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Florida Preemption of Local Environmental Ordinances

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FLORIDA PREEMPTION OF LOCAL ENVIRONMENTAL ORDINANCES

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Abstract

This Note addresses the battle between Florida legislators and local governments over the environmental ordinances local governments can enact. Florida state legislators and private industries have frequently used the preemption doctrine to strike down local governments' environmental ordinances. This Note looks at three areas where that battle is currently taking place or is expected to take place: the regulation of single-use plastics, the granting of rights to nature, and fracking. Seeing the lack of success that Florida's local governments have had, this Note turns to the rest of the United States to examine how local governments can better respond. Three lessons that stand out are the importance of prioritizing public education, avoiding overlapping state permits and regulations, and framing local ordinances as zoning matters. This Note brings these lessons back to Florida and uses them to develop strategies that Florida local governments could use to advance their environmental ordinances or the goals behind them. These strategies focus on using public education to gain public and constitutional support, rooting the goals of local environmental ordinances in the traditional functions of local governments, and framing local ordinances primarily as zoning matters.

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INTRODUCTION

A battle is waging in Florida over what power local governments have to pass environmental ordinances. A growing trend in the relations between state and local governments is the use of state-level preemption laws that prevent local governments from passing certain regulations.[1] This trend becomes even more common when there is a wave of local environmental ordinances that do not align with their state governments' views.[2]

Within the past few years, Florida legislators have, on multiple occasions, created preemption laws to prevent local governments from enacting environmentally targeted ordinances seeking to protect local water sources.[3] The ensuing litigation has proved unsuccessful for local governments in Florida.[4] This is not the case in other states where similar litigation has occurred on many of the same issues, and where local governments have ultimately successfully upheld their local autonomy against state preemption.[5]

Preemption laws are a center point in the debate between the competing interests of state and local governments. State legislators frequently enact preemption laws to promote statewide uniformity, simplification of private business operations, economic growth, and

1. *See* Paul A. Diller, *The Political Process of Preemption*, 54 U. RICH. L. REV. 343, 343–44 (2020) (explaining the growth in popularity of preemption among state legislatures).

2. *See id.* at 367.

3. For two examples of Florida state legislators passing preemption laws against the ability of local governments to pass environmentally focused laws, see FLA. STAT. § 500.90 (2021) (preempting local ordinances from regulating the "use or sale of polystyrene products") and FLA. STAT. § 403.412 (2021) (preempting all local governments within Florida from granting rights to any waterways).

4. *See* Fla. Retail Fed'n, Inc. v. City of Coral Gables, 282 So. 3d 889, 896 (Fla. Dist. Ct. App. 2019) (upholding the state's preemption of single-use plastics ordinances by local governments), *aff'd*, No. SC19-1298, 2020 WL 710303 (Fla. Feb. 12, 2020). Subsequently the Florida Supreme Court declined to accept jurisdiction over the matter, upholding the lower court's ruling. *Fla. Retail Fed'n*, 2020 WL 710303, at *1.

5. There is a wide range of successful litigation brought by local governments against state preemption of environmental ordinances. *See, e.g.*, Robinson Twp. v. Commonwealth, 83 A.3d 901, 913 (Pa. 2013) (holding that Pennsylvania's state preemption law against local regulation of oil and gas fracking operations was unconstitutional).

equal application of state laws.[6] Though some argue that these interests should take precedence, others argue that these laws prevent effective governance and limit the extent to which local governments can protect their citizens.[7] Local government autonomy can benefit citizens to a greater extent than state-level action by encouraging a responsive and participatory government, promoting diversity through experimentation, and diffusing power to citizens.[8] In the context of environmental protections, this is especially true because local governments have firsthand experience with the unique environmental problems that their communities face, and can tailor their response to the citizens who face the harshest impact of environmental degradation.[9]

This Note analyzes the legal battles in Florida between state and local governments in regulating single-use plastics, granting rights to nature, and regulating fracking. All three of these movements are active in local governments within Florida. Understanding the background of past litigation in Florida and other states provides insight as to what methods are fruitful for local governments. Part I of this Note catalogs each of these efforts in Florida. Part II looks to the rest of the United States to examine other local governments in each of these areas. In particular, Part II examines the importance of public education, the challenges that arise if local ordinances overlap with state regulations, and the ability of local governments to avoid state preemption by framing their regulations as zoning matters. Part III applies the strategies used by other local governments throughout the United States to those in Florida. This application includes using public education to encourage ballot-driven constitutional amendments, incorporating environmental goals into traditional functions of local governments, and framing of local environmental ordinances as zoning ordinances.

I. OVERVIEW OF FLORIDA ENVIRONMENTAL PREEMPTION BATTLES

Federal governments have the power to preempt state and local governments. Under the Supremacy Clause of the U.S. Constitution,

6. *See* Lori Riverstone-Newell, *The Rise of State Preemption Laws in Response to Local Policy Innovation*, 47 J. FEDERALISM 403, 405 (2017) (explaining the state's interest in passing preemption laws).

7. *See* David J. Barron, Commentary, *A Localist Critique of the New Federalism*, 51 DUKE L.J. 377, 377–78 (2001) (noting many of the possible advantages of local action compared with state action).

8. *Id.*

9. *See* David L. Markell, *Emerging Legal and Institutional Responses to Sea-Level Rise in Florida and Beyond*, 42 COLUM. J. ENV'T L. 1, 6–9 (2016) (demonstrating how, in the context of sea-level rise, local governments are better situated to address environmental challenges).

federal laws and the Constitution itself supersede state law.[10] The limitation is that Congress can only legislate in areas where the Constitution grants Congress the power.[11] The Supreme Court recognizes three different ways that federal law preempts state laws: express preemption, preemption from conflict, and preemption in the field.[12] First, express preemption occurs when Congress declares, in a statute, that a certain federal law expressly preempts state laws on that topic or area.[13] Second, even if a federal law does not expressly preempt state laws, implied preemption from conflict occurs when state laws on the topic are preempted if in conflict with the federal law.[14] For example, conflict happens when both federal and state laws impose different sets of requirements on a certain party, making it impossible for that party to follow both laws.[15] In that case, courts generally hold that the federal law would preempt the state law.[16] Third, implied preemption in the field occurs if federal law and regulations cover a topic so completely that there is little to no room for states to legislate on that topic.[17] In this type of preemption, courts hold that the federal laws preempt state laws that cover the same field.[18]

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10. *See* U.S. CONST. art VI ("This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.").

11. *See* U.S CONST. art. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

12. *See* Altria Grp. v. Good, 555 U.S. 70, 76–80 (2008) (outlining the preemption doctrine); Arizona v. United States, 567 U.S. 387, 406 (2012) (explaining that the Immigration Reform and Control Act expressly preempts states from imposing criminal or civil penalties on employers of unauthorized aliens (citing Chamber of Com. v. Whiting, 563 U.S. 582, 587–88 (2011))); Sperry v. Florida, 373 U.S. 379, 400–01 (1963) (illustrating preemption through conflict when a nonlawyer was permitted to represent applicants before the United States Patent Office even though it conflicted with Florida law); Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 99 (1992) (plurality opinion) (explaining that the state law at issue was preempted in the field because Congress intended OSHA to limit the regulation of occupational safety to one set of standards unless a state submitted a plan that completely supplanted federal regulations).

13. *See* Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977) (holding that Congress may indicate preemptive intent in the express language of a statute (citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947))).

14. *See* Maryland v. Lousiana, 451 U.S. 725, 746–47 (1981) (explaining that state laws that are in conflict with federal law are void to the extent they conflict (first citing Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963); then citing Hines v. Davidowitz, 312 U.S. 52, 67 (1941))).

15. *Id.*

16. *Id.*

17. *See Rice*, 331 U.S. at 230–31 (stating that a scheme of federal regulations may touch a field such that it precludes enforcement of state law on that subject (citing *Hines*, 312 U.S. at 70)).

18. *Id.*

As to state-government preemption of local governments, because the Constitution is silent on the topic of local governments, there is significant variation across the United States in terms of which powers, if any, local governments have to enact their own policies and what powers the state has to override those policies.[19] Due to the lack of express rights granted to local governments, it is commonly up to state governments to determine what powers local governments have—giving state governments the inherent power to preempt local governments.[20] State legislators can preempt through the three recognized methods: express preemption, implied preemption through conflict, or implied preemption in the field.[21]

This balance of power between state and local governments has shifted throughout time. As a result, most states today adopt either the Dillon's Rule approach or the Home Rule approach.[22] Dillon's Rule was the earliest approach, and it originated in an 1868 decision written by Iowa Supreme Court Justice John Dillon.[23] It maintains that local governments only have powers that are either expressly or implicitly granted to them, and that state legislators have the power and duty to curtail local governments as they deem fit to promote the public good.[24] Because the balance of power in states that use Dillon's Rule shifts even more in favor of state governments, local governments frequently face preemption and have little prospect of overcoming litigation.[25]

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19. *See* Joshua S. Sellers & Erin A. Scharff, *Preempting Politics: State Power and Local Democracy*, 72 STAN. L. REV. 1361, 1371–74 (2020) (explaining the lack of constitutional authority on the topic of local governments and the wide variety of power arrangements between state and local governments around the United States).

20. *See id.* at 1371–73; *see also* Josh Bendor, Note, *Municipal Constitutional Rights: A New Approach*, 31 YALE L. & POL'Y REV. 389, 408 (2013) ("[T]he Fourteenth Amendment does not confer rights on municipal corporations against their states." (quoting 13B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3531.11.1 n.46 (3d ed. 2012))).

21. *See* Sellers & Scharff, *supra* note 19, at 1378–83 (noting examples of express, implied through conflict, and implied in the field preemption disputes between state and local governments throughout the United States).

22. *See* Hon. Jon D. Russell & Aaron Bostrom, *Federalism, Dillon Rule and Home Rule*, AM. CITY CNTY. EXCH. 1 (Jan. 2016), https://www.alec.org/app/uploads/2016/01/2016-ACCE-White-Paper-Dillon-House-Rule-Final.pdf [https://perma.cc/AH7E-3UT9] (explaining the variation and different adoptions of both the Home Rule and Dillon's Rule approaches across the United States). All states discussed throughout this paper have adopted the Home Rule approach to some extent, with some adopting only Home Rule, and others adopting parts of both Home Rule and Dillon's Rule. *See id.* at 6.

