

## UNDERSTANDING THE RISE OF SUPER PREEMPTION IN STATE LEGISLATURES

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In 1957, the City of Tallahassee, Florida, enacted a local gun control ordinance. Now known as § 12-61(a) of the Tallahassee Code (hereinafter the “1957 ordinance”), the ordinance stipulates, “No person shall discharge any firearms except in areas five acres or larger zoned for agricultural uses.”<sup>1</sup> Although the law was never amended, it was restated in the Code’s 2003 codification and has remained in its current form ever since.<sup>2</sup> In 1984, Tallahassee passed another gun control law. Today referred to as § 13-34(b)(5) of the Tallahassee Code (hereinafter the “1984 ordinance”), it prohibits any person from discharging a firearm in a park or recreational facility owned by the City.<sup>3</sup> The law was amended in 1988 and restated in the Code’s 2003 codification.<sup>4</sup>

In 1987, the Florida legislature passed § 790.33 of the Florida Statutes, establishing that the State “occup[ies] the whole field of regulation of firearms and ammunition.”<sup>5</sup> Known as a “preemption” statute, this type of state legislation renders “null and void” all past and future local enactments that conflict with its terms.<sup>6</sup> After the law’s passage, Tallahassee’s gun control ordinances amounted to little more than words on a page. In the past 10 years, there is no record of local police attempting to enforce either ordinance, and, in 2011, the Tallahassee Police chief officially advised all personnel that, due to the state legislation, the 1957 ordinance and the 1984 ordinance were unenforceable.<sup>7</sup>

If this is where the story ended, it would likely not warrant scholarly attention. Although state preemption of local ordinances causes much

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<sup>1</sup> TALLAHASSEE, FLA., CODE OF GEN. ORDINANCES § 12-61(a) (2009); *see also* Fla. Carry, Inc. v. City of Tallahassee, 212 So. 3d 452, 455–56 (Fla. 1st Dist. Ct. App. 2017).

<sup>2</sup> Fla. Carry, 212 So. 3d at 456.

<sup>3</sup> TALLAHASSEE, FLA., CODE OF GEN. ORDINANCES § 13-34(b)(5) (2015); *see also* Fla. Carry, 212 So. 3d at 456.

<sup>4</sup> Fla. Carry, 212 So. 3d at 456.

<sup>5</sup> FLA. STAT. § 790.33(1) (2017); *see also* Fla. Carry, 212 So. 3d at 455.

<sup>6</sup> FLA. STAT. § 790.33(1) (2017); *see also* Fla. Carry, 212 So. 3d at 455.

<sup>7</sup> *See* Fla. Carry, 212 So. 3d at 456.

political consternation,<sup>8</sup> there is little legal debate that state legislatures, generally speaking, possess broad authority to strike down local legislation.<sup>9</sup> Indeed, in recent years state preemptive activity has become nearly ubiquitous, with states from Florida to Arizona overturning local enactments that curtail plastic bag use, ban hydraulic fracking, create municipal broadband networks, regulate the sharing economy, and establish municipal living wages.<sup>10</sup> While many commentators are troubled by this rise in preemptive activity,<sup>11</sup> few see it as a material departure from the long-standing battle for power between states and their localities.<sup>12</sup>

But Tallahassee's story takes a surprising turn. No longer satisfied with simply "occupy[ing] the . . . field" of gun control", the Florida legislature amended its 1987 statute in 2011 to add an unusual provision: penalties against local officials who pass gun control ordinances in violation of the state's preemptive mandate.<sup>13</sup> The amendment created a private right of action for declaratory and injunctive relief against any local ordinance that ran afoul of the state's preemption statute and allowed courts to impose civil damages of up to \$5,000 against local legislators charged with supporting the preempted law.<sup>14</sup> Additionally, the law barred local officials named in these lawsuits from using public funds for their legal defense,<sup>15</sup> and provided that violation of the statute could warrant removal from office or termination of employment at the governor's direction.<sup>16</sup>

In May 2014, two "gun rights" organizations brought suit against the Tallahassee Mayor and various city commissioners for noncompliance

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<sup>8</sup> See, e.g., Madeleine Davies, *The Republicans are Coming for Your Liberal Bubble*, THE SLOT (Jan. 6, 2017), <https://theslot.jezebel.com/the-republicans-are-coming-for-your-liberal-bubble-1790873529> (lamenting that Republicans, "[n]ot content to leave us with anything nice on this melting planet of ours," are marshalling a concerted effort to prevent liberal cities from passing progressive policies).

<sup>9</sup> See generally Paul Diller, *Intrastate Preemption*, 87 B.U. L. Rev. 1113 (2007).

<sup>10</sup> For a compilation of recent state preemptive activity, see Lori Riverstone-Newell, *The Rise of State Preemption Laws in Response to Local Policy Innovation*, 47 PUBLIUS 403, 408–17 (2017).

<sup>11</sup> See, e.g., Chris Conry, *Statewide Preemption: The Most Dangerous Bill You've Never Heard of*, MINNPOST (Feb. 8, 2017), <https://www.minnpost.com/community-voices/2017/02/statewide-preemption-most-dangerous-bill-you-ve-never-heard> ("Statewide preemption is a shameful attempt by powerful corporate interests to stop regular people from enacting popular laws using legitimate democratic processes. It is a reactionary, oppressive measure: end of story.").

<sup>12</sup> Cf. Kenneth A. Stahl, *Preemption, Federalism, and Local Democracy*, 44 FORDHAM URB. L.J. 133, 134 (2017) (arguing that while state preemption of local laws is "hardly unprecedented", the marked uptick in recent preemption has "rarely been seen in American history").

<sup>13</sup> See FLA. STAT. § 790.33(3) (2017); *Fla. Carry*, 212 So. 3d at 456.

<sup>14</sup> See FLA. STAT. § 790.33(3)(b)–(c) (2017).

<sup>15</sup> See *id.* at § 790.33(3)(d).

<sup>16</sup> See *id.* at § 790.33(3)(e). This portion of the law has been held unconstitutional solely as it pertains to county commissioners. See *Marcus v. Scott*, No. 2012-CA-001260, 2014 WL 3797314, at \*\*3–4 (Fla. 2d Cir. Ct. Jun. 2, 2014).

with § 790.33.<sup>17</sup> And, while the City ultimately prevailed in this legal battle, Florida's First District Court of Appeal notably declined to hold the state's new punitive measures unconstitutional.<sup>18</sup> The City touted this as a moral victory for local decisionmaking,<sup>19</sup> but in reality this holding did little to limit the State's preemptive power, or, perhaps more accurately, the State's "super" preemptive power.

The term "super preemption," coined in response to the proliferation of preemptive penalties like those in Florida's 2011 amendment, describes the diverse category of state preemption statutes aimed at holding local actors *personally* accountable for ordinances that impermissibly expand local power.<sup>20</sup> No longer is it enough for a state legislature to overturn local legislation. Instead, state legislatures have enacted super preemptive punitive measures that place local officials at risk of losing their jobs, paying civil damages, or even facing criminal charges for passing laws that conflict with state statutes.<sup>21</sup> Moreover, many of these provisions appear to confer liability even in cases where the local law is no longer enforced.<sup>22</sup> So long as the preempted law remains on the books, local officials may be held liable for their roles in its passage. Versions of these laws have passed

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<sup>17</sup> *Fla. Carry*, 212 So. 3d at 456; see also Kriston Capps, *A Florida Mayor Fights the Gun Lobby*, CITYLAB (Jan. 6, 2017), <https://www.citylab.com/equity/2017/01/a-florida-mayor-fights-the-gun-lobby/512345/>.

<sup>18</sup> *Fla. Carry*, 212 So. 3d at 463–66. Specifically, the court declined to address the City's argument that the state's super preemption law violated its officials' rights to legislative immunity and free speech under both the Florida and United States Constitutions.

<sup>19</sup> See Andrew Gillum, *How to Fight the NRA*, MEDIUM (Jan. 4, 2017), [https://medium.com/@a\\_gillum/how-to-fight-the-nra-1a63f47d4a0c](https://medium.com/@a_gillum/how-to-fight-the-nra-1a63f47d4a0c) (touting the city's victory over "special interests and corporations . . . trying to intimidate and bully local communities").

