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# PROGRESSIVE POLICY-MAKING ON THE LOCAL LEVEL: RETHINKING TRADITIONAL NOTIONS OF FEDERALISM

by MATTHEW J. PARLOW\*

## INTRODUCTION

In his oft-quoted and famous dissent, Justice Louis Brandeis stated 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.”<sup>1</sup> This theme is very much alive in contemporary discourse and scholarship—as evidenced by the Symposium held by this Law Review.<sup>2</sup> And while states may indeed be fertile grounds for policy innovation, one must question whether states continue to be the best level of government at which to engage in such experimentation. Instead, local governments<sup>3</sup> may prove even more fruitful agents for social change and policy innovation than the state or federal levels of government. After all, conceptually 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. Accordingly, this Article aims to further explore the idea of further decentralization of policy-making to the local level and the attendant challenges and tensions that such a notion begets.

Part I of this Article discusses why local governments are critical components of our federal system and why they embody the values of federalism. Part II will detail how local governments have been trailblazers in many areas of progressive policy-making. Part III analyzes why, despite their importance in our

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

2. See, e.g., Tammy Murray, Note, *State Innovation in Health Care: Congress' Broad Spending Power Under a National Health Care System Will Stifle State Laboratories of Democracy*, 3 *IND. HEALTH L. REV.* 263, 266-80 (2006) (analyzing state innovations in health care reform); David A. Dana, *State Brownfields Programs as Laboratories of Democracy?*, 14 *N.Y.U. ENVTL. L.J.* 86, 97-107 (2005) (detailing varying land use approaches in many states to develop brownfields).

3. In this Article, I use the terms local governments, cities, and localities interchangeably and broadly to refer to local government entities. While there are admittedly great differences in the types of local governments and their attendant powers, for the purposes of this Article, I narrow my focus to those local governments that exercise a meaningful amount of legislative power over traditional areas covered by the Tenth Amendment police powers. These local governments would mainly focus on cities, towns, villages, counties, and the like.

intergovernmental system, local governments' powers have been drastically limited by a perhaps overzealous preemption doctrine which may run afoul of the original intent of the home rule movement in state and local government law. Finally, the Article concludes by questioning the wisdom of the current preemption doctrine that limits local governments' ability to be Petri dishes for innovative policies that might translate well to the state and federal level of governments.

## I. LOCAL GOVERNMENTS' ROLE IN OUR FEDERAL STRUCTURE

### A. *Local Governments as Originally Conceived and Their Maturity*

Local governments are not mentioned or even considered in the United States Constitution.<sup>4</sup> Local governments were originally created by states and began as small urban and rural areas, far from the cities and major metropolitan areas we know and experience today.<sup>5</sup> States created local governments—and, with many forms of local government, still do to this day—to carry out the duties of the state on the local level.<sup>6</sup> Local governments were limited by Dillon's Rule, which permitted localities to exercise only those powers expressly granted to them by the states.<sup>7</sup> In this regard, courts and scholars viewed local governments as mere administrative arms of the state.<sup>8</sup> From this view, local governments would not seem to be promising forums for policy experimentation. However, as explored further in Part III, the home rule movement aimed to empower local governments in a more meaningful way where localities could exercise all powers not expressly reserved by the state—so long as they were not preempted by the state government.<sup>9</sup> This change, as discussed further below, provided hope for policy innovations on the local level the way Justice Brandeis envisioned the states would do in our federalism system.

Local governments have also transformed from the smaller urban and rural centers when originally conceived to include flourishing metropolitan areas. Many

4. Frayda S. Bluestein, *Do North Carolina Local Governments Need Home Rule?*, 84 N.C. L. REV. 1983, 1988 (2006).

5. See Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1096-97 (1980) (discussing the power that cities and towns had before the Revolution, and the fact that many cities were not incorporated at that time).

6. *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907).

7. See Kenneth A. Stahl, *The Suburb as a Legal Concept: The Problem of Organization and the Fate of Municipalities in American Law*, 29 CARDOZO L. REV. 101, 114-15 (2008) (“[Judge John] Dillon promulgated the famous ‘Dillon’s Rule,’ which established that municipalities were entirely creatures of the state and had no inherent right to exercise any of the powers the municipal corporation had classically enjoyed.” (citing JOHN DILLON, TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS § 9 at 21-22 (1st ed. 1872))). See also *Hunter*, 207 U.S. at 178-79 (noting that a state may modify or withdraw any and all powers that it delegates to the local government).

8. See *Hunter*, 207 U.S. at 178-79 (“The number, nature and duration of the powers conferred upon [municipal] corporations and the territory over which they shall be exercised rests in the absolute discretion of the state.”); Frug, *supra* note 5, at 1112 (stating that one of the central legal doctrines emphasized by Dillon was state control over cities).

9. See *infra* text accompanying notes 86-90.

cities and counties are now significantly more powerful, socially, economically, and politically than when they were originally created and their powers—or lack thereof—originally devised.<sup>10</sup> In fact, one might even argue that cities' economic strength, large populations, and political importance make them more powerful and influential than some states. For example, as of July 2006, the city of New York, New York has 8,250,000 residents; the city of Los Angeles, California has approximately 4,000,000 residents; and the city of Chicago, Illinois has almost 2,900,000 residents—constituting the three most populated cities in the United States.<sup>11</sup> These cities individually have more residents than forty-one states, twenty-four states, and nineteen states, respectively, as of the 2000 census.<sup>12</sup> The gross domestic products for these cities, as of 2005, are also quite compelling: New York's is \$11,330,000,000; Los Angeles's is \$6,390,000,000; and Chicago's is \$4,600,000,000.<sup>13</sup>

Finally, local governments also warrant our attention because a significant percentage of public goods, services, and regulation occur at the local level.<sup>14</sup> In particular, local governments provide essential services that affect citizens' day-to-day lives: police, fire, library, trash collection, street maintenance, transportation, water and power, education, and others. As one scholar notes, "The services performed by municipalities are those most vital to the preservation of life (police, fire, sanitation, public health), liberty (police, courts, prosecutors), property (zoning, planning, taxing), and public enlightenment (schools, libraries)."<sup>15</sup> In this regard, local governments can be viewed as perhaps the most critical level of government in terms of responding—through regulation, goods, or services—to the needs and wants of its constituents.

