

Louisiana Law Review

Volume 77 | Number 4

Louisiana Law Review - Summer 2017

Reorienting Home Rule: Part 2—Remedying the Urban Disadvantage Through Federalism and Localism

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Repository Citation

Paul A. Diller, *Reorienting Home Rule: Part 2—Remedying the Urban Disadvantage Through Federalism and Localism*, 77 La. L. Rev. (2017)

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Reorienting Home Rule: Part 2—Remedying the Urban Disadvantage Through Federalism and Localism

Paul A. Diller^{*†}

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† Note on citations: When not specified, election results come from secretaries’ of state (or equivalent) offices, sometimes obtained through a gathering website like Ballotpedia or David Leip’s Atlas of U.S. Presidential Elections. Unless otherwise noted, population figures come from the U.S. Census and are 2015 estimates.

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INTRODUCTION

The first installment of this two-part Article series illustrated how the federal and state lawmaking processes disadvantage urban areas.¹ That disadvantage accounts for the inability of a president strongly preferred by urban voters, Barack Obama, to accomplish much, if any, of his domestic agenda after 2010. It also explains, at least in part, the one-party domination of the federal government as of 2017. Despite losing the popular vote by almost three million, Donald Trump nonetheless won the Electoral College by a margin of 304–227.² Republicans won the total vote for the United States House in 2016 by just a percentage point, yet maintain an ironclad seat majority of 241–194.³ Finally, in the Senate, despite holding a 52–48 advantage in seats, Republicans represent a minority of the nation’s population.⁴ This new, one-party federal government can be expected to

1. See Paul A. Diller, *Reorienting Home Rule: Part 1—The Urban Disadvantage in National and State Lawmaking*, 77 LA. L. REV. 287 (2016) [hereinafter *Urban Disadvantage*].

2. Hillary Clinton was thought to have won seven more electors’ votes, making for a 304–234 loss, but these seven defected and cast their votes for other candidates, mostly as a protest. See Scott Detrow, *Donald Trump Secures Electoral College Win, with Few Surprises*, NPR (Dec. 19, 2016, 4:52 PM), <http://www.npr.org/2016/12/19/506188169/donald-trump-poised-to-secure-electoral-college-win-with-few-surprises> [https://perma.cc/ZUG9-CBRY].

3. Ballotpedia has the Republicans winning 49.13% of the popular vote and Democrats winning 48.03%. *United States House of Representatives Elections, 2016*, BALLOTPEDIA, https://ballotpedia.org/United_States_House_of_Representatives_elections_2016 [https://perma.cc/JUG3-68U9] (last visited Feb. 13, 2017).

4. See E.J. Dionne Jr., *The Minority Is in Charge*, PITTSBURGH POST-GAZETTE (Dec. 8, 2016, 12:00 AM), <http://www.post-gazette.com/opinion/2016/12/08/The-minority-rules/stories/201612080063> [https://perma.cc/KS3L-EWFE] (noting that after 2016 elections, Senate Democrats will represent 55.33% of the nation’s population).

pursue policies that skew toward the rural and exurban voters who formed such an important part of its victory coalition.

At the state level, the urban disadvantage has played out vividly in states like North Carolina, where the legislature in 2016 preempted Charlotte's municipal transgender protections through the "Bathroom Bill."⁵ Other states stand on the precipice of enacting similar preemptive legislation.⁶ In other "purple" states like Arizona, Florida, Michigan, Ohio, Pennsylvania, and Wisconsin, the state legislatures have aggressively preempted local authority in numerous important substantive areas, from minimum wage and paid sick leave to gun control.⁷ As the first part of this series argued, these policies likely do not represent the views of the median voter in these states, but rather skew toward the preferences of rural and exurban voters.

Hence, at least for those with progressive political leanings, local government is often now seen as the most responsive and nimble level of government in the United States and indeed worldwide. From public health and gay rights to climate change and gun control, cities' activism

5. H.B. 2, 2016 Gen. Assemb., 2d Extra Sess. (N.C. 2016) (preempting Charlotte, N.C., Ordinance 7056 (Feb. 22, 2016)), <http://charmeck.org/city/charlotte/nondiscrimination/Pages/default.aspx> [<https://perma.cc/P78V-KDV4>]. The scope of the state preemption law was sweeping. It prohibits not only additional local employment and public accommodation protections of any kind beyond state law, but also any local minimum wage ordinances. *Id.*

6. David A. Graham, *What's Behind the New Wave of Transgender "Bathroom Bills"?*, ATLANTIC (Jan. 9, 2017), <https://www.theatlantic.com/politics/archive/2017/01/states-see-a-new-wave-of-transgender-bathroom-bills/512453/> [<https://perma.cc/G2Y8-HNZK>] (discussing efforts to enact similar legislation in Texas, Virginia, and Kentucky).

7. Purple states—also known as battleground or swing states—are the states that the major candidates in the last few presidential elections have most vigorously contested. *See generally* Fred M. Shelley & Ashley M. Hitt, *Purple States in the 2016 Presidential Election*, 13 GEOGRAPHY TEACHER 124 (2016). For a detailed account of state preemption of local minimum wage, paid sick leave, and antidiscrimination laws, see NAT'L LEAGUE OF CITIES, CITY RIGHTS IN AN ERA OF PREEMPTION: A STATE-BY-STATE ANALYSIS (2017), <http://www.nlc.org/sites/default/files/2017-03/NLC-SML%20Preemption%20Report%202017-pages.pdf> [<https://perma.cc/8UEX-4GF8>]. Recent prominent firearms preemption laws include Florida's 2011 law that imposed liability on local officials who enforce gun restrictions beyond those mandated by state law, *see* 2011 Fla. Laws 109 (amending FLA. STAT. ANN. § 790.33), and Arizona's similarly aggressive statewide preemption of local firearms regulation in 2016. 2016 Ariz. Sess. Laws ch. 132 (amending ARIZ. REV. STAT. ANN. § 13-3108) (allowing court to impose fines up to \$50,000 on cities that violate state law and terminate local employees).

where states and the federal government either obstruct action or fail to act can only be expected to increase.⁸ In taking on these issues, cities are addressing subjects or using modes of regulation that are not unique to local government. Public health and climate change are hardly “local” issues, yet cities are attempting to regulate these areas even if they are outside any “traditional” municipal domain of regulation.⁹

Taking the “urban disadvantage” as a given, this Article posits that local lawmaking in urban areas may serve as a modest corrective and shift the cumulative local, state, and national legal framework back toward the views of the national median voter. Were local, state, and federal lawmaking merely layers of sediment, the ability of local lawmaking to serve as a corrective to state and national deficiencies would be limited primarily by matters of scale. For instance, if residents of urban areas prefer stricter gun control, as most do, they could simply add such restrictions to the pre-existing national and state regulatory layers. The effectiveness of this extra layer of regulation might be limited by the ability of guns to slip through city and state lines, but cities would at least be able to impose a more preferable regulatory regime within their own boundaries.¹⁰

Cities’ limited geographical jurisdiction, however, is not the only or even primary limitation on the effectiveness of their regulatory choices. Rather, the frequent preemption of city authority by Congress and especially state legislatures prohibits local governments from layering or reducing additional regulation when they see fit. This preemption has

8. See Kenneth A. Stahl, *Local Home Rule in the Time of Globalization*, 2016 BYU L. REV. 177, 181–82; Paul A. Diller, *Why Do Cities Innovate in Public Health?*, 91 WASH. U. L. REV. 1219 (2014) [hereinafter *Why Innovate?*]; Matthew J. Parlow, *Progressive Policy-Making on the Local Level: Rethinking Traditional Notions of Federalism*, 17 TEMP. POL. & CIV. RTS. L. REV. 371, 375–82 (2008); Richard Briffault, *Home Rule for the Twenty-First Century*, 36 URB. LAW. 253, 259–60 (2004).

9. For skepticism of the notion that cities even have a “traditional” policy domain, see *Why Innovate?*, *supra* note 8, 1222–23. As an example, consider civil rights efforts in 1950s at the *local* level. See *John R. Thompson v. Dist. of Columbia*, 203 F.2d 579, 599–600 (D.C. Cir. 1953) (citing numerous city ordinances prohibiting racial discrimination in employment, housing, and public accommodations); see also Pamela H. Rice & Milton Greenberg, *Municipal Protection of Human Rights*, 1952 WIS. L. REV. 679 (1952) (revealing that, as of 1952, a handful of cities had antidiscrimination ordinances that applied to private employment).

10. Court-recognized substantive constitutional restraints, of course, also limit city policy choices. *E.g.*, *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (holding that the Second Amendment right to bear arms is an individual right that can be enforced against states and cities).

become particularly frequent, impactful, and noteworthy in states where the urban–rural divide is strongest. It may soon become more common at the federal level as well. With the threat of state legislative, congressional, and presidential override, therefore, local governments are highly constrained in how they can implement their residents’ preferred policies.

If preemptive action represented the median view of the nation’s or states’ cumulative voters, including urban residents, such preemption would be relatively unproblematic. Local control would be usurped, but it is not uncommon or remarkable for the level of government representing the larger geographical unit and the higher number of people to have the final say. Because the federal and state lawmaking processes are structured so as to underrepresent the urban viewpoint, however, there is good reason to question the democratic legitimacy of preemption, particularly when targeted at large and densely populated urban areas.

Interestingly, local government law holds out some promise that city enactments might be protected from state legislative override. In some states, courts interpret the state constitution to carve out a sphere of “local” issues in which the actions of the local government are immune to or more robustly protected from state legislative override.¹¹ The United States Supreme Court famously called this system of home rule “imperium in imperio,” or an “empire within an empire,” in the late 19th century.¹² In states with such a system of home rule, court-enforced immunity to preemption from state override is usually rooted in the state constitution. A legislative decision to override local authority, therefore, might run afoul of this protection; hence, “imperio” home rule is sometimes also referred to as “constitutional home rule.”¹³

Although only a few states employ a pure “imperio” form of home rule today, elements of the approach remain in more states than is commonly recognized. At its core, constitutional home rule rests on a judicially defined distinction between “statewide” and “local” matters,

11. See Appendix B (listing such states).

12. *St. Louis v. W. Union Tel. Co.*, 149 U.S. 465, 468 (1893); see also *City of New Orleans v. Bd. of Comm’rs of the Orleans Levee Dist.*, 640 So. 2d 237, 241–42 (La. 1994) (reviewing the “imperio” model of home rule).

13. In this sense, “constitutional home rule” has a more specific meaning than merely a home rule provision rooted in a state’s constitution. Many state constitutions provide for the power to legislate at the local level, but only a subset thereof have been interpreted to provide immunity also to state legislative override. It is this smaller subset to which “constitutional home rule” refers as used in this Article. See *infra* note 106 and accompanying text.

with only the latter being immune to preemption.¹⁴ Courts have long struggled to articulate this distinction in a neutral, principled fashion, leading many states to abandon the system for “legislative” home rule, wherein the legislature may preempt all matters.¹⁵ Nonetheless, constitutional home rule or some version of it stubbornly persists, particularly with respect to local decisions regarding the structure of municipal government or municipal employment. Many states instead or in addition recognize a softer version of constitutional home rule, requiring that state preemption be of a certain form, and often substance, to override city enactments legally. In some states, for instance, local enactments may be immune to state legislative preemption if the potentially preemptive statute is deemed not to address a matter of “statewide” or “general” concern.¹⁶ In other states, courts purport to inquire only as to legislative intent to preempt, but often consider the domain of municipal regulation that would be preempted as a factor in their analysis.¹⁷

As currently enforced, constitutional home rule is a somewhat awkward and incomplete remedy for the urban disadvantage. Constitutional home rule is often seen as a way of protecting a local minority from the will of the statewide majority, usually on matters deemed to have little effect on the rest of the state’s community, such as the local form of government.¹⁸ In the current environment, however, much statewide legislation does not actually represent the will of the statewide majority. Hence, constitutional home rule

14. Lynn A. Baker & Daniel B. Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, 86 DENV. U. L. REV. 1337, 1341 (2009) (noting that constitutional home rule “center[s] on the divide between local and statewide affairs”).

15. See, e.g., *City of La Grande v. Pub. Emps. Ret. Bd.*, 576 P.2d 1204, 1213–14 (Or. 1978) (“A search for a predominant state or local interest in the ‘subject matter’ of legislation can only substitute for the political process . . . the court’s own political judgment whether the state or the local policy should prevail.”). Although the *La Grande* majority did not so admit, the approach to home rule pronounced by that opinion was a sharp departure from a prior Oregon Supreme Court opinion, *State ex rel. Heinig v. Milwaukie*, 373 P.2d 680 (Or. 1962), that essentially embraced a judicially enforced “local”–“statewide” subject matter distinction. See *La Grande*, 576 P.2d at 1224 (Tongue, J., dissenting) (accusing the majority of overruling *Heinig*).

16. See Appendix B (listing these states).

17. E.g., *Li v. State*, 110 P.3d 91, 99 (Or. 2005) (holding that state marriage law preempted county same-sex marriage policy because of state’s historic interest in regulating this subject).

18. E.g., *Devlin v. City of Philadelphia*, 862 A.2d 1234, 1242 (Pa. 2004) (“[M]atters affecting merely the personnel and administration” of Philadelphia “are of no concern to citizens elsewhere.”).

now ironically might serve as a device for protecting policies that appeal to a statewide majority from override by a legislature that represents a minority.

The overarching concern of this project is the effect of anti-majoritarian lawmaking on local policy choice. Hence, across-the-board constitutional home rule for every city or county in a state might compound the urban disadvantage should it benefit rural and exurban municipalities whose residents' views are already more than adequately represented in the legislative process. Constitutional home rule, therefore, is a potential double-edged sword. Its ability to ameliorate the urban disadvantage depends on the details of that disadvantage in a particular state and which municipalities may avail themselves of constitutional home rule.

This Article proceeds as follows. Part I discusses the impact of the urban disadvantage on federal preemption and possible doctrinal remedies thereto. Any potential remedies run into two hard-and-fast federal constitutional rules: first, that all states are to be treated equally; and second, that cities and states are conflated under federal preemption analysis. If committed to curing the urban disadvantage, the Supreme Court might reconsider these doctrines, but this Article takes these doctrines as a given.

Part II of the Article then explores the doctrines that grant and limit local power at the state level, fleshing out constitutional home rule in more detail. Part III explores the possibility of using constitutional home rule to help cure the urban disadvantage that exists in many state legislatures. Part III also highlights the peril of constitutional home rule inadvertently strengthening populations in areas whose views are already sufficiently represented, if not overrepresented, at the national and state levels. Part IV turns the lens of the Article's analysis to local government itself and asks whether its structural design can bear the responsibility that would accompany the power to enact legislation that is immune to state legislative override. Finally, Part V examines what effect an emboldened constitutional home rule, which technically and most directly affects state-local relations, might have on the federal order.

I. REMEDYING THE URBAN DISADVANTAGE IN THE FEDERAL ORDER

Reorienting Home Rule: Part I articulated at length the manner in which the U.S. Senate, House of Representatives, and state legislatures frequently and systematically underrepresent the views of urban voters.¹⁹ This Part summarizes that account before analyzing the implications for the urban disadvantage at the federal level. Proceeding from the premise

19. See *Urban Disadvantage*, *supra* note 1.

of one-person, one-vote, the Senate greatly disadvantages more populous (“larger”) states. The state of California, with 39,000,000 people, receives two senators, just as the state of Wyoming does with fewer than 600,000 people. This underrepresentation ratio of 66 to 1 makes the Senate one of the most malapportioned legislative bodies—from the standpoint of one-person, one-vote—in the world.²⁰ Proportionally, more underrepresented states are urbanized.²¹ That the Senate’s composition hurts urban areas in pursuing these areas’ policy goals is a straightforward conclusion.

In contrast to the Senate, the U.S. House roughly complies with one-person, one-vote.²² Nonetheless, the uneven geographic distribution of voter ideology, combined with the prevailing use of winner-take-all, reasonably compact, contiguous districts, substantially dilutes the urban voice in the chamber. Political scientists have demonstrated that the dynamic of packing like-minded voters into small districts frequently occurs with respect to “left-leaning,” urban voters in many populous states.²³ In states such as Florida, the urban-favored political party, the Democratic Party, receives far fewer seats in the state legislature than its total, statewide vote count would predict because its voters are primarily packed into small urban districts.²⁴ In other words, Democratic candidates win these districts 90–10, while Republicans win suburban, exurban, and rural districts 60–40. Aided by intentional, political gerrymandering perpetrated by Republican-dominated state legislatures in many states, this dynamic has also greatly influenced the composition of the U.S. House of Representatives in recent years. Democratic candidates, for instance, won the total vote count by more than 1,400,000 votes in 2012, yet Republicans

20. See *id.* at 308 n.86 (noting that only Argentina, Brazil, and Russia violate one-person, one-vote more than the U.S. Senate).

21. See *infra* notes 47 and accompanying text.

22. The House deviates slightly from one-person, one-vote first because of the requirement that every state have at least one representative, and second, because of the fact that districts may not cross state lines. Neither of these factors, however, systematically militates against the interests of large states. See *Urban Disadvantage*, *supra* note 1, at 322 (“The rounding errors that result from House apportionment do not systematically favor small states.”).

23. See Jowei Chen & Jonathan Rodden, *Unintentional Gerrymandering: Political Geography and Electoral Bias in Legislatures*, 8 Q.J. POL. SCI. 239, 264 (2013); Jonathan A. Rodden, *The Long Shadow of the Industrial Revolution: Political Geography and the Representation of the Left* 138 (Mar. 25, 2011) (unpublished manuscript), <http://web.stanford.edu/~jrodden/wp/shadow.pdf>.

24. Chen & Rodden, *supra* note 23, at 264 (“[I]n contemporary Florida and several other urbanized states, voters are arranged in geographic space in such a way that traditional districting principles of contiguity and compactness will generate substantial electoral bias in favor of the Republican Party.”).

maintained a seat count majority of 234 to 201.²⁵ Pointing to the history of the Democratic Party in the 20th century, Rodden argues that even when the urban-favored political party wins a seat majority, it achieves this margin only by relying on “moderate” representatives in swing, suburban districts, thus resulting in an ideologically incoherent majority.²⁶ In an exhaustive study, Rodden demonstrates that the phenomenon of urban underrepresentation is hardly uniquely American; it is common in any country that relies on a “first-past-the-post” system of representation using compact and contiguous districts, which is a more common practice in former British colonies.²⁷

The urban disadvantage would not be nearly as important if there were not strong ideological divisions between urban and rural or exurban voters. Such divisions exist on many policy matters, however. Urban residents generally favor stronger gun control; proportionally more spending on public transit, including rail; higher minimum wages; antidiscrimination protection for sexual minorities; stronger environmental protections; looser regulation of marijuana; a more forgiving approach to illegal immigration; and a more secular form of government.²⁸ In the last 10 to 20 years, the national party most receptive to these urban political priorities has been the Democratic Party.²⁹ Barack Obama won two

25. *Urban Disadvantage*, *supra* note 1, at 323.

26. Rodden, *supra* note 23, at 138, 167.

27. *See generally id.* (examining numerous countries that are former British possessions, such as New Zealand, Australia, and Canada).

28. *See* Loey Nunning, *6 Big Differences That Turn City Dwellers into Liberals*, CRACKED (Feb. 18, 2017), <http://www.cracked.com/blog/6-ways-big-cities-turn-you-liberal-converts-perspective/> [<https://perma.cc/43SU-K7NN>] (explaining why urban voters prefer higher minimum wages, more public transit, and looser enforcement of immigration laws); Robert Mikos, *Marijuana Localism*, 65 CASE W. RES. L. REV. 719, 735 (2015) (noting that opposition to marijuana legalization in states that have held ballot initiatives has been more concentrated in thinly populated counties). On the urban preference for secular values, see Rodden, *supra* note 23, at 10–11, 96–99. On big cities’ comparative willingness to protect rights of sexual minorities, see Reid Wilson, *Study: Big Cities Most Likely to Have Progressive Gay-Rights Laws*, WASH. POST (Nov. 9, 2013), https://www.washingtonpost.com/blogs/govbeat/wp/2013/11/19/study-big-cities-most-likely-to-have-progressive-gay-rights-laws/?utm_term=.141b6a4f5bd1 [<https://perma.cc/RS3A-DBYM>] (“The nation’s largest cities are most likely to have laws that benefit gays and lesbians, while smaller cities and those in the South are least likely to accommodate homosexuals . . .”).

29. Drew DeSilver, *The Growing Democratic Domination of America’s Largest Counties*, PEW RESEARCH CTR.: FACT TANK (July 21, 2016), <http://www.pewresearch.org/fact-tank/2016/07/21/the-growing-democratic-domination-of->

elections representing most of these values in large part because of strong support from urban voters. Indeed, because all states but two award their electoral college votes on a statewide rather than district basis, urban areas are at less of a disadvantage in electing the chief executive than they are in determining the composition of the Senate or House.³⁰ The inability of President Obama to enact his agenda in the face of a hostile Congress, despite handily winning re-election in 2012, was due in no small part to the urban disadvantage in Congress.