23. *Id.* at 2 (noting that Dillon's Rule originated from Iowa Supreme Court Justice John Dillon, who outlined the approach in *City of Clinton v. Cedar Rapids & Missouri River Railroad Co.*, 24 Iowa 455, 480 (1868), and held that municipal governments have only those powers either expressly or implied from the state).

24. *Id.*

25. *See City of Clinton*, 24 Iowa at 480.

The second approach, the Home Rule approach, was popularized as a shift from the more restrictive Dillon's Rule approach.[26] Most states that adopt this second approach delegate certain police powers to local governments and provide some level of protection against state interference in using those powers.[27] The extent to which powers are delegated to local governments depends on the state. In every Home Rule state, however, state governments' power to preempt local governments is limited to topics that involve a state interest.[28] Local governments define and codify these powers in the form of municipal charters.[29]

Florida, like the majority of states, has adopted the Home Rule approach. As codified within the Florida Constitution, "Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law. Each municipal legislative body shall be elective."[30] Though this amendment states that municipalities may exercise a power except as provided by law—referring to express preemption—subsequent court decisions have allowed implied preemption through conflict or preemption in the field.[31] Florida courts first look to see if a state statute expressly preempts local ordinances.[32] Next, Florida courts look to see if the local ordinance frustrates the purpose of the state statute.[33] Frustrating the purpose could take the form of local actions providing for more stringent regulation or penalty than state statutes, or prohibiting or allowing behavior that is not prohibited or allowed by state statute.[34]

A. *State Preemption of Single-Use Plastics Regulations*

The widespread adoption of single-use plastics has become a hotly debated issue because of its negative impact on ecosystems and

26. *See* Russell & Bostrom, *supra* note 22, at 6–9 (noting that the first Home Rule charter was passed in 1875 and that, at the start of the 1900s, there was a dramatic growth of Home Rule charters due to the focus at the time on municipal reform).

27. *Id.* at 6.

28. *Id.*

29. *Id.*

30. *See* FLA. CONST. art. VIII, § 2(b).

31. *See* Russell & Bostrom, *supra* note 22, at 6 (explaining how forty-four states currently use the Home Rule approach); Judge James R. Wolf & Sarah Harley Bolinder, *The Effectiveness of Home Rule: A Preemption and Conflict Analysis*, 83 FLA. B.J. 92, 93–95 (2009) (outlining the use of implied preemption throughout the courts of Florida).

32. Wolf & Bolinder, *supra* note 31, at 92.

33. *Id.* at 93.

34. *Id.*

wildlife.[35] Single-use plastics never fully degrade naturally, making them a significant threat to marine life either through digestion or entanglement.[36] In addition, once single-use plastics are broken down into microplastics, they can pass up the food chain to reach land-based wildlife, including humans, through fish consumption.[37] Also, in Florida, where a large portion of the state depends on tourism, single-use plastics litter beaches throughout the state which—as it has in other states—could reduce tourism.[38] In response to this negative impact and a subsequent shift in public opinion,[39] many local governments throughout Florida have sought to regulate or ban single-use plastics such as plastic bags and straws.[40]

The first attempts at banning single-use plastics in Florida came at the local level from larger cities such as Orlando, Coral Gables, and Palm Beach, and smaller cities such as St. Augustine Beach, Surfside, and Gainesville.[41] These ordinances covered a range of single-use plastics, with some cities banning plastic bags and other polystyrene containers (commonly used for carry-out food) across their entire jurisdiction, and other local governments targeting only single-use plastics and

35. *See* Rebecca Fromer, Comment, *Concessions of a Shopaholic: An Analysis of the Movement to Minimize Single-Use Shopping Bags from the Waste Stream and a Proposal for State Implementation in Louisiana*, 23 TUL. ENV'T L.J. 493, 498–500 (2010); *see also* Olga Goldberg, Note, *Biodegradable Plastics: A Stopgap Solution for the Intractable Marine Debris Problem*, 42 TEX. ENV'T L.J. 307, 310 (2012) (explaining that "[o]n average, approximately 60-80% of debris is plastic waste").

36. *See* Fromer, *supra* note 35, at 498.

37. *Id.* at 499.

38. *See* Nchekube U. Onyima, Student Work, *Litter and Louisiana: Turning the Red State Green*, 8 J. RACE, GENDER & POVERTY 195, 201 (2017) (showing how litter has negatively affected tourism in Louisiana); *see also* Goldberg, *supra* note 35, at 336 ("Plastic debris is . . . known to cause financial harm to coastal communities by soiling beaches, interfering with fisheries, and damaging tourist and recreational businesses . . . .").

39. *See* Drew DeSilver, *Americans Say They're Changing Behaviors to Help the Environment—But Is It Making a Difference?*, PEW RSCH. CTR. (Dec. 19, 2019), https://www.pewresearch.org/fact-tank/2019/12/19/americans-say-theyre-changing-behaviors-to-help-the-environment-but-is-it-making-a-difference/ [https://perma.cc/FR5U-H43F] ("About two-thirds of Americans say . . . using fewer single-use plastics (such as cups, straws and bags) would make a big difference for the environment.").

40. Several counties in Florida enacted plastic bag regulations before the subsequent litigation with Florida Retail Federation. *See* Julia Ingram, *Cities Are Stymied in Banning Plastics—And the State Is Doing Nothing About It, They Say*, MIAMI HERALD (Aug. 23, 2019, 2:09 PM), https://www.miamiherald.com/article234158642.html#storylink=cpy [https://perma.cc/K5MQ-NRS6] (reporting that localities, such as Surfside, Palm Beach, and Gainesville, repealed their plastic bans in response to threatened litigation by Florida Retail Federation alleging that the bans violated state law).

41. *See* Holly Parker, *Plastic Ordinances Prevail in Florida*, SURFRIDER FOUND. (July 17, 2019), https://www.surfrider.org/coastal-blog/entry/plastic-ordinances-prevail-in-florida [https://perma.cc/TGA2-ZUDX] (outlining cities where single-use plastics were banned prior to the discussed litigation).

polystyrene products on city property.[42] All other ordinances by local governments at that time fell within this range—either banning single-use plastics outright across their jurisdiction, or banning them only within the scope of city or county operations.[43]

Many of these local ordinances were in direct opposition to existing Florida state preemption laws regarding plastic bans, so litigation was imminent.[44] Shortly thereafter, the Florida Retail Federation (FRF), a lobbying group and trade association representing many of the largest corporations in the state, including Publix, CVS, Walgreens, Target, and Walmart,[45] sued for declaratory relief. The FRF claimed that Coral Gables' city ordinance, which banned polystyrene containers, was preempted by state law.[46] This suit resulted in a string of litigation between the FRF and Coral Gables, which was ultimately decided by the

42. *See* Cindy Swirko, *City OKs Plastic Bag, Styrofoam Ban*, GAINESVILLE SUN (Jan. 18, 2019, 9:30 AM), https://www.gainesville.com/news/20190117/city-oks-plastic-bag-styrofoam-ban [https://perma.cc/JA4W-SS5L] (showing the type of single-use plastic ban passed in Gainesville as the first example); Xander Peters, *City of Orlando Officially Bans Single-use Plastics and Polystyrene on City Property*, ORLANDO WEEKLY (June 3, 2019, 5:38 PM), https://www.orlandoweekly.com/Blogs/archives/2019/06/03/city-of-orlando-officially-bans-single-use-plastics-and-polystyrene-on-city-property [https://perma.cc/VL64-LS9N] (showing the single-use plastics ban passed in Orlando as the second example).

43. *See* PALM BEACH, FLA., ORDINANCE 24-2019 (June 11, 2019) (banning polystyrene containers and single-use carry out plastic bags throughout its jurisdiction), *repealed by* PALM BEACH, FLA., EMERGENCY ORDINANCE 37-2019 (Sept. 10, 2019); Sheldon Gardner, *Plastics, Polystyrene Ban Passes in St. Augustine Beach*, ST. AUGUSTINE REC. (July 2, 2019, 5:51 PM), https://www.staugustine.com/news/20190702/plastics-polystyrene-ban-passes-in-st-augustine-beach [https://perma.cc/9D54-SKW4] (explaining two ordinances in St. Augustine Beach that prevent retail and food services "from giving their customers single-use plastic straws, single-use plastic bags or expanded polystyrene product—such as foam food containers"); Brittany Shammas, *Surfside Passes Ban of Most Single-Use Plastics, Including Bags and Utensils*, MIAMI NEW TIMES (June 12, 2019, 11:00 AM), https://www.miaminewtimes.com/news/florida-town-of-surfside-bans-most-single-use-plastics-including-shopping-bags-and-utensils-11194786 [https://perma.cc/4WPH-YMEG] (explaining that Surfside expanded "its existing plastic-straw ban to include plastic bags, utensils, and dinnerware"). This is not an exhaustive list as many of these ordinances were repealed following the litigation that will be discussed later in this Note.

44. Florida state legislators have passed three laws that preempt local governments from regulating single-use plastics. *See* FLA. STAT. § 403.708(9) (2021) (stating that the packaging of products made or sold in the state may not be governmentally regulated); *id.* § 403.7033 (preventing local governments from enacting any regulation or other ordinances about the "use, disposition, sale, prohibition, restriction, or tax of . . . auxiliary containers, wrappings, or disposable plastic bags"); *id.* § 500.90 (preempting the regulation of polystyrene products enacted after January 1, 2016).

45. Jerry Iannelli, *Five Times Florida's Powerful Retail Lobby Tried to Influence State Law*, MIAMI NEW TIMES (Aug. 25, 2019, 9:00 AM), https://www.miaminewtimes.com/news/heres-how-publix-walmarts-florida-retail-federation-influences-the-law-11250371 [https://perma.cc/S7YE-YFA6] (outlining some of the largest contributors behind the Florida Retail Federation as well as the group's lobbying efforts).