### *B. Local Government and the Values of Federalism*

Local governments may also have the potential to best embody the values of federalism. 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. It is far more likely that average citizens may interact with their city councilmember or mayor than their state legislator or governor, or their congressperson, senator, or President. Congress conducts its sessions in Washington, D.C.—far away from most cities. State legislatures meet in their state capitol, which is often inconvenient for those living outside of that

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10. See Frug, *supra* note 5, at 1062-63 (discussing the limited powers of American cities).

11. U.S. Census Bureau, Annual Estimates of the Population for Incorporated Places Over 100,000, <http://www.census.gov/popest/cities/tables/SUB-EST2006-01.csv> (last visited Apr. 13, 2008).

12. U.S. Census Bureau, United States and Puerto Rico Population Estimates, <http://factfinder.census.gov> (under "Population Estimates Program," follow "get data"; select "2007 Population Estimates" and follow "Geographic Comparison Tables"; then select "United States—States; and Puerto Rico" and click "Show Result") (last visited Aug. 1, 2008).

13. City Mayors, The 150 Richest Cities in the World by GDP in 2005, <http://www.citymayors.com/statistics/richest-cities-2005.html> (last visited Apr. 13, 2008).

14. ROBERT L. LINEBERRY, EQUALITY AND URBAN POLICY: THE DISTRIBUTION OF MUNICIPAL PUBLIC SERVICES 10 (1977).

15. *Id.*

metropolitan area. In this regard, average citizens cannot take advantage of opportunities to voice their opinions at open meetings when Congress or their state legislature considers various regulations and the like.<sup>16</sup> On the other hand, city council meetings are held within the locality—usually at city hall—thus making it convenient for community members to voice their concerns to their local elected officials.<sup>17</sup>

More importantly, perhaps, many local governments offer meaningful opportunities for public participation through various substructures of local governments that aim to engage the public in the local decision- and policy-making process: business improvement districts, neighborhood councils, and the like.<sup>18</sup> Such opportunities allow community stakeholders to dialogue regarding the issues the city faces and then interact with their elected officials to help inform the decision-making process. This type of public participation furthers one of the key values of federalism: democracy.<sup>19</sup>

Because they are smaller in size, local governments are more capable of being responsive to the needs of their respective communities because they are more in touch with their constituents.<sup>20</sup> This leads, in theory, to more responsive and representative policy-making as local government officials make decisions informed by the community's wants and needs.<sup>21</sup> Moreover, because citizens are closer to and more in touch with their local governments, they can better monitor and hold accountable their elected and appointed officials and mitigate against the capture of their local government by special interest groups.<sup>22</sup>

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16. See Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 397 (1990) [hereinafter Briffault, *Our Localism II*] (noting how average citizens are more likely to believe that their voices are drowned out or ignored due to the greater number of constituents).

17. Richard Briffault, *The Rise of Sublocal Structures in Urban Governance*, 82 MINN. L. REV. 503, 505 (1997). See generally Nicholas Johnson, *Open Meetings and Closed Minds: Another Road to the Mountaintop*, 53 DRAKE L. REV. 11, 16-29 (2004) (discussing the purposes and the costs of open meetings).

18. See generally Richard Briffault, *A Government for Our Time? Business Improvement Districts and Urban Governance*, 99 COLUM. L. REV. 365, 366 (1999) (detailing business improvement districts); Matthew J. Parlow, *Civic Republicanism, Public Choice Theory, and Neighborhood Councils: A New Model for Civic Engagement*, 79 U. COLO. L. REV. 137, 166-87 (2008) (providing an overview of neighborhood councils).

19. Richard Briffault, *Home Rule for the Twenty-First Century*, 36 URB. LAW. 253, 258 (2004) [hereinafter Briffault, *Home Rule*].

20. See Briffault, *Our Localism II*, *supra* note 16, at 397 (noting that participation is often seen as being futile at the state or national level due to the large constituency, while at the local level where constituency is smaller, "each individual can be heard and can influence a significant portion of the community").

21. See, e.g., Nicole Stelle Garnett, *Suburbs as Exit, Suburbs as Entrance*, 106 MICH. L. REV. 277, 297 (2007) ("Smaller local governments also may be more responsive to constituent preferences."); Matthew J. Parlow, *A Localist's Case for Decentralizing Immigration Policy*, 84 DENV. U. L. REV. 1061, 1070 (2007) [hereinafter Parlow, *Decentralizing Immigration Policy*] (explaining why local governments are more in touch with their constituents and thus capable of being more responsive to the needs of their communities).

22. Parlow, *Decentralizing Immigration Policy*, *supra* note 21, at 1071.

## II. INNOVATION ON THE LOCAL LEVEL

Perhaps the most significant federalism value embodied in local governments is the opportunity to be laboratories of innovation as Justice Brandeis envisioned for the states.<sup>23</sup> In many ways, local governments have led the way in many areas of public policy where the federal and state governments have either failed, avoided issues altogether, or been unable to reach an agreement because of the divergent interests of their constituencies. For example, local governments have been on the forefront of policy areas such as climate change,<sup>24</sup> gay rights and gay marriage,<sup>25</sup> domestic partner benefits,<sup>26</sup> affordable housing,<sup>27</sup> campaign finance and other electoral reforms,<sup>28</sup> health care,<sup>29</sup> and term limits.<sup>30</sup> Two other areas, local

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23. Richard Briffault, *Home Rule and Local Political Innovation*, 22 J.L. & POL. 1, 31 (2006) [hereinafter Briffault, *Local Political Innovation*]. See generally *id.* at 1-32 (describing various areas of local policy innovation, particularly in electoral reform).