<sup>20</sup> Given the relative newness of this legislative phenomenon, finding one agreed-upon definition has proven challenging. Indeed, some recent definitions of super preemption have been more encompassing than others. For example, in its September issue brief, the American Constitution Society defined "punitive" preemption (a synonym for super preemption) as any preemptive statute that "seeks to punish local governments and local officials for disagreeing with their states." RICHARD BRIFFAULT ET AL., AM. CONSTITUTION SOC'Y, ISSUE BRIEF, THE TROUBLING TURN IN STATE PREEMPTION: THE ASSAULT ON PROGRESSIVE CITIES AND HOW CITIES CAN RESPOND 9 (2017). Other commentators have defined super preemption so broadly as to include the often-related practice of "blanket" preemption, which bar cities from enacting *any* piece of local legislation that does not perfectly conform to state law. See Richard Florida, *City vs. State: The Story So Far*, CITYLAB (June 13, 2017) <https://www.citylab.com/equity/2017/06/city-vs-state-the-story-so-far/530049/>. This Article will deviate slightly from these broader definitions, defining super preemption as any preemptive legislation that attaches punitive measures directed at local officials in their individual capacities. This definition excludes both punitive measures that target the locality as an institution and blanket preemption measures that lack punitive provisions.

<sup>21</sup> BRIFFAULT ET AL., *supra* note 20.

<sup>22</sup> See, e.g., ARIZ. REV. STAT. ANN. § 41-194.01 (2017).

in states across the country, including Arizona, Mississippi, Texas, Oklahoma, and Kentucky.<sup>23</sup>

The rise of statutes like Florida's presents two important questions about the modern relationships between states and localities that this Article seeks to address. First, why now? That is, if super preemption has always been legally permissible, what is it about the current relationship between states and their localities that has prompted so many state legislatures to adopt these punitive measures in recent years? Second, why super preemption? That is, if traditional preemption has historically been such an effective tool for overturning local legislation, what further purpose do these punitive add-ons serve their states? To be sure, if the Florida legislature's aim was to prevent the application of local laws conflicting with the state's gun policies, they achieved that goal with regard to Tallahassee well before passing their punitive amendment. In that way, the State's 2011 measure was, ostensibly, gratuitous—it added nothing beyond the original legislation's preemptive mandate. In order to understand super preemption provisions as something more than empty exercises in vindictiveness, this Article will need to develop a more nuanced picture of why states seek to suppress local legislative activity.<sup>24</sup>

This Article puts forth two potential answers to the questions posed above. First, this Article argues that super preemption provisions are a symptom of a larger societal trend whereby the fortunes and demographics of our cities and rural communities have sharply diverged. Geography increasingly predicts both political affiliation and economic opportunity.<sup>25</sup> Many of America's urban centers are becoming increasingly liberal, affluent islands in seas of rural red. This hardening of political and economic identity along geographic lines helps explain why conservative state legislative leaders are striking an increasingly anti-urban posture.

However, this first theory only tells part of the story. While political geography may explain the timing of these policies, it does little to explain

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<sup>23</sup> See ARIZ. REV. STAT. ANN. § 41-194.01 (2017); KY. REV. STAT. ANN. § 65.870(4) (West 2017); MISS. CODE ANN. §§ 45-9-53(5)(a), (c) (2017); OKLA. STAT. tit. 21, § 1289.24(D) (2017); Tex. S.B. 4, 85th Leg., R.S. (2017) (§ 5.02, adding a new § 39.07 to the Texas Penal Code).

<sup>24</sup> While this Article devotes much of its energy to developing a descriptive framework for understanding super preemption, many important questions still remain. Notably, this Article devotes little attention to super preemption's normative merits. Is super preemption a desirable practice? Is super preemption legal? If not, what strategies can localities take to prevent its harms? While these questions are important and will receive some cursory attention in the Article's conclusion, fuller explorations of their answers are both necessary, and, unfortunately, outside this project's scope.

<sup>25</sup> See Stahl, *supra* note 12, at 146 (noting that "rural residents are now solidly aligned with Republicans and urban dwellers with Democrats," and that cities and rural areas' economic interests have also diverged).

their strategic purpose. This Article's second theory serves that latter goal, arguing that super preemption targets aspects of local lawmaking that traditional preemption cannot reach. Using Professor Heather Gerken's three-part framework for understanding local decisionmaking,<sup>26</sup> this Article contends that, under a traditional preemption regime, state legislatures can only suppress one facet of local lawmaking: the act of self-governance. By striking down a local ordinance, state lawmakers have prevented local officials from changing the rules that govern their locality. But local lawmaking is more than simply enacting policy. According to Professor Gerken, local lawmaking serves the additional goals of adding to the marketplace of ideas and providing minorities with an opportunity to craft political identities.<sup>27</sup> These auxiliary goals occur irrespective of whether an actual policy ever goes into effect, and, for that reason, they are outside the reach of traditional preemptive measures. Super preemption, however, can reach these auxiliary goals. By preempting both the policy and *politics* of local lawmaking, super preemption has the ability to deflate local progressive action before it has a chance to take flight.

This Article proceeds in three parts. Part I provides a background for understanding local lawmaking power and the State's preemptive ability. Part II attempts to describe the relatively new landscape of super preemption laws. Using various state laws as examples, this Part seeks to develop a basic taxonomy of the super preemption provisions currently in existence. Part III aims to provide some answers to the two descriptive questions posed above. After illustrating that states cannot fully justify super preemption on traditional grounds, this Part will argue that their rise is both a product of America's changing political geography and state legislators' desires to curb both the policies and politics of local lawmaking.

#### PART I – CITY POWER AND STATES' PREEMPTIVE AUTHORITY

To better understand both super preemption and states' preemptive powers more generally, one must first understand the legal regime that permits such actions. Although both federal and state preemption are commonplace in the United States, it is important to recognize that the

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<sup>26</sup> See Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1749 (2015) (organizing her analysis around three primary justifications for dissent: it contributes "to the marketplace of ideas, engages electoral minorities in the project of *self-governance*, and facilitates *self-expression*") (emphasis added).

<sup>27</sup> *Id.*

existence of preemption is not required by America's federalist structure of government. In fact, for much of American history, state preemption was either rare or non-existent.<sup>28</sup> Its prevalence today has as much to do with the modern *legal* rules governing the relationships between our cities and states as it does with the fractious political environment surrounding those rules. Indeed, it is quite easy to imagine a legal system where localities are afforded real autonomy over a particular area of policy – a similar arrangement governs the relationship between our federal government and our states. Although the federal government can certainly preempt states on some matters,<sup>29</sup> much of state action exists outside the reach of federal meddling. In the same way that the powers afforded to states are *legal* in nature—enshrined in the United States Constitution, statutes, and common law—the current regime of local disempowerment is also a product of well-established legal rules.

This Part describes the evolution of the legal rules that have given rise to state preemption and states' often unchecked authority over local matters. Starting with the theory of limited local authority known as Dillion's Rule, this Part charts the gradual expansion of city power through the Home Rule era into modern times. It then turns to the practice of state preemption, describing its evolution as part of a movement to cabin local autonomy in places where city power was at its height. This Part closes with a recitation of some of the common justifications for state preemption. Using various court opinions as examples, this Part illustrates that preemptive activity has historically been rationalized in three ways: as a mechanism for preserving uniformity, as a protection against extraterritoriality, and as a tool for limiting the subject matter of local action.

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<sup>28</sup> See Diller, *supra* note 9, at 1123–25 (noting that under earlier legal constructions of city power, preemption was either unnecessary or difficult to achieve).

<sup>29</sup> In addition to preempting state legislative activity, the federal government has a long history of preempting local action. Although the federal-local preemptive relationship is not the topic of this paper, many of the same themes addressed in this Article apply to that relationship. See Paul S. Weiland, *Preemption of Local Efforts to Protect the Environment: Implications for Local Government Officials*, 18 VA. ENVTL. L.J. 467, 473–482 (1999) (highlighting several examples of federal preemption of local laws in the environmental context); Annie Decker, *Preemption Conflation: Dividing the Local from the State in Congressional Decision Making*, 30 YALE L. & POL'Y REV. 321, 35–368 (2012) (providing a framework for assessing when it is appropriate for the federal government to preempt local action).

### A. The Evolution of City Power

Despite the persistent desire to characterize early American cities as bastions of democratic activity,<sup>30</sup> for much of America's history, localities possessed no inherent lawmaking authority. For most of the nineteenth century, cities were understood as little more than creatures of the state which only possessed powers expressly delegated to them from their state governments.<sup>31</sup> This philosophy was grounded in the legal theories of jurist John F. Dillon, who described cities as state administrative agents only imbued with such powers as granted by the state.<sup>32</sup> According to the eponymously-named "Dillon's Rule," if a city wanted to build a road, that city first needed to receive road-making authority through an express delegation from its state legislature. The Dillon's Rule conception of city power dominated city-state relations in the United States until the late 1800's,<sup>33</sup> eventually receiving the Supreme Court's endorsement in the landmark decision, *Hunter v. City of Pittsburgh*.<sup>34</sup>

Although Dillon's Rule espoused a decidedly limited view of city power, it, perhaps surprisingly, left almost no room for the kind of state preemptive activity seen today.<sup>35</sup> Because city action required an express delegation of authority from the state, there were few opportunities for

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<sup>30</sup> Even as far back as the early nineteenth century, political theorists like Alexis De Tocqueville extolled the virtues of local political activity in the United States. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 59–83 (Phillips Bradley ed., Henry Reeve trans., Vintage Books 1990) (1835).