Donald Trump's election in 2016 ushers in a new era for the urban-rural divide at the federal level. As in previous elections, the urban-rural split was pronounced. Trump won overwhelmingly in smaller and less densely populated counties, while Hillary Clinton overwhelmingly won the largest and most densely populated cities.³¹ For instance, Clinton won Manhattan by 579,013 to 64,929, or 87% to 10%; San Francisco by 345,084 to 37,688, or 84% to 9%; and Philadelphia by 584,025 to 108,748, or 82% to 15%. Even in "red" states, the pattern of the Democratic candidate winning large cities held; in Texas, for instance, Clinton easily won the counties in which Dallas, Houston, Austin, and San Antonio sit.³²

Although it would be convenient for this Article's thesis to attribute Trump's victory to the Electoral College's amplification of small-state power—Wyoming, for instance, receives one-eighteenth of California's electoral votes despite having one-sixty-sixth of its population—it appears that Trump's victory had a different cause. Trump won the Electoral College because he barely won several key swing states—Florida, Pennsylvania, Michigan, and Wisconsin.³³ Each of those states, like all the other states except Maine and Nebraska, awards its electoral votes on a winner-take-all basis.³⁴ Hence, despite nearly tying Trump in those four states, Clinton took zero electoral votes while Trump took 75.

nations-largest-counties/ [https://perma.cc/LZ27-XGAM] (noting Democratic "dominan[ce] in big cities").

30. *Urban Disadvantage*, *supra* note 1, at 30–35.

31. See Lazaro Gamio, *Urban and Rural America Are Becoming Increasingly Polarized*, WASH. POST (Nov. 17, 2016), <https://www.washingtonpost.com/graphics/politics/2016-election/urban-rural-vote-swing/> [https://perma.cc/4BYK-SYZK].

32. Clinton won Dallas County 61%–35%, Harris County in Houston 54%–42%, and Bexar County in San Antonio 54%–41%, all despite losing Texas 52%–43%.

33. Nate Cohn, *Why Trump Had an Edge in the Electoral College*, N.Y. TIMES: THE UPSHOT (Dec. 19, 2016), <https://www.nytimes.com/2016/12/19/upshot/why-trump-had-an-edge-in-the-electoral-college.html> [https://perma.cc/9BK7-2ZM7].

34. See *About the Electors*, NAT'L ARCHIVES & RECORDS ADMIN., <https://www.archives.gov/federal-register/electoral-college/electors.html#selection> [https://perma.cc/V8PF-RH9P] (last visited Mar. 12, 2017).

Regardless, the next two years will highlight extraordinary tension between the federal government, which tilts ideologically away from the preferences of the median national voter, and those states and cities that tilt in the other direction. California, for instance, has indicated that it intends to fight the federal government on matters from immigration enforcement to climate change.³⁵ Leaders of large cities like Chicago, New York, Portland, and San Francisco have pledged to resist the efforts of a Trump administration to deport undocumented aliens.³⁶ Several cities have already sued the Trump administration regarding its plans to cut off federal funding to “sanctuary cities.”³⁷ Already, residents of urban areas are turning out in the thousands to protest President Trump’s first moves on immigration.³⁸ In other matters, such as climate change, health care, and LGBT rights, local governments and large states are also likely to resist attempts by the federal government to preempt.

A. States Suffer Urban Disadvantage Too

Vis-à-vis the federal government, it is not just residents of large cities that bear the brunt of Senate malapportionment. All residents of large states, even those in rural areas, suffer to some extent from the federal government’s composition. The larger the state, the more all of its residents suffer from Senate malapportionment. California, for instance, with over 12% of the nation’s population, wields only 2% of the Senate’s voting strength and only 10% of the Electoral College, and therefore suffers at the hands of states with amplified power like Alaska, Idaho, and

35. Adam Nagourney, *California Hires Eric Holder as Legal Bulwark Against Donald Trump*, N.Y. TIMES (Jan. 4, 2017), https://www.nytimes.com/2017/01/04/us/california-eric-holder-donald-trump.html?_r=0 [https://perma.cc/TBD4-S3SU] (citing California state senate leader as predicting that California would challenge Trump administration on the environment, immigration, and criminal justice).

36. Ruairí Arrieta-Kenna, *Sanctuary Cities Stand Firm Against Trump*, POLITICO (Dec. 12, 2016, 5:14 AM), <http://www.politico.com/story/2016/12/sanctuary-cities-trump-immigration-232449> [https://perma.cc/KA7Y-GMDH]. On January 31, 2017, San Francisco filed the first lawsuit by a city challenging President Trump’s threat to withhold federal funds. *See generally* Complaint, City & Cty. of S.F. v. Trump, No. 3:17-cv-00485 (N.D. Cal. filed Jan. 31, 2017).

37. *See generally* Complaint, City of Chelsea v. Trump, No. 1:17-cv-10214-GAO (D. Mass. filed Feb. 10, 2017); Complaint, City & County of San Francisco v. Trump, No. 3:17-cv-00485 (N.D. Cal. Jan. 31, 2017).

38. Jonathan Martin, *As Democrats Take to the Streets, Lawmakers Rush to Keep Up*, N.Y. TIMES (Jan. 29, 2017), <https://www.nytimes.com/2017/01/29/us/politics/donald-trump-democrats-backlash-executive-orders.html> [https://perma.cc/YE59-Y2K4].

Montana.³⁹ All factors being equal, therefore, the more populous the state, the more disadvantaged it is by the Senate and to a much lesser extent the Electoral College.

All factors are not equal, however, with respect to policy goals. For instance, voters in California and Rhode Island, which is vastly overrepresented in Senate, likely favor stricter gun control and environmental regulation.⁴⁰ Voters in Texas, which is vastly underrepresented, and Idaho generally prefer the opposite.⁴¹ If large states have enough like-minded, small-state allies, then perhaps the Senate's gross deviation from one-person, one-vote is of no significance, at least with respect to policy goals rather than non-ideological "pork" spending.⁴²

Although large states do have small-state allies, they do not have enough to mute their disadvantage in the Senate on many issues. Voter ideology correlates more significantly with density of a state's population than with absolute population.⁴³ Although Rhode Island's population is tiny in absolute terms, it is the second-densest population in the nation.⁴⁴ California's is the eleventh-densest population.⁴⁵ Likewise, although Texas is the second most populous state, its population is in the bottom

39. In addition, Washington, D.C. residents, who number more than 670,000, suffer from receiving no representation despite having more residents than either Vermont or Wyoming. For more discussion of this and detailed data, see *Urban Disadvantage*, *supra* note 1, at 308–10.

40. In a 2014 ranking of states' ideology, Gallup ranked California and Rhode Island among the most liberal, or at least among the least conservative. See Frank Newport, *Mississippi, Alabama, and Louisiana Most Conservative States*, GALLUP (Feb. 6, 2015), <http://www.gallup.com/poll/181505/mississippi-alabama-louisiana-conservative-states.aspx> [<https://perma.cc/UKR6-ZQUU>].

41. *Id.* (ranking Idaho as "most conservative" and Texas as "above-average conservative").

42. *Urban Disadvantage*, *supra* note 1, at 20 & n.88.

43. See Richard Florida & Sara Johnson, *What Republicans Are Really Up Against: Population Density*, ATLANTIC: CITYLAB (Nov. 26, 2012), <http://www.citylab.com/politics/2012/11/what-republicans-are-really-against-population-density/3953/> [<https://perma.cc/YL3Y-MTMW>] (including a graph of 2012 presidential election results plotted against population density); *but see* Richard Florida, *What Makes a Dense Urban County Vote Republican?*, ATLANTIC: CITYLAB (Feb. 9, 2015), <http://www.citylab.com/politics/2015/02/what-makes-a-dense-urban-county-vote-republican/385299/> [<https://perma.cc/SC4Z-89E4>] (discussing outliers to this trend).

44. Population numbers are based on the 2014 Census estimate, *Population Estimates*, U.S. CENSUS BUREAU, <https://www.census.gov/popest/data/state/totals/2014/> [<https://perma.cc/T9AF-FU34>] (last visited Feb. 13, 2017).

45. *Id.*

half of population density.⁴⁶ Because there is a rough correlation between a state's absolute population and population density, large states are overall hurt by the Senate's composition. Despite some outliers, most large states are relatively densely populated. Of the top 17 states—all those that are disadvantaged by the two-senator rule—11 are also within the top 17 of population density.⁴⁷ Likewise, the ten least densely populated states are among the 18 least-populous states.⁴⁸

As a result of the House's and Senate's compositions, it is exceedingly difficult for a popular majority drawn mostly from densely populated areas to promote its affirmative governance agenda. A majority of voters nationally may desire a tighter national gun control regime. If this majority draws disproportionate support from voters in the more populous states, or those in urban areas, it will have much less success at achieving its legislative goals than if its support is spread evenly among and within states. Urban-favored proposals, therefore, need an even larger reservoir of support to be viable politically than do those favored by residents more diffusely distributed.⁴⁹

Residents of urbanized states are also often on the losing side of national policies pushed forward by legislators from less densely populated areas that preempt the regulatory goals of large states. Because of the Senate's malapportionment, it is possible for legislation that enjoys support from senators representing only the 30 smallest states—which constitute only 24% of the national population—to displace state policies, even those of the largest states.⁵⁰ This concern is not just hypothetical. For instance, a state might prefer to maintain tort liability for firearms manufacturers, even those that operate primarily within the state. In 2005, however, Congress passed a federal law, the Protection of Lawful Commerce in Arms Act ("PLCAA"), with strong support from small-state legislators that preempts any state regime to the contrary.⁵¹ Indeed, the

46. *Id.*

47. *Id.* These states include (followed by total and density ranks): California (1, 11); Florida (3, 8); New York (4, 7); Illinois (5, 12); Pennsylvania (6, 9); Ohio (7, 10); Georgia (8, 17); North Carolina (9, 15); Michigan (10, 18); New Jersey (11, 1); Virginia (14, 12); and Massachusetts (15, 3).

48. *Id.* These states include: Alaska (48, 50); Wyoming (50, 49); Montana (44, 48); North Dakota (47, 47); South Dakota (46, 46); New Mexico (36, 45); Idaho (39, 44); Nebraska (37, 43); Nevada (35, 42); and Kansas (34, 41).

49. For recent examples of this phenomenon, see *Urban Disadvantage*, *supra* note 1, at 312–15.

50. *Id.* at 314.

51. Pub. L. No. 109–92, 119 Stat. 2095 (codified at 15 U.S.C. §§ 7901–7903 (2012)).

Senate passed the law by the seemingly overwhelming, filibuster-proof majority of 65–31.⁵² When accounting for the populations of the states whose senators voted for the legislation, however, it passed by a much more modest 58%–42%.⁵³ That 58% majority would not overcome the 60-vote filibuster requirement if the Senate were apportioned on the basis of population. Moreover, any future Senate with a majority more sympathetic to gun control would almost certainly never be able to overcome the filibuster or even gain a majority of Senate votes to reverse the law given the small-state advantage.

Likewise, the House of Representatives passed the PLCAA by a seemingly overwhelming vote of 283–144, or 65%–33%. Much of the bipartisan support for the bill came from “blue-dog” Democrats representing more rural and exurban areas.⁵⁴ Many urban-centered representatives, both Democrat and Republican, voted against the legislation.⁵⁵ The overwhelming vote in favor may have represented the views of a majority of the American people, but this majority’s legislative clout was amplified by the advantages rural and exurban areas reap through a system of compact, contiguous, first-past-the-post district representation—which was explained in Part 1 of this series.

Unlike the PLCAA, in which Congress’s intent to preempt was clear and express, many other instances of federal preemption are more muddled. Preemption often results from a judicial interpretation that Congress “intended” to preempt state and local regulatory regimes without expressly saying so.⁵⁶ In other instances, preemption is a consequence of

52. S.B. 397, 109th Cong. (2005).

53. See Appendix A.

54. See S. 397 (109th): *Protection of Lawful Commerce in Arms Act*, GOVTRACK, <https://www.govtrack.us/congress/votes/109-2005/h534> [<https://perma.cc/XRL6-ZFE2>] (last visited Feb. 12, 2017). For instance, all Democrat representatives from Connecticut, Maryland, Massachusetts, New Jersey, Rhode Island, and all but one from New York, which are all among the most urbanized states, voted against the bill. Democratic Representatives representing rural parts of Georgia, Maine, Michigan, Oregon, California, South Dakota, and many other states, by contrast, voted in favor. *Id.* See also Sheryl Gay Stolberg, *Congress Passes New Legal Shield for Gun Industry*, N.Y. TIMES (Oct. 21, 2005), <http://www.nytimes.com/2005/10/21/politics/congress-passes-new-legal-shield-for-gun-industry.html> [<https://perma.cc/3JCJ-Y8VF>] (noting “considerable Democratic support” for the bill).

55. See S. 397 (109th): *Protection of Lawful Commerce in Arms Act*, *supra* note 54, (counting four Republican “no” votes, including from the Connecticut suburbs of New York City, suburban Chicago, and relatively urbanized Delaware).

56. See Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1141 (2007) [hereinafter *Intrastate Preemption*]. Technically, “field” preemption and

agency action that flows, however imperfectly, from congressional delegation.⁵⁷ Even if preemption in these instances is less clearly a result of intentional congressional action, it still flows from the structure that disadvantages highly and densely populated states. In theory, agency officials appointed by a majoritarian-elected president—such as President Obama, who twice won the popular vote with a majority of the vote—might take democracy-remediating concerns into account when promulgating regulations.⁵⁸ Even if acting so boldly, however, they would do so under the shadow of the Congress that delegates them their power.⁵⁹ Any attempt to do so, moreover, would face inevitable challenge before federal courts applying both the organic statute and the Administrative Procedure Act (“APA”) passed by Congress.⁶⁰

B. Assessing Big-State Immunity to Preemption

One potential solution to preemptive national policies that reflect the urban disadvantage in national lawmaking would be for the federal judiciary to enforce constitutional immunity tailored on the basis of population. The Supreme Court has for years wrestled with whether the Ninth and Tenth Amendments, or just the structure of the Constitution’s enumerated grants of power to Congress, guarantee states a reserve of power with which the federal government may not interfere. Dating back to *National League of Cities v. Usery*,⁶¹ progressing to *Garcia v. SAMTA*,⁶²

“conflict” preemption are separate forms of Congress preempting state law, each with slightly different emphases. In practice, however, the line between the two is fuzzy. *Id.* (first citing *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 n.5 (1990), and then citing *French v. Pan Am. Express, Inc.*, 869 F.2d 1, 2 (1st Cir. 1989)).

57. See Brian Galle & Mark Seidenfeld, *Administrative Law’s Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933, 1948–83 (2008); Nina A. Mendelson, *A Presumption Against Agency Preemption*, 102 NW. U.L. REV. 695 (2008) [hereinafter *Presumption Against Preemption*]; Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737, 765 (2004) [hereinafter *Chevron and Preemption*]; Ernest A. Young, *Executive Preemption*, 102 NW. U. L. Rev. 869 (2008).

58. Cf. *Chevron and Preemption*, *supra* note 57, at 769–71 (discussing presidential control over executive branch agencies as a means of ensuring their democratic responsiveness).

59. *Id.* at 790 (agency must follow requirements imposed by Congress).

60. *Id.* at 794 (“[A]n agency’s reliance on federalism concerns apparently un contemplated by the statutory scheme thus could present legal problems [under the Administrative Procedure Act.]”).

61. 426 U.S. 833 (1976).

62. 469 U.S. 528 (1985).

and illustrated vividly again by *NFIB v. Sebelius*,⁶³ the Court has struggled to articulate any principled method for how, or even whether, states may be immunized from federal regulatory mandates.⁶⁴ To remedy the urban disadvantage in federal lawmaking, stronger Tenth Amendment protections for California than for Montana as a way to compensate for California's disadvantage in the federal order might be desirable.

David Dana has offered a "weaker" version of this proposal, arguing that the popular support a policy enjoys as reflected through the populations of the states that have adopted it ought to influence the Supreme Court's adjudication of preemption questions when congressional intent is unclear.⁶⁵ Like any judicial test that incorporates political analysis, there would be major questions about the courts' capacity to administer it.⁶⁶ How many small states must "gang up" on large states to trigger the extra scrutiny? What would the congressional vote count need to be? How many large states need be affected? Could large states object when a regime was imposed on top of whatever pre-existing mixture of laws they had before, or only when a specific positive enactment was displaced? These are no doubt difficult questions, but they are not necessarily more difficult by any order of magnitude than the questions associated with modes of analysis the Supreme Court has embraced over the years, such as the scrutiny of legislation that burdens "discrete and insular minorities"⁶⁷ or whether government action "endorses" religion in the eyes of a "reasonable observer."⁶⁸

The more serious doctrinal problem with both Dana's proposal and the stronger version offered herein is the Supreme Court's strong presumption

63. 567 U.S. 519 (2012).

64. See Daniel J. Meltzer, *Preemption and Textualism*, 112 MICH. L. REV. 1, 51 n.308 (2013) (citing *Sebelius* as an attempt to revive the "discarded" doctrine of "dual federalism").

65. David Dana, *Democratizing the Law of Preemption*, 102 NW. U. L. REV. 507 (2008).

66. Cf. *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 893 (2009) (Roberts, C.J., dissenting) (listing numerous difficulties of courts engaging in political analysis in deciding whether campaign contributions require judicial recusal).

67. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). See David A. Strauss, *Is Carolene Products Obsolete?*, 2010 U. ILL. L. REV. 1251, 1264-67 (reviewing criticisms of the famous footnote's mode of analysis).

68. *Lynch v. Donnelly*, 465 U.S. 668, 688-92 (1984) (O'Connor, J., concurring). For criticism of Justice O'Connor's test, which became the prevailing mode for analyzing Establishment Clause claims against publicly sponsored religious displays, see, e.g., Paula Abrams, *The Reasonable Believer: Faith, Formalism, and Endorsement of Religion*, 14 LEWIS & CLARK L. REV. 1537 (2010).

in favor of treating all states equally. Often referred to as the “equal-footing doctrine,” the principle holds that once admitted to the union, each state must be treated the same way as every other, particularly with respect to matters of sovereignty.⁶⁹ In *Coyle v. Smith*, for instance, the Supreme Court invalidated the section of Oklahoma’s Enabling Act, passed by Congress, that limited where the newly admitted state could put its capital for a certain period of time.⁷⁰ The *Coyle* Court cited the importance of states in the union being “equal in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself.”⁷¹

The Court has permitted Congress to treat states differently when compelling circumstances justify it, but it has expressed discomfort with such treatment. Indeed, in *Shelby County v. Holder*, the Court cited *Coyle* in invalidating the Voting Rights Act’s requirement that certain states undergo the arduous preclearance procedure when making voting changes.⁷² The Supreme Court usually applies the equal-footing doctrine when reviewing acts of Congress challenged on other substantive constitutional grounds, but it presumably binds the Court’s own jurisprudence as well. There may be good normative reasons, particularly in an era of a president elected despite losing the popular vote by almost 3,000,000 for California, for example, to receive special treatment in preemption jurisprudence. Any judicially imposed democracy-remediating immunity doctrine, however, would have to overcome this significant doctrinal obstacle.⁷³

Even putting aside the equal-footing doctrine, there may be institutional problems with tasking federal judges with remedying the urban disadvantage through stronger immunity for large-state enactments. Although they enjoy life tenure, members of the judiciary are confirmed by the malapportioned Senate. The Senate can be expected, therefore, to screen judges for any such sympathies; small-state senators, in particular, would be expected to object. Further, judges usually conceptualize their role in preemption decisions as one of interpreting dutifully Congress’s “intent.”⁷⁴

69. See *Puerto Rico v. Sanchez Valle*, 136 S.Ct. 1863, 1871 n.4 (2016) (reiterating the importance of the “equal-footing” doctrine); see also John Hanna, *Equal Footing in the Admission of States*, 3 BAYLOR L. REV. 519 (1951).

70. 221 U.S. 559, 563–64 (1911) (citing Oklahoma Enabling Act of 1906, Pub. L. No. 59–234, 34 Stat. 267).

71. *Id.* at 567.

72. 133 S.Ct. 2612, 2623–24 (2013) (quoting *Northwest Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193, 203 (2009)) (“[T]here is . . . a ‘fundamental principle of equal sovereignty among the States.’”).

73. See *Dana*, *supra* note 65, at 512–13.

74. See *supra* note 56.

To ask federal judges to engage in a completely different sort of endeavor would upend this judicial self-image.

