning commissions, local school boards, locally elected prosecutors’ offices, [and] state administrative agencies” are a quintessential, but often ignored, piece of the federalism paradigm. Gerken, *Foreword*, *supra* note 17, at 8.

179. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); *supra* notes 75–87 (discussing how local governments can provide the normative benefits typically attributed to federalism); *supra* notes 102–192 (discussing waves of recent progressive local regulations and state preemption).

thirty-two percent of a city's revenue generally comes from the state.¹⁸⁰ Thus, in California, for example, where the state legislature now has the power to impose state policy by tying "local affairs" to the threat of removal of state funds, local governments may have no choice but to acquiesce to state demands in order to remain fiscally stable.¹⁸¹ In particular, legislation designed to penalize local governments for regulations deemed to *subsequently* be preempted will likely further chill innovation: Cities may choose to avoid regulating in certain areas at all in order to avoid severe penalties.¹⁸²

Individual liability may have an even greater chilling effect. Local officials may be hesitant to risk severe fiscal penalties and potential criminal charges, which can have a broad impact on their professional and personal lives.¹⁸³ This may be further exacerbated by restrictions on officials' use of local government funds to support legal challenges.¹⁸⁴

With home rule, the delineations of a local government's power may not be clear at the outset. For example, on its face, Miss. section 45-9-53 broadly preempts local gun regulation.¹⁸⁵ Yet, the Mississippi Attorney General has opined that constitutional home rule allows local governments to pass certain regulations in areas of local control regardless of the state's objection.¹⁸⁶ Even though there thus may be a strong legal argument to justify local regulations, the statute threatens harsh personal penalties if a court subsequently finds a regulation to be in violation of the state statute: Officials may face a \$1,000 fine and attorney's fees and costs, which may not be paid for with public funds.¹⁸⁷ Given the punitive nature of a potential court decision, a local official may be hesitant to risk passing such a regulation regardless of its potential legality.

180. See What Are the Sources of Revenue for Local Governments?, Tax Policy Center's Briefing Book: The State of State (and Local) Tax Policy, Tax Policy Ctr. <http://www.taxpolicycenter.org/briefing-book/what-are-sources-revenue-local-governments> [<http://perma.cc/H7S4-D5PU>] (last visited Aug. 14, 2017).

181. See *supra* notes 140–149 and accompanying text (discussing California law).

182. See *supra* notes 149–152 and accompanying text (citing proposed Texas legislation designed to impose a high monetary penalty for anything deemed to be a violation of state law).

183. See *supra* notes 146–165 and accompanying text (discussing fiscal and criminal penalties of preemptive statutes).

184. See *supra* notes 153–165 and accompanying text (discussing fiscal penalties holding individual officers personally responsible for passing local regulations).

185. Miss. Code Ann. § 45-9-53(5)(c) (2015).

186. These areas of exclusively local control include "(1) a public park or at a public meeting of the municipality or other municipal governmental body; (2) a political rally, parade or official political meeting; or (3) a nonfirearm-related school, college or professional athletic event." Letter from Jim Hood, Office of the Attorney Gen., to Colmon S. Mitchell, Esquire, Smith, Phillips, Mitchell, Scott, & Nowak, LLP, Opinion No. 2013-00224, 2015 WL 1524052, at *1 (Feb. 3, 2015).

187. See Miss. Code Ann. § 45-9-53(5)(c); *supra* notes 155–156 and accompanying text (discussing the provisions of the statute).

Finally, legislative provisions imposing structural impediments on local governments are likely to have the greatest stifling effect on local innovation because local governments will not only be penalized for regulations, but they will also have limited recourse to challenge potentially unconstitutional legislation. As with the gun regulation example cited above,¹⁸⁸ cities may have a claim that state legislation violates home rule¹⁸⁹ but may be limited in their ability to raise such challenges. This may be especially true under the harsh provisions of the Arizona law, under which the State Attorney General's determination may be effectively binding due to the impediments limiting court challenges.¹⁹⁰ Local governments may thus see silence as the better of two evils, as restrained local governance may be more favorable than no governance powers at all.