24. See Kirsten Engel, *State and Local Climate Change Initiatives: What Is Motivating State and Local Governments to Address a Global Problem and What Does This Say About Federalism and Environmental Law?*, 38 URB. LAW. 1015, 1015 (2006) (“[I]t is the state governments that are actively pursuing programs to reduce emissions of greenhouse gases and sequester carbon while the federal government has adopted a nonregulatory, and, many would argue, a mostly do very little approach.”); Hari M. Osofsky & Janet Koven Levit, *The Scale of Networks?: Local Climate Change Coalitions*, 8 CHI. J. INT’L L. 409, 410-11 (forthcoming 2008), available at <http://ssrn.com/abstract=1018310> (stating that, in contrast to the federal government, governmental leadership in U.S. cities has been very progressive addressing the impact of emissions on the environment).

25. See David J. Barron, *Why (and When) Cities Have a Stake in Enforcing the Constitution*, 115 YALE L.J. 2218, 2225-32 (2006) (discussing San Francisco’s challenge to California’s state ban on same-sex marriages and contextualizing the case in a theoretical discussion of what latitude cities have in enforcing the U.S. Constitution in direct contravention of state law); Richard C. Schragger, *Cities as Constitutional Actors: The Case of Same-Sex Marriage*, 21 J.L. & POL. 147, 148-53 (2005) (detailing San Francisco’s issuance of marriage licenses to same-sex couples and exploring the possibility and desirability of local government action in this policy area).

26. See generally Catherine L. Fisk, *ERISA Preemption of State and Local Laws on Domestic Partnership and Sexual Orientation Discrimination in Employment*, 8 UCLA WOMEN’S L.J. 267, 270 (1998) (describing San Francisco’s uniquely progressive nondiscrimination policy which requires “city contractors to provide the same benefits to employee’s domestic partners as are provided to employee’s spouses.”); Ryah Lilith, *Caring for the Ten Percent’s 2.4: Lesbian and Gay Parents’ Access to Parental Benefits*, 16 WIS. WOMEN’S L.J. 125, 139-41 (2001) (detailing local laws that extend domestic partner benefits to municipal employees).

27. See generally Cecily T. Talbert, Nadia L. Costa & Alison L. Krumbein, *Recent Developments in Inclusionary Zoning*, 38 URB. LAW. 701, 702-05 (2006) (detailing local inclusionary zoning ordinances and the results of legal challenges to them).

28. See Briffault, *Local Political Innovation*, *supra* note 23, at 2 (“[A] number of cities and counties across the country have been actively engaged in examining and revising their local governmental and electoral processes, and in experimenting with new forms of political organization. Many of these—like alternative voting systems, campaign finance reform, term limits, and conflict of interest regulation—can involve fairly dramatic changes in local politics and governance.” (citations omitted)). See generally *id.* at 4-15 (describing various local experimentation and innovations, including direct democracy via initiative, referendum, and recall, nonpartisan primaries, proportional representation electoral systems, semi-proportional electoral systems, instant runoff voting, and campaign finance reform).

29. See S.F., CAL., HEALTH CARE SECURITY ORDINANCE § 14.2 (2007), available at <http://www.municode.com/content/4201/14131/HTML/ch014.html> (providing uninsured residents of the City and County of San Francisco with access to health care). See also *Golden Gate Rest. Ass’n v. City*

immigration ordinances and living wage ordinances, warrant further consideration because they represent policy areas where the federal and state governments have failed to meet the needs of their constituents and the local governments have attempted to address the problems on a micro-level. However, as discussed further below, such efforts have been struck down on preemption grounds by courts.

### A. Local Government Immigration Regulation

Local governments have recently waded into the highly politicized policy arena of immigration regulation.<sup>31</sup> The proliferation of such laws may be due, in part, to a perception that the federal government has failed to properly address illegal immigration<sup>32</sup> in a manner that the public deems satisfactory.<sup>33</sup> Regardless of the impetus for such laws, the past few years have seen more than one hundred cities and counties adopt and/or consider laws targeted at illegal immigration within their boundaries.<sup>34</sup> These local immigration ordinances fall into four main categories: day laborer, employment, housing, and English-only.<sup>35</sup>

The day laborer ordinances require those who hire day laborers to register with their respective municipality and even display a certificate in the windshield of their car.<sup>36</sup> The employment ordinances seek to punish those businessES that

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& County of S.F., 512 F.3d 1112, 1114 (9th Cir. 2008), available at [http://www.ca9.uscourts.gov/ca9/Documents.nsf/54dbe3fb372dcb6c88256ce50065fcb8/aff372e2cbda965a882573cb0070d2ca/\\$FILE/0717370o.pdf](http://www.ca9.uscourts.gov/ca9/Documents.nsf/54dbe3fb372dcb6c88256ce50065fcb8/aff372e2cbda965a882573cb0070d2ca/$FILE/0717370o.pdf) (allowing the San Francisco Health Care Security Ordinance to go into effect pending an appeal on the merits from the district court's grant of summary judgment in favor of the plaintiff).

30. See generally Danielle Fagre, *Microcosm of the Movement: Local Term Limits in the United States*, TERM LIMITS OUTLOOK SERIES (U.S. Term Limits Foundation), Aug. 1995, available at <http://heartland.temp.sitexecutive.com/pdf/28804d.pdf> (detailing how almost 3000 municipalities have adopted term limits and the changes these laws have brought about).

31. Parlow, *Decentralizing Immigration Policy*, *supra* note 21, at 1061. See Karla Mari McKanders, *Welcome to Hazelton! "Illegal" Immigrants Beware: Local Immigration Ordinances and What the Federal Government Must Do About It*, 39 LOY. U. CHI. L.J. 1, 6-20 (2007) (providing a more in-depth analysis of local immigration ordinances and their attendant legal and policy issues).

32. In this Article, I use the term "illegal immigration" to refer to the phenomenon of persons entering the United States illegally, as defined by our federal immigration laws, or who remain in the country illegally after their permitted period of time to be lawfully present has expired.