46. Fla. Retail Fed'n, Inc. v. City of Coral Gables, 282 So. 3d 889, 892 (Fla. Dist. Ct. App. 2019).

Florida Third District Court of Appeal, which upheld the state preemption laws as constitutional and controlling over these local ordinances.[47] This case set up the arguments that local governments—and those challenging local ordinances—commonly make. This case also helps with deciding what types of local ordinances that regulate single-use plastics will survive today.

At issue in *Florida Retail Federation, Inc. v. Coral Gables*[48] were three separate Florida statutes that prevented any local regulation of polystyrene products.[49] In particular, the court decided whether local ordinances banning single-use plastic bags across Coral Gables' jurisdiction violated the Florida Constitution, and whether these statutes constitutionally preempted the powers of the local government to enact these ordinances.[50]

On one side, the City of Coral Gables argued that the three Florida state statutes were unconstitutional and violated the nondelegation doctrine.[51] In *Askew v. Cross Key Waterways*,[52] the Florida Supreme Court reinvigorated and outlined the nondelegation doctrine. The court stated that "the [state] legislature is not free to redelegate to an administrative body so much of its lawmaking power as it may deem expedient."[53] However, the state legislature can "flesh out" a policy, with flexibility given to the administrative agency that is managing the policy, if it "is essential to meet the complexities of our modern society."[54] Coral Gables argued that the state delegation of power to the Florida Department of Agriculture was inappropriate.[55] Also, Coral Gables argued that it had this power under the Miami–Dade County Home Rule Amendment so the state could not redelegate it.[56] Coral Gables further argued that the statutes arbitrarily and capriciously targeted it.[57]

Opposing this, FRF argued that Coral Gables was explicitly prohibited from regulating the packaging of products manufactured or sold in

47. *Id.* at 896.

48. 282 So. 3d 889 (Fla. Dist. Ct. App. 2019).

49. *Id.* at 892–93.

50. *Id.*

51. *See* Alexa Camareno, Local Government Digest, Florida Retail Federation, Inc. v. City of Coral Gables*, 282 So. 3d 889 (Fla. 3d Dist. Ct. App. 2019)*, 49 STETSON L. REV. 763, 764 (2020) (outlining the case and each side's arguments).

52. 372 So. 2d 913 (Fla. 1978).

53. *Id.* at 924 (citing FLA. CONST. art. II, § 3).

54. *Id.* The Florida Supreme Court also stated that there is no single clear test for this doctrine and the delegation of power under this doctrine is flexible. *See* B.H. v. State, 645 So. 2d 987, 993 (Fla. 1994).

55. *Fla. Retail Fed'n*, 282 So. 3d at 893–94.

56. *See* Camareno, *supra* note 51, at 764–66; FLA. CONST. art. VIII, § 11 (granting "full power and authority to the Board of County Commissioners of Dade County to pass ordinances relating to the affairs, property and government of Dade County").

57. *Fla. Retail Fed'n*, 282 So. 3d at 893.

Florida under the three statutes.[58] In particular, Section 500.90 preempted all local ordinances regulating polystyrene products if enacted after January 1, 2016.[59]

The court held that these statutes did not violate the Miami–Dade County's Home Rule Amendment, as, according to precedent, "Home Rule Amendment[s] must be strictly construed to maintain the supremacy of general laws," and these statutes fell within that scope.[60] The court also struck down the argument by Coral Gables that the statutes violated the nondelegation doctrine, holding that the statutes are, on their face, silent on the delegation of any legislative authority and are thus not unconstitutional for that reason.[61] The court further overturned the trial court's prior holding that the date chosen in Section 500.90 unconstitutionally targeted some Florida towns because the date chosen by the statute presented no classification of any governmental entities.[62] Lastly, the court held that the statutes were clear and unambiguous, so they did preempt local ordinances.[63]

This case resulted in all other local governments with similar regulations on the private use of single-use plastics to repeal their ordinances due to the threat of suit by the FRF.[64] Cities with ordinances that only targeted city activities, however, did not have the same pressure to repeal those ordinances and as a result, cities, such as Hollywood Beach, enacted ordinances banning plastic packaging and foam products from all city-owned properties and for any city vendors.[65]

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58. *See* Camareno, *supra* note 51, at 763–64.

59. *Fla. Retail Fed'n*, 282 So. 3d at 893.

60. *Id.* at 893–95. For this determination, the court relied on *Metropolitan Dade City v. Chase Federal Housing Corp.*, 737 So. 2d 494, 504 (Fla. 1999), which held that home rule amendments must be strictly construed to maintain supremacy of the Florida Constitution and general laws.

61. *Fla. Retail Fed'n*, 282 So. 3d at 894.

62. *Id.* at 894–95. Specifically, the trial court held that section 500.90 of the *Florida Statutes* violated article III, section 11, subsection (b) of the Florida Constitution, which states that "general laws . . . may be classified only on a basis reasonably related to the subject of the law." FLA. CONST. art. III, § 11(b).

63. *Fla. Retail Fed'n*, 282 So. 3d at 895–96.

64. *See* Ingram, *supra* note 40.

65. *See* Louis Aguirre, *New Ban on Plastics Passes in City of Hollywood, Expanding on Measures Already in Place*, LOC. 10 (Oct. 21, 2020, 6:36 PM), https://www.local10.com/news/local/2020/10/21/new-ban-on-plastics-passes-in-city-of-hollywood-expanding-on-measures-already-in-place/ [https://perma.cc/B2ZD-U3VF] (explaining the ordinance by Hollywood Beach that bans "the use and distribution of single use plastics and polystyrene on city owned property and by city vendors"). Other counties in Florida have followed suit. *See, e.g.*, Martin E. Comas, *Seminole Bans Plastic Straws, Styrofoam Cups, Other Single-use Items in County Contracts*, ORLANDO SENTINEL (Nov. 9, 2021), https://www.orlandosentinel.com/news/seminole-county/os-ne-seminole-county-commission-single-use-plastics-20211109-oxjbcjdwzzacdcfex7rhkgme2q-story.html [https://perma.cc/9BLV-QSXV].

B. *State Preemption of the Rights of Nature*

Another growing movement, both on local and international levels, is the push to give certain important resources, such as waterways, protections based on their intrinsic value to ecosystems and their greater function to society.[66] While these protections have been based on a number of frameworks, most protections are based on government bodies granting nature certain rights to provide legal standing for others to sue on its behalf and to adjudicate claims against its polluters.[67] Local governments stand to benefit greatly from these new protections, as they allow for further redress against polluters or inaction by state legislators while protecting the health of their citizens.[68]

Though most efforts in this movement have primarily been international, local governments and organizations in Florida have sought to push for rights of important natural resources within their communities.[69] For example, in Orange County, Florida, a group called Speak Up Wekiva sought to create a bill of rights for the Wekiva and Econlockhatchee rivers that would allow for Orange County citizens to sue any persons or entities that intentionally or negligently pollute these waters.[70] The bill of rights went before Orange County voters, by way of a charter amendment, on the November 2020 ballot.[71] It ultimately passed, setting up a conflict with state legislators.[72] There are also movements in Lee, Alachua, Brevard, and Osceola counties following a

66. *See, e.g.*, Maria Akchurin, *Constructing the Rights of Nature: Constitutional Reform, Mobilization, and Environmental Protection in Ecuador*, 40 L. & SOC. INQUIRY 937, 944 (2015) (explaining the successful movement in Ecuador to grant certain rights to nature).

67. *See, e.g.*, Geneva E. B. Thompson, *Codifying the Rights of Nature, The Growing Indigenous Movement*, 59 JUDGES' J. 12, 13–14 (2020) (outlining examples of how tribal nations have granted rights to nature under tribal law as well as the growth of this movement).

68. *See* David R. Boyd, *Recognizing the Rights of Nature: Lofty Rhetoric or Legal Revolution?*, 32 NAT. RES. & ENV'T 13, 13–15 (2018) (describing the benefits that can be gained from local efforts for rights of nature and the scope of those efforts within the United States).

69. *See, e.g.*, Katie Surma, *Does Nature Have Rights? A Burgeoning Legal Movement Says Rivers, Forests and Wildlife Have Standing, Too*, INSIDE CLIMATE NEWS (Sept. 19, 2021), https://insideclimatenews.org/news/19092021/rights-of-nature-legal-movement/ [https://perma.cc/Y3NA-B9ZT].

70. *See* WEBOR, *What Is the Right to Clean Water?*, SPEAK UP WEKIVA (2020), http://www.speakupwekiva.com/WEBOR.html [https://perma.cc/497K-672M].

71. *See* Asher Wildman, *Charter Amendment 1 Aims to Help Protect Waterways in Orange County*, SPECTRUM NEWS 13 (Sept. 18, 2020, 4:35 PM), https://www.mynews13.com/fl/orlando/news/2020/09/18/charter-amendment-1-aims-to-help-protect-waters-in-orange-county [https://perma.cc/DR6B-G3N6].