Taken together, these forms of preemption suggest an increasing national convergence of state preemption legislation at the expense of local experimentation. Republican-led state legislatures often seek to limit largely Democrat-run local governments through similar preemption legislation enacted, ironically, in the name of federalism.¹⁹¹ While local innovation in these spaces is not an entirely new phenomenon—much of the mid-1900s civil rights movement and early movements to enhance LGBTQ protections began at the state or local level—the current landscape has seen a distinct shift: Current local and state legislation is being passed not to *lead* to national change, but based on the possibility that the federal government may not pass national protections in the near future.¹⁹² Yet, as states have increasingly preempted local ordinances in increasingly aggressive ways, progress at the local level has faltered.

188. See *supra* notes 185–187 and accompanying text.

189. For example, the Tucson City Attorney challenged the state law as preempted against the Arizona constitutional delegation of home rule, separation of powers, and management for the re-appropriation of funds. Letter from Mike Rankin, City Attorney, Office of the Tucson City Attorney, to Beau W. Roysden, Assistant Attorney Gen., Office of the Ariz. Attorney Gen. 9–13 (Oct. 27, 2016) [hereinafter Rankin, Letter to AG] (on file with the *Columbia Law Review*). While the Arizona Supreme Court did not find the law to be a violation of separation of powers in this instance, it did express concern about the funding provisions, stating that the purpose of the bond was unclear and that “if enforced, [it] would likely dissuade if not absolutely deter a city from disputing the Attorney General’s opinion of a local law’s constitutional validity,” an “acquiescence [that] would displace this Court from its constitutionally assigned role.” *State v. City of Tucson*, CV-16-0301-SA, 2017 WL 3526556, at *7 (Ariz. Aug. 17, 2017).

190. See *supra* notes 169–176 (describing Arizona’s preemption law).

191. See *supra* notes 60–75 and accompanying text (discussing the partisan implications of the state–local preemption dynamic, and how the idea of “states’ rights” has served as the mantra for many Republican-led states when this serves national political goals). Importantly, as the California example shows, this is not inherently a construct of the current Republican–state–Democratic–city divide, and it may manifest itself in different ways depending on the political climate of the nation and of each state.

192. See Johnson, *supra* note 17, at 115 (asking whether the future of civil rights is “sub-national” and assessing state and local progress in the area).

2. *Impeding the Democratic Process.* — Closely linked to concerns about its effect on innovation and experimentation, recent preemption legislation threatens the ability of representatives to respond to local concerns. Local governments provide important benefits: Although not necessarily true in every case, local representatives may be able to more easily identify and represent local concerns.¹⁹³ Each area of legislation discussed in section II.B threatens this process, but personal liability and structural impediments present heightened concerns.

While legislation imposing fiscal impediments necessarily limits local governments' ability to act, legislation holding local officials *personally* liable for their votes presents additional troubling issues. By imposing personal liability, state legislation may “deter[] qualified individuals from seeking local office” and “distort[] the thinking of the individuals who do serve, thus discouraging valid local legislative action in areas that are not reserved to the state.”¹⁹⁴ Although local governments are inherently restricted in their powers, they serve an important role in passing regulations that their constituents favor, and such a power should not be limited by fear of punitive retribution.

Structural impediments like those in Ariz. S.B. 1487¹⁹⁵ and Fla. section 790.33¹⁹⁶ further threaten the democratic process as they delegate substantial decisionmaking power of legal and constitutional questions to one individual, thereby significantly altering—if not removing—the role of the judiciary. While states have substantial power to determine the duties and obligations of their employees and the structure of their governments,¹⁹⁷ procedural alterations such as these may interfere with traditional norms of separation of powers and the importance of the democratic process.¹⁹⁸

3. *The Role of the U.S. Constitution.* — Finally, the three main strategies—fiscal implications, personal liability, and structural implementation—cannot be divorced from their implications on the federal level, as state statutes may threaten to impede upon rights enshrined in the U.S. Constitution. Federal

193. See supra notes 82–84 and accompanying text (discussing the benefits of local governments on democracy).

194. Brief of the Law Center to Prevent Gun Violence et al. as Amicus Curiae in Support of Cross-Appellants at 14, *Florida Carry Inc. v. City of Tallahassee*, 212 So. 3d 452 (Fla. Dist. Ct. App. 2017) (No. 1D15-5520) (on file with the *Columbia Law Review*).