<sup>31</sup> See Diller, *supra* note 9, at 1122 (describing the Dillon's rule regime as one that "held that local units of government were mere administrative conveniences of the state with no inherent lawmaking authority"). However, despite Dillon's rather limited appraisal of local power, he did recognize that some localities possessed "inherent" powers that extended beyond explicit statutory grants coming from their states. According to Dillon, this was due to their many business-like characteristics and structures. JOHN F. DILLON, *COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS* § 15, at 34 (4th ed. 1890). See also David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2257, 2285–86 (2005) (describing the contours of Dillon's rule).

<sup>32</sup> See Diller, *supra* note 9, at 1122. Dillon's narrow conception of city power was not merely anti-local bias. It instead stemmed from a gradual, national evolution in thought regarding the nature of the city. Prior to the 1800s, cities in the United States and England were understood as "municipal corporations," legally indistinct from the business corporations of the day. See Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980) ("It must be understood that before the nineteenth century, there was no distinction in England or in America between public and private corporations, between businesses and cities."). Over time, this conception began to change in the United States. Corporations came to be seen as something private in nature that, if anything, needed protection from the state. Cities, by contrast, were increasingly public entities that needed few, if any, of those same protections. See David J. Barron, *Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 506 (1999).

<sup>33</sup> See Diller, *supra* note 9, at 1123 (describing Dillon's Rule's dominance through the mid- to late-nineteenth century).

<sup>34</sup> *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907).

<sup>35</sup> See Diller, *supra* note 9, at 1123 (describing preemption as "a remote possibility" under Dillon's Rule regimes).

cities to promulgate policies in conflict with their states' wishes. If a state did not want a city to take a particular action, then, presumably, it would not have given the city the ability to take that action in the first instance. Instead, conflicts surrounding local action usually came through claims that the city had behaved *ultra vires*—that is, outside the bounds of the narrow delegations of powers that it had received from the state.<sup>36</sup> Although Dillon's Rule regimes have been eclipsed by more "robust" conceptions of city power in most places, the few cities still operating under Dillon's Rule continue to face accusations of *ultra vires* behavior from their states even today.<sup>37</sup>

Drawing inspiration from the system of dual sovereignty enshrined in the United States Constitution, nineteenth century urban reformers began pushing for a protected sphere of local authority to fight a growing set of urban ills.<sup>38</sup> According to these advocates, state-level corruption and financial profligacy contributed to the era's high municipal tax rates, massive urban debt loads, poor housing conditions, and deplorable levels of urban sanitation.<sup>39</sup> Under the Dillon's Rule regime, cities interested in addressing these poor living conditions first required express policymaking authority from their state legislatures—the same state legislatures profiting off of urban disarray and under-regulation.<sup>40</sup> In an effort to protect their desired urban reforms from state legislative meddling, local leaders pushed for—and ultimately received—constitutional carve outs for protected, local lawmaking power.<sup>41</sup> These early "home rule" provisions granted their cities the legislative autonomy to initiate, enact, and implement policies of "local" concern without state permission or oversight.<sup>42</sup> Still in effect for many cities around the country, these early protections effectively created an "*imperium in imperio*," or "a state within a state," which ultimately contributed to their modern nickname: *imperio* provisions.<sup>43</sup>

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<sup>36</sup> *Id.*

<sup>37</sup> See *Arlington Cty. v. White*, 528 S.E.2d 706, 709 (Va. 2000) (striking down a domestic partnership ordinance in Virginia on the grounds that it was *ultra vires* the county's local power).

<sup>38</sup> See Barron, *supra* note 31, at 2289.

<sup>39</sup> *Id.*

<sup>40</sup> See *id.* at 2288 (describing late nineteenth century cities as being exposed to "state politicians in search of 'spoils.'" Barron argues that state politicians would often craft urban policy so as to place themselves in advantageous positions to obtain city "contracts and franchises," with little regard for how those policies impacted the cities and their residents. *Id.* at 2886–88).

<sup>41</sup> See Diller, *supra* note 9, at 1124–25 (describing the rise of early home rule provisions).

<sup>42</sup> See Barron, *supra* note 31, at 2290 (describing the package of early home rule powers as "charter power, some initiatory authority, and limited immunity rights").

<sup>43</sup> Diller, *supra* note 9, at 1125.



Although *imperio* provisions varied from state to state, these laws typically possessed two important features that protected cities against the kind of express preemptive interference seen today. First, these provisions were typically enshrined in their states' constitutions as opposed to simple statutory enactments.<sup>44</sup> This meant that state legislatures often had to clear a higher legislative bar if they wanted to overturn or amend these provisions at a later date. Second, and perhaps more importantly, these provisions were only understood to protect matters of *local* concern.<sup>45</sup> Embedded in this construction is the assumption that there are a set of matters that are distinctly local in nature and, therefore, exist outside the policymaking ambit of the state or federal government. In this way, *imperio* provisions created two nonconcentric legislative spheres—a truly local policy could not be enacted by the state, and a state policy could not be enacted by a locality.<sup>46</sup> By contrast, preemption requires overlapping spheres of legislative authority; both the state and the locality need to possess the authority to speak on a particular matter before one can make the determination that the state's voice supersedes that of the locality.<sup>47</sup> This constitutional restriction of *imperio* home rule to matters of local concern has been interpreted by many state courts as affording a degree of immunity from state interference in truly local matters.<sup>48</sup>

However, the existence of an *imperio* provision did not mean that cities instantly had unfettered authority to legislate on matters of local concern. It instead meant that whichever entity was authorized to determine what constituted a “local matter” was also able to establish the metes and bounds of local power. That entity was, almost always, the judiciary. In the wake of the early home rule movement, courts occupied the important role of determining whether a newly-enacted local ordinance was sufficiently local in nature.<sup>49</sup> Given the term's vagueness, these early court opinions often turned on rather capricious notions of cities' traditional legislative qualifications. For example, land use decisions were typically considered the types of policies that cities enact, so they had to be local in nature.<sup>50</sup>

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<sup>44</sup> See Barron, *supra* note 31, at 2290.

<sup>45</sup> See Diller, *supra* note 9, at 1124–25.

<sup>46</sup> See *id.*

<sup>47</sup> See *id.* at 1125.

<sup>48</sup> *City of New Orleans v. Bd. of Comm'rs of Orleans Levee Dist.*, 640 So.2d 237, 242 (La. 1994) (noting that under early home rule provisions the city could act “without fear of the supervisory authority of the state government” when its activity was “local” in nature).

<sup>49</sup> Diller, *supra* note 9, at 1125; Barron, *supra* note 31, at 2325–26.

<sup>50</sup> See, e.g., *Town of Telluride v. Lot Thirty-Four Venture, LLC*, 3 P.3d 30, 43–44 (Colo. 2000) (Mullarkey, J., dissenting) (describing the land use power as one historically reserved for local actors).

Tax policy, on the other hand, traditionally fell to the state or federal government and therefore could be the type of policy envisioned by the term local.<sup>51</sup> Suffice to say that, although *imperio* provisions greatly expanded local lawmaking authority on paper, in practice, they have been interpreted narrowly so as to provide very limited policymaking space for cities.<sup>52</sup>

The vagueness of *imperio* provisions coupled with the significant way in which they empowered the courts prompted a second wave of reformers to push for a revised conception of home rule. Beginning in earnest around the 1950's, organizations of municipal leaders such as the American Municipal Association and the National Municipal League pushed for home rule provisions that mirrored the lawmaking authority of the state.<sup>53</sup> These "legislative" home rule provisions, which have become the most common approach to home rule, rejected the notion that there was some clearly identifiable set of local matters.<sup>54</sup> Instead, cities could ostensibly craft policy on any matter on which their states had the authority to legislate.<sup>55</sup> This broad grant of power was almost universally subject to one, important restriction: a local policy could not conflict with state law.<sup>56</sup>

By greatly expanding the cities' policymaking authority, the legislative home rule provisions brought the separate spheres of state policymaking and local policymaking under one roof. What was once a state concern was now also local, and what was once purely local was now also a matter of state concern. Additionally, by stipulating that local policies not conflict with state statutes, these provisions shifted an important power from the judiciary to the state legislature.<sup>57</sup> Whereas the judiciary was the primary arbiter of local lawmaking authority under *imperio* regimes, with the passage of legislative home rule provisions, state legislatures gave themselves the final say over whether a city could legislate in a particular area. If the state felt that a matter should be off limits for cities, the

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<sup>51</sup> C.f. GERALD E. FRUG & DAVID J. BARRON, CITY BOUND: HOW STATES STIFLE URBAN INNOVATION 147–48 (2013) (discussing the limitations placed on city taxing power).

