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## Protecting Local Authority in State Constitutions and Challenging Intrastate Preemption

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## PROTECTING LOCAL AUTHORITY IN STATE CONSTITUTIONS AND CHALLENGING INTRASTATE PREEMPTION

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Emily S. P. Baxter\*

### ABSTRACT

*In recent years, state legislatures have increasingly passed laws that prohibit or preempt local action on a variety of issues, including fracking, LGBTQIA nondiscrimination, and workplace protections, among others. Often, these preemption laws are a direct response to action at the local level. States pass preemption laws either directly before or directly after a locality passes an ordinance on the same subject. Scholars have seen these preemptive moves as the outcome of the urban disadvantage in state and national government due to partisan gerrymandering.*

*Preemption may be a feature of our governing system, but it has also become a problematic political tool state legislatures use to block the will of local governments. This Note discusses the role of cities and localities within the American republican system and proposes new ways to address preemption based on a commitment to local governing autonomy, also known as home rule. State constitutions and the guidelines courts use to interpret state constitutions offer an opportunity to improve and secure the relationship between state and local governments. The first Part of this Note addresses theories of local power, the second Part surveys a broad range of sources and examples to understand the scope of state preemption of local action, and the third Part critiques proposals to address preemption while offering new ideas to further that effort focused on amending state constitutions. Finally, the Appendix contains an original qualitative analysis of states' constitutional home rule provisions and statutes.*

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## INTRODUCTION

For supporters of worker-protective workplace policies, such as paid sick days or a higher minimum wage, 2014 and 2015 were game-changing years. An unprecedented number of cities passed paid sick leave ordinances and minimum wage increases.<sup>1</sup> There was a feeling that, while there might be legislative inertia at the federal or state level, cities could act and prove that these workplace protections were effective, feasible, and forward-thinking. But, as low-level economic policy researchers in Washington, D.C., my fellow think-tank denizens and I were quickly alerted to another growing pattern: state legislators were introducing preemptive

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1. See, e.g., *Paid Sick Time Legislative Successes*, A BETTER BALANCE, <https://www.abetterbalance.org/resources/paid-sick-time-laws/> (last visited Mar. 24, 2019); *14 Cities & States Approved \$15 Minimum Wage in 2015*, NATIONAL EMPLOYMENT LAW PROJECT (Dec. 21, 2015), <https://www.nelp.org/news-releases/14-cities-states-approved-15-minimum-wage-in-2015/>.

bills to block these local actions as soon as they were passed or, sometimes, days before city councils voted. We saw the pattern repeating in other areas, such as environmental ordinances, particularly local hydraulic fracturing (fracking) bans, and LGBTQIA anti-discrimination actions—most famously with North Carolina’s “bathroom bill.”<sup>2</sup> Working with my counterpart on the LGBT policy team, we learned that these preemptive moves were more than just political power grabs. They also raised fundamental questions about the functioning of American democracy at the state and local level. They challenged typical assumptions about the structure of our government and its aspiration to balance power. We were out of our depth.

Since then, some of the nation’s foremost scholars on local law have taken on the effort to untangle the meaning, legal ramifications, and possible avenues for addressing state preemption of local action. A dominant view is that such preemptive action is the result of a systematic urban disadvantage in representation at the state and national level, leading to legislatures that are skewed toward the preferences of non-urban constituents and legislators that may disagree with the actions of local governments.<sup>3</sup> Accepting this foundation, this Note seeks to broaden the universe of solutions that may recalibrate intrastate preemption so that it is a more deliberate feature of state and local governance, rather than merely a political opportunity. Given the difficulties of legal challenges to intrastate preemption discussed in Part II.C, this Note focuses on state constitutional and judicial reforms.

Part I of this Note explains the role that cities and localities play in the American governing structure. It discusses differing theories about the extent of local power and introduces preemption as a feature of our system of representative democracy. Part II looks more closely at the current problem: a recent wave of preemptive state legislation in response to local action. Part III furthers efforts to address the rise of state preemption by focusing on possible amendments to state constitutional constructions of home rule. It analyzes current proposals and then offers new changes to state constitutions and judicial procedures. Finally, the Appendix provides a qualitative assessment and comparison of states’ home rule provisions.

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2. See, e.g., Amber Phillips, *The Tumultuous History of North Carolina’s Bathroom Bill, which is on Its Way to Repeal*, WASH. POST (Dec. 19, 2016), [https://www.washingtonpost.com/news/the-fix/wp/2016/12/19/the-tumultuous-recent-history-of-north-carolinas-bathroom-bill-which-could-be-repealed/?utm\\_term=.7310a08339da](https://www.washingtonpost.com/news/the-fix/wp/2016/12/19/the-tumultuous-recent-history-of-north-carolinas-bathroom-bill-which-could-be-repealed/?utm_term=.7310a08339da).

3. See discussion *infra* note 37.

## I. LOCAL AUTONOMY AND ITS CHALLENGES

Within the structure of American government, localities are seen both as creatures of the state<sup>4</sup> and as independent governing entities.<sup>5</sup> There are benefits and disadvantages to each outlook. State legislatures may have more expertise to analyze issues and implement laws that affect a whole state.<sup>6</sup> At the same time, localities are often made of discrete populations with specific governing needs. They may be able to “try out” new policies that would be difficult to enact statewide.<sup>7</sup> Despite—or because of—cities’ growing economic and cultural power, discussed below,<sup>8</sup> states have increasingly passed laws that specifically preempt local action on a broad range of issues.<sup>9</sup> In some instances, states passed preemption laws just after or just before a particular city passes an ordinance, suggesting reactionary state action.<sup>10</sup> Part I situates this phenomenon within the context of general principles about the role of local political subdivisions in the constellation of American government and discusses the advantages and disadvantages of preemption.

A. *Cities in the American System*

Since the late nineteenth century, the baseline theory of the role of cities in the American governing structure has been that cities are creatures of the state.<sup>11</sup> The United States Constitution does not mention local governments,<sup>12</sup> and conceptions of American federalism tend to focus on the relationship between the “dual sovereignties” of the federal government and state government.<sup>13</sup> Following this line of thinking, states permitted localities to create local governments in order to implement state goals and duties in places that, at one time, were isolated from other metropolitan ar-

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4. Matthew J. Parlow, *Progressive Policy-Making on the Local Level: Rethinking Traditional Notions of Federalism*, 17 TEMP. POL. & CIV. RTS. L. REV. 371, 372 n.7 (2008) (referencing Judge John Dillon’s “Dillon’s Rule”); see, e.g., *Hunter v. Pittsburgh*, 207 U.S. 161 (1907).

5. See discussion *infra* note 18 and accompanying text.

6. See *infra* Part I.B.

7. *Id.*

8. This Note does not focus on the difference between city or urban governance and other forms of local government, such as in rural areas or suburbs.

9. Nicole DuPuis et al., *City Rights in an Era of Preemption: A State-by-State Analysis 2018 Update*, NATIONAL LEAGUE OF CITIES 3 (2018), <http://www.nlc.org/sites/default/files/2017-03/NLC-SML%20Preemption%20Report%202017-pages.pdf>.

10. Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163, 1165–66 (2018).

11. Parlow, *supra* note 4, at 372.

12. *Id.*

13. Rick Su, *Intrastate Federalism*, 19 U. PA. J. CONST. L. 191, 211 (2016).

eas or from the state legislature.<sup>14</sup> Until the late nineteenth century, local governments tended to operate under Dillon's Rule, a common-law principle that allowed cities and localities to take action only where the state had given them a specific grant of power.<sup>15</sup>

Unlike Dillon's Rule, "home rule" is the term used to describe local governments' ability to make policy and govern of their own accord.<sup>16</sup> The movement for home rule began in 1875 with a constitutional amendment in Missouri,<sup>17</sup> but its origins are often attributed to Michigan Supreme Court Justice Thomas Cooley.<sup>18</sup> In

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14. Parlow, *supra* note 4, at 372.

15. *Id.* at 372 n.7, 383.

16. Richard Briffault et al., *The Troubling Turn in State Preemption: The Assault on Progressive Cities and How Cities Can Respond*, AM. CONST. SOC'Y FOR L. AND POL'Y 2-3 (2017) (citing Paul A. Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1124 (2007)), [https://www.acslaw.org/wp-content/uploads/2017/09/ACS\\_Issue\\_Brief\\_-\\_Preemption\\_0.pdf](https://www.acslaw.org/wp-content/uploads/2017/09/ACS_Issue_Brief_-_Preemption_0.pdf).

17. Paul A. Diller, *Reorienting Home Rule: Part 2—Remedying the Urban Disadvantage Through Federalism and Localism*, 77 LA. L. REV. 1045, 1065 (2017). Under the 1875 constitution, "large cities" could adopt their own charters. MO. CONST. ART. IX § 16 (1875), [http://www.archive.org/stream/cu31924030493419/cu31924030493419\\_djvu.txt](http://www.archive.org/stream/cu31924030493419/cu31924030493419_djvu.txt). The law required that the local charters align with the state constitution and laws, and specially highlighted that the state legislature retained power over St. Louis, even if it had its own charter. As one early commentator complained: "[h]ome rule in Missouri was unfortunately born with serious congenital defects. . . . Taken at face value, this language would appear to indicate that what the state gave with one hand it took away with the other." Henry J. Schmandt, *Municipal Home Rule in Missouri*, 1953 WASH. U. L. Q. 385, 387 (1953), [https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=3603&context=law\\_lawreview](https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=3603&context=law_lawreview).

18. Justice Thomas Cooley expressed his ideas about local power in his opinion for the Michigan Supreme Court's 1871 case, *People ex rel. Leroy v. Hurlbut*:

The doctrine that within any general grant of legislative power by the constitution there can be found authority thus to take from the people the management of their local concerns, and the choice, directly or indirectly, of their local officers, if practically asserted, would be somewhat startling to our people, and would be likely to lead hereafter to a more careful scrutiny of the charters of government framed by them, lest sometime, by an inadvertent use of words, they might be found to have conferred upon some agency of their own, the legal authority to take away their liberties altogether. . . . We have taken great pains to surround the life, liberty, and property of the individual with guaranties, but we have not, as a general thing, guarded local government with similar protections. We must assume either an intention that the legislative control should be constant and absolute, or, on the other hand, that there are certain fundamental principles in our general framework of government, which are within the contemplation of the people when they agree upon the written charter, subject to which the delegations of authority to the several departments of government have been made. That this last is the case, appears to me too plain for serious controversy.