72. *See* Stephen Hudak, *Orange Voters Approve Charter Changes for Clean Water, Split Oak*, ORLANDO SENTINEL (Nov. 3, 2020, 9:13 PM), https://www.orlandosentinel.com/politics/2020-election/os-ne-2020-general-election-orange-amendments-20201104-lupmb6nczzdcbc3smm65536wie-htmlstory.html [https://perma.cc/3ZLY-CLW2] (outlining the passing of the Orange County charter amendment along with a similar measure that limited any changes to the protective status of Split Oak Forest in Orange County).

similar direction to those in Orange County, but the movement in Orange County is the only one that has made it to the citizens for a vote so far.[73] In opposition to Orange County's movement and others like it, many state governments, including Florida's, have sought to forestall any advancement of these rights before they grow in popularity.[74]

In response to efforts by local governments to grant rights to nature, Florida state legislators enacted the Clean Waterways Act[75] ("the Act"), which provides a range of water quality protections that seek to minimize nutrient pollution.[76] Seeing the growing support for the granting of rights to nature, the Florida state legislature codified Section 403.412 of the *Florida Statutes* within the Act, prohibiting all local governments from recognizing or granting certain legal rights to the natural environment, or from granting such rights relating to the natural environment to a person or political subdivision.[77] In response, Speak Up Wekiva sued the Florida Governor, arguing that the Act is unconstitutional under the Ninth and Fourteenth Amendments to the U.S. Constitution.[78] In addition, the group

73. *What Can We Do Differently?*, FIGHT FOR ZERO, https://www.fight4zero.org/rightsofnature [https://perma.cc/XZZ5-95DW]. In Alachua County, a similar measure was submitted for the Santa Fe River, however the Alachua County 2020 Charter Review Commission denied the request to appear on the 2020 ballot. *See* Press Release, Alachua Cnty., 2-12-20 Charter Review Commission Meeting—Public Participation Encouraged (Feb. 7, 2020), https://alachuacounty.us/news/article/pages/2-12-20-Charter-Review-Commission-Meeting---Public-Participation-Encouraged.aspx [https://perma.cc/6ULJ-QRC2]. In Osceola County, the movement to grant rights for Split Oak was proposed for a county charter amendment, however it was also denied by the Osceola County Commission. *See* Terry Lloyd, *Group Hoping to Better Steer Environmental Issues in Osceola*, OSCEOLA NEWS-GAZETTE (Apr. 18, 2020), https://www.aroundosceola.com/news/group-hoping-better-steer-environmental-issues-osceola [https://perma.cc/BL3V-KLJX]. Politicians in other counties adopted the position in their campaign ticket but no legislation or charter amendments have been passed at this point. *See* Scott Powers, *Florida Democratic Party Adopts "Rights of Nature" into Platform*, FLA. POL. (Oct. 16, 2019), https://floridapolitics.com/archives/308603-florida-democratic-party-adopt-rights-of-nature-into-platform/ [https://perma.cc/4G62-5LM8]; *see also* Haley Brown, *Anna Eskamani Files Bill Granting Legal Rights For Natural Environment*, FLA. POL. (Aug. 3, 2021), https://floridapolitics.com/archives/445558-anna-eskamani-files-bill-granting-legal-rights-for-natural-environment/ [https://perma.cc/VNX8-5MDD] (outlining the bills—but not passed—that have been proposed to repeal Florida's preemption law that prohibits localities from passing ordinances that recognize the rights of nature).

74. *See* Boyd, *supra* note 68, at 13–15.

75. 2020 Fla. Laws 1722.

76. *See id.* at 1722–23.

77. *See* FLA. STAT. § 403.412(9)(a) (2021) (limiting all local governments from granting any rights to nature or rights relating to the environment).

78. Complaint at 2, Speak Up Wekiva, Inc. v. DeSantis, 6:20-cv-01173 (M.D. Fla. July 1, 2020). In that complaint, Speak Up Wekiva alleged U.S. constitutional violations for the infringement on "the people's constitutional right of local, community self-government" and that the state's interest of uniformity was not a compelling state interest. *Id.* at 16. It also alleges that, under the U.S. Constitution, section 403.412 of the *Florida Statutes* is not narrowly tailored and

argued that the Act violates Article I, Section 1; Article VIII, Section 1, subsection (g); and Article VIII, Section 2, subsection (b) of the Florida Constitution.[79] Though this lawsuit was voluntarily dismissed by Speak Up Wekiva after the Florida Governor asserted sovereign immunity, the complaint outlines the arguments that will be at the forefront of subsequent lawsuits in which local groups challenge preemption laws.[80]

Local governments and environmental groups argue that the Clean Waterways Act violates parts of the U.S. and Florida constitutions.[81] Looking at the U.S. Constitution, local governments argue that, under both the Ninth and Fourteenth Amendments, such state preemption laws lack a compelling state interest, and that the language in these preemption laws is unconstitutionally vague or unclear.[82] Under the Fourteenth Amendment, if a government activity infringes on a fundamental right of the citizens, the activity must further a compelling state interest.[83] Here, local advocates argue that the right to local community government is so fundamental that it warrants the right to create new causes of action when necessary to protect individual rights.[84] They also argue that the state lacks a compelling state interest, because the only justification the state can assert is its interest in "general uniformity of law" across the state.[85] Lastly, as seen in this case, local advocates argue that the Act uses such vague and unclear language as it simply bans local governments from this activity generally, and that this unclear language and scope is insufficient to justify a preemptive effect.[86]

Additionally, local groups make a similar argument under the Florida Constitution for individual localities involved in the single-use plastics

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is unconstitutionally vague. *Id.* at 16–17. Lastly, the complaint alleged Florida constitutional violations for impermissibly infringing on the ability of charter counties to enact ordinances "not inconsistent" with general law, for not failing to state specific and clear intent to preempt an area or field, and for violating the "single subject rule." *Id.* at 31.

79. *Id.* at 2.

80. *See* Notice of Dismissal of Complaint Without Prejudice at 44, *Speak Up Wekiva*, No. 6:20-cv-01173 (July 21, 2020); Order to Show Cause at 2, *Speak Up Wekiva*, No. 6:20-cv-01173 (July 9, 2020).

81. Complaint, *supra* note 78, at 2.

82. *Id.* at 2, 16–17.

83. *See* Michael J. Gerhardt, Essay, *The Ripple Effects of* Slaughter-House*: A Critique of a Negative Rights View of the Constitution*, 43 VAND. L. REV. 409, 436 (1990) (explaining the standard that the U.S. Supreme Court uses when a fundamental right is placed at issue).

84. *See* Complaint, *supra* note 78, at 10–12 (outlining one example of this argument used by local groups); Tomas Linzey & Daniel E. Brannen Jr., *A Phoenix From The Ashes: Resurrecting a Constitutional Right of Local, Community Self-Government in the Name of Environmental Sustainability*, 8 ARIZ. J. ENV'T L. & POL'Y 1, 7–11 (2017) (explaining the argument that under the Fourteenth Amendment there is a fundamental right to local community self-government).

85. Linzey & Brannen, *supra* note 84, at 51–52.

86. *See* Complaint, *supra* note 78, at 18–24 (arguing that the state statute is unconstitutionally vague).

litigation discussed above.[87] These groups argue that the Act impermissibly infringes on the rights granted in the Florida Constitution under Article 1, Section 1; Article 8, Section 1, subsection (g); and Article 8, Section 2, subsection (b), which allow local governments to enact ordinances and other laws not inconsistent with the general law of the state.[88]

Opposing these arguments, the state or those seeking to uphold these preemption laws would argue the alternative.[89] First, in response to the challenge under the Fourteenth Amendment of the U.S. Constitution, the state would likely argue that the local government does not have a fundamental right to engage in this regulation, or, alternatively, that the state's interest in uniformity is compelling because it is necessary to achieve effective governance.[90] The state would further argue that the statute is not unconstitutionally unclear or vague: its intent is clear on its face, so its application is clear.[91] The state would also likely argue that, though the Florida Constitution grants some powers to local governments, only those powers not given to the state government are left to the local governments—and in this case, this is a power left to the state based on the ruling in *Florida Retail Federation*.[92]

With imminent litigation likely, the recent granting of rights by Orange County to the Wekiva and Econlockhatchee rivers will be the

87. These arguments center around the Florida state constitution not exercising this power so it is left to local governments to govern and control. *See* Camareno, *supra* note 51, at 763–66.

88. Complaint, *supra* note 78, at 2; *see* FLA. CONST. art. 1, § 1 ("All political power is inherent in the people. The enunciation herein of certain rights shall not be construed to deny or impair others retained by the people."); FLA. CONST. art. 8, § 1(g) ("Counties operating under county charters shall have all powers of local self-government not inconsistent with general law, or with special law approved by vote of the electors."); FLA. CONST. art. 8, § 2(b) ("Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law.").

89. *See* Paul S. Weiland, Comment, *Federal and State Preemption of Environmental Law: A Critical Analysis*, 24 HARV. ENV'T L. REV. 237, 237–44 (2000) (outlining the typical arguments in favor of centralization and preemption laws).

90. This argument would center around U.S. Supreme Court cases that do not grant local governments this protection under the Fourteenth Amendment. *See* City of Trenton v. New Jersey, 262 U.S. 182, 191–92 (1923) (holding that in the context of the Due Process Clause of the Fourteenth Amendment, there are no grounds for applying constitutional restraints based on "[t]he distinction between the municipality as an agent of the state . . . and as an organization to care for local needs in a private or proprietary capacity . . . [when] appl[ied] as against the state in favor of its own municipalities").

91. *See* Reynolds v. State, 383 So. 2d 228, 229 (Fla. 1980) (holding that "[t]he test of vagueness of a statute is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and purpose").

92. *See* Fla. Retail Fed'n, Inc. v. City of Coral Gables, 282 So. 3d 889, 893 (Fla. Dist. Ct. App. 2019).

center point of this debate.[93] Despite other counties' efforts leading up to the November 2020 election, only the Orange County amendment reached the ballot. This lawsuit stands as the bellwether case for all other counties, which will look to see how the litigation develops and if local governments will succeed against state preemption on this topic.[94]

C. *State Preemption of Fracking Regulations*

The discovery of fracking and its expansion across the United States led to the opportunity for states to expand into the oil and gas industry where it was not traditionally present.[95] Fracking is a drilling process where water, sand, and chemicals are injected deep underground into shale rock at a high pressure, first downwardly and then laterally across huge distances, in order to break apart the rock to extract oil and natural gas.[96] This fracking expansion has led to economic growth and the expansion of jobs in this industry, but it also has several potential downsides.[97] There is a large public debate around the negative effects that fracking can have on the environment and the health of those who live near fracking operations.[98] The threat of these negative impacts has led many local municipalities across the United States to pass laws regulating fracking operations within their areas.[99] Issues frequently arise when state governments grant permits for fracking operations, and a

93. *See* Hudak, *supra* note 72 (discussing the passage of the Orange County charter amendment, "dubbed the 'clean-water' amendment by its supporters").

94. *See* Craig Pittman, *Ignoring Legislature, Central Florida Voters Say Clean Water Is a Right*, FLA. PHOENIX (Nov. 12, 2020, 7:00 AM), https://floridaphoenix.com/2020/11/12/ignoring-legislature-central-florida-voters-say-clean-water-is-a-right/ [https://perma.cc/U3YX-QQEL] (explaining that individuals from at least fourteen other Florida counties wish to pursue similar amendments).

95. Vanessa Klass, *What's the Big Fracking Deal?*, 42 W. STATE L. REV. 159, 159 (2015) ("Fracking has transformed America's energy potential by allowing increased production of oil and natural gas from formerly inaccessible shale formations.").