<sup>52</sup> C.f. Kenneth A. Stahl, *Local Home Rule in the Time of Globalization*, 2016 BYU L. Rev. 177, 204–05 (2016) (arguing that the state/local distinction that has become so relevant in *imperio* home rule jurisprudence has been used to restrict local policymaking to primarily "family" affairs, while states are afforded policymaking power over "market" concerns).

<sup>53</sup> See Diller, *supra* note 9, at 1125–26.

<sup>54</sup> See *id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 1126.

legislature need only pass a law stating as much. And with that, preemption power was born.<sup>58</sup>

Before addressing the practice of super preemption specifically, it is worth noting that the formal categories of Dillon's Rule, *imperio* home rule, and legislative home rule do not perfectly capture the messiness and complexity of local legislative power. As Professor David Barron illustrates, early home rule provisions may have appeared similar on paper, but in practice, they placed very different limitations on city power, depending on the ideological leanings of their proponents as well as of the judges interpreting these provisions.<sup>59</sup> Indeed, while many cities may operate under a constitutionally-enshrined *imperio* provision, courts sometimes interpret these provisions in unpredictable or capricious ways. When judicial opinions interpret an *imperio* provision narrowly, they may limit the city's sphere of legislative immunity by allowing state preemption in matters that may be traditionally understood as local concerns.<sup>60</sup> In brief, the categories outlined above are not meant to describe city-state relations perfectly; instead, they are meant to serve as generalized typologies for the ways in which states delegate powers to their local subordinates.

#### *B. Understanding State Preemption Doctrine*

As the previous section illustrates, preemption is neither a necessary nor an intuitive practice in a system where subsidiary governments possess lawmaking authority.<sup>61</sup> Instead, state preemption is a recent phenomenon responding to modern changes to the laws governing city power. For this reason, scholarly analysis on this topic is relatively sparse. While several scholars have addressed state preemption as a subset of broader discussions on state power, very few have explored the practice in depth or analyzed

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<sup>58</sup> See *id.* (discussing the relationship between preemption and legislative home rule).

<sup>59</sup> Barron categorizes these three competing ideologies by the types of cities they aimed to create. These include the "Old Conservative City," whose proponents aimed to carve out just enough local legislative authority to combat state-level largess; the "Administrative City," whose advocates pushed for state delegation to an apolitical class of local government professionals tasked with addressing the complexities of rapid urbanization; and the "Social City," whose reformers saw city power as a political tool for redistributive ends. Barron, *supra* note 31, at 2292–309.

<sup>60</sup> See, e.g., *Town of Telluride*, 3 P.3d at 37 (describing a complicated three-tiered test for the permissibility of state preemption, whereby matters of truly local concern are afforded immunity from state preemption, but matters of statewide or "mixed" concern are subject to state legislative interference.).

<sup>61</sup> Stephen A. Gardbaum, *Nature of Preemption*, 79 CORNELL L. REV. 767, 768 (1994) ("The granting of a power of preemption to the central government is a common, but not a necessary, feature of a federal state.").

how preemption statutes have been interpreted by state courts.<sup>62</sup> However, in order to better understand the recent rise of super preemption provisions, it is important to situate these laws in the general landscape of state preemption.

Although the proliferation of legislative home rule provisions ostensibly reaffirmed the legislature's role as the primary arbiter of local power, courts still play an important role in the preemption battles across the country. Indeed, while legislatures most always have the ability to decide *if* they will preempt a particular local action, *whether* they have preempted or *what* they have preempted are often open questions that courts are enlisted to answer.<sup>63</sup> How the courts answer those questions is typically a function of the kind of preemption at play in a particular dispute. Most state courts, in keeping with the framework established in federal preemption jurisprudence, divide preemptive actions into two categories: express or implied preemption.<sup>64</sup> Whether a preemptive action is express or implied can determine everything from the type of analysis the court applies to the dispute, to the complexity of the legal questions at play, to whether the court will hear the case in the first place. For these reasons, understanding the contours of these two categories is necessary for furthering one's understanding of both traditional preemption and the more recent super preemption provisions.

Express preemption is perhaps the clearest category of preemption, although not the most common.<sup>65</sup> It occurs when a state legislature enacts a law that explicitly prohibits localities from taking a particular legislative action, or mandates that localities overturn a law that is already on their books.<sup>66</sup> This type of preemption can take a variety of forms; including specific prohibitions against local policies like gun control, fracking

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<sup>62</sup> Two notable outliers in this regard are recent articles by Professors Paul Diller and Kenneth Stahl. See generally Diller, *supra* note 9, at 1114 (suggesting courts addressing state preemption questions aim to maximize "good-faith" experimentation while minimizing exclusionary or parochial policies); Stahl, *supra* note 12 (teasing out the relationship between geographic political polarization and an increase in state preemptive activity).

<sup>63</sup> See Diller, *supra* note 9, at 1126 ("Thus, despite the second-wave home-rule reformers' intent to remove the responsibility for deciding the scope of local authority from the judiciary, legislative home rule traded the much-criticized judicial role of determining whether a subject matter was properly 'local' for the equally controversial task of applying the doctrine of preemption.").

<sup>64</sup> *Id.* at 1141–42 (noting that while Utah is the only state to explicitly adopt the Supreme Court's taxonomy, all state courts but Illinois recognize both conflict and implied preemption).

<sup>65</sup> Cf. Mary J. Davis, *The New Presumption Against Preemption*, 61 HASTINGS L.J. 1217, 1228 (2010) (noting that, historically, express preemption analysis has been rarely applied at the federal level).

<sup>66</sup> See Diller, *supra* note 9, at 1115 (defining express preemption).

ordinances, and rent control laws;<sup>67</sup> or blanket prohibitions against local laws on topics as broad as public health, social justice, or environmental protection.<sup>68</sup> In fact, several states have begun enacting even broader express preemption provisions, outlawing *any* municipal actions that do not perfectly conform to state law.<sup>69</sup> Texas, for example, recently introduced a bill that would have prohibited any local legislation that did not first receive express state approval.<sup>70</sup> Although that law was ultimately rejected,<sup>71</sup> similarly broad express preemption provisions have appeared in Arizona and Oklahoma.<sup>72</sup> These bills illustrate the sheer diversity, breadth, and ambition of express preemption provisions. Ultimately, the most important identifying features are that these provisions clearly point to types of policies that localities have enacted or could enact, and unambiguously establish that localities can no longer legislate in these areas.

As previously mentioned, a byproduct of the rapid expansion of legislative home rule has been a reduction in the role of the judiciary in disputes about city power. This is particularly true with regard to express preemption provisions. By passing an express preemption provision, state officials leave little room for ambiguity as to whether a locality can continue to take a particular course of action.<sup>73</sup> If courts have determined that a state has preemptive power over its localities, few questions remain after a state has expressly preempted a category of local law. With that said, the court's role in express preemption disputes is not immaterial. As a preliminary matter, courts still have to determine if the state can preempt local action in the first place.<sup>74</sup> In *imperio* states where home rule provisions are enshrined in the state constitution, localities are afforded a sphere of constitutionally protected lawmaking authority that even express preemption cannot pierce. Courts must therefore determine to what degree their state protects that kind of local power, and if the preempted action falls within the class of "local" policies that are often afforded constitutional protection.

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<sup>67</sup> See Riverstone-Newell, *supra* note 10, at 407.

<sup>68</sup> AMERICANS FOR NONSMOKERS' RIGHTS, THE EVOLVING FACE OF PREEMPTION: NEW TACTICS TO LIMIT LOCAL CONTROL 2 (2016), <https://perma.cc/3SQC-R9CP>.

<sup>69</sup> Riverstone-Newell, *supra* note 10, at 418.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> See Diller, *supra* note 9, at 1158 (noting that Illinois' refusal to acknowledge implied preemption "severely reduces the judicial role in deciding questions of preemption").

<sup>74</sup> See, e.g., *Town of Telluride*, 3 P.3d at 37 (exploring the reach of Colorado's home rule power to determine if the state's express preemptive activity actually applied to Telluride's case).

