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The Troubling Turn in State Preemption: The Assault on Progressive Cities and How Cities Can Respond*

Richard Briffault, Nestor Davidson, Paul A. Diller,
Olatunde Johnson, and Richard C. Schragger

In an era of paralysis and increasingly bitter partisan conflict at the national level, cities have become a critical source of innovation across a wide array of policy areas that advance inclusion, equitable opportunity, and social justice. In recent years, cities and other local governments have taken the lead in enacting minimum wage and paid sick leave policies, expanding the boundaries of civil rights, responding to emerging environmental threats, tackling public health challenges, and advancing other important progressive goals.

Increasingly, however, states have been working to shut down this local innovation through legislation that either overrides—“preempts”—local policies or withdraws authority from local governments. North Carolina’s success in blocking the city of Charlotte’s ordinance extending municipal non-discrimination protections to gay, lesbian, bisexual and transgender people appropriately sparked national outrage, but it is only one high-profile example. States have left almost no area of local policy free from preemption—increasingly expressing political differences through a legal tool originally designed to protect legitimate state interests in uniformity and to police against truly recalcitrant localities. The trend toward intrusive state oversight has been most notable in—but is by no means exclusive to—states with conservative state governments that are home to progressive cities, and these conflicts have been growing in recent years.

As troubling as the current wave of preemption has been, states are also now edging into new, uncharted legal territory by seeking to punish cities and even individual local officials who defy them. States have adopted statutes that threaten to withhold funding and expose cities to private liability in preemption conflicts as well as enacted laws that seek to impose personal civil penalties—and in some instances, even potential *criminal* liability—on mayors, city council members, police chiefs and other local officials who defy state legislation.

In the face of all of this, some cities, officials, and citizens have been fighting back, defending against preemption with claims based on state constitutional “home rule” immunity, state constitutional constraints on unfairly targeting local governments, as well as federal equal protection, due process, and other constitutional arguments. Despite their limited formal authority, cities have sometimes been successful in protecting local democracy. Overall, while the legal structure of intrastate preemption does not favor cities, given the contemporary landscape of increasing state hostility, there is an urgency to thinking creatively about new legal arguments, as well as building on instances of successful local advocacy, where they can be found.

* This Issue Brief was initially published in September 2017.

This Issue Brief canvasses the current wave of preemption and the primary legal theories that these state-local conflicts present, as well as claims that might arise as these battles continue.¹ The Brief also explores other possibilities for strengthening home rule to advance progressive local policymaking at a moment when cities increasingly stand on the front lines of economic justice, civil rights, sustainable development, and so many other critical policy domains.

Of course, preemption can be an important progressive tool for states to check local parochialism, as fights over exclusionary zoning have amply demonstrated. Any legal strategy to bolster local democracy must be calibrated to take into account this countervailing concern so that strong federal and state laws on civil, labor, environmental and other rights remain an important baseline that localities cannot undermine. That said, the current wave of preemption has all too often focused on displacing progressive local policy innovation.

I. HOME RULE AND IMMUNITY FROM STATE OVERRIDE

To understand current state-local conflicts, it is helpful to start—briefly—with some basics. Cities derive their power to determine their own policies as well as the contours of their independence through what is known as home rule.² Home rule has two aspects: initiative and immunity.³ The power of initiative “enable[s] local governments to undertake actions over a range of important issues without having to run to the state for specific authorization.”⁴ This aspect of home rule in the United States is widespread, with at least forty states delegating some significant, presumptive authority to local governments—typically cities, but in some states also counties—to initiate policies without prior state legislative authorization. The power of immunity, by contrast, “protect[s] local government decisions concerning local action from displacement by state law.”⁵

¹ Under the Trump Administration, *federal*-local conflicts are emerging as a troubling flashpoint, with conflicts over so-called “sanctuary cities” as an early example. This Issue Brief focuses on *state*-local conflicts, recognizing that many of the same concerns are at issue when the federal government acts to preempt local (and state) policymaking.

² Historically, home rule reflected dissatisfaction with the “scant authority” provided to cities by an early American rule of construction known as Dillon’s Rule. See Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1124 (2007). Dillon’s Rule, developed by Judge John F. Dillon in the late 1800s, stands for the idea that “municipalities possess[] only those powers indispensable to the purposes of their incorporation as well as any others expressly bestowed upon them by the state.” *Id.* at 1122–23. Generally, a Dillon’s Rule regime provides “few opportunities for cities to engage in substantive policymaking.” *Id.* at 1123. At the end of the nineteenth century, discontent with Dillon’s Rule reached a critical mass, and “states gradually began to grant more substantive policymaking power ... to their cities.” *Id.* at 1124. This initial form of home rule, called *imperium in imperio*, or simply *imperio*, “granted substantive lawmaking power to cities, but generally limited this authority to matters of ‘local concern’,” with the interpretation of “local concern” left to the state courts. *Id.* at 1124–25. Beginning in the 1950s, a second wave of home-rule reform focused on creating “a more flexible and less formalistic method for distributing power to cities,” granting “police powers” to local governments through statutes, “subject to denial of power in a particular substantive field by specific act of the state legislature.” *Id.* at 1125; see also Lynn A. Baker & Daniel B. Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, 86 DENV. U. L. REV. 1337, 1338–39 (2009). This method presumed “that cities would have any power the state possessed, unless the state legislature had exclusively reserved power over a particular subject matter to the state.” Diller, *supra*, at 1125.

³ RICHARD BRIFFAULT & LAURIE REYNOLDS, *CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW* 346 (8th ed. 2016).

⁴ *Id.*

⁵ *Id.* Currently roughly fifteen states provide some form of home rule immunity. See Paul A. Diller, *Reorienting Home Rule: Part 2—Remedying the Urban Disadvantage Through Federalism and Localism*, 77 LA. L. REV. 1045, 1066 (2017).

Within the basic framework of home rule, important features vary by state. First, home rule regimes can be rooted in the state constitution, defined by state statute, or derived from a hybrid model, with the state constitution structuring home rule but leaving it to the legislature to elaborate. Similarly, in some states, the state constitution authorizes, but does not compel, the legislature to create a system of home rule for municipalities.⁶ In some states, the judiciary has interpreted state statutes delegating broad power to local entities as implicitly rejecting an older, restrictive rule of construction.⁷ In other states, the state legislation granting power to local governments makes clear that this restrictive view no longer applies.⁸ Constitutional home rule is generally more protective of local authority than statutory delegations, both because it is harder to amend state constitutions and, of course, because constitutions trump statutes.

Whether constitutional or statutory, home rule provisions generally delegate presumptive power to local governments across a broad swath of subjects, often with limitations over specific subject matters, such as the power to tax or create felony offenses,⁹ or substantive power over “civil or private law.”¹⁰ The National League of Cities (NLC) has usefully broken down home rule into structural, personnel, regulatory, and fiscal categories.¹¹ *Structural authority* is the power to design one’s type of government, including issues such as the number of city councilors, whether elections are by district or at-large, the length of terms, and rules for how campaigns are financed. *Personnel authority* is the power to manage and set compensation and benefits for a city’s personnel. *Regulatory power*, what the NLC calls “functional” authority, includes the “police power” authority to regulate for the health, safety, welfare, and morals of the community. This authority is arguably the most significant form of home rule for preemption purposes because cities often rely on this strand when they impose requirements on private businesses or property owners.

On *fiscal home rule*—the authority to raise revenue, borrow money, and spend—many state constitutional restrictions and statutes highly constrain local authority, although the details vary significantly by state. Some states specifically exclude taxing

⁶ In some states, moreover, the foundations for home rule may be different for different types of government. The state constitution may create home rule for cities but not for counties, or vice versa. In some states, the constitution singles out specific cities for home-rule powers. *E.g.*, MD. CONST. art. XI-A, § 1 (establishing home rule for the city of Baltimore and counties). In others, the constitution or statutes establish a population minimum, or an opt-in requirement through the adoption of a charter that triggers home rule authority. *E.g.*, COLO. CONST. art. XX, § 6 (minimum population of 2,000 to adopt municipal home rule charter); WASH. CONST. art. XI, § 10 (requiring population of 10,000 for city to frame charter). Some states, by contrast, automatically provide home rule to cities of a certain size but allow them to opt out. *E.g.*, ILL. CONST. art. VII, §§ 6(a), (b) (allowing cities of 25,000 or greater to opt out of home rule).

⁷ See *supra* note 2 (discussing Dillon’s Rule, the older, restrictive view of local authority).

⁸ Compare *State v. Hutchinson*, 624 P.2d 1116, 1127 (Utah 1980) (holding that “the Dillon Rule of strict construction is not to be used to restrict the power of a county under a grant by the Legislature of general welfare power or prevent counties from using reasonable means to implement specific grants of authority”), with IND. CODE § 36-1-3-3 (2017) (abrogating anti-local judicial canons of statutory construction).