33. See Joseph Chamie, Center for Migration Studies, *What About the Illegal Aliens? 4-7* (Mar. 20, 2006) (draft presented at the Annual Meeting of the Population Association of America), available at <http://paa2006.princeton.edu/download.aspx?submissionId=60186> (citing public opinion polls demonstrating that a majority of Americans view illegal immigration as a serious problem).

34. See Fair Immigration Reform Movement, *Database of Local Immigration Ordinances*, <http://www.fairimmigration.org/learn/immigration-reform-and-immigrants/local-level/database-of-ordinances.html> (last visited Apr. 13, 2008) (listing pending and passed local immigration ordinances); Puerto Rican Legal Defense and Education Fund, Latino Justice Project, available at <http://www.prldf.org/Civil/Latino%20Justice%20Campaign.htm> (last visited Apr. 13, 2008) (listing pending and passed local anti-immigrant ordinances).

35. Parlow, *Decentralizing Immigration Policy*, *supra* note 21, at 1064-65.

36. See, e.g., VISTA, CAL., ORDINANCE 2006-9 §§ 5.90.020, 5.90.030, available at <http://www.prldf.org/Civil/Documents/Vista,%20CA%20Ordinance.pdf> (last visited Apr. 13, 2008) (requiring that "[e]ach employer or agent who makes an offer of day labor employment or who hires an individual to perform day labor employment" must hold a valid registration certificate and attach such a certificate to the passenger side window of any vehicle used to transport the day laborer from an

employ undocumented immigrants.<sup>37</sup> These ordinances bar businesses that employ undocumented immigrants from securing city contracts or business licenses.<sup>38</sup> Some of these employment ordinances even affirmatively—and controversially—impose a duty on businesses to verify the lawful residency and/or immigration documentation of their employees.<sup>39</sup> Similarly—and also controversially—some of the housing ordinances require landlords to verify the legal resident status of their tenants.<sup>40</sup> The more standard housing ordinances prohibit landlords from renting to undocumented immigrants and impose fines for doing so.<sup>41</sup> Finally, the English-only ordinances establish English as the official language of a city and mandate that all city business—with certain limited exceptions—be conducted in English.<sup>42</sup>

At the same time, other cities have advanced pro-immigration approaches. For example, many cities have designated themselves sanctuary cities by adopting non-cooperation laws or policies that make their boundaries safe-havens for

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uncontrolled location to a work site).

37. In this Article, I use the term “undocumented immigrants” to refer to persons who enter the United States illegally, as defined by our federal immigration laws, or who remain in the country illegally after their permitted period of time to be lawfully present has expired. Others refer to such individuals as “illegal aliens,” as do our federal immigration laws.

38. See, e.g., San Bernardino, Cal., City of San Bernardino Illegal Immigration Relief Act Ordinance § 6 (2006), available at <http://www.campaignsitebuilder.com/templates/displayfiles/tmpl68.asp?SiteID=843&PageID=12139&Trial=false> (last visited Apr. 13, 2008) (“Any for profit entity . . . that aids and abets illegal aliens or illegal immigration shall be denied approval of a business permit, the renewal of a business permit, city contracts or grants for a period not less than five years from its last offense.”). The San Bernardino City Council rejected the proposed ordinance. The ordinance subsequently failed to pass through the initiative process. Kelly Rayburn, *Opinions Split on Effect of Ruling on SB Initiative*, SAN BERNARDINO COUNTY SUN, June 28, 2006, available at 2006 WLNR 11211358. Other employment ordinances revoke city contracts from businesses that employ undocumented immigrants. See, e.g., Riverside, NJ, Riverside Twp. Illegal Immigration Relief Act § 4, (2006), available at <http://www.prldef.org/Civil/Documents/Riverside%20Ordin%2016%20%2018%20Passed%207-06.pdf> (last visited Apr. 13, 2008) (“Any for profit entity . . . that aids and abets illegal aliens or illegal immigration shall be denied approval of a business permit, the renewal of a business permit, township contracts or grants for a period not less than five years from its last offense.”).

39. See, e.g., Suffolk, N.Y., A Local Law to Require Companies Doing Business with the County to Certify Compliance with Federal Law with Respect to Lawful Hiring of Employees § 3, (2006), available at <http://www.prldef.org/Civil/Documents/Suffolk%20County.pdf> (requiring employers that receive any compensation from the county to submit sworn affidavits stating that they have complied, in good faith, with 8 U.S.C. § 1324a’s prohibition against employing undocumented immigrants).

40. See Cherokee County, Ga., Ordinance No. 2006-003 § 3 (Dec. 5, 2006), available at [http://www.aclu.org/pdfs/immigrants/cherokeecounty\\_ordinance.pdf](http://www.aclu.org/pdfs/immigrants/cherokeecounty_ordinance.pdf) (“To let, lease or rent a dwelling unit to an illegal alien . . . shall be deemed to constitute harboring.”).

41. See, e.g., San Bernardino, Cal., Save City of San Bernardino Illegal Immigration Relief Act Ordinance § 5, <http://www.campaignsitebuilder.com/templates/displayfiles/tmpl68.asp?SiteID=843&PageID=12139&Trial=false> (last visited June 29, 2008) (“Any person or his or her servant, agent, or employee who owns, leases, conducts or maintains any vehicle used to solicit day laborers is guilty of creating a nuisance.”). The San Bernardino City Council rejected the proposed ordinance. The ordinance subsequently failed to pass through the initiative process. Rayburn, *supra* note 38.

42. See, e.g., Farmers Branch, Tex., Res. No. 2006-130 § 3 (Nov. 13, 2006), available at <http://www.ci.farmers-branch.tx.us/Communication/Resolution%202006-130.html> (allowing the use of languages other than English to promote public health and where necessary to comply with federal and state law).



undocumented immigrants.<sup>43</sup> In this regard, sanctuary cities mandate that their employees not enforce federal immigration laws, nor cooperate with, or coordinate with, federal immigration enforcement.<sup>44</sup>

As evidenced by these polar opposite approaches, local governments have entered the field of immigration regulation in unprecedented ways. As discussed further below, the legal soundness for these laws—particularly the anti-illegal immigration ordinances—is questionable. However, these efforts demonstrate that local governments may provide fertile testing grounds for the rhetoric surrounding illegal immigration that might prove or disprove, on a micro-level, some of the potentially dispositive issues in the immigration debate. This type of local government experimentation in the immigration field may prove valuable to inform state and federal policy-making in the area.