Finally, in certain large states, such as Texas, at least formally disadvantaged by the Electoral College and the Senate's composition, the views of the median voter may be more in agreement with the legislative output produced by the federal government. In other "purple" states such as Pennsylvania, Florida, and North Carolina, the median voter may hold views to the left of the legislative output of both Congress and their own state legislatures because of both intentional and unintentional gerrymandering.⁷⁵ Hence, providing bolstered immunity from federal override to a large state like Florida or North Carolina might actually reinforce the urban disadvantage. By contrast, a stronger normative—if not doctrinal—case for bolstered immunity applies to two types of states: (1) those where state legislative gerrymandering is muted, such as in states that have removed political considerations from districting, like Arizona and California;⁷⁶ and (2) those whose cumulative political preferences are relatively evenly distributed throughout the state, such as New Jersey and Massachusetts.⁷⁷

C. Assessing Big-City Immunity to Preemption

If large and densely populated states are disadvantaged by the federal legislative process, large and densely populated cities are, in many ways, even more disadvantaged. New York City, for instance, with a population of 8,500,000, has more people than all but 11 states.⁷⁸ Nonetheless, any local ordinance the city enacts can be preempted by a Congress that overstates the preferences of voters in sparsely populated states and rural areas. To overcome the filibuster in the Senate, a bill supported by senators representing the least possible number of people would still account for 24% of the 50-state population, or approximately 75,000,000 people. The idea of 75,000,000 people preempting 8,400,000 may not seem problematic at all.

On closer look, however, the cumulative disadvantage cities suffer in the federal order is more problematic for two reasons. First, unlike states, they receive no institutional representation within Congress.⁷⁹ States enjoy

75. See *Urban Disadvantage*, *supra* note 1, at 336–44.

76. *Id.* at 306 & n.77.

77. *Id.* at 332.

78. Virginia, at 8.4 million, is close behind. *Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2015*, U.S. CENSUS BUREAU: AM. FACTFINDER, <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk> [https://perma.cc/JA4Q-XBB9] (last visited Feb. 18, 2017).

79. *Urban Disadvantage*, *supra* note 1, at 51–55.

“political safeguards” that help prevent Congress from ever attempting to preempt a unique state policy in the first place, whereas cities enjoy no such advantage.⁸⁰ Second, large cities are often interested in the same types of policies as each other because of their dense, diverse, and cosmopolitan populations. Any particular city policy that Congress preempts, therefore, may represent a beachhead of emerging urban support for a policy. For instance, when Congress passed the PLCAA, it had the effect of nullifying city legislation that would hold gun manufacturers strictly liable for harm caused by their products. Although only one city—Washington, D.C.—had passed such an ordinance by the time of the PLCAA’s passage, it is possible that more cities would have done so over time.⁸¹ Further, even absent preemption, like-minded cities have no formal mechanism for banding together to pursue policy choices; states, by contrast, may form bi- or multi-state compacts with congressional approval.⁸²

When viewed *en masse*, urban America represents a large, relatively disempowered segment of the general population. In the 297 cities that have populations of greater than 100,000, 90,000,000 people live; in the 81 cities with populations over 250,000, 58,000,000 people live; and in the 11 cities with populations over 1,000,000, 25,600,000 people live.⁸³ The number of people in the 11 largest cities is greater than the total living in the 17 smallest states.⁸⁴ Yet the 24,000,000 people in the smallest 17 states are represented by 34 senators—enough to block a treaty—while the nearly 26,000,000 living in the 11 largest cities are represented by a mere 12 senators, those from New York, Arizona, Illinois, Pennsylvania, California, and Texas, whom, of course, they share with the residents of the rest of their states.⁸⁵

80. Herbert Wechsler, *The Political Safeguards of Federalism*, 54 COLUM. L. REV. 543 (1954).

81. See Assault Weapon Manufacturing Strict Liability Act of 1990, 37 D.C. Reg. 8482 (Mar. 6, 1991) (codified at D.C. CODE ANN. §§ 7-2551.01, 7-2551.02, 7-2551.03 (2017)). On the complicated legislative history of this act, see Markus Boser, *Go Ahead, State, Make Them Pay: An Analysis of Washington, D.C.’s Assault Weapon Manufacturing Strict Liability Act*, 25 COLUM. J.L. & SOC. PROBS. 313, 313 n.5 (1992). The D.C. Court of Appeals held that the PLCAA preempted Washington’s liability act. See *District of Columbia v. Berretta U.S.A. Corp.*, 940 A.2d 163 (D.C. Ct. App. 2008).

82. See U.S. CONST. art. I, § 10. See generally JEFFREY LITWAK, *INTERSTATE COMPACT LAW: CASES & MATERIALS* (2014).

83. These calculations are based on *Population Estimates*, *supra* note 44.

84. See *id.*

85. *Id.*

Even if by this measure large cities are more disadvantaged than large states, current federal constitutional doctrine again provides no comfort to cities. Under black-letter Supremacy Clause doctrine, local enactments are treated the same as state laws for preemption purposes.⁸⁶ Arguably, local enactments should receive less judicial protection from federal override because the Constitution's "immunity-granting" provisions, like the Tenth Amendment, refer only to states, not localities.⁸⁷ Annie Decker has argued that in passing federal legislation, Congress should be more careful about whether it preempts both state and local law or only one or the other.⁸⁸ Decker offers several good reasons why Congress might choose not to preempt local law even when it preempts state law.⁸⁹ Given that the urban disadvantage is part and parcel of Congress's design, however, Congress is likely institutionally incapable of wielding its preemption power in a manner that would remedy the disadvantage. Moreover, although there is no "equal-footing doctrine" for states, there is no precedent yet for the notion that large-city enactments might be more immune to federal preemption than those of small cities. Such an approach follows from the normative analysis of this project, but it would be groundbreaking and, again, the federal judiciary may be ill-suited to administer it.⁹⁰

II. CONSTITUTIONAL HOME RULE OR "MINI TENTH AMENDMENTS"

In contradistinction to their place in the federal order, local governments occupy a vaunted place in many state constitutions. "Home rule" is a protean concept used to describe many different governmental

86. *Hillsborough Cty. v. Automated Med. Lab., Inc.*, 471 U.S. 707, 713 (1985) (unanimous opinion) ("[F]or purposes of the Supremacy Clause, the constitutionality of local ordinances is analyzed in the same way as that of statewide laws."). In her insightful work analyzing federal preemption of local law, Annie Decker refers to *Hillsborough's* rule as the "conflation axiom." Annie Decker, *Preemption Conflation: Dividing the Local from the State in Congressional Decision Making*, 30 *YALE L. & POL'Y REV.* 321, 333 (2012).

87. *Printz v. United States*, 521 U.S. 898, 955 n.16 (1997) (Stevens, J., dissenting) (questioning the extension of Tenth Amendment immunity to local, rather than state, officials).

88. Decker, *supra* note 86, at 350 ("Congress should strive to [differentiate between state and local preemption outcomes] and make clear its intentions for both levels of government in federal preemption provisions.").

89. *Id.* at 351, tbl.1 (listing "allowing site-specific regulation," "promoting innovation and intergovernmental learning," and "enlisting local partners in federal programs," as reasons why Congress might prefer not to preempt local law even as it preempts state law).

90. *See supra* text accompanying note 74.

systems that embrace some form of local control, from Ireland to Washington, D.C.⁹¹ In state constitutional law, the term refers to a legal regime in which cities need not seek state permission before taking action on a certain subject. For instance, in most “home-rule” states, a city that wants to enact a paid sick-leave ordinance may do so unless and until the state legislature says that it may not.⁹² A home-rule regime stands in contrast to a state that uses Dillon’s Rule, whereby cities are presumed powerless unless and until granted express authority by the legislature to address a particular subject.⁹³ In a Dillon’s Rule state, a city wanting to adopt paid sick leave would need to point to a specific statutory authorization from the legislature to sustain the ordinance against legal attack.

A clear majority of states have some version of home rule for cities and counties.⁹⁴ In most of these states, cities are empowered to address whatever subject they wish, but they may be preempted by the state on most matters. In some states, like Alaska, the state constitution imposes a system of pure “legislative supremacy,” or “legislative home rule.”⁹⁵ That is, cities enjoy authority to enact whatever they want so long as not prohibited by state law or the constitution. Legislative home rule is a misnomer in states like Alaska that also have the initiative system for statutory matters.⁹⁶ In these states, “the people”—expressing themselves

91. See, e.g., FRANK WRIGHT, *TWO LANDS ON ONE SOIL: ULSTER POLITICS BEFORE HOME RULE* (1996) (discussing home rule in the context of Ireland and Northern Ireland); District of Columbia Self-Government and Governmental Re-Organization Act, Pub. L. No. 93–198, 87 Stat. 774 (1973) (also known as the “Home Rule Act”).

92. See JEFFERSON B. FORDHAM, *AM. MUN. ASS’N, MODEL CONSTITUTIONAL PROVISIONS FOR MUNICIPAL HOME RULE* (1953); NAT’L MUN. LEAGUE, *MODEL STATE CONSTITUTION* § 8.02 (6th ed. rev. 1968).

93. E.g., *Early Estates, Inc. v. Hous. Bd. of Review*, 174 A.2d 117 (R.I. 1961) (Providence’s ordinance requiring hot water in residences held ultra vires because the state had granted the city only the authority to set minimum standards for the conditions of buildings.).

94. See Paul A. Diller, *The City and the Private Right of Action*, 64 STAN. L. REV. 1109, 1129 (2012) [hereinafter *The City and the Private Right of Action*] (tallying 42 “home-rule” states).

95. See ALASKA CONST. art. X, § 11 (“A home rule borough or city may exercise all legislative powers not prohibited by law or by charter.”).

96. E.g., *id.* art. XI, § 1 (“The people may propose and enact laws by the initiative . . .”).

directly through the initiative—are as capable of preempting local power as is the legislature.⁹⁷

A. Constitutional, or Imperio, Home Rule as a Provider of Immunity to State Override

In a significant number of home-rule jurisdictions—approximately 15—the state constitution either explicitly limits the ability of the state legislature to override certain local enactments, or the state supreme court has so read the constitution.⁹⁸ The traditional name for a home-rule regime that immunizes local action to statewide preemption is “imperio.”⁹⁹ In a classic “imperio” regime, the state judiciary divides the realm of local enactments into matters of local, statewide, or mixed concern. When the legislature attempts to preempt a “local” matter, the local policy will prevail. When mixed or statewide, the state law will prevail.

Most states’ home-rule doctrine is a mix of imperio and legislative. Many states are simply internally inconsistent. In others, the constitutional text or case law allows for local immunity for certain kinds of local enactments but not for others. The National League of Cities breaks down local enactments into four categories: structural, personnel, functional, and fiscal.¹⁰⁰ Structural home rule means control over one’s form of government.¹⁰¹ This control might mean, for example, deciding how many city councilors to have, whether those councilors are elected at large or by district, how long their terms are, and whether they are part-time or full-time. Personnel authority gives a local government the ability to set employment policies for its employees.¹⁰² Functional authority is perhaps the most important for this Article’s purposes: it is the ability to regulate anyone or anything in the jurisdiction, usually under a police-power grant—for that reason this Article will refer to it as “regulatory.”¹⁰³

97. See *Initiative and Referendum States*, NAT’L CONF. OF ST. LEGIS., <http://www.ncsl.org/research/elections-and-campaigns/chart-of-the-initiative-states.aspx> [https://perma.cc/5CW3-Q83T] (last visited Feb. 13, 2017) (listing the 14 states with direct initiative processes).

98. See Appendix B (listing home-rule states with some strain of jurisprudence like the one described).

99. See *supra* note 12.

100. *Local Government Authority*, NAT’L LEAGUE OF CITIES, <http://www.nlc.org/build-skills-and-networks/resources/cities-101/city-powers/local-government-authority> [https://perma.cc/QSM2-CNEN] (last visited Feb. 1, 2017).

101. *Id.*

102. *Id.*

103. *Id.*

Finally, fiscal authority is the authority to raise revenue, either through borrowing or taxation, as well as the authority to decide how to spend such revenue.¹⁰⁴

Of the 15 states that recognize home-rule immunity for some types of enactments, most do so for only one or two of these categories. Structural and personnel home rule are the areas in which immunity is most prevalent.¹⁰⁵ Fiscal and regulatory home rule are the least common, although a few states recognize some home rule in the regulatory sphere for matters denominated “local.”

Imperio home rule has the greatest effect when enshrined in the state constitution. If local governments’ protections against state override is merely statutory, legislatures can overrule it. For this reason, imperio home rule is sometimes also referred to as “constitutional home rule.”¹⁰⁶ When constitutionalized, imperio home rule functions like a miniature version of the strong Tenth Amendment that states’ rights advocates have championed at the federal level.¹⁰⁷ Interestingly, even in states where the constitutional system of home rule is not self-executing or it expressly allows the legislature to weaken local authority, the courts have nonetheless recognized some realm of local enactments that cannot be overruled by the state legislature.¹⁰⁸ Somehow these states have a form of imperio home rule that is not guaranteed by the state constitution. It may

104. *Id.*

105. *See* Appendix B.

106. *E.g.*, Baker & Rodriguez, *supra* note 14, at 1342–45 (reviewing the framework of “constitutional home rule”).

107. *See* Judith Olans Brown & Peter D. Enrich, *Nostalgic Federalism*, 28 HASTINGS CON. L.Q. 1, 9 & n.51 (2000) (contrasting a more “robust” version of Tenth Amendment jurisprudence that “carve[s] out constitutionally significant spheres of state autonomy” with “a more moderate” doctrine).

108. Examples include Connecticut and Georgia. Connecticut’s home rule is non-self-executing, *see* CONN. CONST. art. X, § 1 (“The general assembly shall by general law delegate such legislative authority as from time to time it deems appropriate to towns, cities and boroughs . . .”), and Georgia’s allows the legislature “to limit, or otherwise regulate the exercise” of county home-rule authority. GA. CONST. art. IX, §2, para. I(a). Yet in each state, courts hold that the legislature may not infringe on certain local matters. *See* Caulfield v. Noble, 420 A.2d 1160, 1165 (Conn. 1979) (“[G]eneral laws pertaining to municipal affairs . . . do not supersede the provisions of home rule charters or ordinances on the same subject.”); Johnston v. Hicks, 170 S.E.2d 410 (Ga. 1969) (concluding that Home Rule Amendment granted counties authority to enact planning and zoning laws and the general assembly had no authority to override).

be that home-rule statutes in these states have acquired the aura of a “super statute.”¹⁰⁹

In the handful of states that have some form of imperio home rule for local regulatory or fiscal enactments, ordinances governing substantive matters of local concern are immune from statewide legislative override. In Colorado, this approach is buttressed by the state constitution’s language that local charters and ordinances involving “local and municipal matters . . . shall supersede . . . any law of the state in conflict therewith.”¹¹⁰ In these states, the extent of immunity for local regulatory enactments depends completely on the distinction between “local” and “statewide.” To articulate this distinction, the Colorado Supreme Court has relied on several criteria. Most prominent among them are tradition, extraterritorial effects, and the need for statewide uniformity.¹¹¹

Of the Colorado Supreme Court’s factors, tradition perhaps is the most suspect. Even if the “traditional” realm of local government matters could be adequately catalogued, there is no good reason why cities should be bound to continue to operate in this realm.¹¹² One of the primary benefits of home rule is cities’ ability to serve as agents of policy experimentation and change.¹¹³ Confining their actions to a fixed realm of “traditional” prerogatives severely limits cities’ ability to function as agents of policy experimentation and change. Similarly, merely because local governments have “traditionally” operated in a realm, they ought not necessarily be permitted impunity in their continuing regulation. Land use is an obvious example. Although it is often considered a “traditional” local concern, the record of local governments using their authority therein to exclude “undesirable” uses, like low-income housing, is legion.¹¹⁴

The criteria of extraterritorial impact and the need for statewide uniformity of regulation have more to be said for them even if they too are difficult to implement. Many of the states that protect only personnel or

109. See William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215 (2001).

110. COLO. CONST. art. XX, § 6.

111. See *City of Longmont v. Colo. Oil & Gas Ass’n*, 369 P.3d 572, 580 (Colo. 2016); see also *Fraternal Order of Police, Colo. Lodge No. 27 v. City and Cty. of Denver*, 926 P.2d 582, 587 (Colo. 1996) (holding that the regulation of deputy sheriffs is a local matter that the state may not preempt).

112. Cf. Dana, *supra* note 65, at 517 (“Even if the traditional state arenas category [of federalism] were coherent . . . it would be normatively unattractive. If states are to remain vibrant parts of our democracy, they need to be active in both traditional and nontraditional spheres . . .”).

113. See *Intrastate Preemption*, *supra* note 56, at 1117–33.

114. See, e.g., DOUGLAS S. MASSEY ET AL., *CLIMBING MT. LAUREL* (2013).

structural matters from statewide preemption offer similar reasons for that approach. In Pennsylvania, for instance, the courts have said that matters of “personnel and local administration” are of no concern to residents of the rest of the state—i.e., they have no extraterritorial impact of significance and there is no need for uniform statewide regulation.¹¹⁵

Within the regulatory sphere, the Colorado Supreme Court has invoked the extraterritorial and uniformity factors in declaring various city ordinances, such as local bans on sex offenders and fracking, as regulating “statewide” matters and, therefore, susceptible to preemption by the state.¹¹⁶ Laurie Reynolds has extensively analyzed the “extraterritorial impact” factor.¹¹⁷ She notes that courts applying the factor assess both the effect of a lone-city ordinance, as well as the possible cumulative effect of other cities adopting similar ordinances.¹¹⁸ Reynolds concludes that courts use “extraterritorial impact” as “cover for imposing their own political assessment of the local laws at issue” and thus argues that it should be abandoned.¹¹⁹

Reynolds is likely correct that courts strain their institutional capacity in attempting to assess the “extraterritorial impact” of local laws. Indeed, when cities address controversial and high-profile issues, any extraterritorial impact from the city action will necessarily also be difficult to assess neutrally. Raising the minimum wage in a city, for instance, whether directly or through other employee-friendly regulation, will have a negative extraterritorial impact if residents believe that the minimum wage promotes unemployment. By contrast, if residents believe that a higher minimum wage lifts all boats, there will be no or little negative extraterritorial impact. Indeed, there is arguably a positive impact. No obvious answer to this debate presents itself. Nobel-Prize-winning economists argue both sides.¹²⁰ Similarly, if a county loosens gun

115. *Devlin v. City of Philadelphia*, 862 A.2d 1234, 1242 (Pa. 2004) (“[M]atters affecting merely the personnel and administration” of Philadelphia “are of no concern to citizens elsewhere.” (citation omitted)).

116. *See Longmont*, 369 P.3d at 580–81 (invalidating local fracking ban); *City of Northglenn v. Ibarra*, 62 P.3d 151, 163 (Colo. 2003).

117. *See* Laurie Reynolds, *Home Rule, Extraterritorial Impact, and the Region*, 86 DENV. U. L. REV. 1271 (2009). For additional excellent analysis that was published just before this paper went to editing, see Stahl, *supra* note 8, at 213 (analyzing extraterritorial impact and uniformity).

118. Reynolds, *supra* note 117, at 1278–82.

119. *Id.* at 1285.

120. *See* Mike Patton, *The Facts on Increasing the Minimum Wage*, FORBES (Nov. 26, 2014, 10:46 PM), <http://www.forbes.com/sites/mikepatton/2014/11/26/the-facts->

regulations, its voters may argue that they are doing so because allowing more guns in the hands of law-abiding citizens leads to less crime. Urban areas in the state are likely to disagree and are also likely to claim that they will be on the receiving end of the negative externality of loose gun sales. Does gun regulation really work? Should courts have to answer this question in order to properly allocate state and local power?

There will, however, be more obvious cases where a city is clearly seeking to externalize costs to other cities, such as exclusionary zoning and draconian bans on sex-offender residency. In these instances, courts employing the imperio approach would likely be correct to label the matters “statewide.” Indeed, although the Colorado Supreme Court generally considers zoning a “local” matter,¹²¹ it exempts zoning laws that implicate a “statewide concern.”¹²² In response to Laurie Reynolds, Michelle Anderson suggests that rather than abandon the “extraterritorial impact” factor, courts would do well to discipline it by requiring a showing of a significant impact outside of the city limits.¹²³ Under Anderson’s view, courts can still play a useful role in policing the extent of local authority in imperio regimes in the regulatory sphere.¹²⁴ As both Reynolds and Anderson recognize, even when a court categorizes the matter regulated by an ordinance as “statewide,” they are not invalidating it per se; they are merely permitting the state legislature to preempt when and if it sees fit.¹²⁵ The spillovers from one city’s policy to others may force the state legislature to address an issue it might have otherwise avoided.¹²⁶

Similar to the “extraterritorial-impact” factor in assessing the extent of local immunity is the criterion of the need for statewide uniformity. The

on-the-minimum-wage-increase/#48b2154252ad[https://perma.cc/JZX5-E637] (noting that Milton Friedman was against a minimum wage, while Paul Krugman is in favor).