⁹ *E.g.*, IOWA CONST. art. III, § 38A (“[Municipalities] shall not have power to levy any tax unless expressly authorized by the general assembly.”); DEL. CODE ANN. tit. 22, § 802 (2017) (excluding the “power to define and provide for the punishment of a felony” from grant of power to municipalities). See generally Wayne A. Logan, *The Shadow Criminal Law of Municipal Governance*, 62 OHIO ST. L.J. 1409 (2001).

¹⁰ See Paul A. Diller, *The City and the Private Right of Action*, 64 STAN. L. REV. 1109, 1110 (2012).

¹¹ NAT’L LEAGUE OF CITIES, CITIES 101—DELEGATION OF POWER, <http://www.nlc.org/resource/cities-101-delegation-of-power> (last visited Sept. 8, 2017).

authority from their grant of home-rule powers.¹² Other states presumptively grant the power to tax through their home-rule provisions, but impose numerous other restrictions in separate constitutional or statutory provisions.¹³ In light of the various restrictions many states have imposed, commentators consider fiscal home rule the weakest category of city authority.¹⁴

A final category can be added to the four identified by the NLC. In addition to their regulatory powers, cities may use their ability, akin to that of other market actors, to enter into contracts, sell or lease property, or provide services to affect the behavior of the firms with which they do business. This “*proprietary*” authority enables them to require contractors who work on municipal projects to pay a higher wage or offer workplace benefits not required of other firms,¹⁵ or impose higher standards of non-discrimination on services they offer, such as housing and public transportation.¹⁶

Breaking down home rule into these categories is helpful in assessing the immunity, if any, that state constitutions confer on local lawmaking from state override. In states with pure “legislative” systems of home rule, where the constitution grants all powers to cities minus those preempted by the legislature, every and all local power can be preempted so long as the legislature is sufficiently clear about its intent. With other forms of home rule, however, the situation is more complicated. In some states, personnel, structural, proprietary, and some regulatory issues may enjoy outright or modified immunity to preemption.¹⁷ In a handful of states, the constitution expressly allows for certain local enactments to trump state law.¹⁸ In other states, supreme courts have read state constitutions as protecting certain local enactments—usually structural, proprietary, or personnel—from state override or imposing certain conditions on state override. As discussed below, moreover, the state constitution and the judiciary in some states require that in order to preempt effectively, state laws must be of a “general” or “uniform” nature. In some states, this requirement is merely formalistic—preemptive legislation must treat all home-rule cities or counties equally. In other states, the requirement contains a substantive component: courts inquire into whether the preemptive legislation truly addresses a “statewide concern,” as determined by the judiciary.¹⁹

¹² See, e.g., IOWA CONST. art. III, § 38A; see also MASS. CONST. AMEND. art. 2, § 7 (withholding from cities and towns “the power to ... levy, assess and collect taxes [and] to borrow money or pledge the credit of the city or town”).

¹³ E.g., CAL. CONST. art. XIII A (limiting local governments’ ability to raise revenue through property and other taxes).

¹⁴ See, e.g., Erin Adele Scharff, *Powerful Cities?: Limits on Municipal Taxing Authority and What to Do About Them*, 91 N.Y.U. L. REV. 292, 296 (2016).

¹⁵ See, e.g., Scott L. Cummings & Steven A. Boucher, *Mobilizing Local Government Law for Low-Wage Workers*, 2009 U. CHI. LEGAL F. 187, 193-94 (noting that “the most common approach to the living wage ... is to tie living wage compliance to a direct financial relationship between the city and private employer”).

¹⁶ Some of the earliest civil rights legislation at any level of government were local ordinances that emerged in the late 1940s preventing racial and national origin discrimination in city-owned and operated housing. See Pamela H. Rice & Milton Greenberg, *Municipal Protection of Human Rights*, 1952 WIS. L. REV. 679, 684.

¹⁷ Preemption can come through ordinary state legislation or from voters, through referenda or initiatives.

¹⁸ E.g., COLO. CONST. art. XX, § 6 (declaring that local charters and ordinances involving “local and municipal matters ... shall supersede ... any law of the state in conflict therewith”).

¹⁹ E.g., *Jacobberger v. Terry*, 320 N.W.2d 903, 905-06 (Neb. 1982) (upholding statute requiring district elections for Omaha city council due to state concern for more proportional representation of socioeconomic classes in local governing body).

All told, then, home rule defines local autonomy through both the power to initiate policy and the ability to protect that policymaking from state displacement.²⁰

II. LOCAL INNOVATION AND STATE HOSTILITY: THE NEW PREEMPTION

States have traditionally exercised preemptive oversight to advance legitimate state interests in uniformity or to rein in local governments whose actions have clear negative effects beyond their borders or interfere with state regulatory programs. In recent years, however, without much attention or national appreciation, states have increasingly shifted toward using preemption as a tool to block local initiatives in areas of local concern, with many conflicts focused on areas of progressive policy facing conservative backlash at the state level.²¹

This Part canvasses several paradigmatic examples of state overrides—in labor and employment, civil rights, environmental protection, public health and firearms safety, as well as with sanctuary cities—to illustrate how sweeping preemption of local policymaking is becoming. It then explains the rise of “punitive preemption”—legislation that goes beyond merely overriding local policy to punishing local governments and local officials over policy disagreements.

A. LOCAL POWER UNDER SIEGE

Labor and employment is an area where cities have played an essential role in raising the minimum wage and expanding worker benefits above the level set by federal and state law. In the face of that progress, at least twenty-five states have preempted local authority over private-sector minimum wage rules.²² At least eighteen states preempt local authority to regulate the amount of paid or unpaid leave that private

²⁰ For a survey of the current landscape of home rule in every state, as well as other background on preemption, see <https://www.urbanlawcenter.org/enter-leap>.

²¹ For excellent discussions of the full breadth of contemporary preemption practices, see NATIONAL LEAGUE OF CITIES, CITY RIGHTS IN AN ERA OF PREEMPTION: A STATE-BY-STATE ANALYSIS (2017), available at <http://nlc.org/preemption> (discussing state preemption of local policies in the areas of minimum wage, paid sick leave, anti-discrimination, the sharing economy, municipal broadband, tax and expenditures, public health, plastic bags, firearm safety, inclusionary zoning and rent control); Lori Riverstone-Newell, *The Rise of State Preemption Laws in Response to Local Policy Innovation*, 47 PUBLIUS 403 (2017) (canvassing preemption conflicts).

²² These states include Alabama, see ALA. CODE 25-7-41(b) (2017); Arkansas, see ARK. CODE ANN. § 11-4-221 (2017); Colorado, see COLO. REV. STAT. § 8-6-101(3)(a) (2017); Florida, see FLA. STAT. § 218.077(2) (2017); Georgia, see GA. CODE ANN. § 34-4-3.1 (2017); Idaho, see IDAHO CODE § 44-1502(4) (2017); Indiana, see IND. CODE § 22-2-2-10.5 (2017); Iowa, see IOWA CODE § 331.304(12) (2017); Kansas, see KAN. STAT. ANN. § 12-16,130 (2017); Kentucky, see *Kentucky Rest. Ass’n v. Louisville/Jefferson Cty. Metro Gov’t*, 501 S.W.3d 425 (Ky. 2016); Louisiana, see LA. STAT. ANN. § 23:642(B) (2017); Michigan, see MICH. COMP. LAWS ANN. § 123.1385 (West 2017); Mississippi, see MISS. CODE ANN. § 17-1-51 (2017); Missouri, see MO. REV. STAT. § 290.528 (2017); North Carolina, see 2017 N.C. Sess. Laws 4 § 1; Oklahoma, see OKLA. STAT. tit. 40, § 160 (2017); Oregon, see OR. REV. STAT. § 653.017 (2015); Pennsylvania, see 43 PA. CONS. STAT. § 333.114a (2017); Rhode Island, see 28 R.I. GEN. LAWS § 28-12-25; South Carolina, see S.C. CODE ANN. § 6-1-130 (2017); Tennessee (2013), see TENN. CODE ANN. § 50-2-112 (2017); Texas, see TEX. LAB. CODE ANN. § 62.0515 (West 2017); Utah, see UTAH CODE ANN. § 34-40-106 (West 2017); and Wisconsin, see WIS. STAT. § 104.001 (2017). Ohio also attempted to preempt local minimum wage regulations (see OHIO REV. CODE ANN. § 4111.02 (West 2017)), but the statute has been struck down at the trial court level for violating the state constitution’s single subject rule, see *City of Bexley v. State of Ohio*, (Court of Common Pleas, Franklin County, June 2, 2017, Case No: 17CV-2672); but see *City of Hudson v. State of Ohio* (Court of Common Pleas, Summit County, July 7, 2017, Case No: CV-2017-03-1103) (finding the same statute did embrace a single subject). See also NATIONAL LEAGUE OF CITIES, *supra* note 21 (discussing minimum wage and paid sick leave preemption).