96. *See* Benjamin L. McCready, Note, *Like It or Not, You're Fracked: Why State Preemption of Municipal Bans Are Unjustified in the Fracking Context*, 9 DREXEL L. REV. ONLINE 61, 64–65 (2016) (explaining the process of fracking).

97. *See* Clare Foran, *How Many Jobs Does Fracking Really Create?*, ATLANTIC (Apr. 14, 2014), https://www.theatlantic.com/politics/archive/2014/04/how-many-jobs-does-fracking-really-create/445227/ [https://perma.cc/R7MJ-P66G] (discussing the 360-fold increase of oil industry jobs in Pennsylvania between 2002 and 2012 because of fracking, yet noting fracking's minimal impact on the overall economy); Klass, *supra* note 95, at 167 (noting several of the potential fears that people harbor regarding fracking and its growth in the United States).

98. *See* Joel Minor, *Local Government Fracking Regulations: A Colorado Case Study*, 33 STAN. ENV'T L.J. 59, 67–71 (2014) (outlining several health and environmental impacts of fracking).

99. *See* Wayne D'Angelo & Travis Cushman, *Fighting the Frack Attack: The State of State Preemption Efforts*, 37 WL J. ENV'T 1, 2–5 (2016) (outlining many of the local efforts to regulate fracking and the litigation that followed state efforts to preempt them).

battle between state and local governments over who has the power to regulate these operations ensues.[100]

Though there is no ongoing litigation over this issue in Florida, the presence of potential fracking locations is raising issues regarding health, environmental, and water quality concerns.[101] These concerns are primarily centered on the idea that an increase in fracking would contaminate the Florida aquifer, which a significant proportion of the state depends on for fresh water.[102] It has yet to be determined if a law preempting local government's ability to ban fracking will be created at the state level.[103] As of 2016, nearly eighty counties and cities within Florida have passed ordinances banning or opposing fracking or the methods used to discover potential fracking sites.[104]

The difference between this local movement and others across the United States is that, in Florida, there has been some agreement between state and local actors. Florida Governor Ron DeSantis, who ran on the position of banning fracking, issued an executive order in 2019 advising the Department of Environmental Protection to "adamantly oppose" fracking in the state.[105] However, the Florida Governor has yet to put pen to paper, leaving open the option of preempting local bans—in part due to the many failed legislative attempts to ban the practice.[106]

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100. *Id.*

101. *See* Jeff Burlew, *Fracking Fears Surface in North Florida*, TALLAHASSEE DEMOCRAT (Oct. 23, 2015, 2:25 PM), https://www.tallahassee.com/story/news/2015/10/23/fracking-fears-surface-florida-panhandle/74464786/ [https://perma.cc/ZQX5-4EPQ] (noting the public debate in Florida over fears of water contamination caused by a Texas based oil company beginning seismic testing to look into future fracking).

102. *See* Samantha J. Gross, *These Bills Ban Fracking in Florida. They Also Have Loopholes*, TAMPA BAY TIMES (Mar. 26, 2019), https://www.tampabay.com/florida-politics/2019/03/26/these-bills-ban-fracking-in-florida-they-also-have-loopholes/ [https://perma.cc/Q63H-TB7A] (discussing concerns regarding possible contamination of Florida's underground water supply in light of fracking).

103. *See* David Kearns, *Fight Bill to Permit Fracking in Florida Cities*, FLA. TODAY (Feb. 25, 2016, 12:03 AM), https://www.floridatoday.com/story/opinion/columnists/guest-columns/2016/02/25/fight-bill-permit-fracking-florida-cities/80864234/ [https://perma.cc/GCY9-Z6H6] (explaining the debate surrounding proposed Senate Bill 318, which could preempt local governments in Florida from regulating fracking).

104. *See* Lizette Alvarez, *Unlikely Battle over Fracking Intensifies in Florida*, N.Y. TIMES (Feb. 23, 2016), https://www.nytimes.com/2016/02/24/us/in-florida-an-unlikely-battle-over-fracking-intensifies.html [https://perma.cc/8J8T-Z8FY].

105. *See* Seán Kinane, *Ron DeSantis Directs Florida DEP to Oppose Fracking and Off-shore Drilling*, WMNF (Jan. 10, 2019), https://www.wmnf.org/ron-desantis-florida-dep-oppose-fracking-off-shore-drilling/ [https://perma.cc/6MJ8-4E8N] (explaining Governor DeSantis's position on fracking).

106. *See* Jim Turner, *Florida Fracking Ban Could Run into Roadblocks*, PENSACOLA NEWS J. (Nov. 5, 2019, 8:28 AM CT), https://www.pnj.com/story/news/2019/11/05/florida-fracking-ban-could-run-into-roadblocks/4163695002/ [https://perma.cc/2XNC-UZRT] (describing how

Despite the lack of litigation, the arguments that each side would potentially make follow a similar line to those observed in other states. On the local level, there would be anti-preemption arguments that regulating fracking is a power given to local governments by both the United States and Florida constitutions because the local power to ban fracking is bound with the traditional regulation of land.[107] Given the potential health issues involved in fracking, the local government would have an even stronger case that it has the power to protect its citizens from harm. On the other side, the state could argue that regulating the state's energy production is clearly in the state's interest, and is within its power to regulate a practice uniformly across the state as a whole.[108] For support, the state could look to the state's control over oil drilling in the panhandle and the state's past history of state control over offshore drilling operations.[109]

II. LESSONS FROM ACROSS THE UNITED STATES

Florida's local governments are not alone in their fight against state preemption laws. Throughout the United States, there has been extensive litigation over state preemption of local regulations. Local governments in Florida battling against state preemption stand to benefit from the lessons learned from the successes and failures of other local efforts. These lessons cover a wide range of issues and topics, but ultimately boil down to three points: the importance of public education, the uphill battle that arises if local ordinances overlap state regulations, and the notion of zoning being a traditional area of local control.

A. *The Importance of Public Education and Support*

The role of public opinion overarches all similar battles about state preemption of environmental ordinances. Though never explicitly discussed in the litigation, the question of which comes first—public education about either an environmental effort or a local environmental ordinance—can determine whether a local ordinance will be upheld or

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the lack of agreement within the Florida Senate regarding fracking bans prevented the passage of legislation).

107. *See* David L. Schwed, *Pretextual Takings and Exclusionary Zoning: Different Means to the Same Parochial End*, 2 ARIZ. J. ENV'T L. & POL'Y 53, 56 (2011) (discussing the discretion traditionally afforded to local governments to use land for a public purpose).

108. *See supra* text accompanying note 90; *cf.* Alexandra B. Klass & Elizabeth Henley, *Energy Policy, Extraterritoriality, and the Dormant Commerce Clause*, 5 SAN DIEGO J. CLIMATE & ENERGY L. 127, 128–29, 185 (2014) (explaining how Congress can justify federal preemption of state energy laws through a strong federal interest in national uniformity).

109. *See* Craig Pittman, *Florida Not Stopping On-shore Oil Drilling*, TAMPA BAY TIMES (Nov. 30, 2019), https://www.tampabay.com/news/environment/2019/11/30/florida-not-stopping-on-shore-oil-drilling/ [https://perma.cc/3M6R-82NJ] (describing the growth of land oil production in Florida and the state regulation of this industry).

overturned. This is because public education about a cause usually leads to increased political support[110] and a source of law that local governments can point to during litigation. Furthermore, if public support is great enough, it can result in a ballot-driven constitutional amendment that further shapes litigation.

A number of these disputes demonstrate the importance of public education for the success of local actions. The clearest example of this is the battle between state and local governments in California over the implementation of a single-use plastic bag ordinance.[111] In 2005, San Francisco attempted to impose a tax on each single-use plastic bag; however, after heeding pressure from the plastic-bag industry, California state legislators enacted the Plastic Bag and Litter Reduction Act,[112] which preempted all local governments in the state from setting fees or taxes for plastic bags.[113] However, it also required plastic bag manufacturers to develop educational material to encourage citizens to reduce, reuse, or recycle their plastic bags.[114] This provision was one of the key factors in shifting popular opinion because, at the time the preemption was enacted by the state, general public opinion was against the ordinance due to concerns about costs imposed on low income residents.[115] Following the preemptory law's enactment, San Francisco changed its course by focusing heavily on educating the public about the advantages of reusable checkout bags over plastic bags.[116] This focus greatly assisted with the San Francisco local government's next plastic bag ordinance, which, instead of targeting plastic bags, required its citizens to use reusable bags following a gradual implementation period.[117] This new ordinance also worked around the preemption law to

110. *See Education Is the Key to Promoting Political Participation: Vanderbilt Poll*, VAND. UNIV. (June 25, 2012, 1:56 PM), https://news.vanderbilt.edu/2012/06/25/education-key-to-promoting-political-participation/ [https://perma.cc/B972-NB5P] (finding that education increases one's likelihood of political participation).

111. *See* Fromer, *supra* note 35, at 503–04 (summarizing local initiatives in California and changes in state preemption laws regarding single-use plastic bag regulations).

112. 2006 Cal. Stat. 6633.

113. *Id.* at 6635; Fromer, *supra* note 35, at 502 ("Around the same time, California Governor Arnold Schwarzenneger . . . signed into law . . . the Plastic Bag and Litter Reduction Act, which prohibited localities from setting plastic carryout bag fees.").

114. 2006 Cal. Stat. at 6635; Jennie Reilly Romer, Comment, *The Evolution of San Francisco's Plastic-Bag Ban*, 1 GOLDEN GATE U. ENV'T L.J. 439, 456 (2007) ("The law also requires that plastic-bag manufacturers develop educational materials to encourage reduction . . . of plastic bags."); Assem. B. 2449, 2005-06 Reg. Sess. (Cal. 2006) (outlining the requirements for store operators to provide recycling programs and plastic carryout bag manufacturers to create and supply educational materials).

115. *See* Romer, *supra* note 114, at 453–54.

116. *See id.* at 454 (describing methods to achieve a reduction in plastic bag use).