195. See supra notes 134–139, 169–175 and accompanying text (discussing Arizona's preemption bill).

196. See supra notes 157–160, 167–167 and accompanying text (discussing Florida's recent amendment to its firearms and ammunition statute).

197. See Neal Devins & Saikrishna Bangalore Prakash, *Fifty States, Fifty Attorneys General, and Fifty Approaches to the Duty to Defend*, 124 *Yale L.J.* 2100, 2116 (2015) (“Subject to [only a few limitations], states may grant whatever powers and impose whatever obligations on an attorney general that they wish, assuming they choose to have one in the first place.”).

198. See Rankin, Letter to AG, supra note 189, at 10–12 (arguing that Ariz. S.B. 1487 is against the state constitution's requirement of separation of powers).

constitutional and statutory challenges are particularly likely to come to the “new” areas of state preemptive legislation, particularly legislation related to members of the LGBTQ community.

Some have argued that local governments may be able to refuse to enforce unconstitutional laws,¹⁹⁹ but this idea has not gained substantial traction. Instead, particularly in light of N.C. H.B. 2, others have looked to federal constitutional precedent to protect local regulations by asserting that the *state* is violating an individual right enshrined in the U.S. Constitution.²⁰⁰

Although the purpose of this Note is to focus on the dynamic between states and local governments, it would be remiss to ignore the broader constitutional implications of state preemption statutes. While the intricacies of the relationship between federal, state, and local governments are beyond the scope of this Note, it is important to acknowledge that coercive preemption laws complicate this relationship.²⁰¹ With the rise of state preemption laws, local governments may seek to carve out space for local innovation when the state’s action suggests discriminatory intent and animus.²⁰²

199. In particular, there was considerable debate after San Francisco Mayor Gavin Newsom directed the city to issue marriage licenses to homosexual couples in the face of a state law banning such action. See Norman R. Williams, Executive Review in the Fragmented Executive: State Constitutionalism and Same-Sex Marriage, 154 U. Pa. L. Rev. 565, 578–89 (2006) (discussing nonenforcement in San Francisco and Oregon); Samuel P. Tepperman-Gelfant, Note, Constitutional Conscience, Constitutional Capacity: The Role of Local Governments in Protecting Individual Rights, 41 Harv. C.R.-C.L. L. Rev. 219, 220 (2006) (arguing that Mayor Newsom’s “actions were a natural outgrowth of the role that local governments are expected to play in safeguarding individual constitutional rights”).

200. In one especially notable preemption case, *Romer v. Evans*, the U.S. Supreme Court held that Amendment 2—an amendment to the Colorado Constitution designed to preempt local ordinances protecting individuals from discrimination based on sexual orientation—violated the Fourteenth Amendment because the only explanation for it was legislative “animus.” 517 U.S. 620, 632 (1996). Some hoped *Romer* would dramatically alter the state–local dynamic. See Lawrence Rosenthal, *Romer v. Evans* as the Transformation of Local Government Law, 31 Urb. Law. 257, 268–69 (1999) (“*Romer* stands on a proposition that . . . it is irrational to deny local governments the power to address local problems, especially when it leaves a discrete class in jeopardy of having their right to invoke generally applicable legal protections rendered illusory. . . . [T]his conclusion has . . . radical implications for local government law.”). Although it did not have such an impact, it serves as an important precedent that may align with new forms of state preemption.

