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# Is State Preemption Weakening the Authoritarian Resilience of Local Government in the United States?

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## **IS STATE PREEMPTION WEAKENING THE AUTHORITARIAN RESILIENCE OF LOCAL GOVERNMENTS IN THE UNITED STATES?**

The strength of free peoples resides in the local community. Local institutions are to liberty what primary schools are to science; they put it within the people's reach; they teach people to appreciate its peaceful enjoyment and accustom them to make use of it. Without local institutions a nation may give itself a free government, but it has not the spirit of liberty<sup>1</sup>.

In many countries in the world today democratic institutions and ideals seem threatened. Due process, equal protection, freedom of speech, freedom of the press, the right to vote, and other democratic ideals are deeply ingrained in US culture and government. Traditionally, the federal government is thought to be the guardian of these rights, ensuring that state governments adhere to the rule of law established by our written constitution. Similarly, state governments are thought to uphold these democratic ideals *vis a vis* local governments. The American system of checks and balances and separation of powers and the resulting interplay between the branches of government are considered safeguards that protect the rule of law. This horizontal separation of powers – executive, legislative and judicial – often overshadows the similar function served by the vertical separation of governmental power created by our division of governmental power into federal, state and local.

Thus, at least in theory, if the federal and state governments act contrary to the rule of law established by our federal and state constitutions, local governments offer at least some degree of authoritarian resilience. History provides several examples of authoritarian regimes which upon attaining power acted quickly

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<sup>1</sup> A. de Tocqueville, *Democracy in America*, G. Lawrence (transl.) 1966.

to abolish or severely limit the powers of local governments<sup>2</sup>. The motivations that lie behind the suppression of local governments as a precursor to establishing anti-democratic regimes recognize the important role that local governments play in protecting democratic ideals. What power, then, do local governments possess that will allow them to preserve democratic ideals in spite of the contrary actions being taken by “higher” levels of government?

First, this article will discuss the concept and operation of vertical separation of powers in the United States. Secondly, it will discuss the danger posed to authoritarian resilience in the United States by the recent increase in State preemptions of local government power – particularly in regard to sanctuary cities, climate change, gun regulation, and LGBT rights – and with a particular emphasis on affordable housing. Finally, the manner in which local governments may resist anti-democratic action from federal and state governments will be examined.

## 1. VERTICAL SEPARATION OF POWERS: THE ROLE OF LOCAL GOVERNMENTS IN AMERICAN GOVERNMENT AND POLITICS

From the beginning of our nation, local governments have played a major role in all aspects of government, politics and daily life. They play that role as independent – although inferior sovereigns – and not as instrumentalities or administrative divisions of the national government as is the case in many other countries<sup>3</sup>. Alexis de Tocqueville, that great observer of American Democracy, grasped the importance of local government in the passage quoted from him at the beginning of this article. The contemporary validity of his observations is confirmed by the following analysis in *How Cities Will Save the World*:

The governmental structure in the US lends itself to urban innovation. Eighty years ago, US Supreme Court Justice Louis Brandies described the flexibility to innovate available to states in the American federal system as follows: the “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”. Cities and local governments are the rooms inside those laboratories, where local experimentation can flourish just as far as the imagination, the political will, and the urban pragmatic spirit can take it<sup>4</sup>.

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<sup>2</sup> Nazi Germany for instance. See W. Rinderle, B. Norling, *The Nazi Impact on a German Village*, Lexington 1994, pp. 107-109; H. Kupper, *The Concept of Multilayered Statehood in the System of Russian Federalism*, “Review of Central and Eastern Europe Law” 2013, Vol. 38, pp. 239-266.

<sup>3</sup> France is a good example.

<sup>4</sup> R. Brescia, J. Travis Marshall (eds.), *How Cities Will Save the World: Urban Innovation in the Face of Population Flows, Climate Change and Economic Inequality*, Routledge 2016.

International symposia which include discussions of American Law generally concentrate – often exclusively – on our federal government and its laws, policies and politics. For American citizens, however, this often misses the mark, as Professor Briffault has observed, even though the role of the federal government has expanded tremendously since the early days of the Republic and the time frame in which de Tocqueville made his observations:

Yet states and local governments continue to play a significant role in American governance. As in Madison’s day, for most people “the ordinary course of affairs” remains largely the domain of state and local governments. The rules that structure civil society – contract law, tort law, property and land use law, criminal law, family law, the incorporation of businesses, the regulation of the professions – are developed, implemented, and enforced primarily at the state and local levels. So, too, most public services that affect people in their homes and families – public schools, policing and the incarceration of offenders, public safety, the provision of clean water and the removal of solid waste and sewage, maintenance of roads and streets, public parks, public hospitals and emergency medical services – are provided by states and localities, not the federal government. The vast majority of the opportunities for participation in political life – such as running for office, campaigning for or against a ballot proposition, or appearing before such critical governing institutions as the school board, the planning and zoning commission, or a town meeting – are at the state and local level, too<sup>5</sup>.