121. *Town of Frisco v. Baum*, 90 P.3d 845, 850 n.6 (Colo. 2004) (“This court has definitively stated that zoning is generally a local and municipal matter under [Colorado’s constitution’s home-rule provision.]”).

122. *E.g.*, *Northglenn v. Ibarra*, 62 P.3d 151, 155–56 (Colo. 2003).

123. *See* Michelle Wilde Anderson, *Between State and Local: A Response to Professor Reynolds*, 86 DENV. U. L. REV. 1303, 1308 (2009).

124. *Id.* at 1307–09.

125. *Id.* at 1309; Reynolds, *supra* note 117, at 1288. Reynolds, however, notes that the Colorado Supreme Court has on at least one occasion blended the local-versus-statewide and preemption analyses. *Id.*

126. *See* Heather Gerken & James T. Dawson, *Living Under Someone Else’s Law*, DEMOCRACY J., Spring 2015, at 42, 48, <http://democracyjournal.org/magazine/36/living-under-someone-elses-law/> [https://perma.cc/K2Y8-A9RT] (“[S]pillovers force state and local officials to do what they are supposed to do: politic, find common ground, and negotiate a compromise that no one likes but everyone can live with.”).

Colorado Supreme Court recently invoked this factor in its decision invalidating local fracking bans.¹²⁷ This factor as well looks at whether state regulation would be superior to a potential local “patchwork” of regulation.¹²⁸ As applied, application of the factor often revolves around courts’ view of the scale of the problem. If a problem or issue transcends local boundaries, it is likely to be classified as “statewide.”¹²⁹

To the extent that it can be separated from the extraterritorial-impact factor, the need for statewide uniformity is arguably in more tension with the logic of home rule and its power to promote innovation. One goal of home rule is policy experimentation. If a local ordinance creates no cognizable harm besides the mere non-uniformity of regulation, that lack of uniformity is arguably not the kind of harm against which courts need to guard.¹³⁰ In this sense, the uniformity factor is arguably overinclusive. On the other hand, the factor is underinclusive in that almost all issues have importance at the state, national, and even international levels. An issue as seemingly local as parking can have tremendous effects on more obviously global issues like carbon emissions and climate change.¹³¹

The extraterritorial impact and uniformity factors are not arguments for local regulation. Rather, these factors only help delimit local immunity. In contrast, the democratic-accountability argument is a first-order argument for local policymaking. This argument rests less on technical competence than on the notion that local governments are more democratically legitimate because they are “closer” to the people.¹³² This justification for local self-rule has a distinguished pedigree in American legal and political thought. Important 19th-century forebears of this argument include Alexis de Tocqueville and Thomas Cooley.¹³³ It is into this rich vein that present-day proponents of local autonomy across the

127. *City of Longmont v. Colo. Oil & Gas Ass’n*, 369 P.3d 572, 580 (Colo. 2016).

128. *Id.* at 581.

129. *Id.* (“[W]e conclude that the need for statewide uniformity favors the state’s interest in regulating fracking.”).

130. See *The City and the Private Right of Action*, *supra* note 94, at 1119–23.

131. See Donald Shoup, *Cruising for Parking*, ACCESS, Spring 2007, at 16, 17–22 (explaining the high volume of carbon-dioxide emissions that result from drivers “cruising” for underpriced curb parking).

132. Roderick M. Hills, Jr., *Romancing the Town: Why We (Still) Need a Democratic Defense of City Power*, 113 HARV. L. REV. 2009, 2009 (2000) (reviewing GERALD E. FRUG, *CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS* (1999)) (“Local governments are said to bring democracy closer to the people . . .”).

133. David J. Barron, *The Promise of Cooley’s City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 506–10 (1999); Amasa Eaton, *The Right to Local Self-Government*, 13 HARV. L. REV. 441 (1900).

political spectrum attempt to tap when making a renewed argument for “constitutional” home rule. There are good reasons to be skeptical of the democratic-accountability argument for local autonomy.¹³⁴ Nonetheless, this argument can serve as a guidepost for sketching the bounds of a constitutional home-rule system and can explain the approach of many states in immunizing local structural decisions from state override.

Aside from the functional, technical, and democratic arguments regarding constitutional home rule, courts are also guided by the text of the constitution. In a handful of states, such as California, the constitution specifically requires immunizing certain local actions to state override.¹³⁵ Administering these categories—often structural or personnel—raise the same line-drawing issues discussed thus far. Arguably, however, in these states the state’s constitutional text provides at least some positivist mooring for this line-drawing exercise.

B. Modified Immunity to State Override

Some of the states that provide immunity for certain local enactments also regulate the state’s ability to override local enactments in a less direct

134. See *infra* Part IV.

135. See, e.g., CAL. CONST. art. XI, § 1(b) (“The governing body [of a county] shall provide for the number, compensation, tenure, and appointment of employees.”); *Cty. of Riverside v. Superior Court*, 66 P.3d 718 (Cal. 2003) (holding that a state law requiring counties to enter binding arbitration with certain employees after labor negotiations violated the state constitution); *Sonoma Cty. Org. of Pub. Emps. v. Cty. of Sonoma*, 591 P.2d 1, 13 (Cal. 1979) (invalidating state law that denied local governments the use of state funds to fund cost-of-living increases beyond those provided for in state law). California’s constitution also protects charter cities’ authority over compensation of employees and contractors. CAL. CONST. art. XI, § 5 (specifying municipal employee pay as a “municipal affair”); see also *State Bldg. & Constr. Trades Council of Cal., AFL-CIO v. City of Vista*, 279 P.3d 1022, 1034 (Cal. 2012) (“conclud[ing] that no statewide concern has been presented justifying the state’s regulation of the wages that charter cities require their contractors to pay to workers hired to construct locally funded public works”); *S.D. Myers, Inc. v. City and Cty. of San Francisco*, 253 F.3d 461, 474 (9th Cir. 2001) (“[U]nder current California law, the City’s chosen mode of contracting is a municipal affair over which the City may exercise its authority without violating the California constitution.”). The same provision of the California Constitution also denominates the “conduct of city elections” as a “municipal affair.” CAL. CONST. art. XI, § 5; see also *Johnson v. Bradley*, 841 P.2d 990, 1000 (Cal. 1992) (upholding partial public financing measure for local candidates against state law that prohibited any candidate from accepting public funds).

way by requiring that preemptive laws be “general” or “uniform.” Applied most literally, these constitutional provisions are formal or procedural, requiring that when preemption occurs, it apply equally to all cities, or at least all cities of a similar class. Additional states provide no absolute immunity for any category of enactment, but still require generality or uniformity of some or all preemptive laws. In all, approximately 16 states demand generality or uniformity from their state legislatures to preempt some local enactments.¹³⁶

Although usually formalistic and procedural, generality provisions can also have more substantive bite. The Ohio Supreme Court, for instance, lays out four factors for deciding whether a state statute is a general law. To qualify as a general law for home-rule purposes,

a statute must: 1) be part of a statewide and comprehensive legislative enactment; 2) apply to all parts of the state alike and operate uniformly throughout the state; 3) set forth police, sanitary, or similar regulations, rather than purport only to grant or limit legislative power of a municipal corporation to set forth police, sanitary or similar regulations; and 4) prescribe a rule of conduct upon citizens generally.¹³⁷

Applying this test, the Ohio courts have invalidated what they see as selective or partial legislative withdrawal of local authority.¹³⁸

For instance, in the seminal case articulating the standard for general laws, *City of Canton v. State*, the Ohio Supreme Court invalidated a state preemption statute that prohibited local governments from prohibiting mobile homes in areas zoned for single-family homes.¹³⁹ The court invalidated the law in part because of its potential uneven application across the state and because it did more to prohibit local action than affirmatively prescribe a “rule of conduct.”¹⁴⁰ The invalidation of the law insulated cities’ de facto authority over zoning from preemption,¹⁴¹ and at the same time may have limited the state’s ability to promote affordable housing.¹⁴²

136. See Appendix B.

137. *City of Canton v. State*, 766 N.E.2d 963, 967–68 (Oh. 2002).

138. *City of Cleveland v. State*, No. CV-16-868008, slip op. at 4 (Ct. of Common Pleas Jan. 30, 2017).

139. *City of Canton*, 766 N.E.2d at 964 (citing 147 Ohio Laws, Part IV, 7986 (effective March 30, 1999)).

140. *Id.* at 969–70.

141. *Id.* at 968.

142. *Id.* at 972 (Pfeifer, J., dissenting) (describing the invalidated law as “an attempt to increase the stock of affordable housing in the state”).

In a later case, the Ohio Court of Appeals relied on *City of Canton*'s general law doctrine to uphold local authority to regulate the public health. In 2011, Cleveland passed an ordinance that prohibited restaurants from serving foods containing artificial trans fats.¹⁴³ At the behest of major fast-food companies, however, the Ohio legislature included within its biennial appropriations bill an amendment that prohibited local governments from enacting trans-fats restrictions, thereby preempting Cleveland's ordinance before it was even implemented.¹⁴⁴ Cleveland sued, arguing that the preemption provision violated its protected sphere of local regulation, which entitled it to "adopt and enforce within [its] limits such local police, sanitary and other similar regulations, as are not in conflict with *general* laws."¹⁴⁵ An Ohio appellate court agreed, holding that the legislation was not "part of a statewide and comprehensive legislative" approach to regulating food safety and therefore did not meet the state's judicial test for what is a "general" law.¹⁴⁶ Similarly, a recent trial court decision in Ohio invalidated a state law on generality grounds that sought to preempt Cleveland's "Fannie Lewis Law," which required that city contractors hire a certain percentage of city residents and low-income persons.¹⁴⁷

The supreme courts of New Mexico and Arizona have also relied on the "general law" doctrine to invalidate efforts by the legislature to regulate cities' structures. The New Mexico Supreme Court held that a city could decide for itself how many commissioners it would have rather than be subject to a state law mandating five commissioners.¹⁴⁸ In shielding the city of Clovis from a seemingly preemptive state law, the court decided that the state law was not "general" because it interfered with a matter of "local" as opposed to "statewide" concern.¹⁴⁹

143. See CLEVELAND, OH., CODIFIED ORDINANCES § 241.42 (2013).

144. See Am. Sub. H.B. 153, 129th Gen. Assemb., 1st Sess. (Oh. 2011) (amending OHIO REV. CODE ANN. § 3717.53); see also *Cleveland v. State*, 989 N.E.2d 1072, 1085 (Ohio Ct. App. 2013) (citing an email message indicating that the preemption provision was "a high priority for Wendy's, McDonald's and YUM!").

145. OHIO CONST. art. XVIII, § 3 (emphasis added).

146. *Cleveland v. State*, 989 N.E.2d 1072, 1087 (Ohio Ct. App. 2013).

147. *City of Cleveland v. State*, No. CV-16-868008, slip op. at 4 (Ct. of Common Pleas Jan. 30, 2017).

148. *State ex rel. Haynes v. Bonem*, 845 P.2d 150, 151 (N.M. 1992) ("We hold that neither [state law] is a general law that expressly denies to a home rule municipality the power to provide for a different number of city commissioners than that fixed in those statutes.").

149. *Id.* at 156 (quoting *Apodaca v. Wilson*, 525 P.2d 876, 882 (N.M. 1974)); see also *id.* at 155 ("Even if a statute applies to all municipalities throughout the

The Arizona Supreme Court's application of the generality doctrine is more remarkable because there is no such textual requirement in the constitutional home-rule provision. Nonetheless, the court held that Tucson could preserve its unique, partisan system of electing city councilors through ward-based primaries and at-large general elections despite a state law that clearly sought to end this practice.¹⁵⁰ Tucson's system was enshrined in its charter, but the state constitution requires charters to be "consistent with, and subject to . . . the laws of the state."¹⁵¹ Relying on a 60-year-old case, the court grafted a condition onto the preemptive scope of state law, concluding that "laws of the state" in the constitution refers only to "laws addressing matters of 'statewide interest' rather than 'local concern.'"¹⁵² Because Tucson's mode of electing commissioners was of local rather than statewide interest, it was immune to preemption by the seemingly overriding state law.¹⁵³

Although the Arizona and New Mexico decisions concerned structural matters, neither court expressly limited their holdings to that realm, thereby holding out the possibility that another local action, perhaps regulatory, might qualify as "local" enough to receive immunity from state preemption through their analysis. Indeed, the *Tucson* majority relied heavily on a 1951 Arizona case that explicitly embraced a division between statewide and local matters, articulating a "laundry list" of which matters are "statewide" and which are "local."¹⁵⁴

In specifically protecting structural matters from state legislative override, Arizona, New Mexico, and the other states that take a similar approach impliedly or explicitly endorse the democratic-accountability argument for home rule. If local governments should be able to control anything, the argument goes, it should be the design of their own

state, it is not necessarily a general law if it does not relate to a matter of statewide concern.").

150. *City of Tucson v. State*, 273 P.3d 624 (Ariz. 2012).

151. ARIZ. CONST. art. XIII, § 2.

152. *Tucson*, 273 P.3d at 628 (citing *Strode v. Sullivan*, 236 P.2d 48 (Ariz. 1951)).

153. The Ninth Circuit recently affirmed the validity of Tucson's idiosyncratic local election system under the one-person, one-vote standard of the Fourteenth Amendment's Equal Protection Clause. *See Pub. Integrity All., Inc. v. Tucson*, 836 F.3d 1919 (2016) (en banc), <http://cdn.ca9.uscourts.gov/datastore/opinions/2016/09/02/15-16142.pdf> [<https://perma.cc/XH8Q-J8YS>].

154. *See Strode v. Sullivan*, 236 P.2d 48, 52–53 (Ariz. 1951) (citing two cases in which a "subject" of municipal regulation was deemed "local" rather than "statewide" in nature).

governments.¹⁵⁵ This assertion is questionable upon further inspection. For instance, whether a local government uses at-large or district voting—a quintessential choice of municipal government design—can affect the degree of minority representation on the governing body.¹⁵⁶ A weak-mayor form of government in a major central city may lead to the kind of executive impotence that can harm the functioning of an entire region.¹⁵⁷ This possibility does not mean that the external effects are likely to be as significant with these kinds of choices as with other, more substantive matters, but rather that such effects are at least possible and must be recognized.

Indeed, the Nebraska Supreme Court upheld a state law requiring cities to elect their council members from districts rather than on an at-large basis even though it conflicted with an Omaha charter provision.¹⁵⁸ Exploring the statute’s legislative history, the court took note of the sponsors’—including the legendary senator Ernie Chambers’s¹⁵⁹—goal that district representation would ensure more “proportionate” representation of “socioeconomic” groups on city councils.¹⁶⁰ While reserving the ultimate authority to decide what is or is not a “statewide interest” sufficient to override a city charter’s structural provision, the court held that the legislature’s decision was worthy of deference because it was seeking “to insure the fundamental right to

155. In *La Grande*, Justice Linde cited the power of “the people of the locality to decide upon the organization of their government” as the “central object” of the amendments to the Oregon Constitution that established home rule. 576 P.2d 1204, 1208 (Or. 1978).

156. See *City of Mobile v. Bolden*, 446 U.S. 55, 58 (1980) (challenging Mobile’s use of at-large elections for city commissioners on the basis that it “unfairly diluted the voting strength of Negroes in violation of” the Voting Rights Act and the Fourteenth and Fifteenth Amendments); see also Francesco Trebbi et al., *Electoral Rules and Minority Representation in U.S. Cities*, 123 Q.J. ECON. 325 (2008) (concluding that after the Voting Rights Act, cities and towns in the South adopted at-large voting when blacks were a smaller minority and district voting when blacks were a larger minority—close to 50%—to reduce black representation).

157. See, e.g., Doug Morgan et al., “Keep Portland Weird”: Retaining the Commission Form of Government, in MORE THAN MAYOR OR MANAGER: CAMPAIGNS TO CHANGE THE FORM OF GOVERNMENT IN AMERICA’S LARGE CITIES 279 (James H. Svara & Douglas A. Watson eds. 2010) (discussing Portland, Oregon’s “weak-mayor” form of government and criticisms thereof).

158. *Jacobberger v. Terry*, 320 N.W.2d 903 (Neb. 1992).

159. John Eligon, *Lawmaking Maverick Resumes Course in Nebraska*, N.Y. TIMES (Jan. 9, 2013), <http://www.nytimes.com/2013/01/10/us/ernie-chambers-nebraska-senator-returns-to-capitol.html> [<https://perma.cc/XY7A-9MCE>].

160. *Jacobberger*, 320 N.W.2d at 905–06.

vote and the right to proportionate representation,” a matter that transcends “local concern.”¹⁶¹

The generality and uniformity requirements thus work as a backdoor sort of immunity for local governments. They call for a heightened level of judicial inquiry into whether the state’s interest in preempting the local government is legitimate. In the Cleveland trans-fat case, the fact that the preemption withdrew local authority without replacing it with any other regulatory regime was a fatal flaw. Perhaps the *City of Canton* case can be explained by the state’s failure to enact a comprehensive regime favoring affordable housing. As a selective withdrawal of a city’s zoning authority, the Ohio Supreme Court was suspicious. The Nebraska case, however, stands as a cautionary note to allowing this backdoor immunity to be absolute. There, the court was convinced that the state had legitimate, substantive interests in interfering with how local governments structured their councils.

III. CONSTITUTIONAL HOME RULE AS A REMEDY FOR THE URBAN DISADVANTAGE IN STATE LAWMAKING

The extent of the urban disadvantage in any particular state depends on a number of factors, including, most notably, a split in political views between urban and rural or exurban residents.¹⁶² This split is more pronounced in some states than others.¹⁶³ Intentional, political gerrymandering and unusually shaped districts designed to comply with the Voting Rights Act can also compound the dynamic.¹⁶⁴ As Chen and Rodden demonstrate, however, political gerrymandering alone cannot explain the legislature’s underrepresentation of urban preferences in many states.¹⁶⁵ Rather, even under the most politically neutral districting scheme that complies with the usual state constitutional requirements of district compactness and contiguousness, the uneven geographic spread of voter preferences will result in a legislature that overstates the values of rural and exurban voters.¹⁶⁶

161. *Id.* at 907.

162. *See supra* Part I; Chen & Rodden, *supra* note 23, at 242.

163. Chen & Rodden, *supra* note 23, at 262 (noting that the “problem is less severe” in Western and Southern states, where Democratic voters “are more efficiently spread out in space”).

164. *Id.* at 240 (citing political science studies of these effects).

165. *Id.* at 266.

166. *Id.* (“[I]n Florida, New York, Pennsylvania, and other urbanized states with substantial rural peripheries, [districting reform efforts] are likely to lock in a powerful source of pro-Republican electoral bias that emanates from the distinct voter geography of these states.”).

Just as at the federal level, the urban disadvantage in state lawmaking unfolds in a number of realms. Prominent examples of policies often favored by urban-centered coalitions, but rejected or even preempted by state legislatures include transgender and sexual orientation discrimination protections, gun control, higher minimum wages, inclusionary zoning, paid sick leave, paid family leave, Medicaid expansion under the Affordable Care Act (“ACA”), and additional public health measures such as menu labeling, trans-fat bans, and clean indoor-air laws.¹⁶⁷ If cities were simply disadvantaged at the state level, but left free to pursue their own policies, the urban disadvantage would be problematic on normative grounds, but less so. At least some cities would adopt their preferred policies on their own, and the primary limitation on their effectiveness would be due to scale and enforcement limitations. As noted earlier, states often preempt cities’ choices in these realms entirely. Moreover, certain choices, such as expanding Medicaid under the ACA, are for the state alone to make.

Political scientists for years have highlighted cities’ disadvantages at achieving their priorities in the state legislature, with earlier explanations focusing on the pre-*Reynolds* malapportionment common in many states.¹⁶⁸ Some thorough studies of cities’ relative disadvantage focus on cities’ abilities—or inabilities—to wrest “special” bills on their behalf from the legislature.¹⁶⁹ Some of these special bills would provide authority over a particular matter to cities that otherwise lack it.¹⁷⁰ In this sense, this scholarship precedes, or at least analyzes data that precedes, the more widespread availability of local authority to initiate legislation as implemented by increased home rule across the states.¹⁷¹ In a notable

167. Sophie Quinton, *Expect More Conflict Between Cities and States*, PEW CHARITABLE TRUSTS: STATELINE (Jan. 25, 2017), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/01/25/expect-more-conflict-between-cities-and-states> [https://perma.cc/5C5A-L662].

168. See Gerald Gamm & Thad Kousser, *No Strength in Numbers: The Failure of Big-City Bills in American State Legislatures, 1880-2000*, 107 AM. POL. SCI. REV. 663, 663, 666 (2013) (noting that “scholars . . . have contended since the nineteenth century” that “[l]arge cities do face special burdens in state legislatures”).