201. For an in-depth look into how federal constitutional precedent may be used to combat state preemption laws, see generally Anthony Michael Kreis, Amputating Rights-Making, 69 Hastings L.J. (forthcoming 2017) (on file with the *Columbia Law Review*).

202. For example, the ACLU brought suit against the then-Governor of North Carolina, Pat McCrory, and members of the North Carolina state legislature, claiming that the state’s preemption law, N.C. H.B. 2, violated the Equal Protection Clause of the U.S. Constitution. See Brief of Plaintiffs-Appellants at 14–17, *Carcaño v. McCrory*, No. 16-1989 (4th Cir. filed Oct. 18, 2016), 2016 WL 6542973. Another unique example of a challenge based on the federal Constitution took place in Birmingham, Alabama. After Alabama passed legislation preempting the Birmingham minimum wage, a number of individuals and groups brought suit against the Alabama Governor and Attorney General accusing them of violating 42

III. SOLVING THE PROBLEM? REINFORCING LOCAL POWER THROUGH THE COURTS AND THE POLITICAL PROCESS

Having thus identified both the trends and implications of preemptive state laws, this Part seeks to provide suggestions for how public and private actors may combat such laws. Section III.A briefly discusses how courts can avoid implicit preemption to ensure that local governments' powers are preserved to the greatest extent possible. The main focus of this Part is section III.B, which discusses more difficult cases of express preemption and assesses how federalism and localism norms can guide judicial interpretation of constitutional provisions to help promote local power. Because the delineations of states' home rule provisions vary, this section discusses general strategies and judicial methods of interpretation that can be used across states to combat such laws. In evaluating these strategies, it further suggests ways that the public may challenge troublesome preemptive laws and push for even more fundamental change through the political process.

A. *Implicit Preemption: Looking to Federal Law*

Although the main focus of this Note is on the increasing use of express preemption, it is important to recognize that judges maintain the ability to at least limit the viability of implicit preemption arguments. If judges accept arguments in favor of broad implicit preemption of local regulations, cities may be severely limited in their ability to go beyond the regulatory floor set by the state.²⁰³ Thus, just as federalism *norms* serve as a backdrop for ways to assess city power,²⁰⁴ judges may also look to federal

U.S.C. § 1983, section 2 of the Voting Rights Act, 52 U.S.C. § 10301, and the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. See Amended Complaint for Declaratory and Injunctive Relief at 2–3, 8, *Lewis v. Bentley*, No. 2:16-cv-00690-RDP (N.D. Ala. filed June 30, 2016).

203. Consider the views of implied preemption at the federal level and how avoiding preemption in many cases can allow for state and local innovation. For example, the Fair Labor Standards Act (FLSA) establishes a federal minimum wage but explicitly allows for greater state and local wages. See Fair Labor Standards Act, 29 U.S.C. § 218(a) (2012); *Anderson v. Sara Lee Corp.*, 508 F.3d 181, 193 (4th Cir. 2007) (“[T]he FLSA contains a ‘savings clause’ that expressly allows states to provide workers with more beneficial minimum wages and maximum workweeks than those mandated by the FLSA itself.”); *Pettis Moving Co. v. Roberts*, 784 F.2d 439, 441 (2d Cir. 1986) (“Congress did not prevent the states from regulating overtime wages paid to workers exempt from the FLSA. Section 218(a) of the FLSA, 29 U.S.C. § 218(a) (1982), explicitly permits states to set more stringent overtime provisions than the FLSA.”); see also U.S. Dep’t of Labor, *supra* note 108 (“Many states also have minimum wage laws. In cases where an employee is subject to both the state and federal minimum wage laws, the employee is entitled to the higher of the two minimum wages.”). Although federal preemption doctrine allows federal laws to supersede state law, federal statutes such as the FLSA allow for state and local innovation to *further* protect citizens’ rights and livelihoods.