First a bit of a primer for international readers. It is well known that the United States is composed of 50 States<sup>6</sup> which have residual power over aspects of government not granted to the federal government<sup>7</sup>. What is less well known and appreciated is the importance and role of local governments, to again quote Professor Briffault:

There are more than 90,000 of them and they differ dramatically in powers, status, organization, function, authority, and mode of creation across the country and, indeed, within a particular state. There is not even a consistent terminology for local governments; different states include such diverse local units as parishes, boroughs, and townships, as well as the more common forms of local government like county or city. Unlike the states, local governments may – and frequently do – overlap each other’s territory. Unlike the states, local governments are frequently created, modified territorially, or abolished. Unlike the states, local governments lack inherent law-making authority. So, too, while the federal Constitution makes frequent

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<sup>5</sup> R. Briffault, L. Reynolds, *Cases and Materials on State and Local Government Law*, St. Paul, Mn. 2016, 8<sup>th</sup> ed.

<sup>6</sup> And some “territories”.

<sup>7</sup> For an in-depth analysis of American federalism and the Rule of Law, see R. A. Schapiro, *How Federalism Can Promote a National Commitment to the Rule of Law*, “*Studia Iuridica*”, this issue.

reference to the state, the federal Constitution is entirely silent on the subject of local governments<sup>8</sup>.

The powers possessed by local governments vary from state to state. It is traditional to group states into two categories in this regard: 1. Home rule states and 2. Dillon's rule jurisdictions. Simply stated, in home rule states local governments have all powers necessary for them to operate as governments unless the powers in question are directly withheld from them by the state constitution or laws consistent with the constitution enacted by the state legislature. In Dillon's rule jurisdictions, local governments only have those powers which are directly and specifically delegated to them by state constitutions or laws passed consistent therewith. In reality local government powers in the various states fit more into a continuum between those extremes. As a leading local government law treatise phrases it:

The power of home rule is generally understood as synonymous with local autonomy: the freedom of a local unit of government to pursue self-determined goals without interference by its State legislature or other agencies of State government. The possibilities for local autonomy run along a spectrum. At one end local governments are forbidden to do anything unless the State legislature or State constitution has expressly and unambiguously authorized them to do it. At the other end, local governments are authorized to do anything the State legislature can do that has not been explicitly forbidden by State law. Thus, in this theoretical world, local governments at the low autonomy end of the spectrum could not ban fracking in their territories, raise the minimum age, or ban smoking in bars and restaurants unless they could first point to a State statute that clearly gives them the power to do so. On the high autonomy end of the spectrum, local governments, responding to local concerns on their own initiative, would have the power to enact their policy preferences unless otherwise prevented by State law<sup>9</sup>.

Regardless of which category – or where on the spectrum – a state's local governments are placed, the fact remains that all US local governments legislate and set policy in regard to matters of local concern which affect daily life more than much of what the Federal and state governments do. Of course, conflicts between state and local governments often arise over disagreements as to what constitutes a “matter of local concern”<sup>10</sup>.

Areas such as zoning, education, and housing are generally considered “of local concern” as within the home rule ambit. However, local governments have recently taken a more progressive approach to local laws, passing legislation that seeks to set a minimum wage higher than the federal floor, passing more restrictive

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<sup>8</sup> R. Briffault, L. Reynolds, *Cases and Materials*...

<sup>9</sup> See S. M. Stevenson, *Antieau on Local Government Law §21.01*, Newark, N.J., 2009, 2<sup>nd</sup> ed.; see also: J. Martinez, *1 Local Government Law, §4:1 et seqq.*, Rochester, N.Y. 2018.

<sup>10</sup> E. A. Schraff, *Hyper Preemption: A Reordering of the State-Local Relationship?*, “Georgetown Law Journal” 2018, Vol. 106. (Statewide and local concern categories are “porous”).

gun control laws, regulations limiting the use of plastic bags, enacting the so called bathroom bills, etc. These areas relate more to commercial activities and have been the source of considerable pushback from the state governments. In response, state governments have been aggressively passing “preemption” legislation that specifically limits a local government’s ability to legislate in certain areas.

## 2. CURRENT TREND OF STATE PREEMPTION: THE AFFORDABLE HOUSING EXAMPLE

American cities are under attack. The last few years have witnessed an explosion of preemptive legislation challenging and overriding municipal ordinance across a wide-range of policy areas. City – state conflicts over the municipal minimum wage, LGBT anti-discrimination, and sanctuary city laws have garnered the most attention, but these conflicts are representative of a larger trend toward state aggrandizement. These legal challenges to municipal regulation have been accompanied by an increasingly shrill anti-city politics, emanating from both state and federal officials<sup>11</sup>.

The growing deficit of affordable housing for low- and moderate-income households is a major concern for American cities<sup>12</sup>. Local Governments often attempt to increase affordable housing stock within a community through inclusionary zoning ordinances pursuant to which as a condition of development permission a residential developer is required or incentivized to set aside a percentage of the units for which development permits are sought for sale or lease to persons of low or moderate income at below market rates<sup>13</sup>. Local government efforts in this regard are thwarted or at least complicated by the rise of state preemption of municipal authority<sup>14</sup>. In recent years, state preemption statutes have become much more prevalent<sup>15</sup>. Preemption statutes also now touch on a vast range of subject matters, including affordable housing stock<sup>16</sup>. In fact, just last year, Wisconsin

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<sup>11</sup> R. C. Schragger, *The Attack on American Cities*, “Texas Law Review” 2018, Vol. 96.