117. *Id.* at 457, 459 (describing the gradual implementation of San Francisco's Plastic Bag Reduction Ordinance, mandating the use of alternatives to plastic bags).

approach the issue in a different way by working with the public and stores to enact the ordinance.[118] The ordinance has yet to be challenged by the state, and other cities in the state have followed this strategy as well by further educating the public on the topic.[119] Public education through a number of different avenues led to the successful enactment of this local ordinance. For example, public education got more state legislators on the side of the local efforts and helped to convince private industries that they stand to gain from the transition.

Another example of public education and support having a profound effect is how it can result in favorable statutes for environmental efforts. One case that stands out involves Pennsylvania's effort to preempt local governments from regulating fracking.[120] In 2012, Pennsylvania legislators repealed parts of the existing Pennsylvania Oil and Gas Act,[121] and added Chapter 33,[122] which prohibits any local regulations of oil and gas operations.[123] A group of citizens challenged this Act, arguing it was unconstitutional under the Pennsylvania state constitution.[124] The key factor in the court's determination was a largely ignored amendment that was enacted by voters forty years prior: the 1971 Pennsylvania Environmental Rights Amendment.[125] This amendment created a right for all Pennsylvanians to "clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment."[126] The Pennsylvania Supreme Court breathed new life into the amendment when it held that the state law could not preempt the local regulations at issue because it would "fundamentally disrupt [the municipalities'] expectations respecting the environment," [127] and that the amendment created fiduciary duties for the state "to prevent degradation, diminution, and depletion of our public natural resources."[128] The Pennsylvania Oil and Gas Act imposed heavier environmental burdens on some communities than others, thus breaching the state's fiduciary duty.[129] Past public support saved future local ordinances in this case, and looking

118. *Id.* at 459 (explaining how San Francisco's ordinance applies to stores).

119. *See* Fromer, *supra* note 35, at 506 (overviewing proposed or considered bans in other California cities).

120. *See* Robinson Twp. v. Commonwealth, 83 A.3d 901, 915–16 (Pa. 2013).

121. 2012 Pa. Laws 87.

122. *Id.* at 171.

123. *Robinson Twp.*, 83 A.3d at 915.

124. *Id.* at 915–16.

125. *See* Robert B. McKinstry Jr. & John C. Dernbach, *Applying the Pennsylvania Environmental Rights Amendment Meaningfully to Climate Disruption*, 8 MICH. J. ENV'T & ADMIN. L. 49, 51 (2018) (explaining the *Robinson* court's decision to strike down an act in violation of the Pennsylvania Environmental Rights Amendment).

126. PA. CONST. art. 1, § 27.

127. *Robinson Twp.*, 83 A.3d at 978.

128. *Id.* at 978–79.

129. *Id.* at 979–80.

forward, likely prevents state preemption in other areas that violate the Pennsylvania Environmental Rights Amendment.

Conversely, if local ordinances run into state preemption without public education or support, there is a high chance that the local ordinance will be repealed due to the balance of power in the state. In Texas, the City of Laredo passed an ordinance to fine those who use single-use plastic bags in their retail or commercial enterprises.[130] A trade group then challenged this ordinance, and the Texas Supreme Court held that since the Texas Constitution prevents city ordinances from conflicting with state law, this local ordinance regulating single-use plastic bags was preempted.[131] A stark difference between this case and the prior two is a lack of general public support across the state of Texas for the local ordinance, and the limited sources of law that Laredo's ordinance could use as support, as it was one of the first ordinances in the state on this issue.[132] The court noted in its opinion that there are public policy arguments to be made on both sides, and that the court chose to avoid this discussion completely and to strictly apply the state law instead.[133] This leaves open the public policy debate, and if the public policy argument were to shift more in favor of local governments—perhaps if these ordinances had more public support from education—future Texas cases could be decided differently.

B. *Overlap with Existing State Permitting and Regulations*

An overarching theme accompanying many state-preempted local ordinances addressing the three environmental issues discussed in this Note is the common likelihood of preemption if local ordinances overlap states regulations. In litigation throughout the United States, this overlap usually takes the form of a local government's permit process conflicting with a state's permit process, or as a local ordinance making an existing state regulation moot. In either case, if the local ordinance overlaps a state regulation, the court is likely to hold that it is preempted by conflict or preempted in the field.

Overlaps with a state's permit process are common for local ordinances on fracking or other drilling-based operations and in the regulation of air quality. In one example, the Ohio Supreme Court held that the state's Home Rule Amendment did not allow any oil and gas permit schemes on top of the state system.[134] In that case, the City of

130. *See* City of Laredo v. Laredo Merchs. Ass'n, 550 S.W.3d 586, 590 (Tex. 2018).

131. *Id.* at 591, 598.

132. *See* Erin Adele Scharff, *Hyper Preemption: A Reordering of the State-Local Relationship?*, 106 GEO. L.J. 1469, 1477 (2018) (explaining the preemption challenge in Texas and others across the United States).

133. *Laredo Merchs. Ass'n*, 550 S.W.3d at 589–91.

134. State *ex rel.* Morrison v. Beck Energy Corp., 37 N.E.3d 128, 131 (Ohio 2015).

Munroe Falls sought an injunction to stop Beck Energy from drilling within its jurisdiction, arguing that Beck Energy needed to first apply for a permit with the city under a city ordinance.[135] The court held that the local ordinances were preempted because they conflicted with state-licensed oil and gas production, which was within the state's "sole and exclusive authority" to regulate.[136] The city's permit requirement infringed upon the police powers of the state and was in direct conflict with the state's permit procedure.[137]

In another example, the Texas Supreme Court ruled that a city ordinance was preempted under a similar line of reasoning.[138] In that case, the City of Houston denied Southern Crushed Concrete a municipal permit under the city's air-quality ordinance, despite the corporation already having received a state permit.[139] Southern Crushed Concrete brought suit, and the Texas Supreme Court held that the Texas Constitution permitted the state legislature to determine what is preempted even if the challenged local ordinance is within the normal scope of "a home-rule city's broad powers."[140] In this case, the legislature did just that by enacting the Texas Clean Air Act.[141] The additional permit required by the city, according to the court, was an attempt to circumvent preemptive state law.[142]

Another clear situation where local ordinances will be preempted by state law is when the local ordinances make a state regulation effectively moot. For example, in Colorado, the Cities of Longmont and Fort Collins each passed fracking ordinances—one that banned fracking outright within its jurisdiction, and another that placed a moratorium on all fracking within its limits for a five-year period.[143] The Colorado Supreme Court held, first, that if the local ordinances involve both state and local interests, there is potential for preemption; and second, that fracking was a matter of mixed state and local concern due to the state's need for uniform statewide regulation and each town's interest in regulating its jurisdiction's land use through zoning.[144] The court then held that, although the state's law did not expressly preempt the local ordinances, each created an "operational conflict."[145] The court reasoned that, if the

135. *Id.* at 132.

136. *Id.* at 131–35.

137. *Id.* at 135–38.

138. *See* S. Crushed Concrete v. City of Houston, 398 S.W.3d 676, 677–79 (Tex. 2013).

139. *Id.* at 677.

140. *Id.* at 678.

141. *Id.* at 677; Ch. 678, sec. 1, § 382.113, 1989 Tex. Gen. Laws 2230, 2733.

142. *S. Crushed Concrete*, 398 S.W.3d at 678–79.

143. *See* City of Longmont v. Colo. Oil and Gas Ass'n, 369 P.3d 573, 585 (Colo. 2016); City of Fort Collins v. Colo. Oil & Gas Ass'n, 369 P.3d 586, 594 (Colo. 2016) (en banc).

144. *See City of Fort Collins*, 369 P.3d at 591–92; *City of Longmont*, 369 P.3d at 581.

145. *See City of Fort Collins*, 369 P.3d at 592–93; *City of Longmont*, 369 P.3d at 583–85.

overlap were allowed to continue, it would cause the state's regulation—in this case, the Oil and Gas Conservation Act—to be materially impeded by the local government.[146] As a result of this conflict, the local ordinances were preempted.[147]

Under a different type of local environmental ordinance, the principle still holds true. For example, in Hawaii, the County of Kauai passed an ordinance limiting the use of genetically modified seeds.[148] Kauai enacted an ordinance that required farmers to perform several additional steps, such as creating buffer zones between their crops and reporting additional information and reports, to avoid liability.[149] The district court held that since Article VIII, Section 1 of the Hawaii Constitution provides that the state government can grant power as it deems necessary, the counties can regulate in areas of joint state and local concern, but are limited by any state statute or regulations.[150] In this case, though the state statute in question did not explicitly preempt the local ordinance, the court held that the statute impliedly preempted the local ordinance because the ordinance took over the role of identifying potentially harmful plants—a role that was explicitly left to the state in the statute.[151] In other words, the local ordinance took over a role left to the state, and would have made that part of the state regulations moot.

C. *Using Zoning Framing to Avoid State Preemption*

Traditional areas of local control, zoning regulations, and other land-use controls are frequently treated as matters of primarily local jurisdiction by courts. In those cases, if a local ordinance fits within the court's definition of zoning regulations, the local ordinance will not likely be preempted. In many cases, the court will rule that the local ordinance acts in tandem with the state regulations.

One example of this is a local ordinance from Dryden, New York, that banned all oil and gas exploration activities outright within its jurisdiction.[152] The only difference between this ordinance and others that have been previously discussed—the majority of which were preempted by state laws—is that this ordinance was set up as a zoning ordinance.[153] The New York Court of Appeals first examined the New York Constitution and found that local governments had the power to enact

146. *See City of Fort Collins*, 369 P.3d at 592–93; *City of Longmont*, 369 P.3d at 583–85.

147. *See City of Fort Collins*, 369 P.3d at 594–95; *City of Longmont*, 369 P.3d at 584–85.

148. *See* Syngenta Seeds, Inc. v. County of Kauai, No. 14-00014, 2014 WL 4216022, at *1 (D. Haw. Aug. 25, 2014), *aff'd*, 842 F.3d 669 (9th Cir. 2018).

149. *Id.* at *2.

150. *Id.* at *3–5.

151. *Id.* at *8–9; *Syngenta Seeds*, 842 F.3d 669 (affirming the lower court).

152. *See* Wallach v. Town of Dryden, 16 N.E.3d 1188, 1192 (N.Y. 2014).