employers provide their employees.²³ And at least eleven states preempt local authority to regulate other types of benefits that private employers provide their employees.²⁴

In the civil rights arena, Arkansas, North Carolina, and Tennessee have enacted legislation that—despite taking somewhat different forms—effectively preempted local antidiscrimination laws that are more protective than state law.²⁵ To avoid language that facially repeals protections for particular social groups, some of these state preemptive measures have been framed as the protection of “intrastate commerce.” Yet each of these states acted after one of their cities adopted a local ordinance expanding antidiscrimination protection on the basis of sexual orientation or gender identity. For example, after the City Council in Charlotte enacted an ordinance that prohibited businesses from discriminating against customers on the basis of sexual orientation or gender identity and permitted transgender individuals to use facilities corresponding to their gender identity, North Carolina passed legislation to preempt the Charlotte ordinance.²⁶ In addition to prohibiting local antidiscrimination laws pertaining to employment and public accommodations, the North Carolina law required that “[p]ublic agencies ... require multiple occupancy bathrooms or changing facilities ... be designated for and only used by individuals based on their biological sex” and defined

²³ These states include Alabama, *see* ALA. CODE § 11-80-16 (2017); *see also* ALA. CODE § 25-7-41 (2017); Arkansas, *see* ARK. CODE ANN. § 11-4-221 (2017); Florida, *see* FLA. STAT. § 218.077 (2017); Georgia, *see* GA. CODE ANN. § 34-4-3.1 (2017); Indiana, *see* IND. CODE § 22-2-16-3 (2017); Iowa, *see* IOWA CODE § 331.304(12) (2017); Kansas, *see* KAN. STAT. ANN. § 12-16,130 (2017); Louisiana, *see* LA. STAT. ANN. § 23:642 (2017); Michigan, *see* MICH. COMP. LAWS ANN. § 123.1388 (West 2017); Mississippi, *see* MISS. CODE ANN. § 17-1-51 (2017); Missouri, *see* MO. REV. STAT. § 290.528 (2017); NORTH CAROLINA, *see* 2017 N.C. Sess. Laws 4 § 1; Oklahoma, *see* OKLA. STAT. tit. 40, § 160 (2017); Oregon, *see* OR. REV. STAT. § 653.661 (2015) (sick leave); South Carolina, *see* S.C. CODE ANN. § 41-1-25 (2017); Tennessee, *see* TENN. CODE ANN. § 7-51-1802 (2017), and Wisconsin, *see* WIS. STAT. § 103.10(1m) (2017). Arizona’s preemption of local paid sick and family leave policies (*see* ARIZ. REV. STAT. ANN. § 23-204 (2017)), was recently struck down at the trial court level as violating the state’s Voter Protection Act, which essentially prevents the state Legislature from tampering with voter-approved initiatives such as the 2013 initiative that protected local laws on minimum wage and “other benefits” from state preemption. *See* United Food and Commercial Workers Local 99 v. Arizona (Superior Court, Maricopa County, CV2016-092409, August 30, 2017). Ohio also attempted to preempt local leave regulations in the same statute that covered minimum wage regulations (*see* OHIO REV. CODE ANN. § 4113.85 (West 2017)), leading to the same litigation split over the single-subject question. *See supra* note 22.

²⁴ These states include Alabama (2016), *see* ALA. CODE § 25-7-41 (2017); Arizona (2013), *see* ARIZ. REV. STAT. ANN. § 23-204 (2017); *see also* ARIZ. REV. STAT. ANN. § 23-205 (2017) (scheduling); Florida (2013), *see* FLA. STAT. § 218.077 (2017); Georgia (2004), *see* GA. CODE ANN. § 34-4-3.1 (2017); Indiana (2013), *see* IND. CODE § 22-2-16-3 (2017); Kansas (2013), *see* KAN. STAT. ANN. § 12-16,130 (2017); Michigan (2015), *see* MICH. COMP. LAWS ANN. § 123.1386 (West 2017) (including wages or benefits in the prevailing community), *see also* MICH. COMP. LAWS ANN. § 123.1391 (West 2017) (cannot require giving of specific fringe benefits or covering expenses), *and* MICH. COMP. LAWS ANN. § 123.1389 (West 2017) (scheduling and hours); Missouri (2015), *see* MO. REV. STAT. § 290.528 (2017); North Carolina (2016), *see* 2017 N.C. Sess. Laws 4 § 1; Tennessee (2013), *see* TENN. CODE ANN. § 7-51-1802(c) (2017) (health insurance benefits); and Pennsylvania (1996), *see* Bldg. Owners & Managers Ass’n of Pittsburgh v. City of Pittsburgh, 985 A.2d 711, 714 (Pa. 2009) (holding that Pennsylvania state law prohibits certain municipalities from regulating businesses by determining their “duties, responsibilities, or requirements.”).

²⁵ *See* Intrastate Commerce Improvement Act, ARK. CODE ANN. §§ 14-1-402-403 (2015); 2016 N.C. Sess. Laws 3 §§ 1-3 *repealed by* 2017 N.C. Sess. Laws 4 § 1; Equal Access to Intrastate Commerce Act, TENN. CODE ANN. § 7-51-1802 (2017). *See infra* text accompanying notes 26-27 (discussing the North Carolina statute).

²⁶ *See* 2016 N.C. Sess. Laws 3 §§ 1-3 *repealed by* 2017 N.C. Sess. Laws 4 § 1.

“biological sex” as “[t]he physical condition of being male or female, which is stated on a person’s birth certificate.”²⁷

Preemption of local environmental protection is also growing. Seven states, including Oklahoma and Texas, for example, have explicitly preempted local regulation of hydraulic fracturing, or fracking,²⁸ and the Colorado Supreme Court invalidated two cities’ restrictions on fracking and the storage of fracking waste within the cities’ limits in 2016, on the grounds that they conflicted with the state Oil and Gas Conservation Act.²⁹ Arizona, Idaho, New York, and seven other states explicitly preempt localities from banning plastic bags.³⁰ And twenty-nine states explicitly preempted local pesticide regulation, as of 2013.³¹

On the public health front, thirty-one states have some form of preemption of local regulation of tobacco products³² and at least seven states preempt local regulation of e-cigarettes.³³ Nine states currently preempt local actions with respect to nutrition and food policy, with laws ranging from barring local regulations that require nutrition labeling, as in Alabama, to barring local laws that prevent restaurants from including toys in children’s meals, as in Wisconsin.³⁴ Similarly, forty-three states have enacted broad preemption statutes related to firearms and ammunition, with eleven states

²⁷ See *id.* The Act further defined “public agencies” to include, among other entities, the state executive, judicial and legislative branches, including the University of North Carolina system. See *id.* After much controversy, the North Carolina bill was superseded by a replacement statute that nonetheless still preempted local governments from regulating “access to multiple occupancy restrooms, showers, or changing facilities.” 2017 N.C. Sess. Laws 4 § 2. The replacement statute also prohibits—until December 1, 2020—local governments from regulating private employment practices or regulating public accommodations.

²⁸ See Riverstone-Newell, *supra* note 21, at 411. Oklahoma’s 2015 preemptive statute provides that political subdivisions “may not effectively prohibit or ban any oil and gas operations, including oil and gas exploration, drilling, fracture stimulation, completion, production, maintenance, plugging and abandonment, produced water disposal, secondary recovery operations, flow and gathering lines or pipeline infrastructure,” with few exceptions, see OKLA. STAT., tit. 52, § 137.1 (2016), and the 2015 Texas statute is similar. See TEX. NAT. RES. CODE ANN. § 81.0523 (West 2017).

²⁹ City of Longmont v. Colo. Oil & Gas Ass’n, 369 P.3d 573, 585 (Col. 2016).

³⁰ *State Plastic and Paper Bag Legislation*, NATIONAL CONF. OF STATE LEGS., <http://www.ncsl.org/research/environment-and-natural-resources/plastic-bag-legislation.aspx>; 2017 NY Sess. Laws Ch. 7 (McKinney).