<sup>12</sup> M. Hobbes, *Affordable Housing Problem is a Ticking Time Bomb*, “The Huffington Post” 19 June 2018, [https://www.huffingtonpost.com/entry/housing-crisis-inequality-harvard-report\\_us\\_5b27c1f1e4b056b2263c621e](https://www.huffingtonpost.com/entry/housing-crisis-inequality-harvard-report_us_5b27c1f1e4b056b2263c621e) (visited February 18, 2019).

<sup>13</sup> J. C. Juergensmeyer et al., *Land Use Planning and Development Regulation Law*, St. Paul, Mn. 2018, § 6:7A.

<sup>14</sup> See R. Briffault, *The Challenge of New Preemption*, “Stanford Law Review” 2018, Vol. 70; R. Schragger, *State Preemption of Local Laws: Preliminary Review of Substantive Areas*, Legal Efforts to Address Preemption (LEAP) Project, May 2017.

<sup>15</sup> *Ibidem*.

<sup>16</sup> *Ibidem*.

sin successfully passed a statute preempting municipal authority from enacting inclusionary zoning ordinances<sup>17</sup>.

Inclusionary zoning ordinances are either mandatory or voluntary<sup>18</sup>. Inclusionary zoning is mandatory when it requires developers to set aside a certain number of housing units at a below market rate for low- and moderate-income households within a project<sup>19</sup>. This reduced rate may apply to housing units for sale or for rent<sup>20</sup>. A municipality may have voluntary inclusionary zoning in addition or as an alternative to mandatory inclusionary zoning<sup>21</sup>. Voluntary inclusionary zoning is incentives-based<sup>22</sup>. For example, a city may offer a density bonus when a developer includes housing for sale at rates below the market price<sup>23</sup>.

As alluded to above, rental units may be subject to inclusionary zoning ordinances. When an inclusionary zoning ordinance includes a reduced rate for rent, the ordinance may be characterized as rent control<sup>24</sup>. Rent control establishes a certain maximum in rent price and may curb increases thereafter<sup>25</sup>. There are some jurisdictions, however, that have separate rent control and inclusionary zoning schemes, like New York and California<sup>26</sup>.

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<sup>17</sup> Wis. Stat. § 66.1015. In recent years, other states, like North Carolina and Louisiana, have also been pushing for preemption on affordable housing. See K. Litten, J. B. Edwards, *Vetoed Ban on Affordable Housing Requirements for Developers*, “The Times Picayune” 29 May 2018, [https://www.nola.com/politics/index.ssf/2018/05/edwards\\_vetoed\\_inclusionary\\_ho.html](https://www.nola.com/politics/index.ssf/2018/05/edwards_vetoed_inclusionary_ho.html) (visited February 25, 2019); K. Capps, *Preempting the Rights of North Carolina Cities to Govern Themselves*, “CityLab” 29 September 2015, <https://www.citylab.com/equity/2015/09/preempting-the-right-of-north-carolina-cities-to-govern-themselves/408058/> (visited February 25, 2019). Although both North Carolina and Louisiana were unsuccessful in 2017, it is notable that preemption on affordable housing has become a heated issue during state legislative sessions. Interestingly, in 2016 Oregon passed a statute on affordable housing at the state level to permit inclusionary zoning after a seventeen-year prohibition against inclusionary zoning. See Oregon Revised Statutes § 320.192 (2017); D. C. Theriault, *Kate Brown Signs Bill on Affordable Housing Rules, Renter Relief*, “The Oregonian” 17 March 2016, [https://www.oregonlive.com/politics/index.ssf/2016/03/kate\\_brown\\_signs\\_bills\\_on\\_affo.html](https://www.oregonlive.com/politics/index.ssf/2016/03/kate_brown_signs_bills_on_affo.html) (visited February 25, 2019).

<sup>18</sup> See V. J. Pinedo, Note, *Embracing the Excluded: Using Mandatory Inclusionary Zoning to Affirmatively Further Fair Housing in St. Louis*, “Cornell Journal of Law and Public Policy” 2016, Vol. 26.

<sup>19</sup> *Ibidem*.

<sup>20</sup> e.g., Burlington, Vt. Inclusionary and Replacement Housing Code § 9.1.8. Notably, Atlanta’s inclusionary zoning ordinance refers only to rental units. Atlanta, Ga. Affordable Workforce Housing Code §16.36A.004.

<sup>21</sup> See V. J. Pinedo, *Embracing the Excluded...*

<sup>22</sup> *Ibidem*.

<sup>23</sup> *Ibidem*.

<sup>24</sup> This is true even if reduced rent is not necessarily required by the ordinance and may be a part of a larger scheme with several components at play to increase affordable housing. See *Town of Telluride v. Lot Thirty-Four Venture, LLC*, 3 P.3d 30 (Colo. 2000).

<sup>25</sup> M. W. Cordes, *Thompson on Real Property* § 43.04(a) 1994.