*People ex rel. Leroy v. Hurlbut*, 24 Mich. 44, 97–98 (Mich. 1871). According to Judge David Barron, Cooley's outlook was partially a product of the constitutional interpretation of Cooley's era: "This organic approach to constitutionalism was typical of his time. . . . As a result, Cooley's defense of local governmental independence, although formally based in state law norms, was rooted in a larger constitutional vision that he believed to be capable of generalization." David J. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 511–12 (1999).

the intervening century, most states have adopted a form of home rule authority for localities.<sup>19</sup> Some states have “legislative home rule,” where local governments are granted broad authority to legislate on any subject “unless defined”—that is, prohibited—by the state legislature.<sup>20</sup> This type of home rule gives localities considerable freedom to pass laws.<sup>21</sup> Other states operate under a narrower “*imperio*” home rule regime, where state legislatures grant localities specific spheres of power, such as zoning or municipal development.<sup>22</sup> Neither legislative nor *imperio* home rule provides particularly strong protections from preemptive action by state legislatures, although many states’ home rule structure includes some constitutional or legislative limits on the state legislature’s power, as well.<sup>23</sup> By Professor Davidson’s count, thirty-seven state constitutions require state legislation to be general, rather than of “local concern.”<sup>24</sup> As such, states are often prohibited from passing laws specifically targeting a particular locality or a particular local action.<sup>25</sup> At least fifteen states limit—via state constitution or state supreme court interpretation of the state constitution—the ability of the state legislature to “override certain local enactments.”<sup>26</sup>

Given the potential for states to limit local action even where home rule exists, a number of academics argue that home rule is more nominal than substantive. By this view, home rule is not “an identifiable sphere of local autonomy.”<sup>27</sup> Instead, it is a “constellation of grants and limitations that ‘powerfully influence[] the ways in which cities and suburbs act.’”<sup>28</sup> Professor Stahl argues that home rule did not transform cities and suburbs into autonomous actors precisely because the “dividing line between local and state

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19. Diller, *supra* note 17, at 1065.

20. Nestor Davidson, STATE SUBSTANTIVE AND PROCEDURAL CONSTRAINTS ON LOCAL PREEMPTION LEGISLATION, LEGAL EFFORT TO ADDRESS PREEMPTION (LEAP) PROJECT (March 2017), <https://www.abetterbalance.org/wp-content/uploads/2017/08/State-Substantive-and-Procedural-Restraints.pdf>.

21. Schragger, *supra* note 10, at 1193.

22. Laurie Reynolds, *Home Rule, Extraterritorial Impact, and the Region*, 86 DENV. U. L. REV. 1271, 1275–77 (2009). See also Richard Briffault et al., *supra* note 16, at 2 n.2 (describing the historical evolution of the types of home rule); Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 13–17 (1990).

23. See *infra* Part III.A.

24. Davidson, *supra* note 20 (“Roughly 37 states constitutions provide that legislation must be general, as opposed to ‘special’ or ‘local.’ Although the jurisprudence is varied, it is perhaps not too much of an oversimplification to say that a statute that relates to persons or things as a class is a general law, while a statute which relates to particular persons or things of a class is a special law. Similarly, a local law is a kind of special law, where the subject of the law is a specific locality or group of localities singled out from the class of all localities.” (citation removed))

25. *Id.*

26. Diller, *supra* note 17, at 1065.

27. Schragger, *supra* note 10, at 1193.

28. *Id.*

affairs is extremely amorphous.”<sup>29</sup> As definitions or political motivations change, states have passed laws and courts have interpreted them, as well as the meaning of “local concern,” in ways that are often deferential to state control.<sup>30</sup> Moreover, different states have different judicial tests for determining what is or is not a state concern. Given persuasive arguments on both sides, Stahl notes that courts are hesitant to sacrifice “statewide uniformity” and “compromise states’ police powers.”<sup>31</sup>

When courts do take a stance on local versus statewide concern, decisions often fall along a public-sphere versus private-sphere divide: Courts tend to relegate local power to the realm of “home and family” or “associational” concerns rather than “regulation of the market.”<sup>32</sup> Issues such as education, housing, or land use are often found to be local concerns, while regulation of “commercial and other market actors,” including issues involving worker and workplace protections or environmental regulations affecting businesses, are held to require statewide uniformity.<sup>33</sup> This may suggest an anti-urban bias in courts’ and legislatures’ view of home rule.<sup>34</sup>

### B. *The Contested Role of Cities and Localities*

The proper allocation of city and local power is a more controversial debate today than it has been in decades. Many large cities wield social, economic, and political power far greater than the Founders may have imagined.<sup>35</sup> Disputes and disagreements arise for a number of reasons, including the fact, as Professor Schragger argues, that city boundaries are based on an “identifiable constituency,” whereas state boundaries are more arbitrary and based on history and geography.<sup>36</sup> Cities may be in a better position to make

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29. Kenneth A. Stahl, *Preemption, Federalism, and Local Democracy*, 44 *FORDHAM URB. L.J.* 133, 171 (2017).

30. See *infra* notes 119–23, 144–45 and accompanying text.

31. Stahl, *supra* note 29, at 171.

32. Schragger, *supra* note 10, at 1194–95.

33. *Id.*

34. *Id.* at 1193–95. Professor Schragger explains that local grants of power are “more readily enjoyed by suburban jurisdictions and easily effaced when locals seek to regulate powerful commercial and financial actors.” This idea grows out of Barron’s argument that zoning and land use issues invoking home rule often come from “suburban power” trying to “protect property values.” *Id.* at 1193–94.

35. See Parlow, *supra* note 4, at 372–73.

36. Schragger, *supra* note 10, at 1185.



effective policy because their constituents are more likely to be bound by shared experiences, concerns, and needs.<sup>37</sup>

There are competing perceptions of the advantages and disadvantages of local governance: On one hand, the ability of economically and politically powerful localities to experiment with and implement tailored policies can be seen as an important opportunity to improve Americans' lives. Cities can serve as "laboratories of innovation," and strong local power allows local governments to address concerns that might differ from other parts of their state.<sup>38</sup> Local governments can be more responsive to constituents because both the governments and constituencies are smaller (that is, made of fewer people); members of communities may have more access to their elected officials and greater opportunity to be civically involved.<sup>39</sup> Policy innovations that may not be feasible or politically possible at the federal or state level may find a home at the local level. For example, since 2013, twenty-eight cities have passed ordinances ensuring that workers have access to paid sick days,<sup>40</sup> while a federal paid sick days bill has been reintroduced and neglected in Congress seven times since 2004.<sup>41</sup> Paid sick days ordinances are often proposed by the political left, and the success of local-level legislation highlights the fact that city sovereignty has inescapable political and ideological components.<sup>42</sup> Cities or urban areas are increasingly liberal, or at least more likely to vote for the Democratic Party, while rural and non-urban areas are more likely to vote for the Republican Party.<sup>43</sup> In other words, intrastate preemption laws are, in part, an outgrowth of differences in ideology and policy priorities between localities and states.

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37. This Note does not focus on the difference between city or urban governance and other forms of local government, such as in rural areas or suburbs. In the last two years, there have been multiple articles discussing the "urban disadvantage" within state legislatures. Bringing together federalism and politics, these articles argue that more liberal constituents in cities can create large margins for candidates on the left. State legislatures with many rural districts tend to elect more legislators on the right, however, and rural representatives can outnumber their counterparts from cities even though they represent fewer people. In other words, rural areas often have an outsized sway in state legislatures. This is true at the national level as well. This phenomenon is important context for explaining the success of preemptive state-level moves, as well as the political and ideological differences between state and local actors. See Paul A. Diller, *Reorienting Home Rule: Part 1—The Urban Disadvantage in National and State Lawmaking*, 77 LA. L. REV. 287 (2016); Diller, *supra* note 17.

38. Parlow, *supra* note 4, at 375.

39. *Id.* at 374.

40. The National Partnership for Women and Families, CURRENT PAID SICK DAYS LAWS (2017), <http://www.nationalpartnership.org/research-library/work-family/psd/current-paid-sick-days-laws.pdf>.

41. Healthy Families Act, H.R. 4575, 108th Cong. (2004), <https://www.govtrack.us/congress/bills/108/hr4575>.

42. See *supra* discussion in notes 34 and 37.

43. See Stahl, *supra* note 29, at 136.

On the other hand, there is concern that an influx of local regulation will create an untenable patchwork of laws within states.<sup>44</sup> From this view, for example, different minimum-wage requirements in different cities might inhibit intrastate business investment because a business would be unable to keep track of what it must pay its workers in each city or municipality. The argument follows that there are certain issues that require uniformity across a state.<sup>45</sup>

Although an advocacy perspective as opposed to an academic one, the American City Community Exchange (ACCE) takes the stance that the Constitution's vision of federalism purposefully includes only state and federal divisions. ACCE is an offshoot of the American Legislative Exchange Council (ALEC), which is devoted to engaging "local elected officials and leaders from business and industry for the advancement of limited government and free market principles."<sup>46</sup> By this logic, local government is only meant to be an administrative extension of the state.<sup>47</sup> Further, one proponent of preemption argues that state-level opposition to local ordinances is consistent with conservative ideology in that it is resistance to big government via "nanny-statist municipal bureaucrats."<sup>48</sup>

Preemption is an integral piece of American governance, yet Professor Briffault labels the current situation of explicit, state legislative preemption as "new preemption."<sup>49</sup> "Old preemption" was "a judicial determination" about whether local law contradicted preexisting state law<sup>50</sup>: "Classic preemption analysis harmonized the efforts of different levels of government in areas in which both enjoy regulatory authority and determined the degree to which state policies might coexist with local additions or variations."<sup>51</sup> In recent years, localities and cities have taken more direct policy ac-

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44. Patrick Gleason, *2017 Looks to Be a Big Year for States Beating Back Local Tyranny*, FORBES.COM (Dec. 6, 2016), <https://www.forbes.com/sites/patrickgleason/2016/12/06/2017-looks-to-be-a-big-year-for-states-beating-back-local-tyranny/#20c505d13ee0> ("It makes it more difficult and costly to do business and work in a state when there is a patchwork of local laws and regulations for companies and workers to navigate. This is why it is a good for employers and employees alike for states to preempt things like local minimum wage hikes and occupational licensing requirements.").

45. See, e.g., Stahl, *supra* note 29, at 171; Gleason, *supra* note 44.

46. American City County Exchange (ACCE), "About ACCE," <http://www.acce.us/about/>.

47. Jon D. Russell & Aaron Bostrom, FEDERALISM, DILLON RULE AND HOME RULE, AMERICAN CITY COUNTY EXCHANGE 3 (2016), <https://www.alec.org/app/uploads/2016/01/2016-ACCE-White-Paper-Dillon-House-Rule-Final.pdf>.

48. Gleason, *supra* note 44.

49. Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 1997–98 (2018).

50. *Id.*

51. *Id.*

tions, and these ordinances have increasingly been met with reactionary preemption laws at the state level. In other words, where cities pass laws that do not expressly conflict with state or federal law, states legislatures have passed laws targeted at specific cities, where permitted, or specific policy issues that bar the local action.<sup>52</sup> Due to state supremacy, the state-level laws *preempt* the local laws.<sup>53</sup>

Today, scholars are striving to articulate a new theory of local control that addresses the political underpinnings of the wave of state preemption legislation. If leveraging preemption as a political tool is undesirable, understanding why doing so does not “seem right” still requires a theory of local power. In early 2018, Professor Richard Briffault expressed reticence about efforts to imbue theories of local control with “a political valence” where there should not necessarily be one.<sup>54</sup> This concern is essential: If efforts to disrupt the current pattern of intrastate preemption become—or at least, are perceived as—left-leaning cities’ attempts to wrest more power from conservative state legislatures and vice versa, a shift in state-level or local-level partisan politics may disrupt the whole order.<sup>55</sup> In other words, a sound theory of local authority that protects local actors from state-level preemption should be just as applicable and appealing regardless of which political party or ideological group is in control.