³¹ Most of these states’ laws read very similar to the American Legislative Exchange Council’s (ALEC) *Model State Preemption Act*. This Model Act states that “No city, town, county, or other political subdivision of this state shall adopt or continue in effect any ordinance, rule, regulation or statute regarding pesticide sale or use, including without limitation: registration, notification of use, advertising and marketing, distribution, applicator training and certification, storage, transportation, disposal, disclosure of confidential information, or product composition.” Matthew Porter, *State Preemption Law: The Battle for Local Control of Democracy*, BEYOND PESTICIDES, available at <http://www.beyondpesticides.org/assets/media/documents/lawn/activist/documents/StatePreemption.pdf>.

³² Ctr. For Disease Control & Prev. Preemption on Advertising, Licensure, Smoke-free Indoor Air, and Youth Access (2016), <https://www.cdc.gov/statesystem/preemption.html>.

³³ These states include ARK. CODE ANN. § 26-57-267 (2017); IOWA CODE § 453A.56 (2017); NEV. REV. STAT. § 202.249(4) (2017); OKLA. STAT. tit. 37 § 600.10 (2017); S.C. CODE ANN. § 16-17-504 (2017); S.D. CODIFIED LAWS § 34-46-6 (2017); WASH. REV. CODE § 70.345.210 (2017). See also Patrick Kabat, Note, “Till Naught But Ash Is Left To See”: *Statewide Smoking Bans, Ballot Initiatives, and the Public Sphere*, 9 YALE J. HEALTH POL’Y, L. & ETHICS 128, 137-45 (2009) (examining the landscape of state preemption of the local regulation of second-hand smoke).

³⁴ ALA. CODE § 20-1-7 (2017); ARIZ. REV. STAT. ANN. § 44-1380 (2017); FLA. STAT. § 509.032(7)(a) (2017); GA. CODE ANN. § 26-2-373(a) (2017); KAN. STAT. ANN. § 12.16,137 (2017); MISS. CODE ANN. § 75-29-901 (2017); OHIO REV. CODE ANN. § 3717.53 (West 2017); UTAH CODE ANN. §§ 10-8-44.5, 17-50-329 (West 2017); WIS. STAT. § 66.0418 (2017).

absolutely preempting all municipal firearm regulations, including New Mexico, which took the extreme step of amending its state constitution to enshrine the ban.³⁵

Finally—although this brief survey does not come close to covering the entire range of contemporary preemption legislation³⁶—the issue of sanctuary cities is emerging as another front in state-local conflicts.³⁷ While Arizona, Georgia, Indiana, Missouri, and North Carolina all had bans against sanctuary cities that predated last fall’s presidential election,³⁸ since the election and President Trump’s targeting of this issue in one of his first Executive Orders,³⁹ Mississippi and Texas have both passed sweeping preemption bills,⁴⁰ while the Governor of Virginia vetoed a similar set of restrictions,⁴¹ and similar provisions have been introduced in a number of states.⁴²

B. THE TROUBLING EMERGENCE OF PUNITIVE PREEMPTION

The examples above illustrate ways in which current preemptive laws are fundamentally altering the nature of local power. But adding to this is the emergence of an even more troubling form of preemption that seeks to punish local governments and local officials for disagreeing with their states.

Traditionally, state preemption simply rendered local measures ineffective but now states want to go further and actually punish cities and their officials for adopting preempted measures -- or even failing to formally repeal local laws that have been rendered legally ineffective. Arizona, for example, now provides that local

³⁵ These states are Arkansas, *see* ARK. CODE ANN. § 14-54-1411 (2017); Indiana, *see* IND. CODE § 35-47-11.1-2 (2017); Iowa, *see* IOWA CODE § 724.28 (2017); Kentucky, *see* KY. REV. STAT. ANN. § 65.870 (West 2017); Michigan, *see* MICH. COMP. LAWS ANN. § 123.1102 (West 2017); New Mexico, *see* N.M. CONST. art. II, § 6; Oregon, *see* OR. REV. STAT. § 166.170 (2017); Rhode Island, *see* 11 R.I. GEN. LAWS § 11-47-58 (2017); South Dakota, *see* S.D. CODIFIED LAWS §§ 7-18A-36, 8-5-13, 9-19-20 (2017); Utah, *see* UTAH CODE ANN. § 76-10-500 (2017); and Vermont, *see* VT. STAT. ANN. tit. 24 § 2295 (2017). *See generally* Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82 (2013) (arguing that Second Amendment doctrine should distinguish between urban and rural localism in the latitude allowed for local regulation of firearms).

³⁶ Two other notable areas of preemption, among others, include municipal broadband (with seventeen states preempting local authority) and the sharing economy (with at least thirty-nine states preempting local control in various forms). *See* NATIONAL LEAGUE OF CITIES, *supra* note 21.

³⁷ The term “sanctuary city” is contested, but generally refers to local governments that adopt inclusive local policies regarding undocumented immigrants. *See* Rose Cuison Villazor, “Sanctuary Cities” and Local Citizenship, 37 FORDHAM URB. L.J. 573, 575-76 (2010) (discussing a range of sanctuary policies).

³⁸ ARIZ. REV. STAT. ANN. § 11-1051 (2017) (effective July 29, 2010); GA. CODE ANN. § 36-80-23 (2017) (effective May 5, 2009); IND. CODE § 5-2-18.2-4 (2017) (effective July 1, 2011); MO. REV. STAT. § 67.307 (2016) (effective January 1, 2009); N.C. GEN. STAT. § 153A-145.5 (2017) (effective October 1, 2015). Although the Arizona law was partially struck down by the Supreme Court in *Arizona v. United States*, 567 U.S. 387 (2012), key preemption provisions remain.

³⁹ *See* Exec. Order No. 13,768, 82 Fed. Reg. 8,799 (Jan. 25, 2017).

⁴⁰ 2017 MISS. LAWS CH. 383 (S.B. 2710); 2017 TEX. SESS. LAW SERV. CH. 4 (S.B. 4) (Vernon’s). On August 30, 2017, the United States District Court for the Western District of Texas issued a preliminary injunction against a number of provisions of the Texas anti-sanctuary law, Senate Bill 4, federal preemption, First Amendment, Fourth Amendment and Fourteenth Amendment Due Process grounds, which the Fifth Circuit subsequently partially stayed. *See* *City of El Cenizo v. State of Texas*, No. SA-17-CV-404-OLG, 2017 WL 3763098 (W.D. Tex. 2017) (order granting preliminary injunction), *injunction partially stayed by* *City of El Cenizo v. State of Texas*, No. 17-50762 (5th Cir. Sep. 25, 2017).

⁴¹ H.B. 2000, Reg. Session (Va. 2017); Governor Veto Message: H.B. 2000, March 27 2017, <https://lis.virginia.gov/cgi-bin/legp604.exe?171+amd+HB2000AG>.

⁴² *See* NATIONAL CONFERENCE OF STATE LEGISLATURES, STATE SANCTUARY BILLS (May 8, 2017), available at http://www.ncsl.org/Portals/1/Documents/immig/StateSanctuaryBills_050817.pdf.

governments risk losing state funding if they do not act to remove laws that the state Attorney General determines to be in conflict with state law.⁴³

Even more troubling, however, are states that have begun authorizing civil and even *criminal* sanctions against local officials in preemption conflicts. This trend began in 2003, when Oklahoma amended its firearm preemption statute to allow for personal civil liability against officials who vote to enact laws conflicting with the state’s firearm preemption statute.⁴⁴ In 2011, Florida went further, enacting a range of sanctions for “knowing and willful violations” of the state’s firearm preemption statute. These provisions allow courts to impose civil fines on individual officials of up to \$5,000,⁴⁵ bar officials from using public funds for their legal defense or to reimburse them for the fine,⁴⁶ and provide that violation of the statute constitutes cause for termination of employment or removal from office by the governor.⁴⁷

In 2014, Mississippi amended its firearm preemption statute to include penalty provisions modeled after Florida’s punitive law. As in Florida, the Mississippi statute creates a private right of action for declaratory and injunctive relief, granting successful plaintiffs declaratory and injunctive relief and holding any “elected county or municipal official under whose jurisdiction the violation occurred” civilly liable for up to \$1,000, plus attorney’s fees and costs that may not be paid (or defended against) through public funds.⁴⁸ And in 2016, Arizona allowed private litigants to pursue personal sanctions against local officials who violate state firearm preemption bills. The Arizona law states that an official found to have violated the preemption law may be subject to termination from office,⁴⁹ allows for a civil penalty of \$50,000 to be imposed against a local government, and creates a private right of action against local governments to recover damages of up to \$100,000 as well as attorney’s fees and costs.⁵⁰

⁴³ In 2016, Arizona adopted S.B. 1487, now codified as ARIZ. REV. STAT. ANN. § 41-194.01 (2017), requiring the Arizona Attorney General to investigate local laws at the request of any state legislator, *id.* § 49-194.01(A); if the Attorney General finds the ordinance in conflict with state law or the Arizona constitution, the local government must resolve the violation within 30 days or face a loss of shared state money. *Id.* § 49-194.01(B). The Arizona Supreme Court recently upheld portions of the statute, although expressed concerns about some of the statute’s more punitive aspects. *See infra* text accompanying notes 81–85.