204. See *supra* section II.C.

preemption *doctrine* as a way of limiting the power of the state. In determining whether there is implied preemption, judges may seek to analogize to the federal “clear statement” analysis, refusing to find preemption without explicit legislative intent.²⁰⁵

By following a similar “concurrent powers” approach, state judges can ensure that “more of the innovative policies proliferating in cities today would be able to stand and their successes or failures measured and analyzed—thus embodying one of the hallmarks of federalism.”²⁰⁶ If state judges shift their focus toward preserving the benefits of local governments, they may be able to work within the confines of the state–local legal dynamic without unnecessarily limiting localities’ powers.

B. *Express Preemption: Normative Guidance*

When faced with an express preemption law that may interfere either with judicial review or with home rule norms, courts should seek to protect state constitutional norms to the greatest extent possible.²⁰⁷ Although exact challenges must be implemented on a case-by-case basis, this section suggests that increasingly coercive laws can often be rebutted by careful scrutiny of state constitutions. Further, the strategies discussed here may be used to guide the development of future state constitutions and legislation protecting local power.

1. *Limiting Funding Coercion.* — Funding provisions may be the most difficult form of state preemption laws to rebut in court, as counterarguments will likely emphasize the subordinate nature of the local government. Yet, individuals and local governments may challenge these laws as against the norms and structure of home rule, particularly if they are used to limit local governments’ powers.²⁰⁸ Challenges to these laws may emphasize not only their legal deficiencies but also how they inhibit innovation and conflict with democratic goals.²⁰⁹ While funding provisions may be the most difficult forms of legislation to rebut in court, courts may be able to limit their coercive nature. Even if many of these challenges

205. See, e.g., *United States v. Locke*, 529 U.S. 89, 106–07 (2000) (espousing the clear statement rule to preserve federalism).

206. Parlow, *supra* note 23, at 385.

207. Cf. *Baker & Rodriguez*, *supra* note 42, at 1346 (asserting that the court has chipped away at state power under the Tenth Amendment, but that state courts have the power to limit states in “a strong sense” and “localities can maintain a reasonable capacity for resistance”).

208. One interesting example of a state preemption challenge was in California, where the local government relied on federal spending clause jurisprudence to suggest that states may be limited in their coercive power over cities. See *City of El Centro v. Lanier*, 200 Cal. Rptr. 3d 376, 384–85 (Ct. App. 2016) (noting the similarities between home rule and federal constitutional law, and comparing the state’s use of spending power to the Supreme Court’s analysis of spending and coercion in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012)).

209. See *supra* section II.C.

ultimately fail in court, they may spur important political change by bringing to light troublesome state laws.²¹⁰

2. *Protecting Local Officials' Autonomy.* — Legislation designed to fiscally or criminally punish local officials should be viewed with even greater scrutiny. Statutes holding local political officials personally responsible raise concerns about legislative immunity: Many of the recent preemption statutes punish officials for their voting decisions, and some may even punish officials for their *role* in the local administration regardless of any voting decisions.²¹¹ Although assessing the extent of legislative immunity at the municipal level of every state is beyond the scope of this Note, many states have explicitly established legislative immunity in their constitutions or statutes,²¹² and some scholars assert that the U.S. Constitution protects this immunity regardless of whether a state constitution has such a provision.²¹³

3. *Preserving Local Governments' Structure.* — Finally, courts should be most attentive to legislation designed to structurally alter the nature of the state–local relationship or the role of courts in assessing state preemption. Judicial review plays an instrumental role in assessing state preemption: Courts typically establish the factual predicate for any state-imposed penalties—that the local government or local official violated the state preemption law—and further serve an important role in preserving the norms underlying home rule. Preemption laws that interfere with this are thus the most threatening to traditional norms related to the democratic process and separation of powers.²¹⁴

210. Grassroots efforts often serve an important role in rolling back oppressive state laws. For example, public advocacy served an important role in limiting state preemption of smoking regulation. See *supra* notes 97–101 and accompanying text.

211. Florida's state preemption law mandates that a court "assess a civil fine of up to \$5,000 against the . . . local government official or officials or administrative agency head under whose jurisdiction the violation occurred," thus suggesting that a vote in favor of such a provision may not even be required. See Fla. Stat. § 790.33(3)(c) (2017).