Preemption is a part of our constitutional structure, and scholars acknowledge that, on certain issues, equally persuasive arguments can be made in favor of local control and state control.<sup>56</sup> The critical question is, when do preemption laws go too far? This Note posits that if intrastate preemption is a thinly-veiled tool to thwart opposing political interests or appease political stakeholders, then it is not serving its purpose as a systemic mechanism of governance. The rest of this Note operates from the starting point that local control is worth protecting regardless of political or ideological motivation. The current wave of preemption laws may be politically opportunistic and undertheorized, but preemption laws are not an illegitimate use of a structural feature of our democratic system.

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52. See Lori Riverstone-Newell, *The Rise of State Preemption Laws in Response to Local Policy Innovation*, 47 J. FEDERALISM 403, 405–07 (2017).

53. Richard Briffault et al., *supra* note 16, at 9–10.

54. Briffault, *supra* note 49, at 2026. (“So are the concerns raised by the new preemption really about local autonomy, or is local autonomy only a means to the end of advancing preempted policies? If, as Kenneth Stahl argues, ‘it is unlikely that voters and legislators will see the question of local power as anything but a partisan issue,’ should these issues—of firearms, workplace equity, discrimination, immigration law enforcement, or public health—be argued solely on substantive policy lines rather than as also involving local autonomy? Certainly there is no necessary connection between local autonomy and progressive values.”).

55. *Id.* at 2027.

56. Stahl, *supra* note 29, at 171.

This Note proposes solutions, through state constitutions and judicial interpretations, that may provide local government with more opportunities to challenge and check preemptive action by state legislatures.<sup>57</sup>

## II. THE STATUS OF PREEMPTION IN STATE AND LOCAL LAW

### A. *State-Level Preemption Laws Across the Country*

Part I addressed the broad background of state-level preemption of local ordinances. Part II investigates specific illustrative examples of preemption, as well as the recent increase in preemptive legislation. Preemptive actions from state legislatures are not an explicit political movement, but they are undergirded by the calculated actions of political strategists.<sup>58</sup> In many cases, it is difficult to see this increase in state preemption as anything other than a reaction to increased governing action at the local level, especially on highly political, controversial issues.<sup>59</sup>

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57. *See, e.g., id.* at 174 (“When courts proceed on the assumption that Madisonian democracy is still operative, despite increasing evidence that society is composed of competing groups, it leads precisely to the political crisis point we have now reached, in which a dominant group uses the structure of democratic institutions to preserve its dominance.”).

58. *See* discussion of ALEC and ACCE, *infra* Part II.B.

59. Sometimes, the reaction happens at both the state and local level: Following the 2016 presidential election and the introduction of the “Stop Dangerous Sanctuary Cities Act” in Congress in 2017, for example, at least four cities declared themselves sanctuary cities and thirty-seven cities recommitted to their sanctuary city status, for a total of around 330 sanctuary cities. Riverstone-Newell, *supra* note 52, at 414. In turn, since 2015, the number of state legislatures considering legislation to preempt local sanctuary city actions has increased over time, with at least eight states considering bills in 2015, an additional eighteen states considering bills in 2016, and 29 states considering bills in 2017. The state bills had mixed success. *Id.* at 415.

Professors Briffault, Davidson, Diller, Johnson, and Schragger detail another high-profile example that shows the reactionary aspect of state preemption laws. Since 2015, Arkansas, North Carolina, and Tennessee have enacted preemptive legislation to prevent local authorities from creating LGBTQIA antidiscrimination ordinances that were more protective than state laws. Briffault et al., *supra* note 16, at 6. These preemption laws followed efforts in cities to enact greater protections for LGBTQIA people. *Id.* North Carolina’s “bathroom bill” may be the most well-known of these preemption laws. In February 2016, Charlotte, North Carolina, passed an ordinance prohibiting discrimination in public accommodations based on sexual orientation or gender identity. The ordinance also permitted transgender people to use the bathroom that aligned with their gender identity. *Id.* at 7; DuPuis, *supra* note 9, at 11. In response, in March 2016, the North Carolina legislature passed a law that prohibited local antidiscrimination ordinances related to public accommodations and employment. Further, the law provided that bathrooms must be designated for use by people based on their biological sex, and the definition of “biological sex” included the gender assigned at birth. Briffault et al., *supra* note 16, at 7; Camila Domonoske and James Doubek, *North Carolina Repeals Portions Of Controversial ‘Bathroom Bill,’* NPR (Mar. 30, 2017), <https://www.npr.org/sections/thetwo-way/2017/03/30/522009335/north-carolina-lawmakers-governor-announce-compromise-to-repeal-bathroom-bill>; Camila Domonoske, *AP*

Preemptive action at the state level touches a vast array of substantive issues, including fracking, employment issues, antidiscrimination laws to protect LGBTQIA people, zoning, the use of pesticides, public and charter school policy, affordable housing requirements, plastic bag use, and the provision of public internet, among others.<sup>60</sup> The National League of Cities produced an extensive report documenting and quantifying state legislation, although the report does not show when the preemption laws were actually passed. However, the National League of Cities' numbers still show the extent of preemption legislation as of early 2018 on a wide variety of issues:

- Twenty-eight states had laws that preempted local action relating to the minimum wage. In certain states, such as Colorado and New Hampshire, these were longstanding state regimes.<sup>61</sup> However, North Carolina, Ohio, and Alabama implemented their laws in 2016.<sup>62</sup>
- Twenty-three had laws that preempted local action regarding paid family and medical leave.<sup>63</sup>
- Forty-one states preempted local action on "transportation network companies," such as Uber and Lyft.<sup>64</sup>
- Twenty preempted local governments' ability to establish municipal broadband.<sup>65</sup>
- Forty-two states placed some sort of limitation on local government's ability to regulate taxing and spending.<sup>66</sup> These limitations appear to be older and more established, as many were first introduced in the 1970s.<sup>67</sup>
- Forty-three states prevented local governments from passing firearm or ammunition safety ordinances that are more stringent than state laws.<sup>68</sup>

The Economic Policy Institute (EPI) has analyzed the timing of some preemption laws, focusing on laws preempting wage and la-

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*Calculates North Carolina's 'Bathroom Bill' Will Cost More Than \$3.7 Billion*, NPR (Mar. 27, 2017), <https://www.npr.org/sections/thetwo-way/2017/03/27/521676772/ap-calculates-north-carolinas-bathroom-bill-will-cost-more-than-3-7-billion>.

60. See generally Richard Schragger, LEGAL EFFORT TO ADDRESS PREEMPTION (LEAP) PROJECT, STATE PREEMPTION OF LOCAL LAWS: PRELIMINARY REVIEW OF SUBSTANTIVE AREAS (2017), <https://www.abetterbalance.org/wp-content/uploads/2017/08/State-Preemption-of-Local-Laws.pdf>.

61. DuPuis, *supra* note 9, at 6.

62. *Id.*

63. *Id.* at 8.

64. *Id.* at 12.

65. *Id.* at 17.

66. *Id.* at 20.

67. *Id.*

68. *Id.* at 23 (citing the Law Center to Prevent Gun Violence).

bor ordinances at the local level. EPI found that of the twenty-five states that have preempted local minimum wage ordinances, approximately half have done so since 2013.<sup>69</sup> Of the twenty states that preempt paid leave laws, only one preemption law was enacted prior to 2011.<sup>70</sup> Of the twelve states that have passed laws preempting local governments from passing prevailing wage laws, which require contractors to pay workers the average wage in a locality when working on public construction contracts, eleven have been passed since 2013.<sup>71</sup>

Perhaps most remarkable is that, since 2015, nine states have passed laws that prevent local governments from passing ordinances to regulate the ways in which workers' hours can be scheduled. EPI did not find any similar laws prior to 2015, and most of these laws were passed in 2016 and 2017.<sup>72</sup> The only law recorded in 2015 was Michigan's "Death Star Bill," which prohibits a variety of local regulation relating to labor and employment. It prohibits localities from raising the minimum wage, regulating paid or unpaid leave, and regulating employee scheduling, among other provisions.<sup>73</sup> The Michigan bill was singular because most preemptive legislation is enacted piecemeal. By contrast, the Local Government Labor Regulatory Limitation Act, the enacted version of the Death Star Bill, was an effort to ensure that the state "occupied the field" or totally regulated any action in that area.<sup>74</sup>

These data provide an illustrative, if incomplete, picture of the state of preemption laws throughout the country. Understanding the uptick in state preemption laws is another matter, however. It is not entirely clear why preemption laws are on the rise, but legal and political theorists, as well as political advocacy organizations, have some opinions.

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69. See Marni Von Wilpert, ECONOMIC POLICY INSTITUTE, CITY GOVERNMENTS ARE RAISING STANDARDS FOR WORKING PEOPLE—AND STATE LEGISLATORS ARE LOWERING THEM BACK DOWN fig. A (2017), <https://www.epi.org/publication/city-governments-are-raising-standards-for-working-people-and-state-legislators-are-lowering-them-back-down/>.

70. *Id.*

71. *Id.*

72. *Id.*

73. The law provides an example of "express preemption," stating: "The legislature finds and declares that regulation of the employment relationship between a nonpublic employer and its employees is a matter of state concern and is outside the express or implied authority of local governmental bodies to regulate, absent express delegation of that authority to the local governmental body." Local Government Labor Regulatory Limitation Act, MICH. COMP. LAWS SERV. § 123.1382 (LexisNexis 2017).

74. See Local Government Labor Regulatory Limitation Act, MICH. COMP. LAWS SERV. § 123.1381 (LexisNexis 2017). The law's broad-ranging and immediate effect inspired its nickname. See Emily Lawler, 'Death Star' bill protesters interrupt House committee meeting, MLIVE (May 19, 2015), [https://www.mlive.com/lansing-news/index.ssf/2015/05/death\\_star\\_bill\\_protesters\\_int.html](https://www.mlive.com/lansing-news/index.ssf/2015/05/death_star_bill_protesters_int.html) ("If this bill passes the voices of millions of Michigan voters will be silenced very suddenly. That's why it's a death star [referencing the *Star Wars* films]").

### B. *Explaining the Rise in Intrastate Preemption*

Throughout the United States, state legislatures have become more conservative, while cities have grown more liberal.<sup>75</sup> Professors Diller and Stahl emphasize preemption as a byproduct of more liberal cities' disadvantage within the state system. In other words, as conservative legislators gained power in state capitals and found themselves beholden to rural constituents, they passed more preemption laws.<sup>76</sup> At the same time, state legislators are less concerned with preemption laws causing economic harm to rural areas or a state overall because there are fewer economic links between cities and rural areas than there have been in the past.<sup>77</sup> This outlook suggests that deregulatory ideology must carry some weight in state legislators' decisions to take action in certain areas.<sup>78</sup>

Professor Stahl goes so far as to say that cultural differences created by the rural/urban divide mean that the "traditional rivalry between urban and rural areas in American politics is now expressed vertically in the relationship between the state and its cities."<sup>79</sup> It is difficult, otherwise, to understand why rural voters would be concerned whether Detroit, for example, is able to raise its minimum wage or regulate how private businesses schedule their workers' hours. Why should "big government" action in a city matter to those who do not live there? Preemptive action allows state legislatures to advance their own ideological goals and score a win against their political opponents, as represented by localities and local actions. In fact, EPI noted that while ALEC and ACCE have argued against a "patchwork of laws" related to local minimum wage increases or scheduling regulation, they have encouraged local governments to create a different patchwork of laws by adopting "right to work" ordinances, which are traditionally conservative, anti-labor measures.<sup>80</sup>

Professor Schragger argues that efforts to preempt local regulation appear to be a reaction to a perceived threat from "wayward" cities and an effort "driven by a combination of corporate deregulatory opportunism, culture-war hostility, and economic populism."<sup>81</sup> A concern is that state legislators may not always thoughtfully consider the potential future ramifications of their

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75. Stahl, *supra* note 29, at 136-37.