⁴⁴ OKLA. STAT. tit. 21, § 1289.24(D) (2017) (“When a person’s rights pursuant to the protection of the preemption provisions of this section have been violated, the person shall have the right to bring a civil action against the persons, municipality, and political subdivision jointly and severally for injunctive relief or monetary damages or both.”). In November 2003, the Oklahoma Attorney General issued an advisory opinion that the provision did not create civil liability for law enforcement officers seizing unlawfully transported handguns, but the opinion did not address whether the provision would create liability for local officials passing an ordinance in contravention of the preemption statute. Okla. A.G. Op. No. 03-46, 2003 WL 22680002, at *5-7 (Nov. 3, 2003).

⁴⁵ FLA. STAT. § 790.33(3)(c) (2017).

⁴⁶ *Id.* § 790.33(3)(d).

⁴⁷ *Id.* § 790.33(3)(e) held *unconstitutional* by *Marcus v. Scott*, 2014 WL 3797314 (Fla. Cir. Ct.). The law also gives affected individuals and groups a private right of action against local governments for declaratory and injunctive relief, as well as actual damages of up to \$100,000 and attorney’s fees. *Id.* § 790.33(3)(f).

⁴⁸ MISS. CODE ANN. §§ 45-9-53(5)(a), (c) (2017). Unlike in Florida, before instituting suit, the affected party must notify the state Attorney General of the alleged violation. If the Attorney General finds a violation, the local government has 30 days to remedy it before the suit may proceed. *Id.* § 45-9-53(5)(b). Local officials who did not vote for the infringing ordinance or who attempted to cure the violation as noted by the Attorney General may claim an affirmative defense. *Id.* § 45-9-53(5)(d).

⁴⁹ ARIZ. REV. STAT. ANN. § 13-3108(J) (2017).

⁵⁰ *Id.* § 13-3108(I), (K).

Perhaps most troubling, Kentucky in 2012 amended its firearm preemption statute not only to create a private right of action,⁵¹ but to impose a criminal penalty on officials: “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.”⁵² This practice appears to be spreading, as Texas this past May included a criminal liability provision in its anti-sanctuary cities preemption legislation.⁵³

III. LEGAL STRATEGIES FOR RESISTING STATE PREEMPTION

Together, the combination of the breadth and range of current state preemption legislation and the rise of punitive preemption risks fundamentally changing the nature of local power just as cities are taking the lead in so many critical areas of policy. Cities and their officials, however, are pushing back. Resistance to the rising abuse of state preemption has involved organizing, coalition building, and political responses. But legal arguments have also been central to how cities are responding. Historically, cities have been understood to be relatively powerless to resist state oversight in a formal sense, and, broadly speaking, that remains true. With states overreaching, however, courts in recent years have sided with cities on a number of grounds. This Part reviews the legal landscape emerging from current conflicts and highlights other legal issues that preemption presents.

A. STATE CONSTITUTIONAL CHALLENGES TO PREEMPTION

The legal grounds on which cities are challenging preemption derive primarily from state constitutional law, on both substantive—home rule and restrictions on special legislation—and procedural grounds.

1. *Direct Constitutional Home Rule Immunity Claims*

In the right circumstances, constitutional home rule can stand as a source of protection for local autonomy in conflicts with states. In *Telluride v. San Miguel Valley Corporation*, for example, the Colorado Supreme Court held that a state statute that sought explicitly to bar a town’s use of eminent domain to acquire parks and open space was an unconstitutional infringement on the town’s home rule authority over matters of local concern.⁵⁴ Of course, many states lack constitutional protection for home rule and even in constitutional home rule states, courts can be wary of vindicating local authority, limiting the scope of constitutional protection to judicially-determined local or municipal spheres.⁵⁵ That said, the case law is sufficiently mixed for

⁵¹ H.B. 500, Reg. Sess. (Ky. 2012); KY. REV. STAT. ANN. § 65.870(4) (West 2017). The prevailing party in such a suit is entitled to attorney’s fees and costs, as well as expert witness fees. *Id.*

⁵² *Id.* § 65.870(6).

⁵³ Texas Senate Bill 4, signed into law in May, would provide that local law enforcement officials face criminal penalties if they fail to comply with immigration detainer requests. *See* Texas Senate Bill 4, § 5.02 (adding a new § 39.07 to the Texas penal code). As noted, *see supra* note 40, the United States District Court for the Western District of Texas enjoined a number of provisions of the bill this past August 30th. *See* *City of El Cenizo v. State of Texas*, No. SA-17-CV-404-OLG, 2017 WL 3763098 (W.D. Tex. 2017) (order granting preliminary injunction), *injunction partially stayed by* *City of El Cenizo v. State of Texas*, No. 17-50762 (5th Cir. Sep. 25, 2017).

⁵⁴ *Telluride v. San Miguel Valley Corporation*, 185 P.3d 161, 169-71 (Colo. 2008).

⁵⁵ *See* *Baker & Rodriguez*, *supra* note 2, at Part III.

this to be an avenue that local governments in constitutional home rule states will continue to pursue.⁵⁶

2. Generality and Anti-Special Legislation Claims

Another constraint on certain types of state preemptive legislation derives from state constitutional provisions—found in roughly thirty-seven states—that require some form of “generality” or “uniformity” or conversely that prohibit “special” or “local” legislation.⁵⁷ Although the jurisprudence is varied, statutes that relate to persons or things *as a class* likely qualify as general laws, while statutes that relate to *particular* persons or things within a class are special laws.⁵⁸ State statutes may be vulnerable on these grounds because they are “local” in the geographic sense, or discriminate against a particular category, or are applicable only to government entities, instead of including private parties.⁵⁹ Overall, the strongest examples of generality/anti-special legislation principles make clear that individual cities cannot be unfairly singled out, although in many states, the judiciary tolerates circumvention, for example, by permitting legislation that does not expressly identify a particular target jurisdiction, even if in fact by operation only one jurisdiction is affected.⁶⁰

Traditionally, this jurisprudence has not been a significant source of protection for local authority, but there are examples of the principle succeeding, and courts may become more open to these claims as preemption becomes more targeted. For example, in *City of Cleveland v. State of Ohio*, an Ohio trial court recently held that the state’s attempt to preempt Cleveland’s well-known Fannie M. Lewis Resident Employment Law—which sets modest, although important, requirements for the employment of local residents in city-funded projects—violated the state constitution in part because it was not a “general law.”⁶¹ Drawing on long-standing Ohio precedent, the court noted

⁵⁶ *Cf. id.* at 1356 (noting that “the courts have frequently upheld municipal police power regulations in the face of state efforts at control ... [making] clear that regulating the ‘health, safety, and welfare’ of a locality is squarely within the scope of local affairs”). Some recent litigation has also involved challenges to the authority or validity of state legislation, as a threshold matter, prior to the question of the legislation’s preemptive effect. *See, e.g., City of Cleveland v. State of Ohio* (Court of Common Pleas, Cuyahoga County, January 31, 2017, Case No: CV-16-868008) (finding that Ohio lacked authority under the Ohio Constitution to enact legislation to preempt local-hire provisions because the relevant constitutional provision the state invoked—Article II, Section 34—requires that such legislation advance the “comfort, health, safety and general welfare of *all* employees”) (emphasis added).

⁵⁷ For an excellent recent examination of the nature and history of this subject (not focused on the context of preemption), *see* Justin R. Long, *State Constitutional Prohibitions on Special Laws*, 60 CLEV. ST. L. REV. 719, 725-32 (2012).

⁵⁸ Moreover, even for general laws, some states have independent “uniformity” requirements, some of which apply to specific subject matters. The Ohio Constitution, for example, provides that: “All laws, of a general nature, shall have a uniform operation throughout the State; nor, shall any act, except such as relates to public schools, be passed, to take effect upon the approval of any other authority than the General Assembly, except, as otherwise provided in this constitution.” OHIO CONST. art. II, § 26.

⁵⁹ JOHN MARTINEZ, LOCAL GOVERNMENT LAW § 3:23 (2016) (enumerating categories of “special” or “local” laws, but noting that the categories often blur in practice). An example of the kind of state legislative targeting that can be upheld is the use of broad population categories—such as cities of more than one million people—that may have only one member, although very narrow population categories can fail. *See* BRIFFAULT & REYNOLDS, *supra* note 3, at 307-10.