Additionally, courts must determine if the local activity at issue is the kind of action covered by the express preemption provision.<sup>75</sup> In some cases that inquiry is fairly simple. If a state prohibits localities from “banning or imposing a fee for the use of paper or plastic bags,”<sup>76</sup> there should be little dispute as to whether a city’s tax on plastic bags has been preempted. However, not all disputes are this easily resolved. For example, in the *Florida Carry* case profiled earlier, the state law expressly preempted the “promulgation” of local firearm ordinances.<sup>77</sup> While there was no dispute as to whether Tallahassee’s two laws were firearm ordinances, the court nevertheless determined that they were not covered by the state’s express preemption provision because they were no longer enforced.<sup>78</sup> According to the court, unenforced ordinances were not “promulgated” in the way that the state law envisioned.<sup>79</sup> For that reason, applying the state’s preemption statute to Tallahassee’s laws made little sense, despite the legislature’s expressed intent to cover all local firearm regulations. This example illustrates that even under an express preemption provision, the judiciary plays an important but circumscribed role in determining the bounds of local power.<sup>80</sup> With that said, the opportunities for judicial discretion are few and far between under express preemption provisions.<sup>81</sup> Given that super preemption laws are, by their very nature,

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<sup>75</sup> See Diller, *supra* note 9, at 1158 (noting that despite only recognizing express preemption, “Illinois courts still play a role in determining whether the legislature has expressly preempted a certain field, and, if so, the extent of such a preemption provision”).

<sup>76</sup> Diana Barr, *Missouri Legislators Block Cities from Raising Minimum Wage*, ST. LOUIS BUSINESS JOURNAL (Sept. 17, 2015), [https://www.bizjournals.com/stlouis/morning\\_call/2015/09/missouri-legislators-block-cities-from-raising.html](https://www.bizjournals.com/stlouis/morning_call/2015/09/missouri-legislators-block-cities-from-raising.html).

<sup>77</sup> *Fla. Carry*, 212 So. 3d at 457.

<sup>78</sup> *Id.* at 458–59.

<sup>79</sup> *Id.* at 459.

<sup>80</sup> For other examples of the court playing a critical role in a battle over express preemption, see *Town of Telluride*, 3 P.3d at 37; *Fondessy Enters. v. City of Oregon*, 492 N.E.2d 797, 799 (Ohio 1986); *Dallas Merch.'s & Concessionaire's Ass'n v. City of Dallas*, 852 S.W.2d 489, 490 (Tex. 1993).

<sup>81</sup> In opining on the opportunities for judicial discretion in a regime where express preemption was the only mechanism by which states could preempt local action, Professor Paul Diller made the following observation:

Express-only preemption also aims to deprive judges of discretion and the capability of rendering anything resembling a normative judgment. In this vein, Professor Elhauge and other proponents of default-rule theory have described the role of a judge as merely that of an “agent” carrying out the legislature’s instructions. As applied to preemption, an “express-only” default rule reduces judges to “agents” merely searching for a specific instruction from the legislature rather than partners in the process of interpreting state laws and developing the vertical distribution of power in a home rule system.

always express provisions, the fact that courts have historically played a minor role in adjudicating this category of preemptive dispute may indicate that super preemption will receive similarly short shrift from the judiciary moving forward.

Implied preemption, the second preemption category, is slightly more complicated. Most courts subdivide implied preemption into two further analytical categories. The first, conflict preemption, occurs when a local ordinance frustrates or directly impedes a state law's aims.<sup>82</sup> For example, in *Casuse v. City of Gallup*, the New Mexico legislature passed a law requiring cities with populations of 10,000 or more to elect their city council members from single-member districts.<sup>83</sup> Despite having a population of more than 10,000 people, the city of Gallup, elected its council members via at-large districts.<sup>84</sup> Recognizing that the Gallup ordinance directly conflicted with the state's single-member district statute, the New Mexico Supreme Court held that the local law was preempted and struck it down.<sup>85</sup> The court reached this holding despite the fact that the state's statute included no express language explicitly preempting the local ordinance.<sup>86</sup> The fact that the two laws were incompatible was enough to indicate that the state legislature had impliedly preempted the ordinance and all others like it.

The second category of implied preemption, field preemption, requires even less of an affirmative statement from a state legislature for a determination that local law has been preempted. With field preemption, it is enough that the state legislature has simply "occupied the field" in a particular area for a court to preclude local action on that matter.<sup>87</sup> The theory behind field preemption is that when a legislature develops a comprehensive regulatory scheme on an issue, the legislature impliedly indicates its intent for that set of policies to be the final word on the issue.<sup>88</sup> In these cases, it does not matter if a local ordinance directly conflicts with the state's law. As long as the state has sufficiently occupied this policy field, the local law cannot stand.

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Diller, *supra* note 9, at 1159 (footnotes omitted).

<sup>82</sup> See, e.g., *Bloom v. City of Worcester*, 293 N.E.2d 268, 283, n.16 (Mass. 1973) (describing the test for conflict preemption as "whether the local ordinance . . . frustrates the fulfilment [sic] of the legislative purpose of any arguably relevant general law").

<sup>83</sup> *Casuse v. City of Gallup*, 746 P.2d 1103, 1104 (N.M. 1987).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 1105.

<sup>86</sup> *Id.* at 1104-05.

<sup>87</sup> See Weiland, *supra* note 29, at 470 (1999).

<sup>88</sup> See *id.* ("Field preemption may be implied from a pervasive scheme of federal regulation.").

State courts have decided field preemption cases on numerous occasions. For example, in *O'Connell v. City of Stockton*, Stockton, California passed an ordinance providing for the “forfeiture of [a]ny vehicle used . . . to acquire or attempt to acquire any controlled substance.”<sup>89</sup> Plaintiffs argued, in part, that the law was preempted by the California Uniform Controlled Substances Act (UCSA), which, among other things, authorized vehicle forfeiture for particular drug crimes.<sup>90</sup> The California Supreme Court, after considering the UCSA “*as a whole*,” ultimately agreed.<sup>91</sup> According to the Court, even though the UCSA did not contemplate forfeiture for simple drug possession crimes and therefore did not directly conflict with the more stringent Stockton ordinance, the legislature’s host of regulations on the matter indicated a “clear intent” to reserve forfeiture for more serious crimes.<sup>92</sup> In other words, because the state legislature had developed a “comprehensive scheme”<sup>93</sup> addressing forfeiture in drug crimes, they had fully occupied the field in that policy area as to preclude any further regulation from subsidiary governments. Cases like *O'Connell* depict the court’s role at its apex for preemption cases. With field preemption cases, courts are tasked with not only determining what constitutional or statutory power a city has relative to the state, but also with determining if a legislature has spoken expansively enough on an issue to foreclose local regulation on that matter. This latitude grants judges a level of interpretive (and normative) discretion that is almost always lacking in express preemption cases.

Implied preemption provisions, however, bear little resemblance to the super preemption provisions addressed in this Article. As discussed previously, super preemption provisions are punitive measures attached to *express* prohibitions against a category of local action. In this way, they will likely come to resemble other forms of express preemption, leaving little room for judicial discretion while maximizing the legislature’s power in intrastate disputes. Nevertheless, implied preemption cases highlight something notable about the recent proliferation super preemption provisions. As Professor Paul Diller has recognized, much implied preemption litigation is initiated by local business interests—not the city or state governments whose laws are implicated in these cases.<sup>94</sup> This lies in

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<sup>89</sup> *O'Connell v. City of Stockton*, 162 P.3d 583, 586 (Cal. 2007) (quoting Stockton Mun. Code, § 5-1000).

<sup>90</sup> *Id.* at 588.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 590.

<sup>93</sup> *Id.*

<sup>94</sup> See Diller, *supra* note 9, at 1140.



stark contrast to the few super preemption cases that courts have heard to date. In super preemption cases in Florida, Texas, and Arizona, both the plaintiffs and defendants have come exclusively from state government, municipal offices, or advocacy organizations with an interest in the policy matter at hand.<sup>95</sup> In each of these cases the state has played an extremely active role in the litigation, submitting briefs and filing motions in defense of their preemptive provisions.<sup>96</sup> These few examples illustrate that super preemption cases are not dealing with parochial matters of purely local concern.<sup>97</sup> These are politically charged disputes in which the states have very real interests in prevailing. As this Article will soon argue, the deeply political nature of these provisions is one of the features that separates super preemption from much of the traditional preemptive activity.