76. *See id.* at 154.

77. *Id.* at 146.

78. *See, e.g.*, Schragger, *supra* note 10, at 1182.

79. Stahl, *supra* note 29, at 144.

80. Von Wilpert, *supra* note 69, at 15.

81. Schragger, *supra* note 10, at 1215-16.

preemptive moves. State legislatures' reactionary preemption laws also lack a persuasive intellectual foundation. Protecting cities from "nanny-statist municipal bureaucrats"<sup>82</sup> may be well and good; yet, by passing preemptive legislation, state legislators take on the role of nanny-bureaucrat themselves. Why does "deregulation" at the local level require regulation at the state level?

While political motivations may be a large part of the reason preemption has become a more common practice for state legislatures, there is also evidence that conservative political organizations and lobbyists have contributed in a concerted effort to use preemption to advance policy goals.<sup>83</sup> Most scholars indicate the importance of ALEC, in addition to industry groups.<sup>84</sup> ALEC provides "assistance with strategic planning" and even offers free, online model legislation for preemptive state-level laws.<sup>85</sup> For example, preemption bills in both Alabama in 2016 and Arkansas in 2017 contained language that was strikingly similar to one of ALEC's model bills, "The Living Wage Mandate Preemption Act."<sup>86</sup> The model bill contained the following language: "private enterprises in this state must be allowed to function in a uniform environment with respect to mandated wage rates."<sup>87</sup> In turn, the Arkansas bill argued that "allowing localities to mandate employer-provided benefits would create a patchwork of local regulations' that would burden businesses."<sup>88</sup>

It makes sense that industry and lobbying groups seek favorable legislation at the state level: "The vertical fragmentation of authority in a three-tiered political system provides for multiple bites at the legislative apple."<sup>89</sup> If the point is increased opportunity to

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82. Gleason, *supra* note 44.

83. Professor Riverstone-Newell catalogues the ways in which industry and lobbying groups have worked to influence state actors and, in some cases, "rein in" cities and "create a friendlier business environment for themselves." Riverstone-Newell, *supra* note 52, at 405. She notes that at least one tobacco company urged states to pass preemption laws in the 1980s in order to avoid local smoking restrictions. *Id.* Likewise, in the 1990s, the National Rifle Association successfully campaigned for laws that preempted local firearm regulation and, as mentioned above, today forty-three states have some form of preemptive law relating to firearms. *Id.*

84. Riverstone-Newell, *supra* note 52, at 405–06; Schragger, *supra* note 10, at 1170; Stahl, *supra* note 29, at 137 n.9.

Notably, Professor Stahl dismisses the work of groups such as ALEC and its progressive counterpart, the State Innovation Exchange, as "part of the same process of political and geographic polarization that has caused city and state governments to assume such divergent political profiles." Stahl, *supra* note 29, 137 n.9. I believe there is some room to question whether such coordinated advocacy campaigns are *part of* polarization and urban/rural division or whether they are actually, in part, a driver of action-oriented polarization.

85. Riverstone-Newell, *supra* note 52, at 405.

86. Von Wilpert, *supra* note 69. *See also* DuPuis, *supra* note 8, at 6.

87. Von Wilpert, *supra* note 69.

88. *Id.*

89. Schragger, *supra* note 10, at 1184.



achieve policy goals, then there is motivation to take advantage of structural levers such as preemption. Other factors also matter, however, and the current surge in preemption legislation at the state level can be seen as a combination of increased political polarization, particularly between rural and non-rural constituencies, and increased local government action on certain issues.<sup>90</sup> Regardless of political beliefs—whether cities are acting beyond their purview or state legislators are taking advantage of the system to notch a political win—preemptive state action raises deep questions about the interplay of government at different levels. Preemption laws present an issue in need of reform.

### C. *The Difficulty of Challenges to State-Level Preemption Laws*

Localities hoping to challenge new or old state-level preemption laws have an uphill battle. Part III focuses on reforms to state constitutions and judicial interpretation because of the issues with litigation challenges outlined in this sub-Part. The few exemplary federal cases often rely on equal-protection claims, which courts typically reject.<sup>91</sup> *Lewis v. Bentley*, for example, challenged an Alabama law that preempted local governments from raising the minimum wage.<sup>92</sup> Alabama's legislature passed the law shortly after Birmingham enacted an ordinance raising the minimum wage.<sup>93</sup> Litigants from Birmingham argued that “by shifting decision-making authority from a city with an African-American majority to a white-dominated state legislature, preemption restructured decision-making in a manner that violated equal protection.”<sup>94</sup> The district court rejected this argument, and dismissed the case.<sup>95</sup> The court was not persuaded that preempting local action on the minimum wage was sufficiently related to racial discrimination, even if most minimum-wage earners in Birmingham were Black.<sup>96</sup> In July 2018, however, the U.S. Court of Appeals for the Eleventh Circuit surprisingly reversed in part and remanded the case.<sup>97</sup> The panel addressed standing issues before holding that plaintiffs had stated a valid equal protection claim under *Arlington Heights v. Metropoli-*

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90. See, e.g., Riverstone-Newell, *supra* note 52; Schragger, *supra* note 10; Stahl, *supra* note 29.

91. Briffault et al., *supra* note 16, at 13.

92. *Lewis v. Bentley*, 2017 U.S. Dist. LEXIS 13565 \*1 (N.D. Ala. Feb. 1, 2017).

93. Briffault et al., *supra* note 16, at 14–15.

94. *Id.*

95. *Id.* at 15.

96. *Id.* See also *Lewis*, 2017 U.S. Dist. LEXIS 13565, at \*1.

97. *Lewis v. Governor of Alabama*, 896 F.3d 1282, 1287, 1298 (11th Cir. 2018).

*tan Housing Development Corporation*.<sup>98</sup> Of course, it remains to be seen whether, on remand, Birmingham's equal protection claim is successful.

The success of state-law challenges relies on the nature of the preemptive law, the sort of home rule protections enshrined in a state constitution, and the type of challenge brought (procedural, dealing with general laws, etc.). Two recent successes actually highlight the difficulty of winning preemption challenges absent engrained constitutional or judicial footholds. First, Coral Gables, Florida, successfully defeated a state statute that prohibited local regulation of the use of Styrofoam containers.<sup>99</sup> This win was predicated upon the nature of Florida's Constitution, however, which prohibits the state legislature from passing any law targeted solely at Miami-Dade County, of which Coral Gables is a part.<sup>100</sup> Second, in *City of Cleveland v. State of Ohio*, the court drew upon "long-standing Ohio precedent" to hold that a law targeting an employ-

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98. *Id.* at 1294 (citing *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977)). For a discussion of the ways in which the Eleventh Circuit's application of *Arlington Heights* was surprising, see *Recent Case: Equal Protection—Race Discrimination—Eleventh Circuit Reverses Dismissal of Discrimination Claim Relying on Historical and Statistical Evidence—Lewis v. Governor of Alabama*, 896 F.3d 1282 (11th Cir. 2018), 132 HARV. L. REV. 771, 775–78 (2018).

It is worth noting that, in *Lewis v. Governor of Alabama*, the Eleventh Circuit rejected a political process argument. The viability of a political process argument elsewhere is unclear. *Lewis v. Governor of Alabama*, 896 F.3d at 1297–98. See, e.g., Briffault et al., *supra* note 16, at 13–14 (discussing this process argument where there is a "bare desire" to harm a "protected group."). *Hunter v. Erickson* and *Washington v. Seattle School District No. 1* created an opportunity for "scrutin[y of] structural actions that place a 'special burden' on the ability of minorities to achieve their policy goals in the political process." *Id.* at 14 (citing *Hunter v. Erickson*, 393 U.S. 385, 391 (1969); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 467 (1982)). Briffault et al. argue that the *Hunter* and *Seattle* decisions might allow members of protected groups to argue that the "reallocation of power from the local level to the state level" creates a special burden. *Id.* In *Schuetz v. Coalition to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equality by Any Means Necessary (BAMN)*, 134 S. Ct. 1623, 1637–38 (2014), however, the Supreme Court rejected the application of *Hunter* and *Seattle* to a Michigan ballot initiative that prohibited race-based preferences in public university admissions. The Court held that *Hunter* and *Seattle* addressed actual injuries, or the serious risk of injury, to a protected group, while *Schuetz* was about whether Michigan voters could decide if universities should continue to use a system of racial preferences. *Schuetz v. BAMN*, 134 S. Ct. 1637–38 ("This case is not about how the debate about racial preferences should be resolved. It is about who may resolve it."). The Court was divided in *Schuetz*. It is not clear that a *Hunter* or *Seattle*-style argument could survive without showing that a policy was intentionally discriminatory, even though the holding in *Schuetz* did not overturn *Hunter* or *Seattle*. *Id.* at 1637–38. The Eleventh Circuit was similarly reticent in their interpretation of *Schuetz*. *Lewis v. Governor of Alabama*, 896 F.3d at 1298. ("Thus, while we acknowledge the social and economic history behind the plaintiffs' assertion that the minimum wage is a racial issue, their claim still falls outside the Supreme Court's limited application of the political-process doctrine to laws explicitly addressing racial harms such as segregation and discrimination in the housing market." (citations removed)).

99. Fla. Retail Fed'n, Inc. v. The City of Coral Gables, No. 2016-018370-CA-01, 6–7 (Fla. Cir. Ct. Mar. 8, 2017), <https://www.politico.com/states/fl/?id=0000015b-f3b6-d5fd-a55b-ffe81150001>; Briffault et al., *supra* note 16, at 12.

100. Briffault et al., *supra* note 16, at 12.

ment-related Cleveland ordinance did not meet the Ohio Constitution's generality requirement.<sup>101</sup> In other words, the state legislature's law was so clearly an effort to limit or target the Cleveland ordinance that it could not be deemed permissibly general and applicable to the whole state as required by the Constitution.<sup>102</sup>

These two successes owe much to the specific quirks of the respective state constitutions and case law out of which they come. For *Coral Gables*, while some states require state legislatures to pass laws that are "general" and affect all localities, there are fewer instances of states that prohibit laws targeted at specific cities or local governments.<sup>103</sup> Courts tend to find laws to be general if they can affect all localities in a state, even if they particularly affect one.<sup>104</sup> For *City of Cleveland*, Ohio's case law is unusual in its suspicion of nominally general laws. A litigation challenge to a law that specifically preempts or explicitly occupies a field, such as Michigan's "Death Star" bill, would be much more difficult because Michigan does not have the judicial or statutory safety valves to check preemptive action by the state legislature.<sup>105</sup>

As such, *Pennsylvania Restaurant and Lodging Association v. City of Pittsburgh* might be a more typical example of an attempt to challenge a preemptive state law.<sup>106</sup> In that case, the court rejected Pittsburgh's argument that it was permitted to enact a paid sick days ordinance under its home rule charter. The court held that this was not the type of public health law considered by the charter and that the charter also prohibited Pittsburgh from placing "affirmative duties" upon employers.<sup>107</sup> The dissent urged that this decision read limitations into Pittsburgh's home rule charter that did not exist.<sup>108</sup> It highlighted precedent that recognized the difference between health and safety ordinances that *affect* businesses and ordinances that are intended to *regulate* businesses.<sup>109</sup>

In conclusion, preemption as a political and ideological tool touches many substantive issue areas and there has been an uptick of state legislation within the last five years that has responded di-

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101. *Id.*

102. *Id.*

103. *See infra* Appendix.