⁶⁰ *See, e.g., Treadway v. State*, 988 S.W.2d 508, 510-11 (Mo. 1999) (holding that statutes that functionally singled out one city could still be general “because they employ open-ended criteria ... [that] identify the counties by factors that change such as by reference to county classification, population, charter status and nonattainment criteria”).

⁶¹ *City of Cleveland v. State of Ohio* (Court of Common Pleas, Cuyahoga County, Case No: CV-16-868008), Judgment Entry, With Opinion and Order Granting Permanent Injunction (Jan. 31, 2017).

that to be a validly preemptive general law, a statute must be part of a statewide, comprehensive enactment that applies uniformly throughout the state, and that regulates conduct generally, rather than focusing solely on municipal authority—a test the Ohio statute could not pass because it was so clearly targeted at limiting the power of localities to act.⁶² Similarly, because the Florida Constitution prohibits laws that single out municipalities in Miami-Dade County, a trial court in Florida recently enjoined a Florida statute that barred the beach community of Coral Gables from regulating Styrofoam containers.⁶³ Although these examples might be outliers, they point to the potential utility of special legislation claims in resisting preemption.

3. *Procedural Claims*

In some states, the constitution requires specific processes in order to pass local or special laws. These additional legislative steps can act as a means of validating preemption or other oversight of local governments. They also, however, can be a potential ground for raising legal challenges if the procedures are not followed.⁶⁴ Beyond procedural mandates tied to special or local laws, most state constitutions contain provisions that impose procedural limitations, such as that legislation address a “single subject” and have a clear title. To ensure transparency, protect against logrolling, and police against attaching unpopular riders to popular bills, single subject rules restrict the subject matter of an enactment by the state’s legislature to one general topic, so that if, for example, a statute addresses preemption of a local ordinance and an entirely unrelated issue, it may be constitutionally vulnerable.⁶⁵ There are a number of similar procedural constraints found in a variety of state constitutions.⁶⁶

Given the haste or lack of transparency with which some preemption legislation is drafted, these once somewhat obscure procedural requirements have new salience. The single-subject rule, for example, led the Missouri Supreme Court in *Cooperative Home Care, Inc., v. City of St. Louis*, sitting en banc earlier this year, to invalidate the

⁶² *Id.* at 4-5.

⁶³ *Florida Retail Federation, Inc. v. The City of Coral Gables* (Circuit Court of the Eleventh Judicial Circuit for Miami-Dade County, Mar. 8, 2017, Case No. 2016-018370-CA-01).

⁶⁴ These states include New York, Florida, Pennsylvania, Oklahoma, Louisiana, Missouri, and Georgia. See Anthony Schutz, *State Constitutional Restrictions on Special Legislation as Structural Restraints*, 40 J. LEGIS. 39, 48 n.40 (2014). Generally speaking, there are two basic procedures invoked procedurally to validate local or special laws: either a supermajority is required, or notice is required. See *Treadway v. State*, 988 S.W.2d 508 (Mo. 1999).

⁶⁵ See generally Rachael Downey et al., *A Survey of the Single Subject Rule as Applied to Statewide Initiatives*, 13 J. CONTEMP. LEGAL ISSUES 579 (2004) (summarizing the application of the single subject rule in states where it is applied to initiatives). Some 43 states have a form of single-subject rule embedded in their constitutions. See Brannon P. Denning & Brooks R. Smith, *Uneasy Riders: The Case for a Truth-in-Legislation Amendment*, 1999 UTAH L. REV. 957, 963; Martha J. Dragich, *State Constitutional Restrictions on Legislative Procedure: Rethinking the Analysis of Original Purpose, Single Subject, and Clear Title Challenges*, 38 HARV. J. ON LEGIS. 103, app. at 165-66 (2001).

⁶⁶ Other general state constitutional procedural constraints on legislation that could be at issue in the preemption context include requirements that all bills be referred to committee, that votes on bills must be reflected in the legislature’s journal, that no bill be altered during its passage through either House so as to change its original purpose, that legislation must “age” for a certain amount of time before being acting upon, and that appropriations bills contain provisions on no other subject. See generally Robert F. Williams, *State Constitutional Limits on Legislative Procedure: Legislative Compliance and Judicial Enforcement*, 48 U. PITT. L. REV. 797, 798-99 (1987).

state's attempt to preempt St. Louis's 2015 minimum wage ordinance.⁶⁷ The decision, however, highlights a limitation of these kinds of procedural challenges, namely that it remains open to the legislature to re-enact the preemptive statute through proper procedures, as Missouri appears to have done in response to *Cooperative Home Care*.⁶⁸

B. FEDERAL CONSTITUTIONAL CONCERNS

Although many claims that cities are currently asserting in resisting state encroachment are state-based, preemption also raises federal constitutional and statutory concerns, notably around equal protection, voting rights, and potentially the Establishment Clause.

There are at least three related legal theories that might support equal protection challenges to state statutes that preempt local laws.⁶⁹ First, statutes that intentionally discriminate against a protected class, such as race and gender (which arguably includes gender identity), or that impinge on a fundamental right receive some form of heightened scrutiny,⁷⁰ requiring the state to justify the law as furthering a sufficiently important interest (such as privacy or safety). Even without heightened scrutiny, state preemption statutes might be vulnerable if the action is motivated by a “bare desire” to harm a group and is not supported by any legitimate or rational basis, under the Supreme Court's 1996 decision in *Romer v. Evans*.⁷¹ This theory might be applied to statutes enacted with the primary purpose of preempting local ordinances that prohibit

⁶⁷ See generally *Cooperative Home Care, Inc., v. City of St. Louis*, 514 S.W.3d 571 (Mo. 2017) (holding that a statute that sought to preempt local ordinances violated Article III, Section 23 of the Missouri Constitution because the statute contained more than one subject). Another quite recent example can be found in a trial court's decision this past June that an Ohio statute that sought to preempt local minimum wage ordinances that had been attached to a statute regulating dog sales and licensing pet stores violated the single-subject rule in Article II, Section 15(D) of the Ohio Constitution. *City of Bexley v. State of Ohio*, (Court of Common Pleas, Franklin County, June 2, 2017, Case No: 17CV-2672). However, setting up a split in authority, another Ohio trial court found that the same statute did embrace a single subject: “deprive municipal corporations of the ability to regulate such issues by the adoption of local ordinances.” *City of Hudson v. State of Ohio* (Court of Common Pleas, Summit County, July 7, 2017, Case No: CV-2017-03-1103).

⁶⁸ See MO. ANN. STAT. § 290.528 (West 2017) (effective August 28, 2017).

⁶⁹ The Fourteenth Amendment of the U.S. Constitution provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV.

⁷⁰ Some lower courts have concluded that distinctions based on sexual orientation should also receive heightened scrutiny. See, e.g., *Smithkline Beecham Corp. v. Abbott Labs.*, 740 F.3d. 471, 484 (9th Cir. 2014) (applying heightened scrutiny to discrimination based on sexual orientation). To receive heightened scrutiny, it is not enough to show a “disparate impact” on a racial group, rather the action must have a classification on its face or must be motivated by intentional discrimination. See *Washington v. Davis*, 426 U.S. 229, 247–48 (1976) (rejecting claim that facially neutrally statute is invalid under Constitution only because it burdens one race more than another).

It is unlikely that preemption laws will facially classify on the basis of race, but some preemption laws have already moved to classify facially on the basis of gender. North Carolina, for instance, recently limited “sex” to “biological sex.” See *supra* notes 26-27 (citing North Carolina's law on bathroom access). A strong argument can be made that this is a facial classification, and thus should trigger heightened scrutiny.