### C. Common Justifications for State Preemption

Given the ease with which preemptive provisions are passed by legislatures and upheld by many courts, it stands to reason that states and judges must have *some* justification for why they believe particular laws are best implemented at the state level. After all, many state preemption cases turn on whether the ordinance in question is sufficiently “local” in nature. In order for a court to make that determination—or for a state to assert otherwise—it should have some methodology for deciding what constitutes a local matter as compared to something best dealt with by the state. As it turns out, both states and courts rely on three common justifications for preemptive action: a desire for uniformity, a concern about extraterritoriality, and a distrust of local government’s ability to adequately handle certain challenges.<sup>98</sup> Understanding these justifications

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<sup>95</sup> See *Fla. Carry*, 212 So. 3d at 455 (identifying advocacy groups Florida Carry, Inc. and The Second Amendment Foundation, Inc. as appellants); *City of El Cenizo v. Texas*, No. 17-50762, 2017 WL 4250186, at \*1 (5th Cir. Sept. 25, 2017) (identifying the state of Texas as the defendant); *State ex rel. Brnovich v. City of Tucson*, 399 P.3d 663, 668 (Ariz. 2017) (noting that the litigation was prompted by the state filing a special action against the city).

<sup>96</sup> See Attorney General’s Motion for Summary Judgment and Response to Defendants’ Motion for Summary Judgment, *Fla. Carry*, 212 So. 3d 452 (No. 2014CA001168); Brief for Appellants, *City of El Cenizo*, 2017 WL 4250186 (No. 17-50762); Petitioner State of Arizona Ex Rel. Brnovich’s Supplemental Brief, *Brnovich*, 399 P.3d 663 (No. CV-16-0301-SA).

<sup>97</sup> See Erin Adele Scharff, *Hyper Preemption: A Reordering of the State–Local Relationship?*, 5 GEO. L. J. 1469, 1519–20 (describing the Arizona Attorney General’s apparent unwillingness to enforce its super preemption law against localities for “run-of-the-mill issues, driven by local losers in zoning disputes and other principally local matters”).

<sup>98</sup> See, e.g., *City and County of Denver v. State*, 788 P.2d 764, 768 (Colo. 1990) (noting that the three factors the court considers when assessing whether a policy falls within the state’s ambit include “need for statewide uniformity,” “impact of the municipal regulation on persons living outside the municipal limits,” and “whether a particular matter is one traditionally governed by state or by local government.”).

for traditional preemption will prove helpful in eventually teasing out a more nuanced justification for the recent spate of super preemption provisions.

One of the most common justifications for traditional preemption is a desire for state uniformity.<sup>99</sup> Of particular relevance in issues pertaining to business and mobile capital,<sup>100</sup> the theory holds that if mobile businesses have to navigate a patchwork of regulations in expanding from one municipality to the next, they will eventually grow frustrated and leave for a state with a less cumbersome regulatory landscape or potentially pass their increases in production costs on to consumers in the form of higher prices.<sup>101</sup> In *American Financial Services Association v. City of Oakland*, the California Supreme Court relied on this justification to strike down a predatory lending ordinance passed in the City of Oakland.<sup>102</sup> In that case, Oakland's law limited the amount in fees mortgage lenders could charge on subprime loans and mandated that subprime mortgage lenders not engage in various predatory or deceptive financial practices with prospective clients.<sup>103</sup> Plaintiffs pointed to similar legislation passed by the California legislature to argue that Oakland's more stringent law had been preempted and was therefore unenforceable.<sup>104</sup> Despite evidence indicating that the legislature had not intended to preempt local law with their statute,<sup>105</sup> the court ultimately sided with the plaintiffs.<sup>106</sup> According to the court, the California legislature had presumably balanced the risks of subprime mortgage lending with the benefits of providing their citizens

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<sup>99</sup> See Lynn A. Baker & Daniel B. Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, 86 DENV. U. L. REV. 1337, 1349 (“[T]he two factors that seem to loom largest” when determining what fall should fall within the state’s policymaking power are “the extraterritorial effects of the local regulation[] and the need for statewide uniformity in the relevant regulatory area”).

<sup>100</sup> Professor Richard Schragger uses the term mobile capital to describe individuals and firms that have the ability to move from one jurisdiction, often in response to some local policy. See generally Richard Schragger, *Mobile Capital, Local Economic Regulation, and the Democratic City*, 123 HARV. L. REV. 482 (2009). Schragger draws a distinction between this type of highly mobile capital and “place-dependent capital,” which includes fixed assets like office buildings, homes, and railroads. *Id.* at 493.

<sup>101</sup> See, e.g., *N. Calif. Psychiatric Soc’y v. City of Berkeley*, 178 Cal. App. 3d 90, 101 (Cal. Ct. App. 1986) (“Certain areas of human behavior command statewide uniformity, especially the regulation of statewide commercial activities . . .”).

<sup>102</sup> *Am. Fin. Serv. Ass’n v. City of Oakland*, 104 P.3d 813, 823 (Cal. 2005) (“Moreover, it is beyond peradventure that effective regulation of mortgage lending, and in particular here abusive practices in such lending, ‘requires uniform treatment throughout the state.’” (quoting *Chavez v. Sargent*, 339 P.2d 801, 810 (Cal. 1959))).

<sup>103</sup> See *id.* at 818–19.

<sup>104</sup> *Id.* at 815.

<sup>105</sup> See *id.* at 826 (describing evidence that the legislature considered adding express preemption language into the statute and opted against it).

<sup>106</sup> *Id.* at 829.

easy access to liquidity.<sup>107</sup> By appending further prohibitions onto this regulatory baseline, Oakland risked “divid[ing] the state's economy into tiny geographic markets” and ultimately pushing lenders out of the state entirely.<sup>108</sup> For that reason, the court determined that the legislature must have impliedly preempted local laws like the one at issue, and chose to strike it down.

A second, related justification for state preemption is the fear of extraterritoriality.<sup>109</sup> Despite the best intentions of lawmakers, laws do not always obey political boundaries. Instead, the effects of particular laws often creep across jurisdictions, sometimes adversely impacting neighboring polities that had no say in the offending action. This “negative externality” problem is particularly pronounced in the context of local governments. With small geographic boundaries and many neighboring jurisdictions in close proximity, a local government’s law could have far-reaching impacts for citizens across a metropolitan region.<sup>110</sup> The Colorado Supreme Court addressed this exact issue in *Town of Telluride v. Lot Thirty-Four Venture*.<sup>111</sup> In that case, the Town of Telluride passed a rent control ordinance mandating that all new development include a certain percentage of affordable units.<sup>112</sup> In assessing whether the matter was best characterized as one of state or local concern, the court pointed, in part, to the law’s extraterritorial impact.<sup>113</sup> By requiring the construction of affordable units, Telluride was, in effect, limiting the supply of market-rate units that could be developed in its borders.<sup>114</sup> According to the court, this limitation could cause a “ripple effect” across the entire region’s housing market, foisting the unsatisfied demand for market-rate construction upon neighboring localities that had no say in Telluride’s policy decision.<sup>115</sup> For this reason among others, the Colorado Supreme Court determined that rent control policies were better decided by the state, and held that Telluride’s policy had been preempted.<sup>116</sup>

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<sup>107</sup> *Id.* at 824. It is worth noting that this case was decided in 2005, well before the subprime mortgage crisis that would ultimately sour even the most positive perspectives on subprime loans.

<sup>108</sup> *Id.* at 825.

<sup>109</sup> See Baker & Rodriguez, *supra* note 99.

<sup>110</sup> Cf. Marygold Shire Melli & Robert S. Devoy, *Extraterritorial Planning and Urban Growth*, 1959 WIS. L. REV. 55, 55 (1959) (“However, in an urbanized area consisting of several governmental units, it is not enough that each unit individually prepare for the future. Political boundaries are arbitrary in the sense that they may have no relationship to the economic and social units.”).

<sup>111</sup> *Town of Telluride*, 3 P.3d at 38–39.

<sup>112</sup> *Id.* at 33.

<sup>113</sup> *Id.* at 38–39.

<sup>114</sup> *Id.* at 39.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 40.

A final, perhaps less common, justification for state preemption addresses the comparative competencies of state and local governments. Although courts and state leaders may be reluctant to uphold preemptive action on institutional competency, this issue often bubbles just beneath the surface of most preemption conversations. Indeed, although it was never stated explicitly, institutional competency seems to have influenced the court's decision in the aforementioned *American Financial Services Association* case. Despite formally justifying their holding on uniformity grounds, the majority frequently alluded to concerns about the complexity of the problem at hand. The court notes that, while Oakland may in fact bear a disproportionate burden from subprime lending tactics, those burdens "do not give the City a license to regulate a *highly complex* financial area comprehensively addressed by state law."<sup>117</sup> The court goes on to extol the legislature's "reasoned assessment"<sup>118</sup> of the complicated situation, and argues that the modern reality of mortgage-backed securities would "confound" a system of locally-based regulation.<sup>119</sup> This language suggests that the court is simply more comfortable with the state legislature's ability to grasp and analyze the details of the financial system.