104. Davidson, *supra* note 20.

105. *See supra* notes 71–73 and accompanying text.

106. Pa. Rest. & Lodging Ass'n v. City of Pittsburgh, No. 79 C.D. 2016, 2017 Pa. Commw. Unpub. LEXIS 356, at \*1 (2017).

107. *Id.* at \*5.

108. *Id.* at \*10–12.

109. *Id.* It must be noted, however, that shortly before this Note's publication, the Pennsylvania Supreme Court held that the paid sick leave law was within Pittsburgh's home rule authority. Matt Miller, *City can force private employers to provide paid sick leave, Pa. Supreme Court rules*, PENNLIVE (Jul. 17, 2019), <https://www.pennlive.com/news/2019/07/city-can-force-private-employers-to-provide-paid-sick-leave-pa-supreme-court-rules.html>.

rectly to or anticipated local action. While preemption and “intra-state federalism” are important functions of our governing system, local governments should have the ability to rebut state legislatures’ preemptive actions. The next Part discusses the theory behind trying to find a middle ground and stakes a claim for greater local power, while retaining preemptive ability.

### III. RE-IMAGINING LOCAL POWER WITHIN STATE CONSTITUTIONS

The issue-specific nature of recent state-level preemption laws and the downloadable, boiler-plate bills for state legislators demonstrate that there is an effort to use preemption as a tool to arrest local action driven by partisan and demographic divides. There is an evolving debate among scholars of local power about the best way to “reboot” home rule laws and principles to provide local governments with greater protection from preemption and more opportunity to challenge preemptive actions by state legislatures.<sup>110</sup> Part III examines and critiques proposals that have already been made and offers further solutions.

There is longstanding writing on the role judicial interpretation can play in reorienting home rule. Often, preemption-focused legal challenges turn on whether state law explicitly or implicitly preempts a field of regulation such that it prohibits local action in that field or issue area.<sup>111</sup> In some instances, judicial analysis also requires an assessment of the state legislature’s intent.<sup>112</sup> This can be an opaque inquiry, and at least one scholar posits that there should be an “express-only” default rule in judicial determinations of preemption.<sup>113</sup> In other words, local ordinances should only be preempted when state law expressly says they are.<sup>114</sup> Professor Diller notes that this stance deprives judges of discretion and flexibility to handle “unforeseen circumstances.”<sup>115</sup>

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110. See, e.g., *Defending Local Democracy*, A BETTER BALANCE, <https://www.abetterbalance.org/resources/defending-local-democracy/> (last visited Apr. 14, 2018); *The Local Solutions Support Center (LSSC)*, LEAP, <http://leap-preemption.org/index.html> (last visited Apr. 14, 2018). These projects appear to be connected.

111. See generally Diller, *supra* note 16.

112. See *infra* note 184 and accompanying text. See also, e.g., Paul Diller, *Massachusetts*, URB. L. CTR., at 3–4 (May 2017), [https://www.urbanlawcenter.org/copy-of-leap-materials-1](https://www.urbanlawcenter.org/copy-of-leap-materials-1;); Paul Diller, *Texas*, URB. L. CTR., at 2–3 (May 2017), <https://www.urbanlawcenter.org/copy-of-leap-materials-1>; Paul Diller, *Washington*, URB. L. CTR., at 4 (May 2017), <https://www.urbanlawcenter.org/copy-of-leap-materials-1>.

113. Diller, *supra* note 16, at 1159.

114. *Id.*

115. *Id.* Instead, he favors a “substantial interference test” that asks courts to weigh whether a local ordinance “contravenes the broad purposes of state law.” *Id.* at 1168–70. Professor Diller sees this avenue of judicial interpretation as a flexible method for ensuring

In light of the fact that judicial challenges to intrastate preemption have been limited by restrictive interpretations of state constitutions and ironclad state laws, Part III extends previous research and proposes state constitutional changes to better address the problem of intrastate preemption, in addition to recommendations for judicial interpretation. Passing constitutional amendments may be a tall order for states that have passed local preemption laws; yet, it is also important to consider all possible reforms as local actors and state legislators look to redefine the home rule framework in a way that presents a coherent theory of local control and is less vulnerable to the political motivations of state legislators who disagree with local actors.

A. *State Constitutional Home Rule and Arguments for  
Local Immunization*

Although most states provide for some sort of home rule for localities, there is considerable variety among states. Some states, such as Alabama and Delaware, do not have constitutional home rule of any kind.<sup>116</sup> Instead, state statutes provide for local grants of power or limited home rule, but these laws do not have the procedural protections that constitutional home rule provides—that is, it is more difficult to change constitutions. In Alabama, for example, a 1975 state law grants some authority to municipal corporations.<sup>117</sup> While the state permits local action, it also leaves the door wide open for state-level preemption.<sup>118</sup>

Even in states that do provide for constitutional home rule, the extent and expression of home rule can be constrained in certain ways. For example, some states limit home rule by the size of the city, municipality, or county. In Illinois, counties and municipalities with over 25,000 people are automatically considered home rule units, while all other municipalities may elect to become

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protection for local policy innovation and protection from local “expropriative” or exclusionary action. *Id.* at 1170.

116. Paul Diller, *Alabama*, URB. L. CTR., at 1 (May 2017), [https://www.urbanlawcenter.org/Table of Contentscopy-of-leap-materials-1](https://www.urbanlawcenter.org/Table%20of%20Contentscopy-of-leap-materials-1); Paul Diller, *Delaware*, URB. L. CTR., at 1 (May 2017), <https://www.urbanlawcenter.org/copy-of-leap-materials-1>.

117. *See* Diller, *Alabama*, *supra* note 116, at 1 (providing that local corporations can adopt ordinances to “provide for the safety, preserve the health, promote the prosperity and improve the morals, order, comfort and convenience of the inhabitants of the municipality, and may enforce obedience to such ordinances”).

118. *See id.* (“The legislature shall not have the power to authorize any municipal corporation to pass any laws inconsistent with the general laws of this state.”).

home rule via referendum.<sup>119</sup> Moreover, the grant of home rule powers can be limited to specific issue areas or expressly subject to the state legislature's decision to preempt. Again, Illinois's Constitution serves as a useful demonstration: "[A] home rule unit may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare; to license; to tax; and to incur debt." At the same time, the state legislature has the option to "deny or limit" any home rule authority with a three-fifths vote.<sup>120</sup> In other words, large cities and municipalities can do as they please, unless the state legislature says otherwise. Home rule that grants broad authority to local governments but also retains state preemption power is a common approach to constitutional home rule.<sup>121</sup>

There are two other approaches to constitutional home rule: enumerated powers and immune powers. Alaska's constitutional home rule provision, for example, is cabined by a state statute that lists sixty-seven state laws representing areas where the state has denied home rule units' authority. The listed areas focus on regulatory concerns (such as licensing and waste disposal), taxation, and election structure.<sup>122</sup> Yet the list also includes quirkier areas of state-only regulation, such as public breastfeeding and unmanned aircraft (presumably drone) photography.<sup>123</sup> While clear and precise, this reliance on enumerated grants and denials of power is cumbersome. It also relies on express preemption, which can create other problems.<sup>124</sup> It stands to reason that the rigidity of such constitutional provisions or state statutes is inelegant and difficult to overcome through judicial testing. Enumerating provisions place control in the state legislature and leave localities with little recourse.<sup>125</sup>

Although many states have a form of constitutional home rule, fifteen states provide localities with some constitutional or statutory

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119. Paul Diller, *Illinois*, URB. L. CTR. 1 (May 2017), <https://www.urbanlawcenter.org/copy-of-leap-materials-1>.

120. *Id.* (citing ILL. CONST. art. VII, § 6(g)) ("The General Assembly by a law approved by the vote of three-fifths of the members elected to each house may deny or limit the power to tax and any other power or function of a home rule unit not exercised or performed by the State . . .").

121. See *infra* Appendix.

122. ALASKA STAT. § 29.10.200. See also Paul Diller, *Alaska*, URB. L. CTR. 2 (May 2017), <https://www.urbanlawcenter.org/copy-of-leap-materials-1>.

123. ALASKA STAT. § 29.10.200. See also Diller, *Alaska*, *supra* note 122.

124. See *supra* notes 113–15 and accompanying text.

125. By contrast, Illinois might provide a more functional comparison. Illinois' Constitution enumerates more grants and prohibitions for home rule units than other states' constitutions, but it also includes broad grants of power and instructs a liberal reading of the grants. ILL. CONST. art. VII, § 6.

protection from preemption.<sup>126</sup> This number is debatable depending on how protection or immunity is defined. Functional immunity from state interference—areas in which the state cannot act short of constitutional amendment—is typically limited to purely structural and local issues, such as compensation for local officers.<sup>127</sup> But there are other forms of protection, as well: For example, Colorado’s Constitution provides that the state cannot override local action on “purely local and municipal matters.”<sup>128</sup> The constitution enumerates some areas that are local and municipal concerns, including the structure of local elections and mechanisms for collecting local taxes, but does not limit home rule to these issue areas.<sup>129</sup> Even with protections as robust as these, home rule in Colorado only applies to localities with more than 2,000 people. Further, the judiciary has a significant role in determining whether an issue is of local concern, opening the door to more limited interpretations of “purely local and municipal matters.”<sup>130</sup>

Professor Diller sees exceptions to home rule provisions that permit only “general” state laws to preempt local authority as a form of “soft immunity.”<sup>131</sup> Whether these requirements serve as real protection from preemption is debatable, as courts are often more inclined to find laws to be general rather than targeted.<sup>132</sup> Moreover, constitutional requirements that a state’s legislature can only pass laws of “general concern” also serve as “soft immunity” for local government actions and provide opportunity to challenge laws that target specific localities or local actions.<sup>133</sup> There is a counterpoint to that assessment of general laws, however. Most states already prohibit their legislatures from passing “special or local” laws.<sup>134</sup> The problem lies in the fact that state constitutions do not always define “special,” and these provisions have often been interpreted as prohibitions against “private laws”—that is, laws affecting a specific corporation or person, rather than specific localities.<sup>135</sup>

Other states protect home rule via judicial interpretation: In Connecticut, the Constitution does not explicitly provide protec-

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126. Diller, *supra* note 17, at 1067.

127. *Id.*

128. Paul Diller, *Colorado*, URB. L. CTR. 1 (May 2017), <https://www.urbanlawcenter.org/copy-of-leap-materials-1>.

129. *Id.*

130. *Id.* at 2.