169. *E.g.*, *id.*

170. *Id.* at 664 (focusing their study on “district bills,” also “[s]ometimes called ‘special legislation’”). Ironically, Gamm and Kousser never mention that such bills are potentially illegal under many state constitutions. See generally Justin R. Long, *State Constitutional Prohibitions on Special Laws*, 60 CLEVELAND ST. L. REV. 719 (2012).

171. Gamm and Kousser, for instance, cite articles from 1912 and 1955, respectively, for the proposition that states control local initiatives. Gamm & Kousser, *supra* note 168, at 664–65.

study, Gerald Gamm and Thad Kousser analyze almost 2,000 bills from the 1880s to the present and conclude that internal fissures within large cities' state legislative delegations weaken such cities' clout within the body, as do "demographic differences between city residents and those in the rest of the state."¹⁷² Unlike the analysis that flows from Rodden and Chen's work, Gamm and Kousser and similar studies ignore cities' lack of success in achieving major statewide policies that disproportionately benefit, or are preferred by, their residents, such as those discussed above.¹⁷³ Nonetheless, this other line of scholarship is instructive insofar as cities sometimes seek special authority to pursue a policy that might prove useful statewide or nationwide, such as New York City's failed pursuit of congestion pricing.¹⁷⁴

If the composition of legislatures disadvantages urban areas because of the distortions that result from unevenly constituted single-member districts, governors, elected statewide, might be able to temper this disadvantage. In theory, governors should hew closer to the median voter's preferences than does the median legislator, and in many states anecdotal evidence supports this notion. Nonetheless, the base of governors' electoral coalition and the need for governors to press other items on their agenda in the legislature will make it advantageous for governors to sign off on, or at least not veto, some or much of the legislation enacted by the legislature that is disfavored in urban quarters. Hence, while governors elected on a statewide basis should temper the urban disadvantage in the state legislature, they are unlikely to ameliorate it completely.¹⁷⁵

If the urban disadvantage is likely to produce legislation hostile to the preferences of urban voters, constitutional home rule, or even some lighter version of immunity for local enactments, offers a potential ameliorative. At the statewide level, this argument is fairly straightforward, particularly in those states with pronounced urban-rural splits. For instance, in Ohio, urban residents may well be more receptive to the kind of government regulation epitomized by Cleveland's trans-fat ban. Hence, at time-0 the city adopts such a policy. Although other major cities, like Cincinnati or Columbus, may not adopt a similar policy for a variety of reasons at time-0, their residents may be open to the idea and would not generally support legislation that takes this policy choice off the table. Nonetheless, the rural-

172. *Id.* at 677.

173. *Id.* at 664 (noting that their study does "not include the major state health and welfare policies that disproportionately benefit urban dwellers").

174. See Nicholas Confessore, *\$8 Traffic Fee for Manhattan Fails in Albany*, N.Y. TIMES, Apr. 8, 2008, at A1.

175. See *Urban Disadvantage*, *supra* note 1, at 342 & n.208 (discussing governors' roles in the legislative process).

and exurban-dominated legislature votes to preempt any city in the state from enacting this policy.¹⁷⁶ If that legislative choice is viewed as fully democratically legitimate, such statewide preemption is unproblematic. If, on the other hand, the legislature is viewed as democratically compromised because of the urban disadvantage, then a constitutional limit on its ability to preempt may have normative appeal.

The argument is bolstered when considering the role of cities as laboratories of policy innovation. Columbus and Cincinnati may well adopt a provision like a trans-fat ban at a later time, but their governments may be hesitant initially and wait to see how the policy goes over in Cleveland. If the policy goes well in Cleveland, Columbus may follow suit, followed by Cincinnati, then Akron, Dayton, and other cities. If the state can preempt the issue before any city even attempts to address it, however, this policy percolation can never occur.¹⁷⁷

A. *Objections to an Invigorated Imperio Home Rule*

In subverting the hierarchy of states controlling local governments as their “convenient agencies,”¹⁷⁸ constitutional home rule strikes some observers as “radical.”¹⁷⁹ The idea that the policy of one city might be completely immune to legislative override is understandably unsettling, particularly if the policy is widely unpopular beyond the particular city that adopts it. This possibility is probably of most concern in the fiscal or regulatory spheres because local personnel or structural enactments may be less likely to raise concerns outside the enacting city.¹⁸⁰ Taken to an extreme of very strong immunity for most local enactments, imperio home rule might even violate the United States Constitution, which requires states to exercise sovereignty over all their territory.¹⁸¹ Especially where a

176. See *supra* note 144.

177. Cf. Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 4, 20–22 (2007) (explaining a similar dynamic at the state level).

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

179. Baker & Rodriguez, *supra* note 14, at 1342 (“As a matter of theory, constitutional home rule represents an unusual and truly radical reconstitution of the traditional model of state/local relations . . .”).

180. But see *supra* notes 160–61 (discussing an example to the contrary).

181. U.S. CONST. art. IV, § 3 (“[N]o new States shall be formed or erected within the Jurisdiction of any other State . . . without the Consent of the Legislatures of the States concerned as well as of the Congress.”). The author owes this insight to former Oregon Supreme Court Justice Hans Linde. A people-approved initiative that creates a strong imperio system of home rule might qualify as “the Consent of the Legislature[.]” necessary under this provision, but

city blatantly attempts to externalize problems on to other cities, such as by banning sex offenders or waste facilities, good reason exists to be skeptical of local immunity. The state should have the ability to allocate statewide problems fairly throughout the state.

In many instances, however, local action merely represents a different policy choice than that favored by the state legislative regime in power. For instance, cities that seek to raise the minimum wage beyond the federal and statewide floor are usually not attempting to externalize low-wage labor on to surrounding cities. Rather, these cities merely have embraced the notion that a higher minimum wage is better social policy, likely does not increase unemployment, and actually helps the economy by putting more dollars in low-wage earners' pockets.¹⁸² The larger the city and the more geographically isolated, the more credible this position is. Big-city residents cannot scurry off to the suburbs for every takeout meal, pharmacy purchase, and other kinds of transactions in which low-wage employees are most typically involved. Although wage ordinances might have the effect of keeping some big-box stores out of the city, city officials may reject the big-box model of retail provision and prefer an economic system in which this model is less viable.¹⁸³ Similarly, with respect to other urban priorities—inclusionary zoning, paid sick leave, transgender rights, gun control, and even immigration regulation—the costs and benefits of these policies are not easy to determine, even after put into effect. Other policies, such as congestion pricing, might be seen as attempts to externalize costs onto outsiders, but even these policies may serve statewide or national goals and may impose costs on city residents as well.¹⁸⁴

Congressional approval would also be necessary. *Cf.* *Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n*, 135 S.Ct. 2562 (2015) (holding that a voter-approved initiative qualifies as action of a state “Legislature” for purposes of Article I, Section 4, Clause 1 of the United States Constitution).

182. *See, e.g.*, MINIMUM WAGE WORKING GRP., CITY OF CHICAGO, A FAIR DEAL FOR CHICAGO'S WORKING FAMILIES: A PROPOSAL TO INCREASE THE MINIMUM WAGE 3 (2014), <http://www.cityofchicago.org/content/dam/city/depts/mayor/general/MinimumWageReport.pdf> [<https://perma.cc/X75S-UBVA>] (proposing an increase in minimum wage citywide to \$13 an hour).

183. Patricia M. Salkin, *Municipal Regulation of Formula Businesses: Creating and Protecting Communities*, 58 CASE W. RES. L. REV. 1251, 1253–61 (2008) (discussing reasons why communities have attempted to exclude or coerce businesses like Wal-Mart by requiring big-box retailers to pay “living wages”).

184. *See* Confessore, *supra* note 174 (noting that “civic, labor, and environmental organizations” considered congestion pricing, which would have applied to any driver entering Manhattan south of 60th Street during peak hours, as “a bold and essential step to help manage the city’s inexorable growth” while

One concern about the imperio approach to regulatory home rule is that it creates uncertainty regarding which local actions are immune to override and which are not.¹⁸⁵ As with any decisional system that defies easy and objective prediction, the possibility exists that court decisions in this area will be seen as “result based” and political.¹⁸⁶ A pure legislative system of home rule, by contrast, allows for state preemption of any and all matters.¹⁸⁷ In those states where immunity is provided only to structural or personnel matters, ambiguity still remains regarding whether a particular local ordinance or policy falls within such parameters.¹⁸⁸

A related objection to imperio home rule is that some states have historically used it to limit the initiative authority of local governments to the “local” realm.¹⁸⁹ Using this approach, although “local” enactments were immune from override, cities were prohibited from addressing “statewide” matters even in the absence of preemption. Today, most states that retain some version of imperio home rule allow localities to regulate all matters unless

politicians from the outer boroughs and suburbs viewed the proposal “as a regressive measure that overwhelmingly benefited affluent Manhattanites”).

185. See Kenneth Vanlandingham, *Constitutional Municipal Home Rule Since the AMA (NLC) Model*, 17 WM. & MARY L. REV. 1, 2 & n.5 (1975) (discussing dissatisfaction with the “uncertainty” of imperio home rule).

186. E.g., *City of La Grande v. Pub. Emps. Ret. Bd.*, 576 P.2d 1204, 1213 (Or. 1978) (defining the “subject” of a law and “assign[ing] it to one or the other level of government” “merely marks the desired conclusion of an argument rather than its premise”). Dean Sandalow noted the widespread critique of judicial implementation of imperio home rule in his comprehensive review of the subject more than a half-century ago. See Terrance Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643, 661 (1964) (noting that “acclaim” has not been the “reward” of the judiciary for its efforts to distinguish between “what ‘affairs’ are ‘municipal’ . . . and ‘local’”). Baker and Rodriguez, on the other hand, are much more sanguine about the judiciary’s ability to perform this task. Baker & Rodriguez, *supra* note 14, at 1370–71 (“Judicial norms can be expected to cause the courts to strive for continuity over time in deciding what is or is not a matter of local concern.”); see also Vanlandingham, *supra* note 185, at 27 (“Although delineation of home rule powers under *imperio* provisions admittedly is difficult, it is not an impossible task . . .”).

187. E.g., *City of La Grande*, 576 P.2d at 1213–14 (“A search for a predominant state or local interest in the ‘subject matter’ of legislation can only substitute for the political process . . . the court’s own political judgment whether the state or the local policy should prevail.”).

188. E.g., *id.* at 1230 (Tongue, J., dissenting) (arguing that the policy at issue should qualify as “structural” under the majority’s newly minted test).

189. See *Intrastate Preemption*, *supra* note 56, at 1124–25 (discussing early home-rule regimes).

and until the state acts to preempt. In Colorado, the court purports to limit local government authority over “statewide” matters to those for which a state constitutional provision or statute specifically provides authority, but in practice classifies most regulatory matters as “mixed” statewide and local concerns, in which cities are empowered to act.¹⁹⁰ Although the use of “local” as a limitation rather than merely a shield remains in some states, no reason exists as to why imperio home rule needs to be applied this way. Rather, to the extent that this Article endorses constitutional home rule, it does so from the premise that any such system leaves all policy options on the table at least until the legislature or people speak on the matter in some way.

1. An Imperfect Fit with Respect to Issues

As currently structured, constitutional home rule is not a good fit for remedying the urban disadvantage. Most states that provide some immunity for local enactments do so only for personnel or structural matters.¹⁹¹ It is in the regulatory and fiscal spheres, however, that immunizing big-city local enactments would offer the most potential to remedy the urban disadvantage. Imperio home rule in the fiscal realm is an awkward fit because most local governments are highly constrained with respect to their initiative authority to raise revenue, which means the immunity question never arises.¹⁹²

In those few states that apply the local–statewide distinction to regulatory matters, many of the more important local policies may well fall on the statewide side of the divide and therefore remain vulnerable to preemption by the state legislature. For instance, if North Carolina had constitutional home rule for “local” regulatory matters, which it does not, Charlotte’s ordinance providing protection in employment and public accommodations on the basis of sexual orientation, gender identity, and other categories might have been considered regulation of a statewide or mixed local–statewide matter regardless. Therefore, the state legislature would still have been free to preempt the ordinance, at least as applied to private actors.

Nonetheless, more states provide some type of immunity to local structural or personnel decisions. Many of the prominent regulatory measures cities have adopted also apply internally, thus making them

190. *E.g.*, *Town of Telluride v. Lot Thirty-Four Venture, LLC*, 3 P.3d 30, 37–39 (holding that rent control is a matter of mixed state and local concern).

191. *See supra* note 105 and accompanying text.

192. *See* Erin Adele Scharff, *Powerful Cities?: Limits on Municipal Taxing Authority and What to Do About Them*, 91 N.Y.U. L. REV. 293, 312 (2016) (noting that “[l]imits on city revenue authority hamper policymaking”).

structural or personnel ordinances as well. The preempted Charlotte ordinance, for instance, regulates the city's operations, such as requiring contractors not to discriminate on the basis of gender identity, sexual orientation, and so forth.¹⁹³ Many cities have used this more limited scope of regulation in part to evade other potential doctrinal proscriptions on local power, such as the "private law exception."¹⁹⁴ Hence, cities took the first steps toward recognizing the sanctity of gay unions by applying same-sex benefits to their own employees and requiring that city contractors do the same.¹⁹⁵ Constitutional home rule for structural and personnel decisions, therefore, may not apply as sweepingly, but can still have an effect.

Moreover, certain "structural" matters are substantive in their own way. There is a good chance that local campaign finance regulation, for instance, would be considered structural and immune—or more immune—to preemption in several states.¹⁹⁶ This issue is of much concern to advocates throughout the country, and it is one that cities may be better positioned to address where the constitution has been read to provide some protection against state override.¹⁹⁷

Another structural or personnel issue in which immunity to state override might be justified to remediate the urban disadvantage in the state legislature is that of municipal-employee-residency requirements. In the last decade, at least two states—Ohio and Wisconsin—have rescinded the authority of cities to require employees to live within city boundaries.¹⁹⁸

193. Charlotte, N.C., Ordinance 7056, (Feb. 22, 2016), <http://charmec.org/city/charlotte/nondiscrimination/Pages/default.aspx> [<https://perma.cc/2538-DAAY>].

194. See Darin M. Dalmat, *Bringing Economic Justice Closer to Home: The Legal Viability of Local Minimum Wage Laws Under Home Rule*, 39 COLUM. J.L. & SOC. PROBS. 93, 118–26 (2005).

195. See *Equal Benefits Ordinances*, HUM. RTS. CAMPAIGN, <http://www.hrc.org/resources/equal-benefits-ordinances> [<https://perma.cc/7DZX-SG8F>] (last visited Feb. 14, 2017).

196. See, e.g., Paul A. Diller, *The Brief History of "Voter-Owned Elections" in Portland, Oregon: If Public Financing Can't Make it There, Can it Make it Anywhere?*, 49 WILLAMETTE L. REV. 637, 644 (noting that under Oregon's constitution, Portland's public financing program for city candidates likely enjoyed strong immunity from state override).

197. In North Carolina, by contrast, where there is no such constitutional protection, the legislature rescinded its authorization for public financing in Chapel Hill in 2013. *Id.* at 652 n.90.

198. OHIO REV. CODE ANN. § 9.481 (West 2017) (enacted 2006) (prohibiting any political subdivision from requiring its employees to reside in any specific area of the state); WIS. STAT. ANN. § 66.0502 (West 2017) (enacted 2013)

These laws were passed despite stiff opposition by cities. Although some deride the ordinances as protectionist, in the wake of police tensions in Ferguson, Missouri, and elsewhere, these ordinances could serve as models for making a police force more representative of the community.¹⁹⁹ Nonetheless, the suburban- and rural-dominated legislatures in these states preempted the local policies, and the cities lost their court cases asserting immunity, although not without strong dissents.²⁰⁰

There are likely substantive regulatory fields in which constitutional home rule may be undesirable, even as applied to densely populated cities that suffer from underrepresentation in the legislature. For instance, many cities, including large and densely populated cities, engage in zoning that might be called exclusionary.²⁰¹ If a state supreme court considers zoning to be a “local issue” that the state legislature may not breach, such an approach could immunize exclusionary zoning to statewide control. Although few state legislatures have affirmatively attempted to tackle exclusionary zoning, a constitutional home-rule system that prohibits such an attempt would be problematic from the perspective of promoting affordable housing. In Oregon, for instance, immunity for local zoning would prevent the state’s legendary statewide land-use system from requiring localities to offer a mix of housing for different income and demographic groups.²⁰² On the other hand, when a city seeks to take on

(prohibiting cities, towns, villages, counties, and school districts from requiring their employees to live within their jurisdictional limits).

199. Nate Silver, *Most Police Don’t Live in the Cities They Serve*, FIVETHIRTYEIGHT (Aug. 20, 2014, 4:14 PM), <https://fivethirtyeight.com/datalab/most-police-dont-live-in-the-cities-they-serve/> [https://perma.cc/LR4G-YVNU].

200. *Black v. City of Milwaukee*, 882 N.W.2d 333, 364 (Wis. 2016) (Bradley, J., dissenting); *Lima v. State*, 909 N.E.2d 616, 626 (Ohio 2009) (Lanzinger, J., dissenting).

201. Edward Glaeser has done the most thorough work on this topic, offering evidence that New York, San Francisco, Boston, and other major cities and their surrounding metropolitan areas severely limit housing supply through zoning regulation. See, e.g., Edward L. Glaeser et al., *Why Is Manhattan So Expensive? Regulation and the Rise in Housing Prices*, 48 J.L. & ECON. 331, 366–67 (2005) (concluding that “one-half or more” of condominium value in Manhattan is attributable to “regulatory constraint[s] preventing the construction of new housing”).

202. See OR. DEP’T OF LAND CONSERVATION AND DEV., OREGON’S STATEWIDE PLANNING GOALS & GUIDELINES (2010) (discussing Or. Admin. R. 660-015-000(10)) (requiring local jurisdictions to plan for housing “that meets the housing needs of households of all income levels”); see generally Edward J. Sullivan, *The Quiet Revolution Goes West: The Oregon Planning Program 1961-*

more than its fair share of a regional problem like affordable housing, such as by adopting an inclusionary zoning ordinance, constitutional home rule would seem more appropriate to prevent or limit state preemption.²⁰³

2. *Threshold for Immunity*

Assuming, however, that constitutional home rule is at least a somewhat useful method of democratic remediation, the question of which cities and counties should benefit arises. Under the normative framework of one-person, one-vote, and partisan fairness, the most disadvantaged cities in most states are the most populous and the most densely populated. This situation is not the case in every state, but it is in the many states in which the densely populated, urban areas have political preferences starkly different from exurban and rural areas in the rest of the state.²⁰⁴ In states like New Jersey, Maryland, or Massachusetts, where the entire population is fairly urbanized, there is a weaker claim to any increased urban power, just as the claim is weaker in states where rural and exurban voters share similar political views, at least on many issues, with those living in densely populated cities, such as Colorado, Vermont, and, to a lesser extent, Oregon.²⁰⁵

The Voting Rights Act (“VRA”) likely increases the number of states in which a stark urban disadvantage exists.²⁰⁶ In certain Southern states

2011, 45 J. MARSHALL L. REV. 357 (2012) (reviewing the history of Oregon’s unique statewide land-use planning system).

203. Cf. *Town of Telluride v. Lot Thirty-Four Venture, LLC*, 3 P.3d 30, 44 (Colo. 2000) (Mullarkey, C.J., dissenting) (arguing that town’s inclusionary zoning ordinance is “local” matter that does not conflict with state statute banning rent control).

204. See *Urban Disadvantage*, supra note 1, at 45 (listing Indiana, Michigan, North Carolina, Ohio, Pennsylvania, Virginia, and Wisconsin, in addition to Florida); Chen & Rodden, supra note 23, at 240, 241 (discussing Florida, Michigan, Ohio, Missouri, Indiana, and Pennsylvania).

205. Chen & Rodden, supra note 23, at 264 (“[I]n a state like New Jersey, Democrats are evenly dispersed throughout an urban corridor that lacks a sprawling and heterogeneous rural periphery, thus avoiding the phenomenon [of unintentional gerrymandering]”). In a state like Oregon, the urban disadvantage may be reduced with respect to certain policies, such as higher minimum wage or paid sick leave, but not with respect to others where there is a defined rural–urban split that transcends partisanship, such as gun control.