153. *Id.*

laws not inconsistent with general law of the state, along with the power to enact laws for the protection of their respective physical and visual environments.[154] The statute in question, New York's Oil, Gas and Solution Mining Law,[155] states that all local laws relating to the regulation of oil and gas mining are superseded by state statutes unless they are related to local roads and real property tax law.[156] The court then held that the language in the statute applied only to the regulation of oil and gas activities—not to the zoning laws that govern local land use.[157] The court further held that zoning laws do not attempt to govern oil and gas activities, and that, instead, this zoning ordinance was within the traditional municipal zoning powers of the local government and not preempted.[158] The court reasoned that the overall statutory scheme and the legislative history of this statute further supported this argument.[159]

Beyond New York and the context of local fracking regulations, courts have ruled similarly across the United States and across a wide range of local environmental ordinances. For example, the Supreme Court of Illinois upheld a challenged ordinance of the Village of Carpentersville that regulated the disposal of certain kinds of hazardous waste.[160] In that case, Carpentersville's ordinance was constructed as a zoning ordinance and imposed restrictions on the emission of certain kinds of liquid waste by certain factories.[161] Under Illinois' Environmental Protection Act, the state granted a permit to the business in question, and the state argued that this Act preempted the local ordinance.[162] The Illinois Supreme Court held that the plain language of the statute preempted only additional permitting by local governments, and that zoning ordinances were not expressly preempted by the Act.[163] Furthermore, the court held that the state's interest in uniformity—though affected by the local ordinance—worked concurrently with the local ordinance to defeat preemption by the statute.[164]

154. *Id.* at 1194.

155. Ch. 846, sec. 4, § 23-0303, 1981 N.Y. Laws 2246, 2249.

156. *Id.* at 2249; *Wallach*, 16 N.E.3d at 1195.

157. *Wallach*, 16 N.E.3d at 1195.

158. *Id.* at 1195–98.

159. *Id.* at 1199–1203.

160. *See* Vill. of Carpentersville v. Pollution Control Bd., 553 N.E.2d 362, 362–63 (Ill. 1990).

161. *Id.*

162. *Id.* at 363–64.

163. *Id.* at 368.

164. *Id.*

In Pennsylvania, this trend has similarly held true across multiple decades and types of local environmental ordinances.[165] For example, in the town of Adams, Pennsylvania, the Pennsylvania Supreme Court upheld a local ordinance that placed certain restrictions on mining operations.[166] The court held that, though the Surface Mining Act preempted local regulations of surface mining, it did not preempt the local zoning ordinance.[167] The court further held that the statute did not expressly or impliedly preempt this local ordinance because it was a zoning ordinance, and that this is a traditional mechanism by which local governments protect their citizens.[168] Local ordinances set up under a zoning scheme potentially stand a better chance against state preemption than ordinances that outright oppose or impede state activities.

III. BRINGING THE LESSONS BACK TO FLORIDA

Many of the strategies used in other states by local governments and their supporters can be applied to the local governments of Florida. The strategies can also be applied to the three previously discussed issues of single-use plastics, rights of nature, and fracking bans—issues which encompass much of the battle over state preemption in Florida. Local governments can look to possible solutions such as public education campaigns that promote constitutional amendments, the incorporation of environmental goals into traditional local government functions, and the framing of future local ordinances under the context of zoning.

A. *Crystalizing Public Education into Constitutional Support*

Several local governments throughout the United States have successfully passed local environmental ordinances, and later successfully defended their ordinances against state preemption by using public education campaigns that resulted in environmental constitutional amendments. These same strategies have been tried in Florida in the past with some success.[169] Florida has a history of successful environmental ballot initiatives, however, none have been enacted that provide for such

165. *See* Miller & Sons Paving, Inc. v. Wrightstown Twp., 451 A.2d 1002, 1003–04 (Pa. 1982) (holding that local zoning ordinances regulating mining promoted the health and general welfare of the community and were not preempted); Warner Jenkinson Co. v. Zoning Hearing Bd., 863 A.2d 139, 143 (Pa. Commw. Ct. 2004) (holding that a zoning ordinance around the manufacturing of toxic or hazardous waste was not preempted).

166. *See* Hoffman Min. Co. v. Zoning Hearing Bd., 32 A.3d 587, 590 (Pa. 2011).

167. *Id.*

168. *Id.* at 600–01.

169. *See* Julia Belluz, *Florida Passed This Year's Weirdest Ballot Initiative: A Ban on Vaping and Offshore Drilling*, VOX (Nov. 6, 2018, 9:40 PM), https://www.vox.com/science-and-health/2018/11/5/18055844/florida-amendment-9-vaping-offshore-drilling-midterm-election-results [https://perma.cc/A2EN-KBVL] (explaining the 2018 successful Florida ballot initiative that banned offshore drilling off of Florida's coasts).

broad legal protection as observed in Pennsylvania.[170] Most Florida environmental ballot initiatives have targeted specific issues, but there is potential for broader protection, similar to that provided by Pennsylvania's environmental amendment, to have a hugely positive impact on current and future environmental efforts within Florida.[171] Any ballot initiative of this scale will face its challenges, but the odds of passage are greatly increased by implementing a public education campaign, as seen in other previously discussed states.[172] This section contains an outline of what a successful ballot initiative for such a constitutional amendment would require, how a public education campaign could greatly assist environmental efforts, and how this campaign could help tip future litigation around the three discussed local environmental issues in Florida in favor of local governments.

Before looking at how a ballot initiative should be written for Florida, it is important to consider what made the Pennsylvania amendment successful.[173] Looking at its language, the Amendment not only grants Pennsylvania citizens certain rights, such as clean air and water, but it also declares the state's public natural resources as common property. It imposes duties on the state government to be the trustee of these resources, requiring it to conserve and maintain them for the benefit of all.[174] The proposed Florida ballot initiative should include a grant of rights to citizens and impose duties on the state government to protect those rights.[175] Both of these provisions would create a source of law to allow citizens to seek redress against the state government, and would give local governments an additional argument around state preemption.[176] If passed, these local governments could argue that the state is failing its new obligations by attempting to use state preemption to impair the rights of its citizens to have a clean environment, and the rights of citizens to enforce these rights through their local governments.[177] This strategy could effectively work around state

170. *Id.* Note how the 2018 offshore drilling ballot initiative, a recent environmental ballot initiative, is targeting a specific issue only.

171. *Id.*

172. *See* Romer, *supra* note 114, at 457–60 (discussing the successful public education campaign connected to San Francisco's plastic bag ordinance).

173. *See* PA. CONST. art. I, § 27 ("The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.").

174. *Id.*

175. *See* McKinstry & Dernbach, *supra* note 125, at 54–58 (noting what attributes that made the Pennsylvania Environmental Amendment successful).

176. *See* Robinson Twp. v. Commonwealth, 83 A.3d 901, 978–80 (Pa. 2013) (serving as an example of a similar source of law effectively granting redress against state preemption).

177. *Id.*

preemption by shifting the issue in litigation from whether something is preempted to whether the state is breaking its obligation.

Bound to any successful ballot initiative is a successful public education campaign that informs the public about what is at stake and teaches the public about the problem the amendment hopes to solve. One noteworthy difference between the proposed ballot initiative and similar successes in the past is the scope of the amendment.[178] In past successful environmental ballot initiatives, such as the 2018 ban on offshore oil drilling, public education was less important because citizens widely understood the ill effects of offshore drilling as a result of the 2010 Deepwater Horizon oil spill in the Gulf of Mexico.[179] The proposed ballot initiative in this case must be far more expansive to educate the public about the range of environmental issues that the ballot initiative could solve.

As observed in the previous section, San Francisco was able to withstand the state's preemption efforts through the use of public education.[180] For this proposed ballot initiative, a lesson that any Florida public education campaign could learn from San Francisco is the importance of framing the issue to limit the areas where private industry can lobby against it.[181] In San Francisco's case, one key to implementing its new ordinance and circumventing state preemption was the reframing of the issue from being solely a tax on plastic bags to a substitution of biodegradable bags.[182] This reframing removed one of the main attacks that the private industry—the Plastic Bag Alliance and the American Plastics Council—made in arguing that the previous tax was a burden on consumers.[183] A similar focus on framing would be necessary on the ballot initiative to inform the public on how the ballot initiative can benefit their lives, while also showing how it would not burden their communities.[184]

As previously mentioned, if the proposed ballot initiative was enacted, having a basis for local governments to seek redress would create a way

178. *See* Belluz, *supra* note 169. The proposed ballot initiative in this Note is of a more general and expansive nature than that of the 2018 Florida offshore drilling ballot initiative, as the proposed ballot initiative would cover a wider range of environmental issues.

179. *Id.*; Mace G. Barron et al., *Long-Term Ecological Impacts from Oil Spills: Comparison of Exxon Valdez, Hebei Spirit, and Deepwater Horizon*, 54 ENV'T SCI. & TECH. 6456, 6460–62 (2020) (noting the impact of the Deepwater Horizon oil spill on the areas surrounding the Gulf of Mexico, including Florida).

180. *See* Fromer, *supra* note 35, at 502–03.

181. *See* Romer, *supra* note 114, at 457–59.

182. *Id.*

183. *Id.* at 452–54.

184. *See* Sarah Krakoff, *Planetarian Identity Formation and the Relocalization of Environmental Law*, 64 FLA. L. REV. 87, 124–29 (2012) (noting how public education, as a tool of driving behavioral change, requires an application to personal and community norms).

to circumvent state preemption. For single-use plastics bans, if a connection could be made between single-use plastics usage and an infringement on the environmental rights guaranteed to citizens, then environmental advocates could argue that these local ordinances must be enacted to protect those rights. Limiting the use of single-use plastics would then be required for the rights of citizens to not be infringed.

For the rights-of-nature issue, a violation of the state government's obligations as trustee would create a situation similar to the Orlando ballot initiatives where citizens can sue the state for failing to protect specific natural resources, thus giving certain natural resources redress through citizens' actions. This redress could take many forms, such as forcing the state government to monitor natural resources more closely, or further limiting what the state government permits regarding these natural resources.