### B. Living Wage Ordinances<sup>45</sup>

Many major cities have waded into the area of wage regulation, recognizing that the costs of living within their respective jurisdictions far exceed the federal and state minimum wages.<sup>46</sup> This perspective is supported by recent studies that suggest that the minimum wage fails to even meet the federal poverty level or the cost of living in different metropolitan areas.<sup>47</sup> Moreover, the effect of wage levels

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43. See Fair Immigration Reform Movement, Database of Local Immigration Ordinances, <http://www.fairimmigration.org/learn/immigration-reform-and-immigrants/local-level/database-of-ordinances.html> (last visited Apr. 13, 2008) (noting cities designating themselves as sanctuary cities or considering sanctuary regulations or ordinances, including National City, California; Miami, Florida; and Cook County, Illinois).

44. See Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1382-84 (2006) (describing the origins and implications of sanctuary laws).

45. For more in-depth analyses of living wage ordinances, see generally Clayton P. Gillette, *Local Redistribution, Living Wage Ordinances, and Judicial Intervention*, 101 NW. U. L. REV. 1057 (2007), analyzing living wage ordinances in the context of local redistribution efforts; David Neumark, *Living Wages: Protection For or Protection From Low-Wage Workers*, 58 INDUS. & LAB. REL. REV. 27 (2004), considering whether living wage ordinances benefit or hurt low-wage workers and their communities; Rachel Harvey, Note, *Labor Law: Challenges to the Living Wage Movement: Obstacles in a Path to Economic Justice*, 14 U. FLA. J.L. & PUB. POL'Y 229 (2003), analyzing legal challenges to living wage ordinances; and MaryBeth Lipp, Note, *Legislators' Obligation to Support a Living Wage: A Comparative Constitutional Vision of Justice*, 75 S. CAL. L. REV. 475 (2002), arguing that living wage laws are consistent with legislators' obligations under the constitution.

46. See Darin M. Dalmat, Note, *Bringing Economic Justice Closer to Home: The Legal Viability of Local Minimum Wage Laws Under Home Rule*, 39 COLUM. J.L. & SOC. PROBS. 93, 95-101 (2005) (describing the history and interaction with federal efforts of state minimum wage laws from the early 1900s to the present).

47. See Alana Semuels, *Poverty Line Poor Fit With Costs, Report Says*, L.A. TIMES, Oct. 17, 2007, at C2 (noting that in Los Angeles, California, a full-time, minimum wage worker earns \$15,600 per year, while a single adult needs \$28,126 to live modestly, and a single parent needs \$62,393 annually); Economic Policy Institute, *Economic Snapshots: Snapshot for January 31, 2007*, [http://www.epi.org/content.cfm/webfeatures\\_snapshots\\_20070131](http://www.epi.org/content.cfm/webfeatures_snapshots_20070131) (noting that a full-time, minimum wage worker working forty hours a week for fifty-two weeks earns \$10,712 per year—approximately forty percent below the \$17,170 poverty level for a family of three); see also Dalmat, *supra* note 46, at 94 (noting the inadequacy of state minimum wage laws—in excess of the federal minimum wage—that still

on American workers is exacerbated by another economic trend: the decrease of well-paying, unskilled jobs.<sup>48</sup> In this regard, millions of Americans are working for a living, but remain under the poverty level as the value of the minimum wage continues to erode.<sup>49</sup> Accordingly, many cities have adopted living wage ordinances to address this situation.<sup>50</sup> To date, approximately 140 municipalities have adopted living wage ordinances.<sup>51</sup> Living wage laws break down into two broad categories: the contractor model and the “blanket” living wage laws.<sup>52</sup>

Under the contractor model, local governments adopt ordinances that require businesses receiving government contracts, and to a lesser degree, government subsidies, to pay their employees a designated wage—or a combination of wage and health benefits—in excess of the federal and respective state minimum wage.<sup>53</sup> While these types of living wage laws vary slightly from city to city, most living wage ordinances are similar in structure and application. Cities adopting the contractor model of living wage laws define government subsidies to include tax incentives, loans, grants, and other forms of public assistance.<sup>54</sup> Employers subject to such living wage laws can meet the heightened wage requirement in one of two manners: by paying the hourly wage at the required wage level, or by paying a lower hourly wage level plus a minimum level of health benefits.<sup>55</sup> Moreover, employers subject to contractor model living wage laws need only pay a living wage to those employees working on the government contract, or to those who are employed because of the government subsidy (depending on the jurisdiction).<sup>56</sup> Many cities establish their living wage at a level to allow a full-time worker to

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fail to put workers at or above the poverty level). The state of affairs for today’s full-time minimum wage worker contrasts starkly with that of a similarly situated worker in the 1960s and 1970s who could provide for a family of three on the minimum wage and remain above the poverty level. Ralph E. Smith and Bruce Vavrichek, *The Minimum Wage: Its Relation to Incomes and Poverty*, MONTHLY LAB. REV. 1, 26-27 (1987). However, by the 1980s, the full-time minimum wage worker’s yearly earnings fell below the threshold for a family of two. *Id.* at 27.

48. See Jared Bernstein and Lawrence Mishel, *The Growth of the Low-Wage Labor Market: Who, What, and Why*, 3 KAN. J.L. & PUB. POL’Y 12, 24 (1994) (“The fact that wages are falling and good jobs are being lost (and replaced with low quality jobs) leads to falling disposable income.”).

49. *Id.* at 17-18 (noting that the average hourly entry-level wage as measured in 1991 dollars dropped by twenty-five percent between 1973 and 1991).