It is important to note that opinions regarding institutional competency are not necessarily grounded in unfounded prejudice. There are many reasons to believe that state governments have some technical superiority over their local counterparts. For one, state governments tend to be larger than local governments and can therefore probably provide more manpower to solving a problem than individual localities. Additionally, state governments likely draw from a wider pool of job applicants than local governments, increasing the likelihood that they will be able to hire someone with a niche but valuable skillset. Finally, state governments likely have better financing and therefore can pay their employees higher salaries and provide them with better resources. Assuming qualified applications are at least partially motivated by pay and institutional resources, this financial disparity may result in a noticeable skill gap between state and local governments.

These three justifications for preemption are neither collectively exhaustive nor mutually exclusive. Courts and state governments often rely on these three justifications in tandem, weaving arguments from one

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<sup>117</sup> *Am. Fin. Serv. Ass'n*, 104 P.3d at 825 (emphasis added).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 823.

justification to the next to support a preemptive decision.<sup>120</sup> Additionally, scholars and judges have put forth various other arguments to justify preemption at both the federal and state levels.<sup>121</sup> These examples merely serve to illustrate the philosophical underpinnings beneath preemptive action and centralized governing, more generally. As this Article will soon argue, while state leaders lean on these same justifications in their support of super preemption, these traditional arguments for centralized decisionmaking fail to fully explain the purpose behind these punitive measures.

## PART II – THE RISE OF SUPER PREEMPTION

Given the frequency with which traditional preemption provisions are enacted and upheld by state courts, why should one think about super preemption any differently? On the one hand, these policies are simply additional manifestations of the states' supremacy over their local governments, grounded in the same, well-established legal tradition as any other preemption provision. On the other hand, super preemption is unique—and therefore noteworthy—for two reasons. First, prior to the birth of super preemption in 2003,<sup>122</sup> legislators had never tied punitive provisions to preemptive legislation. Although these punitive provisions come in a variety of forms, as a whole, they signal a marked shift in the way in which states approach the practice of preemption. Second, most super preemption provisions aim to pierce the governmental veil of the localities that they target. These provisions are not simply concerned with attacking the policies passed by city officials, nor are they simply concerned with holding cities as institutions accountable for the policies' passage. Instead, many super preemption provisions aim to hold the *individual local officials* accountable for their legislative actions. This, of course, changes the power dynamics of state preemption. What was once a battle for authority between states and their cities has now become a battle over individual legal consequences between states and city officials. For these reasons, scholars should view super preemption as something more than a mere continuation of traditional preemption's reign. These

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<sup>120</sup> See, e.g., *City and County of Denver*, 788 P.2d at 768 (noting that Colorado courts consider relevant all three justifications to make preemption determinations).

<sup>121</sup> See generally, e.g., Mark D. Rosen, *Contextualizing Preemption*, 102 NW. U. L. REV. 781 (2009) (arguing that preemption exists as a mechanism for addressing the maladies of concurrent governmental powers).

<sup>122</sup> See BRIFFAULT ET AL., *supra* note 20 (describing Oklahoma's 2003 super preemption law as the first of its kind).

provisions signal a paradigm shift in the relationship between states and localities; therefore, they deserve specific attention as a category unto themselves.

This Part aims to begin some of that work. First, this Part will address some of the historical precedent for super preemption provisions. While nothing quite like super preemption has ever occurred in the past, these laws do carry some thematic similarities to nineteenth century “ripper” legislation, as well as to the jurisprudential thread that attributes corporate-like fiduciary duties to city officials. These two legal practices foreshadowed super preemption in that they conceptualized the role of city officials differently than other government actors, and therefore afforded them fewer protections or required additional responsibilities of them. After addressing these historical trends, this Part will then turn to super preemption provisions in earnest by outlining some of the common features in these modern provisions and providing various examples from around the country.

#### *A. Historical Precedence for Super Preemption*

As previously mentioned, one of the most salient features of super preemption provisions is the way that they move past the city as an institution to attach damages to local elected officials or city administrators. Traditional preemption pits different levels of government against each other in battles where the victorious party is awarded the ability to enact and enforce a particular piece of legislation and the losing party (often the city officials) bears no residual damage beyond their inability to implement its desired policy. Super preemption changes this dynamic. With these provisions, the opposing parties are no longer state and city, but state and *city officials*. Moreover, the terms of the battle have also changed. Either victorious party is still awarded authority to enact their desired law; but if the city officials lose, they not only lose the ability to enact a particular law, but also may experience civil damages, criminal penalties, and/or loss of employment.

If these individual damages seem odd, they should. Legislators, even at the local level, have traditionally been afforded a wide degree of legislative immunity for work performed in their elected capacity.<sup>123</sup> This means that officials cannot be held personally liable for the government decisions they make while acting in their official capacity. Indeed, some local officials

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<sup>123</sup> See Max Schanzenbach & Nadav Shoked, *Reclaiming Fiduciary Law for the City*, 70 STAN. L. REV. 565, 635 (2018).

operating under super preemption regimes have already raised the legislative immunity as a legal defense to some of these punitive provisions.<sup>124</sup> However, legislative immunity for local officials sits uneasily next to the myriad of ways in which the law has historically assigned vulnerabilities and responsibilities to local actors unexperienced at higher levels of government.

One example of how state laws historically disempowered local officials are “ripper” bills. Ripper bills were legislative acts that “ripped” authority from local officials and vested it at the state level.<sup>125</sup> These laws were commonplace throughout the nineteenth and early twentieth centuries,<sup>126</sup> despite frequently drawing the ire of local officials and city residents. For example, in 1871, the Michigan state legislature passed a bill that took the authority to appoint a board of public works away from the city of Detroit and placed it in the hands of a state body.<sup>127</sup> In 1857, the New York state legislature enacted a similar statute removing New York City’s ability to organize its local police and granting that power to the state’s governor.<sup>128</sup> Perhaps most shockingly, in 1870, state legislators in Harrisburg took over managing the construction of Philadelphia’s City Hall from local officials.<sup>129</sup>

Each of these ripper bills was promoted by the state legislature as a legislative change aimed at empowering state governments. However, the unspoken corollary to state empowerment in these cases was the *disempowerment* of local actors. These bills not only ripped authority from the city as an institution; they ripped responsibilities away from local individuals who were tasked with carrying out these mandates. In this way ripper legislation bears a striking resemblance to modern super preemption. Both of these legislative tactics aim to empower state government at the expense of local office holders. Power and authority that was at one time unquestionably vested at the local level is in both cases taken by the state, enfeebling local actors by restricting their scope of power.

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<sup>124</sup> See, e.g., *Amicus Curiae in Support of Cross-Appellants at 12, Fla. Carry*, 212 So. 3d 452 (No. 1D15-5520).

<sup>125</sup> See Lyle Kossis, *Examining the Conflict between Municipal Receivership and Local Autonomy*, 98 VA. L. REV. 1109, 1126 (2012).

<sup>126</sup> See Stahl, *supra* note 12, at 145.

<sup>127</sup> *People ex rel. Le Roy v. Hurlbut*, 24 Mich. 44, 53 (1871).

<sup>128</sup> *People ex rel. Wood v. Draper*, 15 N.Y. 532, 535 (1857).

<sup>129</sup> See Kossis, *supra* note 125.

Another example that illustrates the unique legal treatment of city officials is the attachment of fiduciary duties to local actors.<sup>130</sup> Fiduciary duties, typically applied to agents controlling trusts or corporations, are divided into two categories: duties of care and duties of loyalty.<sup>131</sup> Under a duty of loyalty, a fiduciary agent is required to avoid conflicts of interest when managing whatever assets are under their control.<sup>132</sup> Under a duty of care, a fiduciary agent must exercise sound management of those assets.<sup>133</sup> Although fiduciary duties are typically associated with *private* law, courts have historically held that, when city officials act in their role as marketplace participants (e.g. when cities behave like parties to private contracts), it is appropriate to attribute a form of fiduciary duties to local actors.<sup>134</sup> For example, in *Milhau v. Sharp*, the New York city council agreed to allow a private party the right to run a passenger railway down a public street.<sup>135</sup> There was little question that the city possessed the legal authority to make such a grant—after all, the street was public and the private party would be paying for access.<sup>136</sup> The plaintiffs, however, took issue with the *amount* of money that the city was willing to accept to allow the railway to operate.<sup>137</sup> According to them, by awarding the street access for a “trifling sum,” the city was paid less than fair value.<sup>138</sup> The court agreed.<sup>139</sup> It stated that, while it typically avoided passing judgement on the wisdom of political acts, when the city council acted “with reference to its private property,” it was no longer acting within its legislative capacity—instead it was “as if it were the representatives of a private individual, or of a private corporation.”<sup>140</sup> As the proprietors of public assets, council members were bound by a fiduciary duty that did not exist when exercising traditional legislative powers. Because the council ignored that duty by accepting considerably less than fair market value for sale, the court struck down the transaction.