Furthermore, with local ordinances limiting fracking, citizens can argue that the risk of contamination of fresh water infringes on their rights, and that the state violates its obligations by not allowing its citizens to protect their sources of fresh water. State and local governments, acting within their usual functions, monitor the use and quality of their drinking water, so any obligation to protect the public's drinking water from fracking contamination falls within the government's usual obligation.

B. *Avoiding Preemption Using Traditional Local Functions*

One common pitfall that local governments fall into is enacting broad ordinances that either limit an activity or impose additional requirements when permitting an activity. As observed above, either of these styles of ordinance is a ripe target for state preemption, as state legislators can preempt many local governments' ordinances with a single broad statute that either preempts the ordinances or enacts the state's own set of permits.[185] A solution to avoid broad state preemption is to instead pursue the goals of local environmental ordinances by using more traditional functions of local government aside from ordinances. Implementing the goals of the local environmental ordinances into existing functions of local government limits the ability of state legislators to preempt local ordinances, and thus increases the chances of local environmental efforts surviving challenges in court. This section will discuss what these local functions are, how this strategy assists local governments in surviving challenges by state legislators or in litigation, and apply this strategy to

185. *See* Fla. Retail Fed'n, Inc. v. City of Coral Gables, 282 So. 3d 889, 893–96 (Fla. Dist. Ct. App. 2019) (serving as an example of state legislators passing a broadly focused statute and being able to enforce it against a wide range of local governments).

the three local environmental ordinances of banning single-use plastics, granting rights to natural resources, and regulating fracking.

The traditional functions of local governments are broad and expansive, but three functions are of particular use when pursing environmental goals: the selection of vendors for government projects, the extension of incentives to certain businesses, and the managing of local permitting.[186] Each of these functions can be used by local governments to incentivize the private industry to pursue environmental goals. For example, local governments could include net positive environmental impacts as a factor when considering which vendors to hire, offer tax incentives to businesses that implement a plan to shift away from certain environmentally degrading activities, or offer businesses a fast track to local permits if they implement certain environmentally conscious practices. Through these functions and many others, local governments can pursue environmental goals without enacting additional permits or restrictions that would be subject to preemption.

Embedding environmental goals into the various functions of local governments, rather than enacting ordinances, can help local governments avoid preemption. By pursuing environmental goals through a range of functions, local governments do not offer state legislators a clear target for preemption, and they force state legislators to spend more effort and political capital drafting statutes to target individual practices within each local government. Such measures would deter state legislators from expressly preempting local environmental efforts. Also, embedding these goals throughout the functions of local governments could further assist local governments in insulating their policy goals from any preemption challenges in litigation. These environmental goals would, in effect, be directly tied to the most basic and universal functions of local governments, so courts would likely have a much harder time connecting them to a state function such as issuing permits.

This strategy could be applied to the three previously discussed environmental issues as well. With respect to banning single-use plastics, local governments could only hire vendors that do not use single-use plastics, offer incentives to business that adopt alternatives to single-use plastics, and give companies that choose such alternatives fast track in pursuing permits. The application of the strategy to giving rights to natural resources is less straightforward. But local governments could choose vendors whose operations protect certain natural resources. In

186. *See, e.g.*, *Business*, ORANGE CNTY. GOV'T, FLA., https://www.orangecountyfl.net/Business.aspx#.YBcFnS3MxGM [https://perma.cc/GAP2-UQC8] (providing links to businesses seeking procurement contracts, permits, and tax exemptions from the city); *Business*, CITY OF MIAMI, FLA., https://www.miamigov.com/Business [https://perma.cc/ES35-DGDH] (noting the licensing and certificate program used to certify businesses within the city).

addition, local governments could offer incentives for businesses that own large land areas to provide environmental protections to that land, and offer a faster permit track to develop undeveloped land when businesses pledge to set aside certain areas to sustain critical environmental functions. These methods—though not directly granting rights to nature—would provide increased protections to these important natural resources and would help develop a climate in which the private industry stands to benefit from giving the environment more protection.

Lastly, for regulating fracking, local governments could work with utility companies and large-scale vendors to expand the use of renewable energy sources, offer incentives to private landowners to not use their land for fracking, and offer fast tracks for permitting businesses that expand renewable energy use. These methods would pursue the goals of limiting the expansion of fracking within each local government's jurisdiction by incentivizing compliance from those who have the most to gain from allowing fracking—private landowners. By offering private landowners a different path that is comparable to the advantages they would gain from fracking, while also further benefiting their neighbors, local governments may win over landowners.

C. *Using Zoning Framing to Avoid Preemption*

Another successful trend for combating state preemption of local government ordinances is the framing of local ordinances as zoning ordinances, rather than as outright bans or permitting restrictions, likely to fall within the scope of statewide preemption. As observed throughout the United States, the zoning framework can be applied to a variety of issues and could facilitate many local environmental ordinances in Florida. This section will examine how the framing of ordinances as zoning matters could be applied to each of the three environmental local efforts going forward.

Looking at single-use plastics bans enacted by local governments in Florida, the ordinances are typically not tied to zoning and instead place limitations directly on certain types of businesses.[187] The only single-use plastics bans in Florida that survived the *Florida Retail Federation* litigation were those targeting only government operations. A reframing of a ban on the use of single-use plastics by certain businesses into a zoning restriction tied to land could circumvent state statutes.[188] One possible option is to tie single-use plastics limitations to the zoning of properties near water sources where plastic waste has some of its worst

187. *See* Parker, *supra* note 41 (outlining where single-use plastics ordinances by local governments stood before the *Florida Retail Federation* litigation).

188. *See* FLA. STAT. §§ 403.708(9), 403.7033, 500.90 (2021). Each statute was the basis for the court's ruling in *Florida Retail Federation*.

environmental impacts.[189] In addition to zoning restrictions, as observed in San Francisco's case, if local governments implement a replacement program to shift from single-use plastics to a more environmentally-friendly or biodegradable alternative, they can further make any ordinance less of an outright ban and more of a zoning and land use matter.[190]

Moving to the efforts by local governments in Florida to grant certain rights to specific natural resources, local governments could use zoning to give additional protections to nature. First, any natural areas under the direct control of the local government could use zoning ordinances to adjust what restrictions are placed on entities that operate within these natural areas. Framing these adjustments as zoning matters connected to the entities' locations—not to their permits to operate in these locations—could avoid many of the issues that occur when state and local permitting overlap.[191] Secondly, though not fully granting rights to these natural resources, the previously discussed additional protections along with further zoning restrictions placed on entities that operate in nearby locations could protect natural resources from pollutants and degradation.[192]

Reframing fracking ordinances in the context of zoning is one method that has proven successful for local governments looking to avoid state preemption throughout the United States, as observed above.[193] While there is yet to be substantial litigation over local fracking ordinances in Florida, there is a state permit process that local governments will likely need to consider in any local restrictions.[194] Local governments in Florida could look directly to the successes in other states, such as that in *Wallach v. Town of Dryden*,[195] to inform future ordinances.[196] In that case, the New York Court of Appeals noted that zoning restrictions tied to

189. *See* G.G.N. Thushari & J.D.M. Senevirathna, *Plastic Pollution in the Marine Environment*, 6 HELIYON 1, 1–2 (2020) (noting the substantial negative impact that plastic pollution has on coastal and ocean-based ecosystems).

190. *See* Romer, *supra* note 114, at 457–60.

191. *See* State *ex rel.* Morrison v. Beck Energy Corp., 37 N.E.3d 128, 131, 135–38 (Ohio 2015); S. Crushed Concrete v. City of Houston, 398 S.W.3d 676, 678–79 (Tex. 2013). Each case serves as an example of the risk local governments face when they overlap state permits.

192. *See* Geoffrey Heal et al., *Protecting Natural Capital Through Ecosystem Service Districts*, 20 STAN. ENV'T L.J. 333, 353–56 (2001) (explaining how natural resources can be further protected through effective zoning laws).

193. *See* Wallach v. Town of Dryden, 16 N.E.3d 1188, 1192–95 (N.Y. 2014) (serving as an example of a local ordinance limiting fracking surviving state preemption due to a zoning framing).

194. *See Oil and Gas Program*, FLA. DEP'T ENV'T PROTECTION, https://floridadep.gov/water/oil-gas [https://perma.cc/5TSJ-9BUH] (noting the state-wide permitting process for oil and gas drilling in Florida).

195. 16 N.E.3d 1188 (N.Y. 2014).

196. *See id.* at 1192–95.

traditional local controls and survived state preemption because zoning restrictions focused on the use of land within the town borders rather than on the operation of oil drilling overall.[197] Local governments in Florida could also look to similar zoning restrictions for heavy industry already in use as further support for any fracking restrictions as well.[198]

CONCLUSION

Though the scales are tipped against Florida's local governments in their fights against state preemption, there remains hope and the potential for change in the future. Local governments are some of the most direct representations of the voices of citizens, and their voices should not be preempted by state legislators when local ordinances do not truly interfere with state interests. By looking to successes elsewhere to learn how others were able to overcome state preemption, future litigation can swing in favor of local governments. Through the careful framing of local ordinances, further education of the public, use of ballot initiatives, and avoidance of overlapping with state permit regimes, future local ordinances have greater chances of surviving litigation and overcoming state preemption challenges. Many other litigation strategies remain that local governments can pursue to support their environmental ordinances, such as arguing that key natural resources should be given personhood or enforcing the Public Trust Doctrine against inactive state governments.[199] The future is bright. Innovation and creative thinking will provide local governments the path forward to overcome preemption.

197. *Id.* at 1202–03.

198. Local zoning ordinances limiting heavy industry are common throughout Florida. One example is section 656.323 of the *Jacksonville Code of Ordinances*, which outlines the restrictions and locations where such industry is allowed within its boundaries. *See* JACKSONVILLE, FLA., CODE § 656.323 (2022).

199. *See* Hannah J. Wiseman, *Rethinking Municipal Corporate Rights*, B.C. L. REV. 591, 593–604 (2020) (arguing that the extension of rights given to corporations could be extended to other associations of people, for example, municipal governments); Gregory Berck, *Public Trust Doctrine Should Protect Public's Interest in State Parkland*, 84 N.Y. STATE B.J. 44, 48–50 (2012) (noting a number of states that have expanded the Public Trust Doctrine).