<sup>26</sup> See N. I. El Mallakh, *Comment: Does the Costa-Hawkins Act Prohibit Local Inclusionary Zoning Programs?*, “California Law Review” 2001, Vol. 89; V. Chau, J. Yager, *Article: Zoning For*

States preempt municipal authority in enacting inclusionary zoning ordinances both explicitly and implicitly. There are at least four states that explicitly preempt mandatory inclusionary zoning: Arizona<sup>27</sup>, Arkansas<sup>28</sup>, Texas<sup>29</sup>, and Wisconsin<sup>30</sup>. Notably, however, nearly all of these states do expressly permit ordinances that create voluntary and incentive-based programs<sup>31</sup>. The only exception is Wisconsin, which prohibits both mandatory and voluntary inclusionary ordinances<sup>32</sup>.

Many affordable housing programs include provisions for rent control by limiting a certain percentage of rental units to low and moderate income individuals at below market rates. At least twenty-eight states preempt municipal enactment of rent control ordinances through explicit statutory prohibitions: Alabama<sup>33</sup>, Arizona<sup>34</sup>, Arkansas<sup>35</sup>, Colorado<sup>36</sup>, Florida<sup>37</sup>, Georgia<sup>38</sup>, Idaho<sup>39</sup>, Illinois<sup>40</sup>, Indiana<sup>41</sup>, Iowa<sup>42</sup>, Kansas<sup>43</sup>, Kentucky<sup>44</sup>, Massachusetts<sup>45</sup>, Michigan<sup>46</sup>, Minnesota<sup>47</sup>, Mississippi<sup>48</sup>, Missouri<sup>49</sup>, New Mexico<sup>50</sup>, North Carolina<sup>51</sup>

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*Affordability: Using the Case of New York To Explore Whether Zoning Can Be Used To Achieve Income-Diverse Neighborhoods*, 25 “New York University Environmental Law Journal 2017, Vol. 25.

<sup>27</sup> Arizona Revised Statutes Ann. § 9-461.16 (2017).

<sup>28</sup> Arkansas Code Ann. § 14-54-1604 (2017).

<sup>29</sup> Texas Code Ann. § 214.905 (2017).

<sup>30</sup> Wis. Stat. § 66.1015 (2017).

<sup>31</sup> Arizona Revised Statutes Ann. § 9-461.16 (2017); Arkansas Code Ann. § 14-54-1604 (2017); Indiana Code § 32-31-1-20 (2017); Kansas Statutes Ann. § 12-16,120 (2017); Tennessee Code Ann. § 66-35-102 (2017). Tex. Code Ann. § 214.905 (2017).

<sup>32</sup> Wis. Stat. § 66.1015 (2017).

<sup>33</sup> Alabama Code § 11-80-8.1 (2017).

<sup>34</sup> Arizona Revised Statutes Ann. § 33-1329 (2017).

<sup>35</sup> Arkansas Code Ann. § 14-16-601(2017).

<sup>36</sup> Colorado Revised Statutes § 38-12-301 (2017).

<sup>37</sup> Florida Statutes §166.043 (2017).

<sup>38</sup> Georgia Code Ann. § 44-7-19 (2017).

<sup>39</sup> Idaho Code § S5-307 (2017).

<sup>40</sup> 50 Illinois Compiled Statutes 825/5 (2017).

<sup>41</sup> Indiana Code § 32-31-1-20 (2017).

<sup>42</sup> Iowa Code § 364.3 (2017).

<sup>43</sup> Kansas Statutes Ann. § 12-16,120 (2017).

<sup>44</sup> Kentucky Revised Statutes Ann. § 65.875 (2017).

<sup>45</sup> Massachusetts General Laws ch. 40P, § 4-5 (2017).

<sup>46</sup> Michigan Compiled Laws § 123.411(2017).

<sup>47</sup> Minnesota Statutes §471.9996 (2017).

<sup>48</sup> Mississippi Code Ann. § 21-17-5 (2017).

<sup>49</sup> Missouri Revised Statutes § 441.043 (2017).

<sup>50</sup> New Mexico Statutes Ann. § 47-8A-1(2017).

<sup>51</sup> North Carolina General Statutes § 42-14.1(2017).



North Dakota<sup>52</sup> Oklahoma<sup>53</sup>, Oregon<sup>54</sup>, South Carolina<sup>55</sup>, South Dakota<sup>56</sup>, Tennessee<sup>57</sup>, Texas<sup>58</sup>, Utah<sup>59</sup>, Washington<sup>60</sup>, and Wisconsin<sup>61</sup>. There are at least an additional four states wherein the respective courts found municipalities did not have authority to adopt rent control ordinances: Connecticut,<sup>62</sup> Louisiana<sup>63</sup>, New Hampshire<sup>64</sup>, and Virginia<sup>65</sup>. The prevalence of rent control preemption in comparison to mandatory inclusionary zoning preemption is significant because rent control preemption frustrates mandatory inclusionary zoning. Therefore, although only four states have explicitly preempted mandatory inclusionary zoning, many more states may have implicitly preempted mandatory inclusionary zoning through its rent control preemption statutes.

A state's rent control preemption statute may frustrate a local mandatory inclusionary zoning ordinance if there is a component of the zoning ordinance that regulates rent below market prices<sup>66</sup>. If the inclusionary zoning ordinance is found to be a form of rental control, and municipalities are expressly prohibited from enacting rent control ordinances, the only way the ordinance can supersede the statute is if the state is home rule and the court finds rental control to be a local matter<sup>67</sup>. This finding is also unlikely as state uniformity in regulation is a high priority<sup>68</sup>. In addition, although rental control is arguably a land use issue, which would imply local regulation, a rental control ordinance may be found to be economic legislation, which is a state matter<sup>69</sup>.