206. See 52 U.S.C. § 10301 (2012) (providing that a violation of the right to vote may be proven by “show[ing] that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a [protected] class of citizens . . . in that its members

with large numbers of black voters in rural areas, like South Carolina, Mississippi, and Alabama, the VRA packs African-American voters into majority-minority districts. Without the VRA, these voters—who usually share the political preferences, at least on many issues, held by urban voters—might be spread out enough so as to counter the urban disadvantage common in the more urbanized northern states.²⁰⁷

It is not just residents of large cities who are disadvantaged in many states, but others who reside in large metropolitan areas, even in smaller suburbs or unincorporated pockets. Smaller cities with intense left-leaning preferences—for example, Ann Arbor and Boulder—feel the effect of the urban disadvantage in many state systems insofar as the legislature leans away from their voters' preferences as well.²⁰⁸ Other small cities, by contrast, may hew closer to the median legislator's preference than do the college towns—for example, Grand Rapids and Colorado Springs. To be seen as legitimate, any system of constitutional home rule would undoubtedly need a neutral threshold rather than one based on political demographics—for example, party registration—even if the latter might more accurately combat the problem identified herein.

Many states already use population thresholds for home rule protections, so the notion of a population “cutoff” has a firm pedigree. Illinois, for instance, requires that cities have a population of at least 25,000 to qualify as a “home-rule unit.”²⁰⁹ Although these thresholds are generally lower than what might be adopted for the specific purpose of remedying an urban disadvantage in the state legislature, they provide a solid precedent for distinguishing among cities by population in terms of

have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice”); *Thornburg v. Gingles*, 478 U.S. 30, 51 (1986) (interpreting this provision in the context of multimember districts).

207. See Keisuke Nakao, *Racial Redistricting for Minority Representation without Partisan Bias: A Theoretical Approach*, 23 *ECON. & POL.* 132 (2011); Nicholas O. Stephanopoulos, *Elections and Alignment*, 114 *COLUM. L. REV.* 283, 351–52 (2014) (“[T]he VRA may result in misalignment by inefficiently ‘packing’ Democrats into majority-minority districts.”); *but see id.* at 352 (noting that it is not inevitable that VRA results in inefficient packing) (citing Adam B. Cox & Richard T. Holden, *Reconsidering Racial and Partisan Gerrymandering*, 78 *U. CHI. L. REV.* 553, 573 (2011)).

208. Chen & Rodden, *supra* note 23, at 244 (noting support for Democratic candidates in big cities in Florida as well as in “a few other smaller railroad and college towns”).

209. ILL. CONST. art VII, § 6(a). See also COLO. CONST. art. XX, § 6 (minimum population of 2,000 to adopt municipal home rule charter); WASH. CONST. art. XI, § 12 (requiring population of 10,000 for city to frame charter).

their powers.²¹⁰ States might amend their constitutions to raise the threshold for immunity power. Only those cities with populations greater than 100,000 or 200,000, for instance, might qualify.

Even if states retain relatively low population thresholds for home rule to apply, many states also require that population-eligible cities affirmatively opt in to home rule.²¹¹ Not all eligible cities do so because opting in to home rule often comes with rights and responsibility. For instance, in some states, opting into home rule offers a city or county greater structural, fiscal, or regulatory authority but also requires that the city reorganize itself in a way different from the default statutory regime.²¹² Opting into home rule can also permit a city greater fiscal authority, such as the ability to raise taxes beyond a default level set by the state.²¹³ It is likely that only those cities whose populations prefer a more activist government would avail themselves of this opportunity, thus “tailoring” home rule in a way that may help remedy the urban disadvantage in some states.²¹⁴

210. George D. Vaubel, *Toward Principles of State Restraint Upon the Exercise of Municipal Power in Home Rule*, 20 STETSON L. REV. 5, 40 n.196 (1990) (“A minimum population condition to the exercise of home rule is not uncommon, in both earlier [home rule] provisions . . . and in more current provisions.”) (citing various state constitutions).

211. *E.g.*, ARIZ. CONST. art. XIII, § 2 (“Any city containing, now or hereafter, a population of more than three thousand five hundred *may* frame a charter for its own government . . .”) (emphasis added); WASH. CONST. art. XI, § 10 (“Any city containing a population of ten thousand inhabitants, or more, shall be permitted to frame a charter for its own government . . .”).

212. *See* WASH. CONST. art. XI, § 12 (requiring population of 10,000 for city to frame charter); OR. CONST. art. VI, § 10 (prescribing the method for counties to adopt home rule, which requires adoption of a county charter delineating the county’s governance structure).

213. *See Home Rule and You*, EDUC. BROCHURE (Citizen Advocacy Ctr., Elmhurst, Ill.), Summer 2004, <http://www.citizenadvocacycenter.org/uploads/8/8/4/0/8840743/homerulebrochure.pdf> [<https://perma.cc/FFX2-NWML>] (“Home rule [in Illinois] . . . is most commonly used to generate revenue through its broad taxation powers.”).

214. In Illinois, for instance, cities may opt out of home rule. Residents of Rockford, Illinois, for instance, voted to abandon home rule in 1983 out of frustration with higher tax rates that resulted from fiscal home rule, but some now argue that this choice was a mistake because of the regulatory power lost. *Our View: Home Rule a Tool Worth Bringing Back to Rockford*, ROCKFORD REG. STAR (June 21, 2013, 8:02 PM), <http://www.rrstar.com/x1629902134/Our-View-Home-rule-a-tool-worth-bringing-back-in-Rockford> [<https://perma.cc/NR9M-PS8T>]; James M. Banovetz, *Illinois Home Rule: A Case Study in Fiscal Responsibility*, 32 J. REG. ANALYSIS & POL’Y 79, 95 (2002).

Even if population thresholds for home rule are lower than ideal for remedying an urban disadvantage and are offered by default when a city reaches the threshold, it is likely that the cities that most actively use their home-rule authority will be the larger ones. These cities are more likely to have the full-time, professional city councils and sophisticated administrative agencies that play a crucial role in proposing and implementing major policy reform.²¹⁵ Large cities are also more immune to capital or population flight because of the adoption of a particular regulation.²¹⁶ Hence, constitutional home rule might protect Charlotte and its adoption of a gay and transgender rights ordinance from override even if it also protects Wilmington, Winston-Salem, and Kannapolis, none of which have adopted such an ordinance.

Moving beyond cities, providing constitutional home rule to counties may be crucial to remedying the urban disadvantage in those states where counties, rather than or in addition to cities, play an active role in policymaking. With a sufficiently high threshold, county home rule would include those densely populated areas near major cities that are similarly underrepresented in the state legislature but may not be incorporated into their own municipality. In some large metropolitan areas, the merged city–county government offers an especially helpful structure for local empowerment.²¹⁷

In theory, a state’s home-rule system might instead draw distinctions between those cities or counties that receive constitutional protection for their enactments and those that do not on the basis of population density. Density likely would be a better metric for remediating the urban disadvantage than the cruder total population figure. There is arguably some precedent for this approach in that density is often a factor in the legal test for whether an area may incorporate under state law.²¹⁸ Such thresholds are fairly low, however. In some states, an incorporated city—no matter how small—automatically ascends to all the rights of every other city in the state.²¹⁹ In other states, incorporation creates a municipality of

215. See *Why Innovate?*, *supra* note 8, at 1250 & n.80.

216. See David Schleicher, *The City as a Law and Economic Subject*, 2010 U. ILL. L. REV. 1507 (2010) (reviewing agglomeration economies).

217. For a recent proposal in this regard, see E. Terrence Jones, *Toward Regionalism: The St. Louis Approach*, 34 ST. LOUIS U. PUB. L. REV. 103 (2014). See also Laurie Reynolds, *Local Governments and Regional Governance*, 39 URB. LAW. 483, 499 (2007) (discussing city–county mergers in Nashville, Indianapolis, and Miami as “rare success[es]”).

218. *E.g.*, WIS. STAT. ANN. § 66.0205 (West 2017) (establishing population density minimums for incorporating in different municipal forms).

219. Oregon, for instance, draws no legal distinctions among incorporated cities in terms of their authority.

some form, but becoming a “home-rule” city requires another step or a minimum population.²²⁰ No state currently uses density as the next step for home-rule eligibility, but there is precedent for the concept.

Without an appropriate threshold, constitutional home rule might compound the urban disadvantage in some ways. In recent years, slow-moving renaissance has been in favor of local immunity to statewide enactment. This movement has attracted interest across the political spectrum, usually in smaller communities. The issues that have spurred interest in this notion have been environmental protection and food regulation, as well as gun control. For instance, in Oregon, some small counties have sought to enshrine immunity for local enactments into the state constitution to ensure that the state does not site a liquefied-natural-gas terminal in their backyard, to protect the prerogative of a county to ban genetically modified organisms, and to prevent stricter statewide background checks for firearms purchases from taking effect.²²¹ In Maine, proponents of raw milk in rural areas have sought to nullify state laws that require pasteurization.²²²

In making their case for local immunity, these proponents often ground their arguments in the Tocqueville and Cooley strains of American legal thought.²²³ These proponents care not about the size of the local

220. See *supra* note 209 and accompanying text.

221. See *Local Law Center*, COMMUNITY ENVTL. LEGAL DEFENSE FUND, <http://celdf.org/law-library/local-law-center/> [<https://perma.cc/4NJ4-6P3T>] (last visited Feb. 15, 2017) (citing proposed Coos County ordinance to prevent construction of Jordan Cove Export Terminal “and the accompanying LNG pipeline”); Mateusz Perkowski, *Local GMO Control Initiative Faces Setback*, CAPITAL PRESS (July 15, 2015, 12:48 PM), <http://www.capitalpress.com/Oregon/20150715/local-gmo-control-initiative-faces-setback> [<https://perma.cc/D98R-J2XQ>] (discussing “a proposed ballot initiative” in Oregon “to overturn statewide pre-emption [sic] laws” regarding GMO’s); Coos County, Or., Second Amendment Preservation Ordinance (Nov. 3, 2015), <http://www.co.coos.or.us/Portals/0/County%20Clerk/Elections/Election%202015/November%20Election/secondamendmentpreservationordinance.pdf?ver=2015-10-20-111618-217> [<https://perma.cc/3JBP-DZEM>].

222. Julia Bayly, *Maine Towns Declare Food Sovereignty, Claim “Home Rule” Trumps State, Federal Regulations*, BANGOR DAILY NEWS: HOMESTEAD (Mar. 7, 2016, 6:36 AM), <http://bangordailynews.com/2016/03/07/homestead/maine-towns-declare-food-sovereignty-claim-home-rule-trumps-state-federal-regulations/> [<https://perma.cc/EA33-FQCW>] (discussing the efforts of “16 Maine towns in seven counties [that] have declared food sovereignty with local ordinances giving residents the right to produce, sell, purchase and consume local foods of their own choosing” and its connection to the raw-milk movement).

223. See *supra* note 133.

government unit. Rather, they stress the notion that the American legal system should or does provide a “natural” or “fundamental” right to local government.²²⁴ Attorney and activist Thomas Linzey, for instance, has urged communities both small and large to use their “sovereign” local government powers to resist environmental impositions from the state, like mandates to permit hydraulic fracturing or liquefied natural gas facilities.²²⁵ On gun “rights,” several smaller, rural jurisdictions have enacted ordinances or charter amendments that seek to nullify state and federal restrictions on firearms transfer.²²⁶ In doing so, some have expressly cited Cooley’s famous opinion in *People ex rel. Le Roy v. Hurlbut*, declaring that local government is a “matter of absolute right” that “the state cannot . . . take away.”²²⁷ These recent efforts to “reclaim” local sovereignty are not entirely new, of course. In the 1990s, for instance, several Western rural counties sought unsuccessfully to resist federal regulation of public lands by invoking this rhetoric, although much of their argument focused on local governments or states combating the federal government rather than the state.²²⁸

Despite its distinguished intellectual and historical pedigree, the right to local government as a fundamental or natural right has always been a minority position in American jurisprudence. Should this “right” bestow immunity on all local enactments regardless of city size, as some activists argue, the beneficiaries of this immunity would often be the rural and exurban communities whose views already receive more than adequate representation in state legislatures. This result is especially true where the immunized local action would impose potential externalities on surrounding communities. For instance, when a community seeks to exempt itself from milk-pasteurization laws, it threatens the health of the wider populace who might purchase such milk and also threatens to impose the burden of medical costs on society at large. Similarly, when a rural county seeks to exempt itself from state gun control requirements, it allows firearms to be

224. Amasa Eaton, *The Right to Local Self-Government*, 13 HARV. L. REV. 441 (1900).

225. Chelsea Davis, *Coos County Community Rights Group Driven to “Legalize Sustainability,”* THE WORLD (Oct. 10, 2015), http://theworldlink.com/lng/coos-county-community-rights-group-driven-to-legalize-sustainability/article_fad88e82-01c0-5175-857b-4d675fdcf1c2.html [https://perma.cc/GY2C-DWMZ]; see also Perkowski, *supra* note 221.

226. *E.g.*, Coos County, Or., Second Amendment Preservation Ordinance (Nov. 3, 2015).

227. *Id.* (citing *People v. Hurlbut*, 24 Mich. 44, 108 (1871)).

228. Alexander H. Southwell, Comment, *The County Supremacy Movement: The Federalism Implications of a 1990s States’ Rights Battle*, 32 GONZ. L. REV. 417 (1996).

purchased there that can then be used to commit violence in other parts of the state and nation.

The concern regarding externalities applies to big-city enactments as well. Some might think that a higher minimum wage in one of the state's largest cities will hurt the economy of the state overall. Much political debate at all levels of government is about which policies work and which tradeoffs are acceptable. The premise of this Article is that urban areas are at an unfair disadvantage in making their cases at the federal and state legislative levels. Hence, local government can counter this disadvantage for large cities and can more effectively do so when enactments have a stronger immunity to preemption. Local enactments by smaller jurisdictions need no such immunity for this purpose. Neither government likely deserves immunity for clear, demonstrable externalities.²²⁹

There may be other normative reasons for privileging any local enactment over those of the state government. Well-funded interest groups may exercise disproportionately more power at the state and federal levels than at local levels.²³⁰ Democratic accountability of local governments may be stronger because of their proximity and lower official–constituent ratios.²³¹ These groups are likely part of the reason that many communities—large and small—feel disillusioned with higher levels of government. Opponents of genetically modified organisms, for instance, have achieved some notable success in low-population areas.²³² Such

229. See *supra* notes 121–26 and accompanying text.

230. See *Why Innovate?*, *supra* note 8, at 1258–61.

231. *Id.* at 1256–68.

232. See KAUAI COUNTY, HAW., KAUAI COUNTY CODE §§ 22–23.7 (2014) (strictly regulating the use of GMOs), *invalidated by* Syngenta Seeds, Inc. v. County of Kauai, Civ. No. 14-00014, 2014 WL 4216022 (D. Haw. Aug. 25, 2014) (holding Kauai's ordinance preempted). In Oregon, voters in two smaller, rural counties—Jackson and Josephine—passed ordinances banning most GMOs in 2014. See Josephine County, Or. Genetically Engineered Plant Ordinance (May 20, 2014), <http://oregoniansforsafefarmsandfamilies.org/measure17-58.html> [<https://perma.cc/APM7-MABQ>]; JACKSON COUNTY, OR., ORDINANCES ch. 635 (2012). In 2013, the Oregon state legislature prohibited local governments from enacting GMO bans, but exempted any then-pending measure, which included the initiative that ultimately passed in Jackson County. See Certainty for Family Farmers of Oregon Act, 2013 Or. Laws Spec. Sess. 2507 (effective Oct. 8, 2013). A trial court has since held that Josephine County's ordinance is preempted by state law, see Letter Opinion, *White v. Josephine County*, No. 15CV23592 (Or. Cir. Ct. Josephine County May 16, 2016) (on file with author), while a federal lawsuit challenging Jackson County's ordinance under the state's "right to farm" statute was settled. See *Lawsuit Over GMO Ban in Jackson County Settled*, THE OREGONIAN: OREGONLIVE (Dec. 7,

success reflects not just the ideological leanings of these areas, but also the greater comparative ability of grassroots organizations to succeed at the local level in achieving legislation they prefer. These reasons may be good to prefer any local action over state or federal action, but they are not concerns related to one-person, one-vote and partisan and ideological alignment, which are the driving concerns of this series.

B. Potential Limitations on Constitutional Home Rule

To assuage concerns regarding where and how to set the threshold for immunity to preemption, several factors come into play. First, if a state has direct democracy to enact statutes, such a system complies fully with one-person, one-vote. In addition, the lack of any district-based voting means that urban areas are not disadvantaged in any way. Hence, a system of home rule whereby constitutional limits on the state legislature's power to preempt do not necessarily apply to the plebiscite might be preferred, because the plebiscite does not create or reinforce the kind of urban disadvantage with which this project is concerned.²³³ For similar reasons, a system whereby state preemptive legislation can take effect only when ratified by a majority statewide might be preferred. There are, of course, legions of problems with direct democracy, as judges and commentators have noted, but imposing a specific disadvantage on urban views is not one of them.²³⁴

Second, the constitutional home rule remedy need not be wholly undertaken to embrace some of its urban remediation benefits. If an absolute shield against statewide preemption is too extreme or may sweep into its protection more jurisdictions than preferred, a softer version of immunity like that used by the Ohio Court of Appeals in *Cleveland v. State* might be preferable.²³⁵ Using such an approach, the courts demand a general statewide interest that the state legislature seeks to enforce by preempting the local ordinance. There is not a hard-and-fast bar to preemption, but the state is at least forced to demonstrate that its choice to preempt reflects more than simply the influence of a well-connected

2015, 12:06 PM), http://www.oregonlive.com/politics/index.ssf/2015/12/law_suit_over_gmo_ban_in_jackso.html [<https://perma.cc/B8CS-MQBW>].

233. Cf. Note, *Power of the Legislature to Amend or Repeal Direct Legislation*, 27 WASH. U.L.Q. 439 (1942) (asking whether state legislature should be able to overrule laws passed by initiative).

234. See, e.g., Michael S. Kang, *Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and "Disclosure Plus,"* 50 UCLA L. REV. 1141, 1144–49 (2003) (reviewing common criticisms of direct democracy).

235. 989 N.E.2d 1072, 1085 (Ohio Ct. App. 2013).

interest group.²³⁶ The state is forced to articulate how the preemptive choice furthers a general interest of the public, and it would be required to apply that preemption to all local governments of similar form and stature equally. In this sense, preemption analysis overlaps with the state courts' enforcement of state constitutional bans on special legislation.²³⁷

C. Other Wrinkles: Chronology and Judicial Enforcement

Another wrinkle in the notion of using constitutional home rule or similar provisions to remedy the urban disadvantage in state lawmaking is chronological. First, insofar as the urban disadvantage is a function of state legislative district drawing, these districts will vary over time, and the disadvantage can be compounded, reduced, or—in some states—even eliminated by partisan gerrymandering.²³⁸ Because states redistrict every ten years, however, it is possible that an urban disadvantage at time-0 may no longer be in effect at time-1; legislation from time-0 that constrains local power, however, may remain on the books. Moreover, several states have delegated district drawing to nonpartisan commissions that purport to have eliminated such gerrymandering; nonetheless, legislation may remain from before these commissions came into being.²³⁹ The power of

236. *Id.* (quoting a restaurant lobbying group's email in support of the preemption calling it "a high priority for Wendy's, McDonald's and Yum! [the owner of KFC, Taco Bell, and Pizza Hut]" and concluding that "the amendments were drafted on behalf of a special interest group with the specific purpose of snuffing out the Ordinance").

237. *See* Long, *supra* note 170.

238. In some states, a politically motivated, pro-Democratic gerrymander might succeed in evening the playing field for urban voters. In other states, even such a gerrymander will not level the field given the current entrenched Republican advantage under single-member, winner-take-all districts. *See* Chen & Rodden, *supra* note 23, at 263 ("[I]n a state like Georgia, where the [districting] simulations reveal an especially bad geography for Democrats, even an aggressive pro-Democratic gerrymander was unable to completely erase the built-in pro-Republican bias.").

239. *See* *Ariz. State Leg. v. Ariz. Ind. Redistricting Comm'n*, 135 S.Ct. 2652, 2662 nn.9–6 (2015) (citing commissions in Hawaii, Idaho, Montana, New Jersey, Washington, California, Iowa, Ohio, Maine, Connecticut, and Indiana); *Leading Cases, Arizona State Legislature v. Arizona Independent Redistricting Commission*, 129 HARV. L. REV. 191, 196–97 (2015) ("With independent commissions now bearing the Court's seal of constitutional approval, redistricting-reform activists may seek their implementation in additional states—especially those in which the people are delegated legislative authority by their state constitutions."); Peter Miller & Bernard Grofman, *Redistricting Commissions in the Western United States*, 3 U. C.

inertia in the legislative process is strong.²⁴⁰ Although the more urban-friendly legislature at time-1 might never enact the preemptive legislation that was enacted at time-0, it may be much more difficult for it to gather the votes to reverse the earlier legislation.