50. Fair Immigration Reform Movement, Database of Local Immigration Ordinances, <http://www.fairimmigration.org/learn/immigration-reform-and-immigrants/local-level/database-of-ordinances.html> (last visited Apr. 13, 2008). To be sure, there are certainly other impetuses that may lead cities to adopt living wage ordinances. See, e.g., Robert Pollin, *Living Wage, Live Action Living Wage Proposals Gaining Ground Across the Nation*, THE NATION, at 7 (Nov. 23, 1998) (noting that cities passing living wage laws did so in response to the failure of the federal government to keep up with inflationary pressure, and to fight local budget cutbacks).

51. See Living Wage Resource Center, Living Wage Wins, <http://www.livingwagecampaign.org/index.php?id=1959> (last visited Apr. 13, 2008) (providing the date and description of municipal living wage ordinances to date and links to summaries).

52. Dalmat, *supra* note 46, at 99-100. See also Lipp, *supra* note 45, at 487-88 (providing a general description of the variations in living wage laws).

53. Dalmat, *supra* note 46, at 99-100.

54. Lipp, *supra* note 45, at 487.

55. *Id.* at 488.

56. Neumark, *supra* note 45, at 28.

support a family of three above the poverty level in the area.<sup>57</sup> In addition, numerous cities adopting such ordinances usually either index the living wage level to inflation or increase it at predetermined amounts for subsequent years.<sup>58</sup> Finally, cities adopting living wage ordinances usually provide exemptions to various employers, such as non-profit organizations, new businesses, businesses that can demonstrate a financial hardship, businesses with a certain number of employees or less, and businesses with government contracts or government subsidies less than a certain dollar amount.<sup>59</sup>

The “blanket” living wage laws regulate private sector wages within municipal boundaries irrespective of whether businesses receive a government contract or government subsidy.<sup>60</sup> There have only been a few cities that have adopted blanket living wage ordinances: Berkeley, California;<sup>61</sup> Madison, Wisconsin;<sup>62</sup> New Orleans, Louisiana;<sup>63</sup> San Francisco, California;<sup>64</sup> and Santa Fe, New Mexico.<sup>65</sup> In the process of adopting these laws, the city councils found that the cost of living in their cities was higher than federal or state minimum wages provided, and that it was in their cities’ best interest to address this economic disparity.<sup>66</sup> In this regard, these cities attempted to remedy a glaring problem in the economic health of the city—something that the state and federal governments had failed to address.

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57. *See id.* at 29 (detailing how various cities throughout the country arrive at the figures for their living wage laws).

58. Dalmat, *supra* note 46, at 100.

59. *See id.* (“A handful of local governments . . . have enacted minimum wage regulations . . . exempting only small business and (sometimes) nonprofit organizations.”).

60. While some cities refer to these laws as living wage ordinances, some merely refer to them as minimum wage laws.

61. *See* BERKELEY MUN. CODE § 13.27.100 (2000) (describing the private rights of action for employees in California to enforce wage laws).

62. MADISON, WIS., GEN. ORDINANCE § 3.45. *But see* WIS. STAT. § 104.001(2) (2005) (invalidating the Madison minimum wage law). *See also* Kerry A. Burchill, Comment, *Madison’s Minimum-Wage Ordinance, Section 104.001, and the Future of Home Rule in Wisconsin*, 2007 WIS. L. REV. 151, 173-87 (2007) (analyzing the Madison minimum wage law and the preemption of the ordinance by state statute).

63. NEW ORLEANS CITY CHARTER §§ 9-501 to 9-507 (2002), *invalidated by* New Orleans Campaign for a Living Wage v. City of New Orleans, 825 So. 2d 1098, 1108 (La. 2002) (holding that the state law preempted the city from passing its own minimum wage laws).

64. *See* S.F., CAL., ADMIN. CODE §§ 12R.1 to 12R.13 (2003) (outlining and enacting the procedures for San Francisco’s minimum wage ordinance).

65. *See* SANTA FE, N.M., CITY CODE §§ 28-1 to 28-10 (2002) (stating that the living wage for Santa Fe was \$8.50 in 2004; \$9.50 in 2006; will be \$10.50 in 2009; and will then be indexed to the consumer price index thereafter).

66. *See, e.g., id.* (noting that the average earnings per job in Santa Fe was twenty-three percent below the national average while the cost of living was eighteen percent higher than the national average).

### C. *Oftentimes the Fate of Local Innovation: Preemption*

Perhaps unsurprisingly, local innovation is often thwarted by state and federal courts on preemption grounds.<sup>67</sup> Courts have invalidated local illegal immigration ordinances described above on preemption grounds, in addition to other constitutional bases including due process and equal protection.<sup>68</sup> However, courts have not held sanctuary cities' non-cooperation laws or policies to be preempted.<sup>69</sup>

Living wage laws have avoided preemption from the federal government because the Fair Labor Standards Act<sup>70</sup> provides that "[n]o provision of this chapter or any order thereunder shall excuse noncompliance with Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter."<sup>71</sup> However, some living wage ordinances have been preempted on state preemption grounds. While most courts have upheld the contract model living wage law,<sup>72</sup> at least one court has invalidated one such municipality's ordinance.<sup>73</sup>

The blanket living wage laws have been preempted by state law in two instances: Madison and New Orleans.<sup>74</sup> In Wisconsin, opponents of the City of Madison's minimum wage law<sup>75</sup> filed suit claiming that the city did not have the authority to adopt such an ordinance.<sup>76</sup> A state court held that the minimum wage

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67. See, e.g., *Lockyer v. City and County of S.F.*, 95 P.3d 459, 488 (Cal. 2004) (holding that local issuance of marriage licenses to same-sex couples violated state statutes and was not within the municipality's authority).

68. See Parlow, *Decentralizing Immigration Policy*, *supra* note 21, at 1065-66 (discussing cases in which the Supreme Court held that the regulation of immigration is an exclusively federal power). See also *Lozano v. City of Hazelton*, 496 F. Supp. 2d 477, 554 (M.D. Pa. 2007) (granting a temporary restraining order based on the likelihood that the two of Hazelton's illegal immigration ordinances violate the Supremacy Clause, the Due Process Clause of the Fourteenth Amendment, and the Equal Protection Clause of the Fourteenth Amendment); *Doe v. Village of Mamaroneck*, 462 F. Supp. 2d 520, 558-60 (S.D.N.Y. 2006) (finding equal protection violations stemming from the Village's regulation of day laborers).