212. See, e.g., Helena R. Pacheco, 1999 Survey of Rhode Island Law—*Maynard v. Beck*, 741 A.2d 866 (R.I. 1999), 5 Roger Williams U. L. Rev. 776, 776 (2000) ("Where municipal officials [in Rhode Island] are engaged in actions that are legislative in character, the doctrine of legislative immunity bars a lawsuit against the officials, regardless of the actual motives of the officials.").

213. See Christopher Asta, Note, Developing a Speech or Debate Clause Framework for Redistricting Litigation, 89 N.Y.U. L. Rev. 238, 256 n.84 (2014) (discussing Supreme Court decisions that seem to suggest local legislative immunity); J. Robert Robertson, Comment, The Effects of Consent Decrees on Local Legislative Immunity, 56 U. Chi. L. Rev. 1121, 1132–41 (1989) (arguing that common law suggests that legislative immunity should be extended to municipalities); cf. Jeanine M. Pollitt, Recent Developments, Legislative Immunity and City Councils: *Spallone v. United States*, 110 S. Ct. 625 (1990), 13 Harv. J.L. & Pub. Pol'y 1049, 1050 (1990) (discussing the Supreme Court's decision in *Spallone v. United States*, stating that "it never reached the . . . issue of whether legislative immunity applies to local legislators in general" and thus "[w]here the boundary lies between judicial power and local legislative prerogatives, therefore, remains essentially unclear").

214. See *supra* notes 82–84, 193 and accompanying text.

A recent challenge in Tucson, Arizona, demonstrates the power of structural preemption laws in action. In response to a state legislator's complaint, the Arizona State Attorney General declared a local ordinance allowing the city police department to destroy confiscated firearms²¹⁵ to be preempted by state law.²¹⁶ He claimed gun disposal was an area of "statewide concern," and thus the city could not regulate it.²¹⁷ According to the procedures mandated by Ariz. S.B. 1487, he petitioned the Arizona Supreme Court to direct the State Treasury to withhold funds from Tucson.²¹⁸

The city defended that the disposal of city-owned firearms is an area of local concern, relying on Arizona precedent explicitly providing that "the sale or disposition of *property* by charter cities' is a matter of solely local concern."²¹⁹ Despite the potential viability of this argument, Ariz. S.B. 1487 greatly restricts the ability of the city to challenge the state preemption law in court and thus essentially removes the role of the judiciary in assessing and weighing precedent.²²⁰ Where there are plausible questions of state legislative constraints and local power, the judiciary is arguably the best body to make these decisions.²²¹

The Arizona case presents just one example of how a city may defend a structural challenge. While other structural challenges may call for different strategies, it is likely that state constitutional separation of powers and home rule provisions will serve an important role in allowing courts

215. See Tucson, Ariz., Code §§ 2-140–2-142 (2017); see also Rankin, Letter to AG, *supra* note 189, at 1–2 (assessing Tucson policies).

216. Arizona law prohibits "any agency or political subdivision" from "facilitat[ing] the destruction of a firearm." Ariz. Rev. Stat. Ann. § 13-3108(F) (Supp. 2016). Instead, the organization must sell the firearms to a registered dealer. *Id.* § 12-945(B).

217. He further asserted that firearm regulation involves "(1) preserving the constitutional right to bear arms; (2) regulating police departments' conduct; and (3) regulating firearms as a way to preserve public safety," thus making it of statewide concern. See Petition for Special Action at 6, 24, State *ex rel.* Brnovich v. City of Tucson, No. CV-16-0301-SA (Ariz. Aug. 17, 2017).

218. *Id.*; see also *supra* notes 134–137 (discussing the fiscal implications of Ariz. S.B. 1487).

219. See Rankin, Letter to AG, *supra* note 189, at 2 (quoting *McMann v. City of Tucson*, 47 P.3d 672, 676 (Ariz. Ct. App. 2002) (emphasis added)). Thus, the city argued, "if there is no legitimate statewide concern in how a charter city disposes of a piece of land, there is no legitimate statewide concern in how a charter city disposes of a firearm—or a desk, a computer, a shovel, or any other piece of equipment or other personal property." *Id.* at 6.