A possible example of this dynamic recently occurred in Oregon. In 1999, the Oregon Legislature banned inclusionary zoning. The Republican-led state legislature was arguably tilted against urban interests in a way that recent legislatures no longer are.²⁴¹ Nonetheless, the 1999 Oregon Legislature enacted a ban on inclusionary zoning that persisted for many years despite numerous local governments' strenuous objections to it.²⁴² Finally, in 2016, the legislature modestly reversed the ban, but not without giving many concessions to landlords and developers along the way.²⁴³ Prior laws are problematic, particularly when strongly supported by powerful interest groups like the homebuilders' lobby, and much vote-wrangling took place for the legislature to eke out a reversal of the ban in 2016. An urban disadvantage may disappear or significantly reduce because of systematic changes in state government or changes in political demography, but the effects of the prior disadvantage may persist. Therefore, one might want constitutional home rule to protect retroactively against laws passed when the disadvantage applied in full force.

IRVINE L. REV. 637, 642 (2013) (noting that states with direct democracy have been at the forefront of districting reform); *see also* League of Women Voters of Fla. v. Detzner, 172 So. 3d 363 (Fla. 2015) (invalidating districting plan on the basis of the Fair Districts Amendment to the Florida constitution, FLA. CONST. art. III, § 20(a), which was enacted by the voters in 2010 and prohibits redistricting “with the intent to favor or disfavor a political party or an incumbent”).

240. *See* WILLIAM ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION 251 (1994).

241. *See* 1999-2000 OREGON BLUEBOOK (1999).

242. 1999 Or. Laws 2040, § 2 (codified at OR. REV. STAT. ANN. § 197.309 (West 2017)); *see also* Dennis C. Theriault, *Housing Crisis: Inclusionary Zoning Bill Clears Senate, Bucking Years of Failure*, THE OREGONIAN: OREGONLIVE (Feb. 26, 2016, 12:13 PM), http://www.oregonlive.com/politics/index.ssf/2016/02/housing_crisis_inclusionary_zo.html [<https://perma.cc/U2QF-28EU>].

243. *See* S.B. 1533, 78th Leg. Assemb., Reg. Sess. (Or. 2016). These concessions included strict limitations on cities' authority to require affordable housing as a condition of granting development permits, *see id.*, as well as two other bills that provided favors to the homebuilding lobby. *See* H.B. 4079, 78th Leg. Assemb., Reg. Sess. (Or. 2016) (allowing “pilot” expansion of Urban Growth Boundary for affordable housing); S.B. 1573, 78th Leg. Assemb., Reg. Sess. (Or. 2016) (allowing city councils to approve annexation without voter approval); *see also* Theriault, *supra* note 242 (noting that the inclusionary zoning bill was “a key piece in a four-bill grand bargain on housing matters”).

Even if the state constitution can be fairly read to require some sort of local immunity, the question remains as to what makes state judges any better than state legislatures at enforcing urban preferences. In other words, when judges are viewed as political rather than purely legal actors, whether they are any better positioned to protect urban populations than the state legislature is questionable. In most states, the answer would appear to be that judges are better positioned because of the fact that judges are elected statewide.²⁴⁴ As a result, insofar as their views reflect the voters' views at all, the median state high court judge should be much closer to the median voter than is the median legislator in most state legislatures. Judicial elections are notoriously low-information affairs, however. It is impossible to gauge whether decisions on home-rule matters influence judicial election results at all. Nonetheless, nothing in the design of most states' judicial elections could be expected to institutionally tilt judges' views away from the preferences of urban dwellers.

IV. CAN LOCAL GOVERNMENT BEAR THE BURDEN OF THE PRIVILEGE OF IMMUNITY?

In considering the idea of elevating certain local enactments beyond state legislative preemption, examining the functioning of local democracy itself to ask whether it merits this privilege is only reasonable. Numerous critiques have been levied at the quality of local democracy, including that it is often subject to corruption, voter apathy and ignorance, and that it is particularly susceptible to capture by certain interest groups.²⁴⁵ An additional critique—that local governments enact few policies of statewide or national importance—can be dispensed with easily.²⁴⁶ If local governments were not enacting important policies of

244. Of the 37 states that elect their highest court's judges, only eight use geographical districts. See *Intrastate Preemption*, *supra* note 56, at 1162 & n.236 (noting district judicial elections in Illinois, Kentucky, Louisiana, Maryland, Mississippi, Nebraska, Oklahoma, and South Dakota). None of these states is among those in which the urban disadvantage is most prominent. Moreover, among these eight states, in four the initial selection of justices is made by the governor, a statewide elected official. *Id.* at 1162 n.238 (listing Maryland, Nebraska, Oklahoma, and South Dakota as such users of retention elections).

245. See, e.g., CLAYTON P. GILLETTE, *LOCAL REDISTRIBUTION & LOCAL DEMOCRACY* 15–30 (2011).

246. E.g., KAREN M. KAUFMANN, *THE URBAN VOTER: GROUP CONFLICT & MAYORAL VOTING BEHAVIOR IN AMERICAN CITIES* 18–19 (2004) (“Local governments . . . are primarily service providers [whose] decisions are less policy driven . . .”).

concern to higher-level authorities, clashes between states and cities should be rare. Because city and state policy preferences are frequently in conflict, however, it appears that many cities, particularly the largest ones, are enacting policies beyond the provision of “bread-and-butter” services like parks and trash pickup.

Even in big cities where councils and mayors may have ambitious agendas, however, voter awareness of and turnout for local elections often lag behind that for higher-level offices.²⁴⁷ Certainly, as compared to federal elections, local-only elections, especially for city council, draw a weak turnout.²⁴⁸ As compared to state legislative elections, however, local elections are not necessarily far behind. Evidence shows voters consider both local and state legislative elections to be “second-order.”²⁴⁹ That is, voters know little about the candidates and usually make their decision based largely on external cues like national political party affiliation of the candidate.²⁵⁰ This phenomenon has two effects unique to the local level. First, in the many cities that use nonpartisan elections, voters have even less information available on which to base their votes; hence, turnout for such elections is often even lower than for partisan local elections.²⁵¹ Second, in partisan local elections, the overwhelming urban preference for the Democratic Party results in noncompetitive council elections.²⁵² Winning the Democratic nomination is often akin to winning the council seat. Some observers link the overwhelming dominance of the Democratic Party with the widely perceived corruption in big cities,²⁵³ although there is scant empirical support for the proposition that large cities are more

247. David Schleicher, *Why Is There No Partisan Competition in City Council Elections?*, 23 J.L. & POL. 419, 444–45 (2007) [hereinafter *Why No Competition?*].

248. *Low Voter Turnout is a Problem in Cities Across the Country*, WHO VOTES FOR MAYOR?, <http://www.whovotesformayor.org> [<https://perma.cc/C9PZ-KMDC>] (noting that in ten of America’s 30 largest cities, fewer than 15% of voters turn out in local elections).

249. See David Schleicher, *Federalism and State Democracy*, 95 TEX. L. REV. (forthcoming 2017) (manuscript at 11–21), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2739791 [<https://perma.cc/8JFV-WFFD>].

250. *Why No Competition?*, *supra* note 247, at 420 (analyzing city council elections in New York City and Philadelphia).

251. J. ERIC OLIVER ET AL., *LOCAL ELECTIONS AND THE POLITICS OF SMALL-SCALE DEMOCRACY* 55, 64–67 (2012).

252. *Why No Competition?*, *supra* note 247, at 420.

253. See David Schleicher, *I Would But I Need the Eggs: Why Neither Exit Nor Voice Substantially Limits Big City Corruption*, 42 LOY. U. CHI. L.J. 277, 289 (2011) (postulating that “the lack of competition in local elections” leads to corruption).

corrupt than small ones.²⁵⁴ Even if corruption exists regarding the award of government contracts or other forms of largesse, it is hard to see how such corruption necessarily impugns policy measures like higher minimum wages and ordinances that seek to promote the public health.

This author's earlier research has demonstrated that voters may, in fact, be less aware of the local candidates for whom they are voting, but that this lack of awareness does not necessarily result in less legitimate local policy outputs, depending on how legitimacy is defined.²⁵⁵ Rather, the lower level of participation is offset by the lower costs of both campaigning at the local level and of lobbying local officials. These lower costs make local governments more accessible as policy laboratories to interest groups that are less well-funded and therefore are often weaker at the higher levels of government where legislative races and lobbying are more expensive.²⁵⁶ Such interest groups often include more "public-minded" groups like the Center for Science in the Public Interest, which may have a better chance at pushing its agenda through at lower levels of government, where money has less influence. Thus, it is not clear that lower-profile city elections result in less legitimate or desirable policy outputs.

Putting aside the question of voter participation and awareness, one can assess city and county elections by the same metric by which this Article has assessed state and federal elections.²⁵⁷ As an initial matter, all city and county elections will abide by one-person, one-vote, thereby eliminating the major problem that affects national lawmaking. With respect to partisan and ideological fairness, local elections are also on better footing. In addition to electing their chief executives at large,²⁵⁸ like almost all governors, but unlike the President, many city councils use at-

254. Assessing the period of 1880–1930, Rebecca Menes found that corruption correlated with city size, but Menes looked at only the 15 largest cities. See Rebecca Menes, *Graft and Growth in American Cities, 1880 to 1930*, in *CORRUPTION AND REFORM: LESSONS FROM AMERICA'S ECONOMIC HISTORY* (Edward L. Glaeser & Claudia Goldin eds. 2007).

255. *Why Innovate?*, *supra* note 8, at 1260–62.

256. *Id.*

257. See *supra* Part I.

258. In some smaller cities, members of the council elect the mayor from the council itself. See *Elected Officials*, NAT'L LEAGUE OF CITIES, <http://www.nlc.org/build-skills-and-networks/resources/cities-101/city-officials/elected-officials> [<https://perma.cc/B6CC-J883>] (noting that "voters in the majority of cities (76 percent) elect the mayor . . . directly" and that "all cities with a population of 250,000 or above vote directly for the mayor").

large elections to select individual council members.²⁵⁹ Assuming, therefore, that there is some geographical difference in voter ideology or partisan preference within a city akin to that existing at the state level—that is, more liberal voters packed into the more densely populated neighborhoods of a city—this difference will not affect the partisan or ideological composition of the body if elected at large.

In those cities with district elections and with geographic sorting of voters, a miniature version of the dynamic that affects state and U.S. House races might be expected. Liberal voters packed into Manhattan, for instance, might “waste” their votes on candidates who win overwhelmingly while more conservative candidates win by smaller margins in the outer reaches of Queens and Staten Island. The same dynamic could be applied to some other big cities, like Chicago with its Bungalow Belt or outer San Francisco. In the largest cities, these dynamics likely have only a minimal effect on city policy, at least with respect to most of the issues that would attract interest from higher levels of government. Although it is true that two of the three councilmen from Staten Island in New York City are Republican, there is only one additional Republican, who is from Queens, thus giving the Democrats a 47–3 lock on the body.²⁶⁰ This statistic does not mean that all the Democrats are in agreement and that these disagreements do not sometimes break down along geographic lines.²⁶¹ But to the extent that voters on the fringe experience an advantage, it will usually only be to block or dilute proposals set forth by representatives of the more densely packed parts of the city. Thus, any policy output from a city council may already tilt away from the preferences of the mean city voter, which means that there is even more reason to protect it from usurpation by higher levels of government that are systematically biased against cities writ large.

259. Portland, Oregon, for instance, elects all city councilors (or “commissioners”) at large. PORTLAND, OR., CITY CHARTER § 2-201 (2017). Some cities use a mix of district and at-large elections to select the members of their councils. *See, e.g.*, BALT., MD., CITY CHARTER art. III, § 2 (2017) (electing 14 members of council by district, as well as a council president at large); BOSTON, MASS., CITY CHARTER § 11 & n.2 (2017) (electing nine members of city council by district and four at large); PHILADELPHIA, PA., HOME RULE CHARTER § 2-100 (2017) (electing ten members of city council by district and seven at large).

260. *See Council Members & Districts*, N.Y. CITY COUNCIL, <http://council.nyc.gov/html/members/members.shtml> [https://perma.cc/C5G6-K9PM] (last visited Mar. 13, 2017).

261. On Mayor Michael Bloomberg’s congestion pricing proposal, for instance, outer-borough council members were vocally opposed. *See* Ray Rivera, *Traffic Plan Needs Votes on Council, Survey Finds*, N.Y. TIMES (Mar. 8, 2008), <http://www.nytimes.com/2008/03/08/nyregion/08congest.html> [https://perma.cc/9ZNN-QKSE].

Moreover, many prominent issues at the local level defy easy partisan categorization. Soda taxes, congestion fees, water fluoridation, and horse carriage rides—these are some of the issues that have riven city councils and voters of late, even in places where voters and city councils are overwhelmingly of the same political party.²⁶² Finally, the same caveat offered above regarding direct democracy must be offered here.²⁶³ Any citywide initiative would not suffer from any of the problems inherent to first-past-the-post legislative systems. Concerns might still arise when city voters, for example, opt against water fluoridation despite a city council's unanimous support following expert advice, but adherence to one-person, one-vote and distortion of the median legislator's views based on geography are not among the concerns.²⁶⁴

V. IMPLICATIONS AT THE FEDERAL LEVEL

If big cities and counties are worthy of some protection from statewide preemption, what implications might this protection have for remedying the urban disadvantage at the federal level? As noted in Part I, no doctrinal path is currently available for protecting local enactments from preemption by Congress. Hence, local enactments will continue to suffer from a disadvantage vis-à-vis preemption by the federal government. Efforts by big cities, for instance, to hold gun manufacturers liable for the harms inflicted by their products will continue to conflict with the gun lobby's exaggerated influence on Capitol Hill, which is due in large part to the Senate's malapportionment and the House's distorted composition.

262. See Tricia L. Nadolny, *Soda Tax Passes; Philadelphia Is First Big City in Nation to Enact One*, INQUIRER (June 16, 2016, 8:36 PM), http://www.philly.com/philly/news/politics/20160617_Philadelphia_City_Council_to_vote_on_soda_tax.html [https://perma.cc/9B3X-9H82]; J. David Goodman & Michael M. Grynbaum, *Mayor de Blasio's Carriage-Horse Plan Falts in City Council*, N.Y. TIMES, (Feb. 4, 2016), https://www.nytimes.com/2016/02/05/nyregion/horse-carriage-deal-new-york.html?_r=0 [https://perma.cc/PJ4D-SRTY] (describing the failure of New York City Mayor Bill de Blasio's proposal to limit carriage-horse rides in Manhattan); Ryan Kost, *For the Fourth Time Since 1956, Portland Voters Reject Fluoridation*, THE OREGONIAN: OREGONLIVE (May 21, 2013, 9:59 PM), http://www.oregonlive.com/portland/index.ssf/2013/05/portland_fluoride_for_the_four.html [https://perma.cc/PZ74-BBK8]; Diane Cardwell, *City Council Approves Fee to Drive Below 60th*, N.Y. TIMES (Apr. 1, 2008), <http://www.nytimes.com/2008/04/01/nyregion/01congestion.html> [https://perma.cc/R8AZ-LJB7] (describing the "controversial proposal" that won "wrenching approval" from the New York City Council "by an unusually slim margin").

263. See *supra* note 234 and accompanying text.

264. See Kost, *supra* note 262.

Nonetheless, constitutional home rule could still help remedy that disadvantage indirectly.

Constitutional home rule allows policies to take root at the local level that might otherwise never be adopted or might be preempted quickly after adoption. If such policies are adopted and persist because of the protection offered by constitutional home rule, they will offer an example for other cities, states, and even the federal government to follow. For instance, the Food and Drug Administration (“FDA”) in 2015 announced a ban on added trans fats beginning in 2018.²⁶⁵ When New York City was the first American jurisdiction to ban them ten years ago, opponents of such regulation and the press ridiculed the move.²⁶⁶ Nonetheless, the New York state legislature never sought to expressly preempt the city’s ban on trans fats, and no litigant came forward to urge a court to read aggressively pre-existing state statutes to preempt the rule impliedly. Allowing New York City’s ban on trans fats to take effect changed the national conversation. It provided momentum for other cities, counties, and states to adopt similar bans and led to a change in national policy.²⁶⁷ Constitutional home rule, therefore, can help remedy the urban disadvantage by allowing policies to advance that might otherwise be halted by state authority.

Local action remains susceptible to being preempted by the federal government. Once local action is successful and widespread, however, pressure will exist for any such preemption to retain at least some version of the increased regulatory scheme that cities had earlier adopted. Although cities may have adopted a policy that is a “10” on the scale of regulatory stringency at a time when the federal government rated a “0,” eventual federal legislation may set a national standard that rates a “5.” Although “5” is not as good as “10” from urban residents’ perspective, it is better than “0,” and the nation may never have gone from “0” to “5” without the local action proceeding and not being preempted.

265. Final Agency Determination Regarding Partially Hydrogenated Oils, 80 Fed. Reg. 34,650 (June 17, 2015).

266. John Tierney, *One Cook Too Many*, N.Y. TIMES (Sept. 30, 2006), <http://www.nytimes.com/2006/09/30/opinion/30tierney.html> [https://perma.cc/N4T2-RBY3] (describing New York City’s trans-fat ban as “the biggest step yet in turning the Big Apple into the Big Nanny”); see also Brittany Schaeffer, *No Fries for You!*, WILLAMETTE WEEK (Oct. 25, 2006), <http://www.wweek.com/portland/article-6206-no-fries-for-you.html> [https://perma.cc/9KJA-WY5X] (noting “[f]ears of overzealous government regulation” and warning readers, disingenuously, to “[e]at your doughnuts while you still can” while Multnomah County, Ore., considered banning added trans fats in restaurant food).

267. See *Why Innovate?*, *supra* note 8, at 1237–38 (describing spread of trans fat bans to other jurisdictions in years after New York City’s adoption).

Even if local action does not spur change or preemption at the federal level, a value in allowing like-minded cities around the nation to adopt similar policies is still present. Benjamin Barber has written of the need for a “parliament of mayors” who can share ideas on policy and even agree to bind each other to certain goals.²⁶⁸ Fordham University has recently sought to implement this idea.²⁶⁹ At the national level, cities pursuing their own policies safe from state preemption—and not pushing so far as to provoke federal preemption—create nodes of policy experimentation that offer relief to the disadvantaged urban population. Within limits, those preferring the urban set of policies, like higher minimum wage, stricter gun control, and more protection for public health, can seek out such policies by moving to the cities that offer them. Although the option of “voting with one’s feet” is a pale substitute for a more robust vote by ballot, constitutional home rule might help make the former a better option while other reforms, like restrictions on political gerrymandering, seek to bolster the latter.

CONCLUSION

Imagine a world in which North Carolina’s controversial “bathroom bill” might not preempt Charlotte’s civil rights ordinance, at least with respect to Charlotte properties and city employees. As this Article has demonstrated, such a world already exists in several states. More than a century after its initial emergence, variations of constitutional home rule persist among the states despite inconsistent application and little in the way of compelling normative justification. This Article has attempted to identify such a justification: remedying the urban disadvantage in the state and national legislative processes.

In other words, if constitutional home rule persists, there should be a good reason for it. This statement does not mean that constitutional home rule is the best method for remediating the urban disadvantage at the state and national levels—it is a second-order solution at best. At the federal level, far-fetched reforms like evening out Senate apportionment would be far more effective. Legislative districting reform in the states, which can affect both U.S. House and state legislative elections, is another, slightly more realistic remedy than Senate reform. But even neutral redistricting might not entirely eliminate the urban disadvantage in first-past-the-post elections so

268. BENJAMIN R. BARBER, *IF MAYORS RULED THE WORLD* (2013).

269. Press Release, Global Parliament of Mayors Project, Professors Sheila Foster and Nestor Davidson to Announce the Inaugural Convening of the Global Parliament of Mayors and New Fordham Urban Consortium (Feb. 16, 2016) (on file with author).

long as compact, contiguous districts are used.²⁷⁰ Given the value of district-based representation and keeping those districts compact and contiguous, constitutional home rule can be a tool that allows the benefits of such districting while mitigating some of its drawbacks. Selecting the right dose of each medicine is up to each individual state.

For those who are sold on the concept, the question arises as to how more constitutional home rule will arise given that legislatures in states with a pronounced urban disadvantage are unlikely to propose such a system. The two most likely possibilities are the initiative process in the 18 states that offer it for state constitutional change²⁷¹ and judicial interpretation. The initiative process, even with its drawbacks, bypasses any urban disadvantage that results from single-member districting. If a proposed system of constitutional home rule distinguishes among cities or counties on the basis of population, that system may not be an easy sell in rural areas, but the urban vote might overpower any such objections. Because the swing voters might be those in mid-size cities or suburbs, a proposal's population cutoff would need to be finely tailored to succeed politically and might also depend on the extent to which regional governments are empowered in the state. With respect to the judiciary, many state constitutional provisions are capacious enough to allow for a version of immunity for some local enactments. Litigants defending city action could articulate the democracy-remediating benefits of such an interpretation. Particularly in states with egregious political gerrymandering, courts might lend a sympathetic ear. Just as the Warren Court saw its role in the one-person, one-vote cases as remediating a structural flaw in the United States democracy, so might some bold state supreme courts take up the mantle with respect to constitutional home rule.