69. See Parlow, *Decentralizing Immigration Policy*, *supra* note 21, at 1068 (discussing local efforts for dealing with immigration policy).

70. 29 U.S.C. §§ 201-219 (2006). The Fair Labor Standards Act's historic purpose, ironically, was to maintain a minimum standard of living, lessen the need for government aid to families, and prevent disputes between employers and organized labor. *Id.* at § 202(a).

71. 29 U.S.C. § 218(a).

72. See, e.g., *RUI One Corp. v. City of Berkeley*, 371 F.3d 1137, 1157 (9th Cir. 2004) (upholding city's living wage ordinance). This decision is also consistent with the history of local minimum wage ordinances related to municipal contracts. See *McMillen v. Browne*, 200 N.E.2d 546, 547, 550 (N.Y. 1964) (upholding city ordinance that set higher wage standards for employees of city contractors). Most courts recognize that such living wage requirements are contract terms and thus are well within the purview of local governments' powers. *Id.*

73. See *Mo. Hotel & Motel Ass'n v. City of St. Louis*, 7 WAGE & HOUR CAS. (BNA) 218, 232-34 (Mo. Cir. Ct. 2001) (striking down the city's living wage law on vagueness and due process grounds).

74. See WIS. STAT. § 104.001(2) (invalidating the Madison minimum wage law); *New Orleans Campaign for a Living Wage*, 825 So. 2d at 1098 (holding that the minimum wage was unconstitutional under the Louisiana constitution).

75. MADISON, WIS., GEN. ORDINANCE § 3.45.

76. Burchill, *supra* note 62, at 156.

law was a valid exercise of the city's home rule powers.<sup>77</sup> However, not soon thereafter, the state legislature passed Section 104.001, which prevented localities from adopting living wage or minimum wage laws.<sup>78</sup>

The New Orleans story is similarly disheartening from a localist's standpoint. In February 2002, New Orleans voters approved the proposed city charter amendment requiring employers within the city limits to pay their employees a minimum wage exceeding federal and state minimum wage levels.<sup>79</sup> A variety of business groups filed suit seeking a declaratory judgment that the living wage was unconstitutional, and injunctive relief prohibiting the city from enforcing the new law.<sup>80</sup> The state district court upheld the living wage ordinance, but the Louisiana Supreme Court reversed the district court and held that the law was invalid under the Louisiana State Constitution because it impermissibly abridged the state's police power.<sup>81</sup> The New Orleans living wage ordinance, like many other examples of local innovations in policy-making, was preempted by state law.

### III. PREEMPTION, HOME RULE, AND A HISTORY LESSON

Local governments are critical components of our federal system, particularly because they are the primary provider of the goods and services that affect our day-to-day lives. Moreover, local governments have been more willing to advance innovative laws and/or policies that the federal and state governments are unwilling or unable to effect. Yet, despite their maturation from when they were originally conceived, local governments still have rather limited law-making authority under current law and are thus often preempted by state and federal law when they attempt such local policy experimentation—as demonstrated by the fate of local anti-immigration ordinances and living wage laws. This state-of-affairs seems to

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77. *See id.* at 156-57.

78. *See* WIS. STAT. § 104.001(2) (invalidating the Madison minimum wage law). *See also* Burchill, *supra* note 62, at 173-87 (analyzing the Madison minimum wage law and the preempting of the ordinance by state statute).

79. *New Orleans Campaign for a Living Wage*, 825 So. 2d at 1101; *see also* Laura Gavioli, *New Orleans Campaign for a Living Wage v. City of New Orleans: State Police Power Swallows Up Constitutional Home Rule in Louisiana*, 77 TUL. L. REV. 1129, 1129 (2003) ("New Orleans voters, on February 2, 2002, strongly endorsed Ordinance 20,376 (Sept. 20, 2001), amending the city charter to increase the minimum wage of employees working in the city to \$6.15 per hour, or \$1 above the federal minimum wage.").

80. *New Orleans Campaign for a Living Wage*, 825 So. 2d at 1101; *see also* Gavioli, *supra* note 79, at 1129 ("In the days following the citywide vote, two groups filed suits seeking declaratory judgments on the validity of the city ordinance.").

81. *New Orleans Campaign for a Living Wage*, 825 So. 2d at 1101-02, 1108; *see also* Gavioli, *supra* note 79, at 1129 ("After the cases were consolidated, the Orleans Parish Civil District Court upheld the ordinance, finding that section 23:64 of the Louisiana Revised Statutes was an unconstitutional exercise of the state legislature's police power and that the city ordinance was valid because it did not interfere with any of the Louisiana Constitution's limitations on New Orleans' municipal powers. On direct appeal to the Louisiana Supreme Court, the court held that the city ordinance was invalid under article VI, section 9(B) of the Louisiana Constitution because the ordinance impermissibly abridged the police power of the state." (citations omitted)).

run counter to the re-conceptualized notion of local government advanced by the home rule movement.

Prior to 1875, most local governments were subject to Dillon's Rule.<sup>82</sup> Under Dillon's Rule, local governments lack inherent law-making authority.<sup>83</sup> Instead, local governments only exercise those powers expressly delegated by the state.<sup>84</sup> Courts thus view municipalities as mere administrative arms of the state.<sup>85</sup> In this regard, when a conflict arises between state and local law, the state prevails.