There are two ways to look at the recent conflicts between state and local governments: (1) either the local governments have exceeded the grant of legis-

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<sup>52</sup> North Dakota Century Code § 47-16-02.1 (2017).

<sup>53</sup> Oklahoma Statutes tit. 11, §14-101.1 (2017).

<sup>54</sup> Oregon Revised Statutes § 91.225 (2017).

<sup>55</sup> South Carolina Code Ann. § 27-39-60 (2017).

<sup>56</sup> South Dakota Codified Laws § §6-1-13 (2017).

<sup>57</sup> Tennessee Code Ann. § 66-35-102 (2017).

<sup>58</sup> Texas Code. Ann. § 214.902 (West 2017).

<sup>59</sup> Utah Code Ann. § 57-20-1 (West 2017).

<sup>60</sup> Washington Revised Code § 35.21.830 (2017).

<sup>61</sup> Wis. Stat. § 66.1015 (2017).

<sup>62</sup> *Old Colony Gardens, Inc. v. Stamford*, 156 A.2d 515 (Conn. 1959).

<sup>63</sup> *Jayers v. Council of New Orleans*, 351 So. 2d 247 (La. 1977).

<sup>64</sup> *Girard v. Allentown*, 428 A.2d 488 (N.H. 1981).

<sup>65</sup> *Fairfax Cty. v. De Groff Enterprises*, 198 S.E.2d 600 (Va. 1973).

<sup>66</sup> See *Town of Telluride v. Lot Thirty-Four Venture, LLC*, 3 P.3d (Colo. 2000). But See Mallakh, *Comment...* (arguing rent control and inclusionary zoning are separate and distinct legal mechanisms).

<sup>67</sup> J. Juergensmeyer et. al., *Land Use Planning...*, 50–51; See also *Town of Telluride v. Lot Thirty-Four Venture, LLC*, 3 P.3d 30 (Colorado 2000).

<sup>68</sup> *Ibidem*.

<sup>69</sup> See *Town of Telluride v. Lot Thirty-Four Venture, LLC*, 3 P.3d 30, fn. 9 (Colorado 2000); See also K. A. Stahl, *Local Home Rule in the Time of Globalization*, “Brigham Young University Law Review” 2016, Vol. 177.

lative power and must be checked, or (2) state governments are using preemption to suppress what should be considered legitimate areas of local legislation. We subscribe to the latter view.

We would argue that the current conflict between state and local governments is largely a political fight. Both left and right are using local governments and their localized responses to local values as an invitation to have political debates that appear to be national in scope. These local governments are legislating (in a representative capacity) to establish regulations that go further than state or federal counterparts – not in opposition to them. Instead of allowing local governments to experiment with different types of solutions, state governments have become increasingly hostile towards local experimentation and have taken preemptive steps to curb the adoption of regulations that go farther than state law. One must ask why this increased hostility is taking place, especially when local laws do not conflict with state laws.

To us it seems like state governments have been blinded by politics and have resultantly chosen to ignore the benefits of local governments as laboratories where ideas can be tested. Further, these state governments are hostile to the will of a significant portion of the population that lives within the cities passing these local regulations. Residents of cities in particular do not feel represented by state-level politicians, as many of these debated local ordinances reflect.

State-level reactions to local government's attempts to legislate on matters of individual rights, worker's rights, housing, environmental, etc. should be troubling to all involved. The wave of preemption legislation is a clear signal of the view that local governments are not meant to be areas of experimentation – therefore significantly reducing the importance of the huge segments of the population that live in cities.

In other words, the recent push by state governments to curb the ability of local governments to legislate is indicative of a fear that these local governments are a threat to consolidated power. The legislation most frequently drawing the ire of state governments is not in direct conflict with the state, but instead concerns giving citizens additional rights or increased protections that build upon a floor established by state or federal law (think minimum wage, plastic bags, bathroom bills).

The republican party-dominated state governments are not truly concerned with the power of local governments to enact legislation or that these governments are abusing any granted power. Instead, the state governments are not pleased with the decidedly liberal-leaning policies enacted by smaller governments and are using the trope of “out of control local government” to curb policies contrary to their own.

Dismissing the importance of local governments is a dangerous step that allows the few to trample on the rights of the many. It is an unfortunate fact that those in power often create rules that assist in maintaining power. We believe this consoli-

dation of power on a state level is exactly such an attempt to consolidate power for a particular party at the expense of local governments. Stripping local governments of a right to legislate limits these local governments' abilities to protect the rights of its citizens and removes a safeguard against larger governments acting contrary to democratic ideals. This could be seen as an initial step in removing an obstacle that allows for the establishment of a more authoritarian form of government that may not respect the rule of law. How then can local governments "fight back" in spite of significant limitations placed on their legislative competence?