131. See discussion *infra* at pp. 971–72, as well as Appendix for examples of local protections from state preemption.

132. *Id.*

133. See Diller, *supra* note 17, at 1050–51.

134. Justin R. Long, *State Constitutional Prohibitions on Special Laws*, 60 CLEV. ST. L. REV. 719, 720 (2012).

135. *Id.* at 724.

tion for home rule, but judicial interpretation has created immunity in “the organization of local government (structural) and procedures for local budgeting.”<sup>136</sup> In California, local home rule governments are protected from state interference as long as the issue addresses local concern. In 1992, the California Supreme Court held that Los Angeles could amend its charter to allow for public financing for city elections, despite the fact that a statewide proposition had banned such funding.<sup>137</sup>

Professor Diller advocates for strengthening constitutional home rule protection as a means of arresting the current wave of preemption efforts and taking a step toward rebalancing urban disadvantage.<sup>138</sup> In his view, broader protections might serve the function of halting intrastate preemption by protecting the local minority from the state legislative minority.<sup>139</sup> If—as this Note argues—preemption is a function of the weakness of “intrastate federalism” or state governing structures that mirror federal-state federalism but lack formalization, explicit constitutional protections can embed de facto assumptions about local power.<sup>140</sup> These reform ideas are presented in Part III.C.

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136. Paul Diller, *Connecticut*, URB. L. CTR. 3 (May 2017), <https://www.urbanlawcenter.org/copy-of-leap-materials-1>.

137. Paul Diller, *California*, URB. L. CTR. 3 (May 2017), <https://www.urbanlawcenter.org/copy-of-leap-materials-1>.

138. Diller, *supra* note 17, at 1066–67.

139. *Id.* at 1050–51.

140. Stahl, *supra* note 29, at 164. Stahl goes even further and argues that the current rise in preemption is exactly because “intrastate federalism” is not true federalism: “The root of the problem is that intrastate federalism is not a true federal system, in which subgroups have constitutionally committed power, but a unitary system in which state legislatures have ample room to decide how much authority to confer upon substate groups.” *Id.* at 171. Moreover, courts are reluctant to interpret greater authority for local governments because of a “suspicion” of “group rights” “rooted in the tradition of Madisonian liberalism that fears ‘factions’ . . . .” *Id.* Professor Stahl differs from Professor Diller on an important point, however. He does not believe that more solid grants of power to local governments will solve the problem of preemption because they will inevitably rely on courts’ interpretation of local and statewide concerns. *Id.* at 174–175 n. 206. Instead, he argues that home rule is weakened by the process failure of partisan gerrymandering and advocates for the Supreme Court to rule that partisan gerrymandering is judiciable in an effort to disrupt the urban/rural divide and strengthen the opportunity for local governments to act free from fear of a state legislature’s politically-motivated retaliation. *Id.* at 175–177. (His ideas come from an article published before the Court’s recent decision in *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), of course.)

His argument seeks to bypass the political implications of the current preemption debate:

Because partisan gerrymandering assures rural Republican control of the statehouse in many places, urban Democrats can only wrest such control by relocating power elsewhere, and so home rule becomes a kind of code word for partisan politics. To strengthen home rule, in other words, would be to empower Democratic cities vis-à-vis Republican legislatures; to weaken it would be to do the opposite. In light of the obvious political implications of home rule, it is unlikely that voters and legislators will see the question of local power as anything but a partisan issue.



Protecting local authority through immunizing home rule from state interference is an efficient, yet deliberate, solution because it reinforces the system of norms as it functions.<sup>141</sup> Even if local governments are “creatures of the state,” it does not necessarily follow that the state would or should want to centralize all local decisions.<sup>142</sup> While it is true that the state-local relationship does not entirely correlate to federal-state federalism, there is still value in the model of cooperative federalism. Professor Davidson makes this argument in terms of federal-local relationships.<sup>143</sup> As he sees it, “cooperative localism” provides for local experimentation and authority while balancing the power of the federal sovereign.<sup>144</sup> The analogy is not a perfect fit, but the cooperation comparison is apt. There is value in local control either by necessity or function of the system. Intrastate preemption that negates the will of local government, then, serves as a warning that the cooperative norms are not enough. Constitutional home rule protections are an opportunity to codify or solidify an important set of norms without requiring a total denial of the federalism-esque give-and-take between state and local power.

There is one final factor in debates of constitutional home rule and local protection: if local control is inherent in our system of governance, then protections from state preemption of local action should not be limited by the size of the locality, city, or municipality in question. Professor Diller points out that such an interpretation of local power has “always been a minority position in American jurisprudence.”<sup>145</sup> He argues that local immunization without regard to the size of a locality would underscore rural and suburban communities’ advantage.<sup>146</sup> Professor Diller’s goal is to remedy the urban/rural divide in state politics, with the rise in state preemption demonstrating an undesirable outcome of that divide. He is concerned about the potential externality effects of small local government action, but it is not entirely clear how size-

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*Id.* at 176. This is a very compelling argument. At the same time, and at the risk of not giving the concerns at the heart of Federalist 10 their due, the justiciability of partisan gerrymandering speaks to negotiating the factions that already exist. Strengthened and protected home rule could correct course for the future. Protecting local power from state or local factions with greater grants of home rule power is not necessarily partisan or extreme. Instead, a more balanced and formalized structure would reorient the rules of the road.

141. See Briffault, *supra* note 49, at 2021–22.

142. See discussion *infra* note 147 and accompanying text.

143. Nestor Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959, 975–76 (2007).

144. *Id.* at 976.

145. Diller, *supra* note 17, at 1090–93.

146. *Id.*

specific home rule provisions affect the political balance of state legislatures or the distribution of seats in Congress.<sup>147</sup>

### B. *Addressing the Divide Between State and Local Concerns*

The problem of state and local concerns is critical in contemplating the form and function of a stronger constitutional home rule framework to combat the misuse of intrastate preemption. In states where there is home rule of any kind, the dividing line between that which can and cannot be preempted by the state legislature often turns on whether an issue is purely local or one that requires state uniformity and control.<sup>148</sup> The state and local concern question is typically a judicial one, and states vary considerably in tests and interpretations.<sup>149</sup> For example, in Oklahoma, courts have not outlined a clear test, but have determined that certain areas are purely local concerns, such as the procedure for local elections.<sup>150</sup> Oregon eschews the traditional state/local divide and allows state preemption of any “substantive social, economic or regulatory objective, unless the law is shown to be irreconcilable with the local community’s freedom to choose its own political form.”<sup>151</sup> Still, this has been used to preempt considerable areas of regulation.<sup>152</sup>

There is debate about how courts should interpret statewide versus local concerns. To Professor Diller, everything comes down to the state/local concern question because only local concerns are protected under a strengthened constitutional home rule framework.<sup>153</sup> In fact, he argues that requiring states to only enact gen-

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147. *Id.* at 1089–91. Professor Diller’s primary contention about the danger of home rule protections unlinked to locality size is the fact that small communities may take actions that would have effects on other communities: “Similarly, when a rural county seeks to exempt itself from state gun control requirements, it allows firearms to be purchased there that can then be used to commit violence in other parts of the state and nation.” *Id.* at 1091–92. He also notes that these externality concerns apply to larger cities or even counties, as well. Given this, the link between size-limited local immunity and remedying the urban disadvantage in state politics is unclear.

148. See generally Diller, *supra* note 16; Briffault, *supra* note 49.

149. See, e.g., *People v. Llewellyn*, 257 N.W.2d 902 (Mich. 1977) (outlining Michigan’s preemption test); *Johnson v. Bradley*, 841 P.2d 990 (Cal. 1992) (outlining California’s preemption test).

150. Paul Diller, *Oklahoma*, URB. L. CTR., at 2 (May 2017), <https://www.urbanlawcenter.org/copy-of-leap-materials-1>.

151. Paul Diller, *Oregon*, URB. L. CTR., at 2 (May 2017) (citing *City of La Grande v. Public Employees Retirement Board*, 576 P.2d 1204, 1211 (Or. 1978), *aff’d on reh’g*, 586 P.2d 765 (Or. 1978)), <https://www.urbanlawcenter.org/copy-of-leap-materials-1>.

152. *Id.* at 3.

153. Diller, *supra* note 17, at 1049–50 (“At its core, constitutional home rule rests on a judicial defined distinction between ‘statewide’ and ‘local’ matters, with only the latter being immune to preemption.”).

eral laws in areas that need state uniformity creates a backdoor to local immunity from preemption because a law targeted at a particular locality might be challenged as “not general.”<sup>154</sup> The uniformity and generality requirements “call for a heightened level of judicial inquiry into whether the state’s interest in preempting the local government is legitimate.”<sup>155</sup>

That said, there is a small but notable distinction among states with “general law” requirements. Many states, such as Georgia, New Mexico, and Arkansas, prohibit local action from conflicting or being inconsistent with state “general law.”<sup>156</sup> A smaller number of states, including Massachusetts, Minnesota, and Tennessee, require state laws to be “general” or “uniform,” rather than special, local, or targeted at one or more particular localities.<sup>157</sup> The latter provisions often have some exceptions that permit special or local laws, such as when voters approve of or request them.<sup>158</sup> This may be a distinction without a difference, but provisions of the latter sort (limiting states’ ability to pass targeted or special laws) may provide more protection than requirements in the first category (requiring local governments to conform to general laws). Requiring state legislatures to pass laws that affect all local governments—and possibly preventing them from passing targeted laws—might be interpreted as a more explicit signal of a state legislature’s desire to protect local autonomy. These requirements limit the state legislature’s, rather than local governments’, ability to act and may provide local governments with an opportunity to challenge targeted laws. At the same time, in many instances, it may make sense that home rule provisions and statutes prohibit local governments from creating ordinances that conflict with existing state law. Home rule is about providing opportunity and protection for local action, but it includes a necessary tension of line drawing between local and state power.<sup>159</sup>

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154. *Id.* at 1077 (citing *City of Canton v. State*, 766 N.E.2d 963, 967–68 (Oh. 2002)).

155. *Id.*

156. Paul Diller, *Georgia*, URB. L. CTR., (May 2017), <https://www.urbanlawcenter.org/copy-of-leap-materials-1>; Paul Diller, *New Mexico*, URB. L. CTR., (May 2017), <https://www.urbanlawcenter.org/copy-of-leap-materials-1>; Paul Diller, *Arkansas*, URB. L. CTR., (May 2017), <https://www.urbanlawcenter.org/copy-of-leap-materials-1>. Wisconsin prohibits local action that conflicts with laws that are general *and* uniform, that is, apply to all cities and relate to an issue of statewide concern. This inclines courts to find conflict, as facial uniformity satisfies the requirement. Paul Diller, *Wisconsin*, URB. L. CTR. 2 (May 2017), <https://www.urbanlawcenter.org/copy-of-leap-materials-1>.

157. Diller, *Massachusetts*, *supra* note 112; Paul Diller, *Minnesota*, URB. L. CTR., (May 2017), <https://www.urbanlawcenter.org/copy-of-leap-materials-1>; Paul Diller, *Tennessee*, URB. L. CTR., (May 2017), <https://www.urbanlawcenter.org/copy-of-leap-materials-1>.

158. *See, e.g.*, Diller, *Minnesota*, *supra* note 157, at 3. *See also* Appendix *infra*.