In 1875, the home rule movement began when Missouri became the first state to adopt a constitutional provision in its state constitution to allow home rule.<sup>86</sup> Home rule provisions enable cities—usually with a certain minimum population—to set up their own local constitutions, called charters.<sup>87</sup> Forty-eight states provide these home rule powers to cities through either constitutional or statutory provisions.<sup>88</sup> Home rule provisions delegate all legislative power regarding local matters to home rule cities except the authority for those areas of law and policy-making reserved for the state. Home rule thus empowers cities to legislate in areas of local concern, so long as their laws do not conflict with state law.<sup>89</sup> In this regard, home rule provisions were envisioned as “mini-Tenth Amendments designed to cordon off local matters from state intervention.”<sup>90</sup> Accordingly, home rule provisions were supposed to provide a constitutional or statutory defense against assertions of state preemptive power. Home rule cities, then, should only be preempted by the state if they legislate in an area reserved for the state, or in an area involving a matter of statewide concern.

However, state courts—after decades of only following Dillon's Rule—continue to give great deference to state governments over local governments when conflicts arise. Most state courts narrowly construe the concept of “local affairs,” viewing the language as limiting a local government's power rather than reading it as a grant of power.<sup>91</sup> Moreover, state courts rely heavily on the implied

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82. Dalmat, *supra* note 46, at 102. A few cities and counties continue to be subject to Dillon's Rule today. *Id.* See generally *supra* note 7 and accompanying text (describing Dillon's Rule).

83. Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1122 (2007). However, local governments under Dillon's Rule may well have significant regulatory authority, as many states delegate important powers to cities and counties. David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2284 (2003).

84. Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 8 (1990).

85. See *id.* at 24 (suggesting that conventional assumptions about state power and local powerlessness indicate local governments are little more than administrative arms of their states).

86. Michael Monroe Kellogg Sebree, Comment, *One Century of Constitutional Home Rule: A Progress Report?*, 64 WASH. L. REV. 155, 156 (1989).

87. See, e.g., *id.* at 159 (describing Washington state's adoption of constitutional provisions providing for home rule, which allow any city with a population of 20,000 or more to frame a charter for its own government subject to the state constitution and laws).

88. Barron, *supra* note 83, at 2260.

89. Diller, *supra* note 83, at 1126.

90. David J. Barron, *A Localist Critique of the New Federalism*, 51 DUKE L.J. 377, 392 (2001).

91. Briffault, *Home Rule*, *supra* note 19, at 264.

preemption doctrine to strike down innovative local policy-making.<sup>92</sup> In this regard, state courts will invalidate local laws, even when they do not conflict with state law—finding that the state intended to occupy the policy field, even without explicit language suggesting such. To be sure, some state courts have upheld local government innovation as falling within local home rule power, even when such legislation directly conflicted with state law.<sup>93</sup> Nevertheless, such cases tend to be the exception to an otherwise (ironically) state-dominated home rule jurisprudence.<sup>94</sup>

### CONCLUSION

The preceding should not be read as advocating for localities to have the authority to pass laws that directly conflict with federal or state law. However, the narrow construction of home rule powers, coupled with the frequency with which implied preemption is used by state courts to invalidate local laws, raises questions as to whether we are foreclosing a significant opportunity to use local governments as the forums for experimentation as Justice Brandeis once envisioned of the states.

A case germane to the living wage discussion above may prove instructive. In 1964, the city of Baltimore adopted a city minimum wage ordinance that mandated an hourly wage greater than that prescribed by the federal and state minimum wage laws.<sup>95</sup> A group of tavern and hotel owners in the city challenged the law claiming it was preempted by state law.<sup>96</sup> The Maryland Court of Appeals held that the minimum wage law was not preempted by state law because it did not conflict with state law—as the required wage would by definition meet the state and federal minimum wage—and because the state legislature had not expressly reserved wage regulation as the sole domain of the state.<sup>97</sup> In supporting its holding, the court relied heavily on the concurrent power doctrine:

Such ordinances must not directly or indirectly contravene the general law. Hence ordinances which assume directly or indirectly to permit acts or occupations which the State statutes prohibit, or to prohibit acts permitted by statute or constitution, are under the familiar rule for validity of ordinances

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92. See Diller, *supra* note 83, at 1140-57 (noting that all states except Illinois recognize a form of implied preemption, and describing different applications of the doctrine).

93. See, e.g., Briffault, *Home Rule*, *supra* note 19, at 266 (citing *Johnson v. Bradley*, 841 P.2d 990 (Cal. 1992) (upholding Los Angeles' adoption of a public election financing system, despite a state law banning public financing in all elections)).

94. Compare *Johnson*, 841 P.2d at 991 (finding for Los Angeles and not the state of California in a legislative conflict regarding public financing in elections), with Briffault, *Home Rule*, *supra* note 19, at 264 (“[N]arrow judicial readings of home rule grants [often] try to convert phrases like ‘local affairs’ or ‘municipal affairs’ or local ‘property, affairs, or government’ into a language of limitation rather than a grant of power.”), and Diller, *supra* note 83, at 1141 (noting that all states except Illinois recognize a form of implied preemption).

95. *City of Baltimore v. Sitnick*, 255 A.2d 376, 377 (Md. App. 1969).

96. *Id.*

97. *Id.* at 385-86.

uniformly declared to be null and void. Additional regulation by the ordinance does not render it void.<sup>98</sup>

The court's reasoning resonates with the dilemma laid out in this Article. If state courts adopted the concurrent powers doctrine when reviewing challenges to local ordinances, 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. If the law conflicted with state law or regulated in an area expressly reserved for the state, then courts should invalidate the law. However, if the ordinance merely builds on a federal or state floor or minimum, then courts should uphold the law under the concurrent powers doctrine. This approach would require a broadening of courts' reading of the term "local affairs" in home rule statutes or constitutional provisions, as well as a move away from implied preemption. In this regard, home rule jurisprudence would enable more experimentation and innovation on the local level, while still allowing states the opportunity to carve out policy areas they want to remain exclusively the domain of the state.

Local innovation will not always lead to desirable policy outputs or results. Nor does local decentralization guarantee success. However, consistent with Justice Brandeis' vision of federalism and with the concurrent powers doctrine, local governments' experimentation—both its successes and failures—has the potential to inform state and federal officials as to what laws and policies might be translatable to the broader levels of government.

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98. *Id.* at 380 (internal citation omitted).