270. See Chen & Rodden, *supra* note 23, at 264 (“[I]n contemporary Florida and several other urbanized states, voters are arranged in geographic space in such a way that traditional districting principles of contiguity and compactness will generate substantial electoral bias in favor of the Republican Party.”).

271. Of these states, two have only an “indirect” constitutional initiative, where a voter-proposed amendment goes first to the legislature for revision. See *Initiative & Referendum States*, NAT’L CONF. OF ST. LEGIS., <http://www.ncsl.org/research/elections-and-campaigns/chart-of-the-initiative-states.aspx> [https://perma.cc/9UNX-M3XQ] (last reviewed Dec. 2015).

APPENDIX A. PROTECTION OF LAWFUL COMMERCE IN ARMS
ACT SENATE VOTE (JULY 2005)

State	2000 population ²⁷²	Vote ²⁷³	
Alabama	4,447,100	Y	Y
Alaska	626,932	Y	Y
Arizona	5,130,632	Y	Y
Arkansas	2,673,400	Y	Y
Colorado	4,301,261	Y	Y
Florida	15,982,378	Y	Y
Georgia	8,186,453	Y	Y
Idaho	1,293,953	Y	Y
Kansas ²⁷⁴	2,688,418	Y	-
Kentucky	4,041,769	Y	Y
Louisiana	4,468,976	Y	Y
Maine	1,274,923	Y	Y
Mississippi	2,844,658	Y	Y
Missouri	5,595,211	Y	Y
Montana	902,195	Y	Y
Nebraska	1,711,263	Y	Y
Nevada	1,998,257	Y	Y
New Hampshire ²⁷⁵	1,235,786	Y	-
North Carolina	8,049,313	Y	Y
North Dakota	642,200	Y	Y
Oklahoma	3,450,654	Y	Y
Pennsylvania	12,281,054	Y	Y
South Carolina	4,012,012	Y	Y
South Dakota	754,844	Y	Y
Tennessee	5,689,283	Y	Y
Texas	20,851,820	Y	Y
Utah	2,233,169	Y	Y
Virginia	7,078,515	Y	Y
West Virginia	1,808,344	Y	Y
Wyoming	493,782	Y	Y
Total population fully in favor	134,786,453		
Indiana	6,080,485	Y	N
Iowa	2,926,324	Y	N
Minnesota	4,919,479	Y	N
New Mexico	1,819,046	Y	N
Ohio	11,353,140	Y	N
Vermont	608,827	Y	N
Wisconsin	5,363,675	Y	N
Total population half in favor	33,070,976		

272. The 2000 population data was obtained from U.S. CENSUS BUREAU, CENSUS 2000 (2001) (Table 1, "States Ranked by Population: 2000").

273. U.S. Senate Roll Call Vote No. 219 (July 29, 2005), 109th Cong., 1st Sess., https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=1&vote=00219 [<https://perma.cc/R2N4-6B6H>].

274. Kansas's population is halved because one of its senators did not vote. *Id.*

275. New Hampshire's population is halved because one of its senators did not vote. *Id.*

California ²⁷⁶	33,871,648	N	-
Connecticut	3,405,565	N	N
Delaware	783,600	N	N
Hawaii	1,211,537	N	N
Illinois	12,419,293	N	N
Maryland	5,296,486	N	N
Massachusetts	6,349,097	N	N
Michigan	9,938,444	N	N
New Jersey	8,414,350	N	N
New York	18,976,457	N	N
Oregon ²⁷⁷	3,421,399	N	-
Rhode Island	1,048,319	N	N
Washington	5,894,121	N	N
Total population fully against	92,383,793		
Total population	260,241,222		
Total in favor	151,321,941	58%	
Total against	108,919,281	42%	

APPENDIX B. STATES WITH SOME JUDICIALLY PROTECTED HOME RULE

This Appendix provides additional explanations and citations for those states not discussed in the Article.

Arizona

Arizona recognizes home-rule immunity for structural decisions; additionally, there is a general law requirement read into the constitution.²⁷⁸

California

California recognizes home-rule immunity for personnel and structural decisions in addition to providing a general law requirement.²⁷⁹ The state constitution provides,

It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to *general laws*. City charters adopted pursuant to this Constitution shall supersede any

276. California's population is halved because one of its senators did not vote. *Id.*

277. Oregon's population is halved because one of its senators did not vote. *Id.*

278. *See supra* notes 150–53.

279. *See supra* note 135 for discussion of personnel.

existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith.²⁸⁰

Colorado

Colorado recognizes home-rule immunity for structural, personnel, regulatory, and possibly fiscal decisions.²⁸¹

Connecticut

Connecticut recognizes home-rule immunity for structural decisions and partially fiscal decisions. Despite a non-self-executing constitutional home rule provision—“The general assembly shall by *general* law delegate such legislative authority as from time to time it deems appropriate to towns, cities, and boroughs”²⁸²—the Connecticut Supreme Court has held that state laws do not preempt municipal ordinances or charter provisions that are of “local concern.”²⁸³ In the fiscal realm, the court has held that although “a municipality has no inherent powers of taxation except those expressly granted by the legislature,” a town charter provision governing the allocation of surplus revenue trumps a state law to the contrary.²⁸⁴

Hawaii

Hawaii recognizes home-rule immunity for structural and possibly regulatory decisions in addition to providing a general law requirement. The state constitution provides some protection for local enactments:

Section 2. Each political subdivision shall have the power to frame and adopt a charter for its own self-government within such limits and under such procedures as may be provided by general law. Such procedures, however, shall not require the approval of a charter by a legislative body.

Charter provisions with respect to a political subdivision's executive, legislative and administrative structure and organization shall be superior to statutory provisions, subject to the authority of the legislature to enact general laws allocating and

280. CAL. CONST. art. XI, § 5 (emphasis added).

281. *See supra* notes 110–11.

282. CONN. CONST. art. X (emphasis added).

283. *Bd. of Educ. of Naugatuck v. Town & Borough of Naugatuck*, 843 A.2d 603, 613 (Conn. 2004) (“[I]n an area of local concern, such as local budgetary policy, general [state] statutory provisions must yield to municipal charter provisions governing the same subject matter.”).

284. *Caulfield v. Noble*, 420 A.2d 1160, 1164 (Conn. 1979).

reallocating powers and functions.

A law may qualify as a general law even though it is inapplicable to one or more counties by reason of the provisions of this section. . . .

Section 6. This article shall not limit the power of the legislature to enact laws of statewide concern.²⁸⁵

Interpreting this provision, the Hawaii Supreme Court held that county charter provisions governing the number and qualifications of water supply board members, as well as a provision allocating authority for deciding liquor control violations, trumped state law to the contrary.²⁸⁶ In doing so, the court noted that “the regulation of the manufacture, importation and sale of intoxicating liquor within a county is a local concern.”²⁸⁷ In dicta, the court also noted that “police function,” or control of the police force, is a local matter.²⁸⁸

Idaho

Idaho provides a general law requirement. The state constitution states, “Any county or incorporated city or town may make and enforce, within its limits, all such local police, sanitary and other regulations as are not in conflict with its charter or with the *general laws*.”²⁸⁹

Kansas

Kansas recognizes home-rule immunity for regulatory decisions and also provides a general law requirement. The state constitution provides,

Cities are hereby empowered to determine their local affairs and government including the levying of taxes, excises, fees, charges and other exactions except when and as the levying of any tax, excise, fee, charge or other exaction is limited or prohibited by enactment of the legislature applicable *uniformly* to all cities of the same class²⁹⁰

Interpreting this provision, the Kansas Supreme Court held that because the state’s Liquor Control Act did not uniformly apply to all cities, a city

285. HAWAII CONST. art. VIII.

286. Haw. Gov’t Emps. Ass’n v. AFSCME, Local 152, 576 P.2d 1029, 1040 (Haw. 1978).

287. *Id.*

288. *Id.*

289. IDAHO CONST. art. XII, § 2 (emphasis added).

290. KANSAS CONST. art. XII, § 5(b) (emphasis added).

subject to the law could exempt itself from the act's prohibition of Sunday sales.²⁹¹

Louisiana

Louisiana recognizes home-rule immunity for structural decisions and possibly personnel and fiscal decisions. The state constitution allows cities that had home-rule charters before the constitution's adoption in 1974 to "retain the powers, functions, and duties in effect when this constitution is adopted."²⁹² This provision would seem to guarantee to such municipalities any pre-existing immunity from state override. At the same time, however, the constitution also states that "[n]otwithstanding any provision in this Article, the police power of the state shall never be abridged."²⁹³

In upholding the state's preemption of New Orleans's charter amendment establishing a higher minimum wage, the state supreme court determined that the preemption was justified because it was a "reasonable exercise of the state's police power" and "necessary to protect the vital interest of the state as a whole."²⁹⁴ The court analyzed thoroughly the state's interest in a statewide minimum wage, deferring somewhat to the legislature's determinations but reserving the ultimate judgment on the issue.²⁹⁵ The court's analysis leaves open the possibility that some other state law—particularly one outside of the regulatory realm, where the police power is most apt—might not be read as "necessary to protect the vital interest of the state as a whole." In such a case, the local ordinance would survive if it would have been immune to preemption before 1974.²⁹⁶

Indeed, in a prior structural case, the Louisiana Supreme Court held that a state law could not override New Orleans's method for selecting members of its aviation board because the statute was not "necessary to prevent abridgement of a reasonable and valid exercise of the state's police power."²⁹⁷ The court there held that the law was prohibited "because it changes a home rule government's distribution of its powers and

291. State *ex rel.* Klein v. Unified Bd. of Comm'rs, Unified Gov't of Wyandotte Cty./Kansas City, 85 P.3d 1237 (Kan. 2004).

292. LA. CONST. art. VI, § 4.

293. *Id.* § 9(B).

294. New Orleans Campaign for a Living Wage v. City of New Orleans, 825 So. 2d 1098, 1107–08 (La. 2002).

295. *Id.* at 1106–07.

296. *See id.* at 1120 (Johnson, J., dissenting) (arguing that New Orleans higher minimum wage was immune to preemption by state law).

297. Francis v. Morial, 455 So. 2d 1168, 1174 (La. 1984).

functions” in violation of the constitution’s home rule article.²⁹⁸ *Francis v. Morial*, therefore, is a ringing endorsement of structural home rule in Louisiana.

Maine

Maine recognizes home-rule immunity for possibly personnel or structural decisions and also provides a general law requirement. The state constitution authorizes “[t]he inhabitants of any municipality [to] alter and amend their charters on all matters, not prohibited by Constitution or *general law*, which are local and municipal in character.”²⁹⁹ Moreover, in dicta in a case involving local personnel, the Maine Supreme Court recognized the possibility “that municipal ordinances or charter provisions addressing exclusively local affairs may . . . supersede statutes of state-wide application.”³⁰⁰

Massachusetts

Massachusetts provides a general law requirement unless the legislature follows enhanced procedure for special law. The state constitution provides,

The general court shall have the power to act in relation to cities and towns, but only by *general laws* which apply alike to all cities or to all towns, or to all cities and towns, or to a class of not fewer than two, and by special laws enacted (1) on petition filed or approved by the voters of a city or town, or the mayor and city council, or other legislative body, of a city, or the town meeting of a town, with respect to a law relating to that city or town; (2) by a two-thirds vote of each branch of the general court following a recommendation by the governor; (3) to erect and constitute metropolitan or regional entities, embracing any two or more cities or towns or cities and towns, or established with other than existing city or town boundaries, for any general or special public purpose or purposes, and to grant to these entities such powers, privileges and immunities as the general court shall deem necessary or expedient for the regulation and government thereof; or (4) solely for the incorporation or dissolution of cities or towns as corporate entities, alteration of city or town boundaries, and

298. *Id.*

299. ME. CONST. art. VIII, § 1 (emphasis added).

300. *Lewiston Firefighters Ass’n, Local 785 v. City of Lewiston*, 354 A.2d 154, 162 (Me. 1976) (citing *Strode v. Sullivan*, 236 P.2d 48 (1951) (a case involving local elections)).

merger or consolidation of cities and towns, or any of these matters.³⁰¹

Minnesota

A Minnesota Supreme Court dissent suggests there is home-rule immunity for personnel decisions. In deciding a lawsuit challenging a 1993 Minneapolis resolution extending health benefits to same-sex partners, one judge on the Minnesota Supreme Court dissented from the court's holding that the resolution was overridden by state law.³⁰² Judge Schumacher would have upheld the resolution despite the seemingly inconsistent state law in part because "the grant of medical benefits to city employees is solely of *local concern* and pertaining to management of municipal government."³⁰³

Missouri

Missouri recognizes home-rule immunity for structural decisions and possibly regulatory decisions, such as eminent domain. Unlike most states, the Missouri courts still occasionally strike down an exercise of local initiative power as beyond the realm of local authority, even in the absence of any preemptive state law. In *Missouri Bankers Ass'n, Inc. v. St. Louis County*, for instance, the Missouri Supreme Court held that the county's "Mortgage Foreclosure Intervention Code" was beyond the authority granted to the county by the state constitution because it "address[ed] a national crisis."³⁰⁴ As such, the ordinance addressed a "statewide issue" and therefore was not the kind of "purely local concern" the county was authorized to regulate.³⁰⁵

At the same time, however, a Missouri court of appeals has upheld a county charter provision regulating the members of a condemnation commission against inconsistent state law.³⁰⁶ At least in the realm of eminent domain, locally adopted procedures trump those found in state law.³⁰⁷

301. MASS. CONST. art. LXXXIX, § 8 (emphasis added).

302. *Lilly v. City of Minneapolis*, 527 N.W.2d 107 (Minn. 1995).

303. *Id.* at 115 (emphasis added).

304. 448 S.W.3d 267, 273 (Mo. 2014).

305. *Id.*

306. *State ex rel. St. Louis Cty. v. Campbell*, 498 S.W.2d 833 (Mo. Ct. App. 1973).

307. *Id.* at 836 ("It has been consistently held that the power of condemnation is a matter of local concern so that the procedure specified in the charter supersedes the statutes.").

Nebraska

Nebraska recognizes home-rule immunity for limited structural decisions.³⁰⁸

New Mexico

New Mexico recognizes home-rule immunity for structural and personnel decisions in addition to providing a general law requirement.³⁰⁹

New York

New York provides a general law requirement with exceptions for special law. The state constitution provides,

[T]he legislature . . . [s]hall have the power to act in relation to the property, affairs or government of any local government only by *general law*, or by special law only (a) on request of two-thirds of the total membership of its legislative body or on request of its chief executive officer concurred in by a majority of such membership, or (b) except in the case of the city of New York, on certificate of necessity from the governor reciting facts which in the judgment of the governor constitute an emergency requiring enactment of such law and, in such latter case, with the concurrence of two-thirds of the members elected to each house of the legislature.³¹⁰

While the New York Constitution does not immunize any areas of local law absolutely to state override, it ensures that any such override is either by general law or by the permitted circumstances for special law. Much case law in New York, therefore, revolves around whether a particular state enactment regulates a local matter and thus needs to be enacted pursuant to the procedures for passing a special law.³¹¹

North Dakota

North Dakota recognizes home-rule immunity for structural and personnel decisions. The state constitution provides a foundation for home

308. See *supra* notes 158–61.

309. See *supra* notes 148–49.

310. N.Y. CONST. art. IX, § 2(b)(2) (emphasis added).

311. E.g., *Greater N.Y. Taxi Ass’n v. State*, 993 N.E.2d 393, 400 (N.Y. 2013) (noting that the legislature may pass special laws without going through special procedures of N.Y. CONST. art. IX, § 2(b)(2)(b), if the state has a “substantial interest” in the subject matter).

rule,³¹² but the details are statutory.³¹³ The home-rule statute provides that the charter and ordinances made pursuant to the charter supersede “any law of the state in conflict,” at least when such municipal enactments deal with local or city matters.³¹⁴ In applying this statutory scheme, the North Dakota Supreme Court upheld a city’s decision to merge police and city employee pension funds despite arguably conflicting state law.³¹⁵ Similarly, the state attorney general opined that the home-rule city of Grand Forks could change the composition of its library board in a manner that conflicted with state law because the composition of such boards is a matter of local rather than statewide concern.³¹⁶

Ohio

Ohio recognizes home-rule immunity for structural decisions in addition to providing a robust general law requirement.³¹⁷

Oregon

Oregon recognizes home-rule immunity for limited structural decisions.³¹⁸

Pennsylvania

Pennsylvania recognizes home-rule immunity for structural and personnel decisions.³¹⁹

Rhode Island

Rhode Island recognizes home-rule immunity for structural decisions and also provides a general law requirement. The state constitution states,

The general assembly shall have the power to act in relation to the property, affairs and government of any city or town by *general laws* which shall apply alike to all cities and towns, but which shall not affect the form of government of any city or town. The general

312. N.D. CONST. art. VII, § 6 (“The legislative assembly shall provide by law for the establishment and exercise of home rule in counties and cities.”).

313. See N.D. CENT. CODE ANN. § 40-05.1 (West 2017).

314. *Id.* § 40-05.1-05.

315. Klug v. City of Minot, 795 N.W.2d 906 (N.D. 2011).

316. Office of Att’y Gen., Opinion Letter No. 2011-L-03 2011 WL 916177 (N.D. Mar. 14, 2011).

317. See *supra* notes 137–47, 197, 199.

318. See *supra* note 15; Paul A. Diller, *The Partly Fulfilled Promise of Home Rule in Oregon*, 87 OR. L. REV. 939 (2008).

319. See *supra* note 115.

assembly shall also have the power to act in relation to the property, affairs and government of a particular city or town provided that such legislative action shall become effective only upon approval by a majority of the qualified electors of the said city or town voting at a general or special election, except that in the case of acts involving the imposition of a tax or the expenditure of money by a town the same shall provide for the submission thereof to those electors in said town qualified to vote upon a proposition to impose a tax or for the expenditure of money.³²⁰

The constitution specifically reserves “the form of government” to local discretion and immunizes it from preemption. Other “local” matters may be preempted, but only by “general” legislation.³²¹ The court has also stated in dicta that municipalities may not legislate at all on matters of statewide concern.³²²

South Carolina

South Carolina provides a general law requirement. The state constitution states,

The General Assembly shall provide by *general law* for the structure, organization, powers, duties, functions, and the responsibilities of counties, including the power to tax different areas at different rates of taxation related to the nature and level of governmental services provided. Alternate forms of government, not to exceed five, shall be established. No laws for a specific county shall be enacted and no county shall be exempted from the general laws or laws applicable to the selected alternative form of government.³²³

Additionally, “The structure and organization, powers, duties, functions, and responsibilities of the municipalities shall be established by general law; provided, that not more than five alternative forms of government shall be authorized.”³²⁴ These provisions prohibit special legislation that aim to restructure municipal or county government boards.³²⁵

320. R.I. CONST. art. XIII, § 4 (emphasis added).

321. See, e.g., *Marran v. Baird*, 635 A.2d 1174 (R.I. 1994); *Bruckshaw v. Paolino*, 557 A.2d 1221, 1224 (R.I. 1989).

322. *Westerly Residents for Thoughtful Dev., Inc. v. Brancato*, 565 A.2d 1262, 1264 (R.I. 1989).

323. S.C. CONST. art. VIII, § 7 (emphasis added).

324. *Id.* § 9.

325. E.g., *Davis v. Richland Cty. Council*, 642 S.E.2d 740, 742–43 (S.C. 2007).

South Dakota

South Dakota provides a general law requirement. The state constitution states, “A chartered [local] governmental unit may exercise any legislative power or perform any function not denied by its charter, the Constitution or the *general laws* of the state.”³²⁶

Tennessee

Tennessee provides a general law requirement. The state constitution states, “[T]he General Assembly shall act with respect to . . . home rule municipalit[ies] only by laws which are *general* in terms and effect.”³²⁷

Texas

Texas provides a general law requirement. The state constitution states, “[N]o [home-rule] charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the *general laws* enacted by the Legislature of this State.”³²⁸

Wisconsin

Some Wisconsin Supreme Court dissenting opinions suggest vestiges of immunity in addition to a general law requirement.³²⁹

Wyoming

Wyoming provides a uniformity requirement. The state constitution states, “All cities and towns are hereby empowered to determine their local affairs and government as established by ordinance passed by the governing body . . . further subject only to statutes *uniformly* applicable to all cities and towns”³³⁰

326. S.D. CONST. art. IX, § 2 (emphasis added).

327. TENN. CONST. art. XI, § 9 (emphasis added).

328. TEX. CONST. art. XI, § 5 (emphasis added).

329. *See supra* note 200.

330. WYO. CONST. art. XIII, § 1(b) (emphasis added).