159. Briffault, *supra* note 22, at 89–90 (“[In *Avery v. Midland County*, 390 U.S. 474 (1968), the Supreme Court recognized] the ‘universal’ existence of local governments possessing considerable autonomy and providing an important representational function. . . . [T]he

While Diller leans into the state/local divide, Professor Briffault takes another tack. He argues that the judicial question should turn on whether the state is unduly impinging on the “local capacity for self-governance.”<sup>160</sup> By his estimation, this question eliminates the need for a state/local consideration.<sup>161</sup> This interpretation grounds the question in a locality’s ability to act, rather than a judicial suspicion that local action may have crossed a line: “[A] preemption measure should be held invalid if it interferes with the power to act in the first place, which is the undisputed purpose of home rule and which is essential to local government’s place in our system.”<sup>162</sup> This analysis means that localities can bring court challenges against state preemption efforts to occupy an entire field of regulation where both local governments and the state have acted or where there is not defined grant of authority, such as Michigan’s Local Government Labor Regulatory Limitation Act.<sup>163</sup> Moreover, he argues that this framework might also be used to challenge state actions that create a “regulatory vacuum” by denying local authority to act without creating any substantive state laws on the matter.<sup>164</sup>

Professor Briffault’s rework of the judicial test to determine state and local power is very persuasive. It provides an opportunity to move away from a state/local analysis that, as he points out, “long resisted, and is likely to long continue to resist, consistent, principled, neutral decision-making.”<sup>165</sup> The fact that the test creates a “home rule presumption” could go far in making it easier to challenge preemptive state legislation. At the same time, this new test is not without limits. First, it still relies on judicial interpretation of vague constitutional or statutory terms. As this Note argues below, home rule may be a situation in which more constitutional specificity is warranted. Second, the test turns entirely on “unduly impinging.” Rather than relying on a single question of a state and local divide, Professor Briffault’s test asks another singular question that at its base is no different: Is this the type of issue or policy that local

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normative implications are unmistakable. *Avery* treats counties and municipalities as political institutions that initiate their own actions on behalf of local citizens rather than just implement state actions locally. . . . By raising localities to the status of governments, *Avery* also raises the standing of the principle of local self-government. . . . *Avery* in a sense complements *Hunter* [v. City of Pittsburgh], providing doctrinal recognition of the fact that, in practice, local governments are agents of both the state and of local constituents, carrying out state functions locally and acting on behalf of local residents and local interests. These two ways of conceiving of local legal status are not entirely inconsistent but there is a tension between them.” (emphasis added).

160. Briffault, *supra* note 49, at 2022.

161. *Id.*

162. *Id.*

163. *See id.* at 2023.

164. *Id.* at 2024.

165. *Id.* at 33.

governments should be allowed to enact without interference from the state?

### C. *Changing Both State Constitutions and Judicial Interpretation*

Professor Briffault and Professor Diller both offer intriguing proposals to remedy the issue of state preemption of local action. Still, neither solution is entirely satisfying, perhaps due to the fact that both of their recommendations are aimed at remedying the democratic dysfunction exemplified by the rural/urban divide. This Note offers reforms that build upon both Diller and Briffault's proposals but have a different focus. The goal of the reforms proposed below is to strengthen the role of local governments and create opportunities for localities to challenge state legislatures' preemption laws. These reforms should be both substantive and institutional. In other words, the substance of state constitutions should include greater protections for local authority and more clear paths to challenge state-level preemption. At the same time, a substantive move also requires institutional actors to consider who should decide if preemption is appropriate and how these decisions should be made. These reforms do not seek to eliminate the ability of states to preempt local authority or to cordon localities into their own untouchable spheres of sovereignty. The current wave of preemption legislation skews to one side of the political spectrum (the right preempting local action on the left), but it also uncovers an opportunity to make the state-local relationship function better. The goal is to make sure that our governing structure represents underlying intuitions and norms about self-representation, power balancing, and policy innovation, and does not only present an opportunity to take advantage of the structure for political gain.

This Part proposes three ways to achieve this goal by: 1) codifying a presumption of inherent local authority in state constitutions; 2) providing strong and explicit state constitutional protections for local actions in the face of preemption; and 3) creating more checks, both in state constitutions and judicial interpretation, to enable local governments to challenge state preemption.

First, an institutional recommendation: It is worthwhile to ground the idea that local governments have inherent authority in both judicial interpretation and state constitutions. Courts should implement Briffault's presumption of home rule in their interpretations.<sup>166</sup> If the goal is fighting "new preemption,"<sup>167</sup> as opposed to

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166. See *supra* notes 159–64 and accompanying text.

remapping the rural/urban divide, a thumb on the scale for local decisionmakers simply iterates a presumption (local governments have inherent powers) that already exists.

One way to achieve this goal would be to give interpretative weight to statements of legislative intent in constitutional home rule provisions and to create new provisions where they do not exist. Some states have these provisions, and a few even speak to underlying assumptions about local authority. For example, Massachusetts's Constitution provides that the purpose of its home rule provisions is to "reaffirm the customary and traditional liberties of the people with respect to the conduct of their local government."<sup>168</sup> A Kentucky statute is more focused: "The powers herein granted are based upon a legislative finding that the urban crisis cannot be solved by actions of the General Assembly alone, and that the most effective agency for the solution of these problems is the government of a city of the first class."<sup>169</sup> New York's Constitution states, "Effective local self-government and intergovernmental cooperation are purposes of the people of the state."<sup>170</sup> In addition to these legislative statements, at least nineteen states provide in their home rule laws that powers granted to localities should be liberally construed in localities' favor, and at least six states provide that enumeration or description of local powers should not be interpreted as limiting local powers.<sup>171</sup> In some cases, these state provisions were meant to make it clear that the state was abrogating Dillon's Rule in favor of home rule.<sup>172</sup> These provisions might not be enough to sway a judicial interpreter on their own, but they may serve as an indication and codification of a state government's belief in local authority and intention to protect it.<sup>173</sup>

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167. See *supra* notes 49–51 and accompanying text.

168. MASS. CONST. amend. art. LXXXIX, § 1.

169. KY. REV. STAT. ANN. § 83.410 (4).

170. N.Y. CONST. art. IX, § 1.

171. See Appendix. For example, New York's Constitution has both a liberal construction provision and a statement of intent:

It is not the intention of the legislature hereby to abolish or curtail any rights, privileges, powers or jurisdiction heretofore conferred upon or delegated to any local government or to any board, body or officer thereof, unless a contrary intention is clearly manifest from the express provisions of this chapter or by necessary intendment therefrom, or to restrict the powers of the legislature to pass laws regulating matters other than the property, affairs or government of local governments as distinguished from matters relating to their property, affairs or government. N.Y. MUN. HOME RULE § 50-51.

172. See, e.g., N.J. CONST. art. IV, §7, ¶ 11. See also Paul Diller, *New Jersey*, URB. L. CTR., at 2 (May 2017), <https://www.urbanlawcenter.org/copy-of-leap-materials-1>.

173. In a singular example, West Virginia's state court's refusal to recognize home rule and use of Dillon's Rule principles triggered the creation of a Home Rule Pilot Project, which permits certain cities to pass ordinances that conflict with state law, with oversight

Finally, a presumption of local authority also means that home rule should not or need not be limited by the size of a city, municipality, or locality. If local authority is good for local governments, it should be available to them all. This does not negate the fact that increased local authority might not make sense or be desirable for every town or village in the United States. The current home rule systems in states show that many eligible localities choose to not become formal home rule entities.<sup>174</sup> Rather, a home rule presumption adjusts the starting point for determinations of local power.

Second, a substantive recommendation: State constitutions should provide some grant of explicit protections to local home rule entities. While express immunity limited to certain issue areas might be too formally rigid, there is value in explicitly protecting areas of local action, particularly if that protection is undergirded by a Briffault-esque recognition that state legislatures should not interfere in areas where local governments have previously acted.<sup>175</sup>

Currently, states vary considerably in the extent to which local authority is immune from state preemption or intervention, from explicit spheres of total local control to easily circumvented prohibitions of targeted laws.<sup>176</sup> Areas of total local control are often limited to hyper-local issues, such as the compensation of local officers or the structure of the local government. For example, in Ohio, the “power of self-government,” or the power to address issues related “solely to the government and administration of the internal affairs of the municipality,” appears to be immune from state preemption.<sup>177</sup> Oklahoma’s statute also firmly prevents preemption by providing that local ordinance “prevails over state law on matters relating to purely municipal concerns.”<sup>178</sup> There are two caveats to Oklahoma’s clear and explicit protection, however: First, because the provision is statutory, it is more easily changed than a state constitution. Second, “purely municipal concerns” is vague

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from a state “Home Rule Board.” Paul Diller, *West Virginia*, URB. L. CTR., at 3 (May 2017), <https://www.urbanlawcenter.org/copy-of-leap-materials-1>.

174. For example, in Tennessee, only 2 of 95 counties and 14 of 348 cities have adopted home rule charters. For cities, this may be because of strong limitations to home rule powers. For counties, state statute provides non-home rule counties with some of the powers of a home rule charter. Paul Diller, *Tennessee*, *supra* note 157, at 2–3 (May 2017), <https://www.urbanlawcenter.org/copy-of-leap-materials-1>.

175. See *supra* notes 159–64 and accompanying text.

176. See Appendix.

177. Paul Diller, *Ohio*, URB. L. CTR. 3 (May 2017) (citing *Marich v. Bob Bennett Constr. Co.*, 880 N.E.2d 906, 914 (Ohio 2008)), <https://www.urbanlawcenter.org/copy-of-leap-materials-1>.

178. OKLA. STAT. tit. 11, § 1-102.

and has given Oklahoma courts the opportunity to limit an already limited grant.<sup>179</sup>

To address intrastate preemption and provide protections with some teeth, it might be necessary for states to give courts clearer instructions. For example, Maine has an unusual statutory provision that provides the focus for determining if a local law can be preempted: “Standard of preemption. The Legislature shall not be held to have implicitly denied any power granted to municipalities under this section unless the municipal ordinance in question would frustrate the purpose of any state law.”<sup>180</sup>

Finally, constitutional protections for local action may not need to be ironclad to be effective against preemption. Instead, it might be better to ensure that there are safety-valve exceptions to local protections. For example, some states have exemptions to their general law requirements that often require the request or approval of the localities affected by a special law.<sup>181</sup> These laws permit local involvement or require local approval in a way that would be useful in the preemption context, where the issue is centered on the conflicting wills of local governments/residents and state legislators.

More importantly, state constitutions should provide protections for local action that do not live or die by judicial line-drawing between state and local concerns. Current state constitutions tend to rely on enumeration, whether intricately specific or broad categories of “local issues.”<sup>182</sup> Instead, state constitutions’ home rule provisions could also ensure protections for local action through preemption prohibitions on state legislatures. For example, a state constitution could provide that the legislature shall not preempt or prohibit local authority without a legitimate state interest. A legitimate state interest would then be defined as local government action that contradicts existing state law, local action that threatens an aspect of state functioning, local action where the state was preparing to pass laws in a particular field, or some other constitutional or practical concern. This sort of protection departs from Briffault’s proposal by placing the onus on the state, rather than the locality, to defend its actions. Requiring an explanation of state interest also addresses the concern that states create a policy vacuum where they preempt a field of regulation from local action but decline to take state action.<sup>183</sup>

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179. See Diller, *Oklahoma*, *supra* note 150, at 2–3.