### 3. WAYS THAT LOCAL GOVERNMENTS CAN RESIST

#### 3.1. REFUSAL TO ENFORCE

A well-publicized example of how local governments can resist federal government policies without being able to pass local legislation is demonstrated through the recent conflict over "sanctuary cities". Sanctuary cities limit cooperation with U.S. Immigration and Customs Enforcement<sup>70</sup>. Here, local governments disagree with federal policy regarding a matter over which local governments are not authorized to legislate. The local governments are not actively passing legislation that conflicts with a national or state policy. Instead, the local governments are refusing to use the local government's resources to enforce or implement a national or state program<sup>71</sup>. A primary tactic used by the federal and state governments to punish this disobedience is threatening to or actually withholding funds from the local government. We have seen numerous threats by the Trump administration to starve sanctuary cities into submission by threatening to withhold federal funds. Trump issued executive order 13768 early on in his presidency ordering that federal funds be withheld from sanctuary cities<sup>72</sup>. San Francisco sued in federal court, challenging the validity of an executive order<sup>73</sup>. The Ninth

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<sup>70</sup> D. Lord, *What are sanctuary cities? Here's a list of sanctuary cities, counties, states*, "The Atlanta Journal-Constitution" 26 January 2017, <https://www.ajc.com/news/national/what-are-sanctuary-cities-here-list-sanctuary-cities-counties-states/Y452wnIOx2hemgKx8T4gIP/> (visited February 25, 2019).

<sup>71</sup> For example, the Mayor of Atlanta recently issued an executive order forbidding the city's jails from accepting new ICE detainees. S. Deere, *Atlanta Mayor Bottoms orders jail to refuse new ICE detainees*, "The Atlanta Journal-Constitution" 20 June 2018, <https://www.ajc.com/news/breaking-news/atlanta-mayor-bottoms-orders-jail-refuse-new-ice-detainees/iy1rtK0WmYkk3cEbv1CeDN/> (visited February 25, 2019).

<sup>72</sup> Text of the Executive Order can be found at: <https://www.whitehouse.gov/presidential-actions/executive-order-enhancing-public-safety-interior-united-states/> (visited October 27, 2018).

<sup>73</sup> The lawsuit can be viewed at: <https://www.sfcityattorney.org/2017/11/20/court-rules-trumps-sanctuary-executive-order-unconstitutional/> (visited February 25, 2019).

Circuit of the United States Court of Appeals determined that the executive order went too far, holding that “the Executive Branch may not refuse to disperse the federal grants in question without congressional authorization”<sup>74</sup>. This decision is in line with Supreme Court precedent that demands a separation of powers between the branches of government and that protects local governments from this type of punishment/coercion<sup>75</sup>.

The Court of Appeals’ adherence to well-established precedent showed that attempts to bully or coerce local governments into enforcing a law with which they disagree can be met with legal resistance. At the very least, local governments have a choice to make and are not required to expend their limited funds enforcing a policy with which they disagree. Of course, a significant portion of local government revenue comes from the federal government. The federal government may withhold funding from disobedient local governments as a form of punishment. However, that withheld funding must be tied to the policy the local government is refusing to enforce.

### 3.2. DECRIMINALIZATION

In the same vein, local governments can “decriminalize” certain activities. A popular example of this practice is demonstrated by marijuana laws. Atlanta, for instance, decriminalized marijuana in late 2017<sup>76</sup>. This tactic is another way that local governments can refuse to expend resources enforcing an activity with which it disagrees. Decriminalizing something does not protect citizens from federal or state level authorities. Employing this method simply requires the federal/state governments to spend more time and resources in enforcing policies with which local governments disagree. A local government can “save” great sums of money by refusing to prosecute certain activities that it deems unworthy of enforcement. At the same time, the local government is making a statement that the citizens within its borders do not agree with the state or federal policy. The growing list of state and local governments that have decriminalized marijuana sheds light on an unpopular position of the federal or state government bodies and puts pressure on those governments to conform with the obvious will of a large portion of the population. Lessons learned from decriminalization can be extended if the federal or state government acted contrarily to the rule of law by criminalizing certain democratic behaviors.

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<sup>74</sup> *City and County of San Francisco v. Trump*, 897 F.3d 1225, 1231 (9th Cir. 2018).

<sup>75</sup> See *Printz v. United States*, 521 U.S. 898 (1997) for a discussion of anti-commandeering, and *South Dakota v. Dole*, 483 U.S. 203 (1987) (holding that any denial of federal funds must be related only to a particular program that a state/local government is not enforcing).

<sup>76</sup> <http://fortune.com/2017/10/03/list-of-cities-that-decriminalized-marijuana/> (visited February 18, 2019).

### 3.3. SPEND FUNDS IN WAYS THAT INDIRECTLY CHALLENGE POLICIES

Local governments can uphold the rule of law by funding programs that hinder policies with which they disagree. California, for example, has set aside \$50 million dollars to increase legal services available to immigrants in response to the federal government's current immigration policy<sup>77</sup>. Funding programs such as this leads to an indirect, non-legislative challenge to federal policy. There is no conflicting legislation on the state level and providing legal representation is certainly within the scope of state authority. Programs such as these are intended to express opposition to federal policy and to slow down the aims of the federal government. However, the basis of local oppositional programs is money.

Local governments must be able to raise enough revenue to fund oppositional programs. This fact raises special concerns for local government that have limited means to raise revenue. In certain instances, state governments have reacted to local opposition by enacting roadblocks of their own and placing caps on property taxes or assessment limits<sup>78</sup>. Doing so severely limits a local government's ability to raise revenue and makes it more difficult to fund oppositional programs.