⁷¹ *Romer v. Evans*, 517 U.S. 620, 634–35 (1996). *Romer* involved a challenge to Colorado Amendment 2, a state referendum that “prohibit[ed] all legislative, executive or judicial action at any level of state or local government designed to protect” gays and lesbians, in response to local ordinances in three Colorado cities that extended antidiscrimination protections based on sexual orientation. *Id.* at 624. The Court ruled that Amendment 2 violated the equal protection clause, with Justice Kennedy's majority opinion concluding that “laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.” *Id.* at 634. According to the Court, “[i]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare... desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.” *Id.* at 634–35 (quoting *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

sexual orientation discrimination, or, more generally provide a basis for arguing that preemption laws violate equal protection when the facts show that these laws are driven by animus—a “bare desire to harm”—towards an unpopular group.⁷² Finally, the Supreme Court has also articulated an equal protection political process rationale that scrutinizes structural actions that place a “special burden” on the ability of minorities to achieve their policy goals in the political process.⁷³ This rationale could apply to statutes that reallocate power from the local level to the state level, although the recent decision of the Supreme Court in *Schuette v. Coalition to Defend Affirmative Action* calls the status of this doctrine into question.⁷⁴

This political process argument is currently being advanced by the plaintiffs in *Lewis v. Bentley*, a case in which several civil rights groups are challenging the State of Alabama’s preemption of the city of Birmingham’s ordinance increasing the minimum wage.⁷⁵ The argument is that by shifting decision-making authority from a city with an African-American majority to a white-dominated state legislature, preemption restructured decisionmaking in a manner that violated equal protection. The Northern District of Alabama, in a February 2017 decision, rejected this argument. Granting the State’s motion to dismiss, the court expressed skepticism of the viability of the doctrine after *Schuette*,⁷⁶ and found unpersuasive the argument that the preemptive statute contained a racial classification.⁷⁷ The decision is currently on appeal before

⁷² The Supreme Court relied on *Romer* several years later in *United States v. Windsor*, 133 S.Ct. 2675 (2013). In *Windsor*, the Court held that DOMA, which effectively preempted state marriage laws, constituted discrimination of an “unusual character,” citing *Romer* and reaffirming the “animus” rationale. *Id.* at 2693 (explaining that “[i]n determining whether a law is motivated by an improper animus or purpose, “[d]iscriminations of an unusual character” especially require careful consideration” and emphasizing that “[t]he Constitution’s guarantee of equality ‘must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot’ justify disparate treatment of that group”) (citing *Romer* and *Moreno*). The Supreme Court, however, has only applied the *Romer* animus rationale in cases in which the classification is present on the face of the statute. *Romer* and *Windsor* do not present this as a limiting principle of animus review, but this factual context appears consistent with the generally high bar for showing animus.

⁷³ See *Hunter v. Erickson*, 393 U.S. 385, 391 (1969); *Washington v. Seattle School District No. 1*, 458 U.S. 457, 467 (1982).

⁷⁴ See *Schuette v. Coalition to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equality by Any Means Necessary (BAMN)*, 134 S.Ct. 1623, 1637–38 (2014) (plurality opinion upholding voter-approved amendment to Michigan constitution prohibiting state universities’ use of race-based preferences in admissions and finding such amendment did not violate precedent of *Hunter* or *Seattle*).

⁷⁵ In August 2015, the Birmingham City Council unanimously passed Ordinance 15-124, providing an incremental increase in the minimum wage for Birmingham employees, starting with \$8.50/hour in July 2016 and increasing to \$10.10/hour in July 2016. See Amended Complaint at 29, *Lewis v. Bentley*, No. 2:16-CV-690-RDP, 2017 BL 29541 (N.D. Ala. Jun. 30, 2016).

⁷⁶ *Lewis v. Bentley*, No. 2:16-CV-690-RDP, 2017 WL 432464, at *13 (N.D. Ala. Feb. 1, 2017) (questioning the “so-called” political process doctrine).

⁷⁷ See *id.* (“[T]he Act has no racial classification and, on its face, calls for uniform economic policy throughout the state.”).

the Eleventh Circuit, but does make clear some of the difficulties in applying the political-process framework.⁷⁸

Finally, preemptive state laws that seek to achieve religious objectives, even with purported secular purposes, could raise Establishment Clause concerns.⁷⁹ Statutes, for example, that preempt local civil rights provisions, even if facially neutral, can be of concern if motivated by a desire to enable business owners to discriminate against LGBTQ people based on religious beliefs. Courts would generally need to probe questions of legislative purpose, principal effects, and level of governmental entanglement with religion to adjudicate these concerns.⁸⁰ This may be a future legal front in preemption battles.

C. PUNITIVE PREEMPTION CHALLENGES

Courts are beginning to adjudicate questions related to issues of punitive preemption where states threaten financial penalties against local governments or local officials face civil or criminal liability. The Arizona Supreme Court in August 2017 upheld some aspects of the state's sweeping new preemption law, S.B. 1487,⁸¹ but sidestepped the constitutionality of the law's financial penalties against localities. In *State ex rel. Brnovich v. City of Tucson*, the court found constitutional the provision of S.B. 1487 that allows a single legislator to request that the state attorney general investigate local laws or other official local action for possible conflicts with state law.⁸² The court did not rule either on the statute's requirement that a city post a bond equal to six months' worth of state shared revenue (which would have been more than \$55 million for Tucson had it applied)⁸³—although it did express some concern about the requirement⁸⁴—or on the provision of the statute that provides for an actual loss of state funding thirty days after the Attorney General declares a local law is preempted.⁸⁵ These kinds of provisions thus remain to be adjudicated.

As to personal liability for officials, the federal District Court in issuing an injunction against the criminal provision in the Texas anti-sanctuary city law found that the

⁷⁸ The Birmingham litigation also includes a claim that the state preemption law, HB 174, violates Section 2 of the Voting Rights Act (VRA), 52 U.S.C. § 10301 (2012). The Complaint alleges that HB 174 results in the denial or abridgement of Birmingham citizens' right to vote because it "reverses a scheme of local control," shifting power "from the city council elected by the majority-black Birmingham electorate to the Legislature elected by the majority-white state electorate." *Lewis*, Amended Complaint, at 37. The Complaint also claims that state legislative elections are not "equally open" to African Americans who have less opportunity to participate and elect representatives of their choice due to the structure of state-wide elections in Alabama. *Id.*; see also *id.* at 25–27. And the Complaint alleges that HB 174 was enacted with the intent of "denying the majority black electorate" the ability to regulate the conditions within their municipality in violation of the VRA. Although the District Court rejected the claim, see *Lewis*, *supra* note 75, at *7-9, it remains to be seen how it will be addressed on appeal.

⁷⁹ The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I.

⁸⁰ *Lemon v. Kurtzman*, 403 U.S. 602 (1971), supplies the prevailing Establishment Clause tests. "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive governmental entanglement with religion.'" *Id.* at 612-13. If the government's action or law violates any of these tests, it will be found unconstitutional.

⁸¹ Codified at ARIZ. REV. STAT. ANN. § 41-194.01 (2017).

⁸² *State ex rel. Brnovich v. City of Tucson*, 399 P.3d 663, 666 (Ariz. 2017), as amended (Aug. 17, 2017).

⁸³ *Id.* at 667.

⁸⁴ *Id.*

⁸⁵ *Id.* at 669 n. 2 (reserving the question of the constitutionality of ARIZ. REV. STAT. ANN. § 41-194.01(B)(1) (2017)).

provision raised Fourteenth Amendment Due Process vagueness concerns.⁸⁶ Lack of clarity about what constitutes the kind of “policy” or “action” necessary to trigger criminal liability for local officials—in light of the significant consequences of assessing such liability—could signal recurring concerns under the Fourteenth Amendment and analogous state constitutional provisions.⁸⁷

There are a number of other grounds on which legislation that seeks to punish local officials for acting in their democratically-elected capacities might also be vulnerable.⁸⁸ Preemption laws imposing civil or criminal sanctions on elected officials, for example, may violate legislative immunity, a common law principle extended to local elected officials in *Bogan v. Scott-Harris*.⁸⁹ In *Bogan*, a unanimous Supreme Court held that local officials are entitled to “absolute immunity from civil liability for their legislative activities.”⁹⁰ The Court further held that the acts of “voting for an ordinance” and “signing into law an ordinance” were legislative acts.⁹¹ This principle—articulated in *Bogan* in the context of interpreting a federal civil rights statute—is untested in the state preemption context, but legislative immunity has long roots in the common law.⁹²

Imposing liability—or even simply the threat of expensive litigation—on a local official for fulfilling their official duties could also amount to an unconstitutional restriction on local officials’ free speech rights under either the federal First Amendment

⁸⁶ *City of El Cenizo v. State of Texas*, No. SA-17-CV-404-OLG, 2017 WL 3763098 at *26 (W.D. Tex. Aug 30, 2017) (order granting preliminary injunction), *injunction partially stayed by City of El Cenizo v. State of Texas*, No. 17-50762 (5th Cir. Sep. 25, 2017).

⁸⁷ Cf. Joseph Tartakovsky, *Firearm Preemption Laws and What They Mean for Cities*, 54:5 MUN. LAWYER 9 (Sept./Oct. 2013), <http://www.gibsondunn.com/publications/Documents/Tartakovsky-Firearm-Preemption-Laws-ML-09.2013.pdf>. Justice Gould of the Arizona Supreme Court, concurring in the recent Tucson firearms preemption decision, *see supra* note 82, would have found the state statute’s provision requiring local governments to post a bond unenforceable because it is “incomplete and unintelligible.” *Brnovich*, 399 P.3d at 683 (Ariz. 2017). Although not quite an explicit void for vagueness argument, this concurrence used very similar reasoning.