220. See *supra* note 189 (discussing the challenge to the Arizona law, made possible only because the state waived the bond fee).

221. See, e.g., Richard H. Fallon, Jr., *The Core of an Uneasy Case for Judicial Review*, 121 Harv. L. Rev. 1693, 1695 (2008) (arguing that the value of judicial review "rests . . . on the . . . ground that legislatures and courts should both be enlisted in protecting fundamental rights, and that both should have veto powers over legislation that might reasonably be thought to violate such rights" (emphasis omitted)). But see Mark Tushnet, *Taking the Constitution Away from the Courts* 154–76 (1999) (arguing against judicial review).

to protect the structure of the state government in its entirety, including local power.²²²

CONCLUSION

Pushing back against preemptive state laws is, admittedly, an uphill battle, as state laws have often defeated preemption challenges. As this Note identifies, recent preemption trends suggest that legislation has shifted in form as well as tactic: States are increasingly restricting the power of local governments, and, in doing so, impeding innovation and experimentation. There is hope, however, that local governments and private individuals can challenge these new threats as against state constitutional provisions and, perhaps, federal law. Additionally, with a better understanding of legislative trends and the negative implications of these laws, a better-informed citizenry can push for political change.²²³ This is an especially important tool as it can be used to push back against the rhetoric of many conservative legislators and organizations that previously emphasized local control and federalism to push against federal law, only to aggressively preempt many progressive ordinances passed by cities.²²⁴

As states increasingly encroach on municipal power, local governments and the public must react to such challenges quickly and effectively to avoid stifling local innovation.²²⁵ Cities serve an important role in the current partisan conflict and may be the most likely entities to experiment in a variety of areas, ranging from environmental protections to gun safety

222. See Rankin, Letter to AG, *supra* note 189, at 10 (arguing that the Arizona statute is a violation of constitutional separation of powers, home rule, and funding allocations).

223. Admittedly, the political process does not always work in favor of localities' goals. Take, for example, the case of N.C. H.B. 2. Largely as a result of the political fallout resulting from the law, voters unseated North Carolina Governor Pat McCrory in 2016. Yet, the state legislature responded in turn by severely reducing the incumbent Democratic governor's power and further refused to repeal N.C. H.B. 2 despite promises from Charlotte that it would repeal the local antidiscrimination ordinance that prompted N.C. H.B. 2 in the first place. See Jonathan M. Katz, In North Carolina, Some Democrats See Their Grim Future, *Politico* (Dec. 27, 2016), <http://www.politico.com/magazine/story/2016/12/in-north-carolina-some-democrats-see-the-future-214553> [<http://perma.cc/2YQ8-LAX4>] (discussing the political fallout resulting from N.C. H.B. 2). After months, North Carolina legislators eventually repealed N.C. H.B. 2. Nonetheless, the legislation that replaced it left bathroom regulations subject to the control of the state legislature and put in place a moratorium preventing local governments from passing new antidiscrimination ordinances. See Hanna et al., *supra* note 126, at 4.

224. See *supra* notes 13–14 (discussing conservative legislators' rhetoric about local control).

225. It is important to note that state constitutions are not as stagnant as the U.S. Constitution, and many states hold constitutional conventions on a relatively regular basis. See Robert F. Williams, *State Constitutional Law Processes*, 24 *Wm. & Mary L. Rev.* 169, 198 (1983) ("State constitutions are much more easily and frequently amended than is the Federal Constitution."). Thus, local constituents may want to focus their efforts on more fundamental reforms to state constitutions that may prohibit aggressive preemption laws in the first place.

to increased labor protections and expanded civil rights. Yet, if local governments are deprived of the ability under state constitutions to even *attempt* to experiment with local regulation, a quintessential aspect of the democratic political process will be lost.