A government cannot exist without a revenue stream. Property taxes are the second largest source of revenue for local governments, accounting for approximately 30% of all revenue<sup>79</sup>. The largest source of income for local governments are direct transfers from larger governments<sup>80</sup>. One does not have to look too far to see that legislation enacted on a state level capping property tax rates has the effect of severely limiting a local government's overall ability to raise revenue.

Taxes are rarely popular. Therefore, convincing voters that property tax caps are a good thing is quite easy. Voters are generally not going to be aware of the consequences of these caps. In reality, the state governments have served to consolidate power by making local governments more dependent on state resources and far less likely to enact or fund policies that hinder policies of the state government. Citizens should be educated on the consequences of limitations on local revenue streams if indirect challenges are to continue.

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<sup>77</sup> J. Ulloa, *Nearly \$50 million in the California state budget will go to expanded legal services for immigrants*, "The Los Angeles Times" 15 June 2017, <http://www.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-nearly-50-million-in-the-california-1497576640-htmlstory.html> (visited February 18, 2019).

<sup>78</sup> *Significant Features of the Property Tax*, [http://datatoolkits.lincolnst.edu/subcenters/significant-features-property-tax/Report\\_Tax\\_Limits.aspx](http://datatoolkits.lincolnst.edu/subcenters/significant-features-property-tax/Report_Tax_Limits.aspx) (visited February 18, 2019). Lincoln Institute of Land Policy and George Washington Institute of Public Policy.

<sup>79</sup> <https://www.urban.org/policy-centers/cross-center-initiatives/state-local-finance-initiative/projects/state-and-local-backgrounders/property-taxes> (last visited October 30, 2018).

<sup>80</sup> *Ibidem*.

### 3.4. ENACT LEGISLATION IN AREAS NOT YET PREEMPTED/ CHALLENGE PREEMPTION IN COURTS

As discussed above, state governments have been enacting “new preemption” legislation that seeks to specifically prohibit local governments from legislating in certain areas<sup>81</sup>. Some states have passed measures that go even farther and allow for the removal of a local official that knowingly enacts such conflicting legislation<sup>82</sup>. These so called “punitive” preemption measures are intended to send a clear message to local governments. Namely, that the state government is in charge and any challenges from local governments will not be tolerated. These types of laws should be of concern because they are just the sort of consolidation of power that can stifle the rule of law by unnecessarily limiting political dissent on the local level. There are conventional methods of preemption legislation that do not require such stifling tactics.

For instance, if a state truly wants to occupy the field in a certain legislative area, then that state should pass a law of general applicability that does so. The problem with many of these “new preemption” laws is that states are not actively passing laws of general applicability but are instead simply forbidding local governments from legislating in certain matters. The only recourse of local governments is to challenge the validity of these laws in courts. However, the challenges are hindered by two obstacles: differing conceptions of local autonomy based in state constitutions and the costs of litigation.

Even in states that will entertain a legal challenge to these types of laws, local governments will be unlikely to afford the costs of litigation – especially when compounded with limitations on revenue collection discussed earlier. Still, legal challenges may grow in frequency. The courts of at least one state, Ohio, have struck down preemption legislation unless the local law conflicts with an existing statewide law of general applicability<sup>83</sup>.

### 3.5. PROVIDE GREATER ACCESS TO GOVERNMENTAL INFORMATION

Local governments can use websites as a tool to resist oppressive activities of the federal or state governments. This tool has the advantage of being both simple and cost-effective. The sites can be tailored such that they enable citizens to respond to particular issues. For instance, in the case of hostile larger govern-

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<sup>81</sup> See R. Briffault, *The Challenge...*

<sup>82</sup> *Ibidem*, 2003.

<sup>83</sup> See footnote 23. *City of Cleveland v. State*, 5 N.E.3d 644 (Ohio 2014), *City of Cleveland v. State*, 2017 WL 6055031 (Ohio Ct. App., Dec. 7, 2017), <sup>SEP</sup>*City of Dayton v. State*, 87 N.E.3d 176 (Ohio 2017); *City of Toledo v. State*, 56 N.E.3d 997, (Ohio Ct. App. 2016).

ment activity such as “new preemption” legislation discussed above, local governments could use their websites as platforms geared to educate citizens about certain issues and as a forum for citizens to gather to discuss these issues.

Education should be a primary goal of these sites. Many citizens do not understand the interplay between federal/state/local governments. Providing a simple explanation of this interplay would be extremely helpful in situations where the federal or state governments are seeking to thwart local activities. Local governments could use websites to explain what they are trying to accomplish and how those governments are trying to stop them from doing so. The sites could explain the legal framework in which the local government is working. For example, the site could explain home rule powers and whether the local government possesses those powers. The sites could explain the taxation powers of the local government and provide a breakdown of the entity’s revenue streams. The site could provide a local budget and breakdown of anticipated spending, etc. These facts could then be used to explain the local government’s stance on a particular issue and how that differs from the state or federal government. Providing citizens with this type of information would, in turn, allow those citizens to make more informed arguments when deciding how they wish to be governed.