180. ME. STAT. tit. 30-A, § 3001(3).

181. See Appendix.

182. Compare ALASKA STAT. § 29.10.200 with ILL. CONST. art. VII, § 6.

183. See *supra* notes 159–64 and accompanying text.



Requiring the state to give a firm and specific reason for preempting local action either in statute or in response to a legal challenge places less emphasis on the vague line between state concerns and local concerns. The question would become: Is the state's interest important enough or legitimate enough? This might trade one set of judicial considerations for another, but examining the state's interest gets closer to the heart of current preemption issues. It addresses the legislature's intent by asking whether it sought to prevent consequences that matter to the state as a whole or whether the state only intended to prevent certain local actions for political reasons. New York courts make a similar inquiry when the state enacts a special or targeted law that is purportedly based on a statewide concern. Such laws must "bear a reasonable relationship to the legitimate, accompanying substantial State concern."<sup>184</sup>

Third, a recommendation that is both substantive and institutional: There should, simply, be more built-in checks to state preemption. State constitutions should have explicit general law requirements. These requirements, or additional statutory provisions, might grant local governments standing to challenge nominally general laws. While there is room to debate how specific a state constitution should be in defining a cause of action for localities, local governments should have an enshrined opportunity to challenge preemption laws. These challenges could follow two different paths, depending on the issue: First, a locality might challenge the generality of a law as pretext. In other words, a law's nominal application to an entire state could in actuality have been intended to undercut a particular city's ordinance. Ohio courts consider similar issues in determining whether a preemptive state law is general. One part of Ohio's test includes: "A statute must . . . set forth police, sanitary, or similar regulations, rather than purport only to grant or limit legislative power of a municipal corporation to set forth police, sanitary, or similar regulations . . . ."<sup>185</sup>

In addition, localities should be able to challenge preemptive state legislative action that creates a policy vacuum. If a law that affects an entire state creates an unknown frontier where local governments cannot act, and state governments choose not to, then it should be possible to question why the issue requires generality and uniformity across the state. While Briffault's interference anal-

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184. *City of New York v. Patrolmen's Benevolent Ass'n*, 676 N.E.2d 847, 851 (N.Y. 1996)). See also Paul Diller, *New York*, URB. L. CTR. 4 (May 2017), <https://www.urbanlawcenter.org/copy-of-leap-materials-1>.

185. Diller, *Ohio*, *supra* note 177, at 3 (citing *Canton v. State*, 766 N.E.2d 963, 968 (Ohio 2002)).

ysis idea asks similar questions,<sup>186</sup> greater clarity in a constitutional text combined with an opportunity to challenge nominally general laws creates more flexibility to focus on facts and legislative intent, rather than a judicial determination of the line between a balance of power and undue interference.

#### CONCLUSION

Regardless of whether it is merely a byproduct of the urban disadvantage in the American political system, targeted and vindictive state preemption of local ordinances is a problem worth addressing. Intrastate preemption represents more than a mere battle of political wills. Additionally, the problem lies in a state's ability to use an open-ended and undefined feature of our governing structure in an unintended way. Understanding the proper place for state preemption and local home rule requires a greater depth of thought and attention to consequence than current preemptive efforts tend to express. It may be that we will one day accept politically-motivated state preemption of local laws as a proper expression of the state-local relationship. However, in the absence of good reasoning for why this should be the case, this Note posits that the opposite is true: There is value and merit in local action and autonomy. By reassessing our understanding of and commitment to home rule, it is clear that state constitutions may be better used to protect the goals of local governance. Likewise, refined judicial inquiries can delve deeper into the motivations of state and local actors. The goal, in each instance, should be forward movement toward better policy—including policy experimentation, when needed—and stronger governing structures.

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186. See *supra* note 162 and accompanying text.

APPENDIX: QUALITATIVE ANALYSIS OF STATE CONSTITUTIONS AND  
STATUTES ON HOME RULE AND LOCAL PROTECTIONS

This Appendix provides a qualitative grouping of key home rule and preemption features of state constitutions, statutes, and some judicial interpretation. It is not meant to provide a quantitative tally of states as it represents the author's own interpretations. This analysis is based upon and gives much credit to the summaries and excerpts of state constitutions and laws compiled by Professor Paul Diller for the Legal Effort to Address Preemption (LEAP) project in May 2017. Unless otherwise noted, all source material comes from that database, which can be found at <https://www.urbanlawcenter.org/copy-of-leap-materials-1>.

The author also searched from new amendments to state constitutions in 2017 and 2018 using <https://ballotpedia.org/>. As of January 13, 2019, there are no new amendments to state constitutions relating to home rule.

<b>TYPE AND STRUCTURE OF HOME RULE</b>	
<b>States without Any Form of Constitutional Home Rule</b>	
DE, IN, MS	Statutory home rule only
<b>Other Notable States</b>	
AL	Limited statutory home rule for municipalities; in 2015, a constitutional amendment granted some powers to counties, but it was not a grant of home rule power
NJ	Statutory home rule; constitution abrogates Dillon's Rule
VA	Dillon's Rule state, but local powers are broadly interpreted by courts
VT	Dillon's Rule state
<b>States with Mixed Constitutional/Statutory Home Rule Structures</b>	
KS, MA	Constitutional home rule for cities; statutory home rule for counties
UT	County home rule is more limited and statutory; municipal home rule is constitutional
<b>Non-Operative Constitutional Home Rule or Non-Self Executing Constitutional Home Rule Provisions</b>	
In these states, the constitution provides for or demands that the	

legislature create mechanisms to provide for local home rule but does not provide home rule power.		
CT, GA, KY, NV, NH, ND		
<b>Notable State</b>		
NH	New Hampshire can be categorized as a Dillon’s Rule state. The constitution provides that the state legislature can allow localities to choose their form of government from the types defined by statute.	
<b>Level of Home Rule Units</b>		
This table distinguishes between municipalities and local units smaller than counties. Some states do not provide home rule to all of these units. For example, a state may provide for home rule for cities but not villages. These categorizations are based on states’ constitutions’ terminology, and individual states’ definitions may vary.		
<b>County Home Rule Only</b>	AR, KY, MD, WV	
<b>City/Municipal Home Rule Only</b>	AZ, ME, NE, NH, OK, RI, TX, WI, WY	
<b>Either and/or Both County and Municipal Home Rule</b>	CA, FL, ID, IL, IA, MI, MS, MO, NV, NC, ND, OR, PA, TN, UT, WA	
	<b>Notable States</b>	
	GA	County has constitutional home rule, constitution authorizes state legislature to provide for municipal home rule
	KS	Cities have constitutional home rule, counties have statutory home rule
	MA	County home rule is very limited
	NJ	County home rule is more limited than municipal home rule
	NY	County home rule is very limited
	OH	Municipal home rule can be interpreted as having greater power
	SD	Law also provides for chartered government that combine cities

		and counties
	UT	County home rule is more limited and statutory; municipal home rule is constitutional
<p><b>Note:</b> In a few states where both counties and localities can exercise home rule powers, courts have held that local ordinances can supersede or exempt localities from county ordinance/control. These states include: IA, IL, KS, and OK. The opposite is true in FL.</p>		
<b>Other Home Rule Units</b>	AK, CT	Home rule provisions include “boroughs,” in addition to cities
	HI	Each political subdivision can be a home rule unit. In Hawaii, political subdivisions are islands.
	LA	Home rule for “any local subdivisions” that adopts a charter
	MN, MT	Home rule for any “local government unit” that adopts a charter

<b>IMMUNITIES, PROTECTIONS, AND PROHIBITIONS RELATED TO HOME RULE</b>	
<b>Examples of States with General Law Requirements</b>	
FL	Limited generality requirement: chartered counties cannot be preempted by “special” (targeted) law.
GA	Constitution contains a uniformity clause prohibiting local laws where “provision has been made by an existing general law.” However, there is no known case law challenging a preemptive state law on these grounds.
MD	Constitution prohibits a law targeting Baltimore or any specific county. However, a law applicable to two or more counties is not considered a local or targeted law.
MA	Constitution requires general laws, but there are exceptions to the requirement: 1) a law is general if it applies to three or more local units, and 2) voters or local office holders can petition for special laws, as well as in a few other circumstances.
MN	Very detailed requirement. Prohibits targeted or special laws on a variety of subjects but permits special laws with permission of the affected unit(s). Generality is prescribed as a judicial determination: “Whether a general law could have been made applicable in any

	case shall be judicially determined without regard to any legislative assertion on that subject.” MINN. CONST. art. XII, § 1.	
RI	State can pass general laws affecting local powers, although laws affecting the structure of local government are not permitted. Special laws are permitted if approved by voters in the affect local unit.	
NH	Not quite a general law requirement: The legislature cannot change the charter or form of government of a local unit without approval from voters of the unit.	
NJ	Not quite a generality requirement, but the legislature can only enact special or local laws with approval from voters or the local governing body in the affected unit.	
NY	General law requirement; special laws only when requested by local governments, with separate rules for New York City.	
TN	Constitution prohibits special laws to remove local officers and special laws affecting a local unit, unless approved by the governing body or voters of the affected unit.	
TX	Strong constitutional general law requirement, however it has not been used to challenge preemption laws.	
<b>States that Prohibit Local Action that Conflicts with State Law</b>		
<b>Local law cannot conflict with state law</b>	FL, HI, IN, IA, ID, KS, KY, LA, MD, MA, ME, MT, NE, NH, NJ, NY, NC, OH, PA, TX, UT, WA, WV	
<b>Local law cannot conflict with <i>general</i> state laws</b>	AR, CT, GA, SC, TN	
	AL, DE	Judicial interpretation; state statute does not specify “general” law
	MI	“General law” is used inconsistently in the constitution and statute
	MS	“General law” is only used for counties, not municipalities
	NV	Term used in case law; state statute does not specify “general” law
	NM	Municipal governments can act except where “expressly denied by general law or charter”
	OK	Judicial interpretation; state statute does not specify “general” law
	RI	Judicial interpretation; state statute does not specify “general” law

	SD	Home rule entity can take any action not denied by the general laws of the state
	WI	Local law cannot conflict with “any enactment of the legislature which is of statewide concern and which uniformly affects every county”
	WY	Local law cannot conflict with uniform state law
<b>States Where Localities Have Any Form of Protection from Preemption (Excluding General Law Requirements)</b>		
AZ, CA, CO, CT, FL, HI, KS, LA, ME, MD, MN, MO, NE, NM, ND, OH, OK, PA, RI, TN		
<b>Notable State</b>		
OR	Courts have adopted a presumption against implied (field) preemption; <i>see supra</i> note 151-52 and accompanying text.	
<b>States Where the Right to Home Rule Depends on the Size of a Municipality</b>		
AK, CO, DE, IL, KY, MO, NE, PA, TX, WA		
<b>States with “Liberally Construed” Provisions</b>		
AK, CO, IL, KS, KY, ME, MI, MT, NJ, NY, NM, NC, ND, OR, PA, SC, SD, WV, WY		
<b>State Law Provides that Enumeration of Local Powers Does Not Limit Them</b>		
IN, IA, OH, UT, TN, VA		