⁸⁸ Another recent direct challenge to official personal liability in preemption, in a Florida case, sidestepped the question of the validity of such liability. Relying on the 2011 Florida statute that subjected individual local officials to liability for promulgating local ordinances that regulate firearms, *see supra* text accompanying notes 45-47, two firearms-rights groups sued Tallahassee, its mayor, and three city commissioners individually regarding two preempted ordinances—passed in 1957 and 1984, respectively—that prohibited the discharge of firearms in certain areas or city properties. *Florida Carry, Inc. v. City of Tallahassee*, No. 1D15-5520, slip op. at 3-4 (Fla. Dist. Ct. App. Feb. 3, 2017) (citing ordinances). Although the city had not enforced either provision for years, the ordinances remained on the books. *Id.* at 4-5. The plaintiffs argued that by failing to repeal the ordinances, the city was liable under the punitive preemption statute. In a technical, narrow holding, an intermediate state appellate court held that in not repealing the old ordinances, the city had not actually “promulgated” preempted ordinances as required for penalties to kick in under the statute, *id.* at 22, thus sidestepping the more challenging constitutional questions at issue.

⁸⁹ *Bogan v. Scott-Harris*, 523 U.S. 44, 44 (1998).

⁹⁰ *Id.* at 46.

⁹¹ *Id.* at 55.

⁹² *Bogan* was a case interpreting federal law—namely, 42 U.S.C. § 1983. The Court held that § 1983 incorporates legislative immunity for local officials, in part because the common law did so in 1871, when Congress passed the original statute. The legislative immunity recognized in *Bogan*, therefore, is not a free-floating concept, but rather one rooted in the history of the particular federal statute the plaintiffs attempted to use to impose liability. Its applicability may be limited, therefore, when the state legislature has spoken clearly to override this common-law doctrine.

It also bears noting that number of state constitutions—43 by one count—contain provisions analogous to the U.S. Constitutions Speech or Debate clause, providing immunity to legislators for legislative acts. U.S. CONST. art. I, § 6, cl. 1; Steven F. Huefner, *The Neglected Value of the Legislative Privilege in State Legislatures*, 45 WM. & MARY L. REV. 221, 224 (2003). By their own texts, however, these provisions apply only to state legislators. *Id.* app. at 308-18 (listing all 43 provisions as of 2002), and it thus might require constitutional amendment to extend to local officials.

or under applicable state constitution provisions.⁹³ In *Nevada Commission on Ethics v. Carrigan*, the Supreme Court rejected a city councilor’s First Amendment challenge to a state ethics commission’s decision to censure him for failing to abstain from voting on a hotel and casino project application in which he had an interest.⁹⁴ In doing so, the Court held that restrictions on legislators’ votes are not restrictions on their “speech” for First Amendment purposes.⁹⁵ The scope of the *Carrigan* decision, however, might be limited by the relatively minor penalty imposed (a mere censure) and the fact that it concerned conflict-of-interest rules, which the Court noted date back to the early years of Congress.⁹⁶ Provisions that penalize, rather than condition, the exercise of individual local legislative authority may be more vulnerable.⁹⁷

By criminalizing and punishing local democracy, moreover, this strain of preemption may be found to violate the structure of home rule in states that have established it in their constitutions. Many state courts interpret their constitutional home rule provision as protecting the ability of local voters to choose their form of government. By criminalizing or punishing a city or local official for simply retaining laws on the books that are no longer enforceable, as is always the case with validly preempted local legislation, these statutes arguably infringe on the ability of local units to express themselves as they see fit, even if they cannot implement local policy that conflicts with state law.

IV. CODA: AFFIRMATIVELY—IF CAREFULLY—REINFORCING LOCAL DEMOCRACY

This Issue Brief has focused primarily on current and potential litigation challenges to the troubling wave of preemptive legislation now roiling local governance. There are more affirmative approaches to strengthening home rule, however, that may play an important role in legal strategies to respond to preemption. Working to prevent preemption before such legislation passes can be effective, but can also be challenging; in the right circumstances, advocates can seek to repeal preemptive legislation, or look to ballot initiatives to preserve local democracy. More ambitiously—and keeping an eye on the potential for long-term advocacy to protect the space for local innovation—it

⁹³ See Tartakovsky, *supra* note 87 at 8 (arguing that punitive preemption will lead to self-censorship by municipal officials and “may effectively prohibit public discussion of an entire topic”) (internal quotations and citation omitted).

⁹⁴ *Nevada Commn. on Ethics v. Carrigan*, 564 U.S. 117, 117-18 (2011).

⁹⁵ *Id.* at 125.

⁹⁶ *Id.* at 122-23; *id.* at 134 (Alito, J., concurring) (disagreeing with the majority that a legislator’s vote is not speech, but concurring because the conflict-of-interest “recusal rules [for early Congresses] were not regarded during the founding era as impermissible restrictions on freedom of speech”).

⁹⁷ Recently, in a challenge to Texas’s punitive anti-sanctuary law, the United State District Court found that a provision forbidding local officials from “endors[ing]” any policy that would “materially limit immigration law” was overbroad and vague and impermissible viewpoint discrimination under the First Amendment. *City of El Cenizo v. State of Texas*, No. SA-17-CV-404-OLG, 2017 WL 3763098 (W.D. Tex. 2017) (order granting preliminary injunction), *injunction partially stayed by City of El Cenizo v. State of Texas*, No. 17-50762 (5th Cir. Sep. 25, 2017).

may be possible to look to state constitutional change.⁹⁸ In the original home rule movement at the turn of the century and again in the post-World War Two wave of home-rule reform,⁹⁹ advocates made some progress embedding home rule reforms in state constitutions. It may be time to revive those movements.

As a final note, as mentioned at the outset of this Issue Brief, it is important to keep in mind that efforts to reinforce local authority and autonomy must recognize that for all of their progressive potential, local governments can also be parochial and exclusionary—or worse—and that there are fundamental constitutional values that must remain state-wide and national in scope as a baseline. It is thus necessary to preserve preemption as an appropriate tool to respond to local exclusion and parochialism, even as cities push back against state overreach entirely unrelated to this kind of oversight. What is needed, then, is a long-term law reform effort to reinvent home rule, beginning with a new understanding of localism that explicitly reflects progressive values, recognizing that to be legitimate, local democracy must be inclusive and equitable. In the balance between uniformity and preserving space for local innovation, devolution should be vindicated to the extent that it reinforces—or at least does not impede—equitable, just policy.

CONCLUSION

At just the moment when so many cities have taken a leading role in advancing a range of progressive goals—from expanding opportunity to advancing social justice to protecting the environment—states are increasingly stepping in to block them. This Issue Brief has surveyed major fault lines emerging in this contemporary clash of state and local governments. There are legal strategies to be tested and policy battles to be waged. But what is clear is that much more needs to be done to protect local democracy.

⁹⁸ In addition, the apparent relationship between politically gerrymandered state legislatures and more aggressive preemption cannot be ignored. See Paul A. Diller, *Reorienting Home Rule: Part 1—The Urban Disadvantage in National and State Lawmaking*, 77 LA. L. REV. 287, 336-42 (2016) (describing the partisan bias in state legislatures after 2010). For more on post-2010 gerrymandering of state legislative and U.S. House of Representative districts, see DAVID DALEY, *RATF**KED: HOW THE DEMOCRATS WON THE PRESIDENCY BUT LOST AMERICA* (2016). Many of the states that have seen the most ferocious preemption conflicts are decidedly “purple”—e.g., Florida, Michigan, North Carolina, Ohio, and Wisconsin—yet their state legislatures have nonetheless consistently attacked local progressive priorities. As articulated by the district court in *Gill v. Whitford*, a case now pending before the U.S. Supreme Court, intentional political gerrymandering after 2010 allowed a conservative-leaning legislative majority in Wisconsin to lock itself into power. *Gill v. Whitford*, 218 F. Supp. 3d 837, 837 (W.D. Wis. 2016), cert. granted (June 19, 2017) (No. 16-1611). The Supreme Court’s resolution of *Gill*, as well as continuing efforts in some states to amend constitutions to prohibit political gerrymandering, may help reduce the frequency and intensity of state preemption of progressive local policies. See, e.g., *Ariz. State Leg. v. Ariz. Ind. Redistricting Comm’n*, 135 S. Ct. 2652, 2658 (2015) (reviewing and upholding, as applied to U.S. House districts, Arizona’s Proposition 106 from 2000 that aimed to end partisan gerrymandering “for congressional as well as state legislative districts”); see generally *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363 (Fla. 2015) (invalidating politically gerrymandered districts under the voter-approved “Fair Districts Amendment” to the state constitution of 2010).

⁹⁹ See *supra* note 2.

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