Aside from simply providing information, the local government site could act as a forum for the people to discuss issues. Because populations have increased, and people’s schedules may hinder them from physically gathering to discuss politics, a local government website could assist in facilitating political speech. Doing so would be particularly useful when a state or federal government is acting to suppress local activities. Providing a convenient, central location where local citizens could discuss matters of local import would be crucial in times of active suppression. Local government websites can easily be tailored to serve this function.

The sites will be invaluable tools in responding to violations of the rule of law because local governments may not be in a position to directly respond to oppressive tactics. There may be budgetary concerns or responsive legislation may not be a possibility. However, by taking the steps outlined above to provide access to government information, these local governments could encourage private action. In times of crisis, people may not be able to look to local governments to provide a direct response. Instead, the people themselves may need to band together to create a non-governmental front against oppressive government action. The local government would not be directly acting to oppose state action but could provide useful tools to those who could. Providing access to data and a forum through which the public could meet would be necessary in times when the federal or state governments seek to defeat the rule of law.

#### 4. CONCLUSION

Ultimately, governments at different levels are intended to monitor each other in an effort to respond to the demands of the governed. The relationship between the different levels is simply another ingrained check meant to ensure that the rule of law is upheld and democratic ideals preserved. Consequently, when local governments are preempted from exercising their powers in regard to socially important issues their authoritarian resilience is seriously impaired. This enhanced level of preemption has been labeled “Hyper Preemption” and identified as a new brand of preemption “which seeks not just to curtail specific local policies, but, rather, to chill local policy making (...) and punish local governments or their public officials for taking policy positions (...)”<sup>84</sup>. If state governments, aided by the federal government continue to adopt such preemptive measures, then as Professor Schraff has predicted it will dramatically reshape our state-local relationship and the consequences will include a weakened ability of local government to protect the rule of law.

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## Summary

In many countries in the world today democratic institutions and ideals seem threatened. Due process, equal protection, freedom of speech, freedom of the press, the right to vote, and other democratic ideals are deeply ingrained in US culture and government. Traditionally, the federal government is thought to be the guardian of these rights, ensuring that state governments adhere to the rule of law established by our written constitution. Similarly, state governments are thought to uphold these democratic

ideals *vis a vis* local governments. The American system of checks and balances and separation of powers and the resulting interplay between the branches of government are considered safeguards that protect the rule of law. This horizontal separation of powers often overshadows the similar function served by the vertical separation of governmental power created by our division of power into federal, state and local. If the federal and state governments act contrary to the rule of law established by our federal and state constitutions, local governments offer at least some degree of authoritarian resilience. The goal of this article is to set forth the manner in which local governments may resist anti-democratic action from federal and state governments and then to discuss the danger posed in the United States by the recent increase in State preemptions of local government power – particularly in regard to sanctuary cities, climate change, gun regulation, affordable housing, and LGBT rights. Ultimately, governments at different levels are intended to monitor each other and when local governments are preempted from exercising their powers in regard to socially important issues their authoritarian resilience is seriously impaired.

### KEY WORDS

local government, United States, state preemption, vertical separation of powers

### Streszczenie

W wielu krajach instytucje i wartości demokratyczne są zagrożone. Sprawiedliwy proces, ochrona praw obywatelskich, wolność słowa, wolność prasy, prawo do głosowania i inne demokratyczne ideały są głęboko zakorzenione w amerykańskiej kulturze prawnej. Tradycyjnie rząd federalny jest uważany za strażnika tych praw, zapewniając, że administracja stanowa przestrzega rządów prawa ustanowionych przez amerykańską Konstytucję. Podobnie uważa się, że administracja stanowa zapewnia te demokratyczne standardy wobec samorządów lokalnych. Amerykański system równowagi władz i trójpodział władzy oraz wynikające z tego wzajemne oddziaływanie między gałęziami administracji są uważane za zabezpieczenia, które chronią praworządność. Ten poziomy trójpodział władzy często przyćmiewa podobne funkcje realizowane przez pionowe rozdzielanie władzy pomiędzy system federalny, stanowy i lokalny. Jeśli władza federalna bądź stanowa działa wbrew przepisom prawa ustanowionym przez Konstytucję Stanów Zjednoczonych i konstytucjom stanowym, samorządy mogą, przynajmniej do pewnego stopnia, sprzeciwić się tym autorytarnym rządóm. Celem tego artykułu jest pokazanie, w jaki sposób samorządy lokalne mogą przeciwstawić się antydemokratycznym działanióm administracji federalnej i stanowej, oraz omówienie zagrożeń, jakie stwarzane są w Stanach Zjednoczonych w wyniku ingerencji administracji federalnej lub stanowej w zakres działania władzy samorządowej – szczególnie w odniesieniu do miast sanktuariów, zmian klimatycznych, przepisów dotyczących posiadania broni, dostępu do tanich

mieszkań oraz praw społeczności LGBT. Głównym celem stworzenia takiej pionowej równowagi i podziału władzy jest wzajemne monitorowanie się administracji na różnych poziomach, ale jeśli samorządy lokalne są pozbawione możliwości sprawowania władzy w odniesieniu do ważnych społecznie kwestii, ich odporność na autorytarne rządy federalne czy stanowe jest poważnie ograniczona.

### **SŁOWA KLUCZOWE**

samorządy lokalne, Stany Zjednoczone, przepisy stanowe, pionowy podział władzy