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<sup>130</sup> See Schanzenbach & Shoked, *supra* note 123, at 573 (describing city officials “long-dormant status” as fiduciaries when transacting in city assets).

<sup>131</sup> *Id.* at 568.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 573 (“[A] long line of forgotten common law decisions from the nineteenth and early twentieth centuries held that city officials are fiduciaries when transacting in city assets and making contracts on the city’s behalf.”).

<sup>135</sup> *Milhau v. Sharp*, 15 Barb. 193, 206–07 (N.Y. Gen. Term 1853).

<sup>136</sup> *Id.* at 207 (citing *Drake v. Hudson River R.R. Co.*, 7 Barb. 528 (N.Y. Gen. Term 1849)).

<sup>137</sup> *Id.* at 214–15.

<sup>138</sup> *Id.* at 198.

<sup>139</sup> *Id.* at 194.

<sup>140</sup> *Id.* at 193–94.



It is important to highlight just how powerful this decision is. This, unlike previous cases in this Article, is not an instance in which the court struck down a local action because it was preempted by state law. The state was not a party to this matter, and the court did not doubt that the city had the *legal* authority to make this transaction. Instead, the court chose to strike down a lawful action performed by an elected legislative body because it decided the transaction was a bad *business* deal. Here, the Court treated the city council as an agent of city residents, held to a higher standard when entering business transactions regarding public property. Although the court was not disempowering the council as was the case with the ripper legislation, it was attaching additional responsibilities to the position that other legislators did not have.<sup>141</sup> Similarly, this decision illustrates how courts may conceive local officials as distinct from other categories of elected governmental agents. In this way, decisions like *Milhau* and ripper legislation may have presaged the unorthodox treatment of local officials in super preemption provisions.

#### *B. The Current Landscape of Super Preemption Provisions*

Despite sharing some thematic similarities to the historic trends just outlined, modern super preemption provisions come in a variety of forms. Indeed, while all super preemption provisions include punitive measures leveled at localities and local actors, no two punitive measures are exactly alike. This Section describes several of the most common punitive features in super preemption provisions, including reductions in state funds, private rights of action, civil damages, criminal penalties, removal from office, and restrictions on the use of government funds in legal disputes. In describing these features, this Section will introduce various pieces of super preemption legislation as examples of how states implement these features in practice.

##### *1. Private rights of action*

One common feature in many super preemption provisions is the creation of private rights of action. Under these provisions, any private citizen or organization who believes they have been adversely impacted by the local ordinance has a statutory right to initiate litigation against a

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<sup>141</sup> *C.f.* Schanzenbach & Shoked, *supra* note 123, at 576–78 (arguing that the modern scholarly trend of trying to ascribe fiduciary duties to federal or state officials sits on uneasy ground and does not comport with the way judges and policymakers have historically understood these actors).

locality in violation of the states super preemption statute.<sup>142</sup> This feature played a prominent role in the *Florida Carry* case.<sup>143</sup> In that dispute, the plaintiff notably was not the state government or some agent thereof. Instead, two advocacy organizations (Florida Carry, Inc. and The Second Amendment Foundation, Inc.) leveled complaints against Tallahassee for its gun control ordinances.<sup>144</sup> Although the state played an active role in the litigation as an *amicus*, the case was initiated by private actors exercising their rights under the legislation's private right of action.

Following Florida's lead, Mississippi enacted a firearm super preemption statute in 2016.<sup>145</sup> Under this law, "[N]o county or municipality may adopt any ordinance that restricts the possession, carrying, transportation, sale, transfer or ownership of firearms or ammunition or their components."<sup>146</sup> Similar to the statute in Florida, this law also created a private right of action, establishing that "a citizen of this state . . . who is adversely affected by an ordinance or posted written notice adopted by a county or municipality in violation of this section may file suit for declarative and injunctive relief against a county or municipality."<sup>147</sup> If the actions of local officials conflict with the statute, then the local officials may be civilly liable for up to \$1,000 as well as for the cost of the opposing party's attorney's fees.<sup>148</sup>

By creating private rights of action, the Florida and Mississippi laws relieve their states of two responsibilities. First, under these statutes, the state does not have to bear the entire burden of identifying local violators. While some local violations are easily identifiable, many potential violations could go unnoticed by state officials.<sup>149</sup> Especially with regard to laws that are on the books but not currently enforced, private rights of action decrease the likelihood that violators will slip through the cracks. Second, under these statutes, the state does not have to bear the entire burden of litigation. Without a private right of action, state attorney general

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<sup>142</sup> See, e.g., Daniel P. Tokaji, *Public Rights and Private Rights of Action: The Enforcement of Federal Election Laws*, 44 IND. L. REV. 113, 160 n.1 (2010) (defining private right of action in the federal context as "a nongovernmental litigant's ability to bring suit to enforce a federal statute").

<sup>143</sup> *Fla. Carry*, 212 So. 3d at 455–56.

<sup>144</sup> *Id.*

<sup>145</sup> MISS. CODE ANN. § 45-9-51(1) (2017).

<sup>146</sup> *Id.*

<sup>147</sup> MISS. CODE ANN. § 45-9-53(5)(a) (2017).

<sup>148</sup> *Id.* at (5)(c).

<sup>149</sup> *C.f.* Trevor W. Morrison, *Private Attorneys General and The First Amendment*, 103 MICH. L. REV. 589, 608 (2005) (arguing that one of the benefits of private attorney general laws, which are laws that empower private actors to bring suits against those who violate public interests, is that they "valuably supplement the government's enforcement efforts without taxing state resources").

offices would have to litigate every case against violating localities. Often operating with limited resources, these offices likely would have to choose which cases to litigate and which to let go. With a private right of action, this decision becomes less daunting. Even if the state chooses to pass on a particular violation, there is still the possibility for a private actor, like a local advocacy organization, to play the role of attorney general and litigate the case.

## 2. Civil penalties and damages

Most super preemption statutes include some provisions for civil damages or penalties in the event that the locality is found to have violated the statute's terms. Some of these provisions take the form of civil *penalties* or *finer*, which suggests that the defendant would have to pay the fee whether or not the plaintiff proves monetary damages.<sup>150</sup> Other provisions are expressed as caps on civil *damages*, which suggests that payment would only occur after an assessment of the plaintiff's monetary damages due to the violation.<sup>151</sup>

One particularly noteworthy statute is Arizona's 2016 firearm provision.<sup>152</sup> Similar to the laws in Florida and Mississippi, Arizona's law states, "(E)xcept for the legislature, this state and any agency or political subdivision of this state shall not enact or implement any law, rule or ordinance relating to the possession, transfer, or storage of firearms other than as provided in statute."<sup>153</sup> What is most curious about this provision is that it provides for both civil damages *and* penalties at varying amounts. First, the law establishes that the court may assess a civil *penalty* of up to \$50,000 when a political subdivision has knowingly and willfully violated this section.<sup>154</sup> Then, it states that if the plaintiff prevails under the private right of action, the court shall award "actual *damages* incurred not to exceed one hundred thousand dollars."<sup>155</sup> It is not clear how these two subsections are expected to operate or if the legislature's use of the words "penalty" and "damages" is purposeful or inartful. It is possible that the penalty provision is only meant to apply in cases where the state is the

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<sup>150</sup> See, e.g., FLA. STAT. § 790.33(3)(c) (2017) ("[T]he court shall assess a civil fine of up to \$5,000 against the elected or appointed local government official or officials or administrative agency head under whose jurisdiction the violation occurred.").

<sup>151</sup> See, e.g., NEV. REV. STAT. § 269.222(7)(c) (2015) (referring to "[l]iquidated damages in an amount equal to three times the actual damages").

<sup>152</sup> ARIZ. REV. STAT. ANN. § 13-3108 (2017).

<sup>153</sup> ARIZ. REV. STAT. ANN. § 13-3118(A) (2017).

<sup>154</sup> ARIZ. REV. STAT. ANN. § 13-3108(I) (2017) (emphasis added).

<sup>155</sup> *Id.* at (K)(2) (emphasis added).

plaintiff. In those situations, it might be difficult to calculate how the state has been “damaged” by a local firearm ordinance. Therefore, the legislature may have decided it best to impose a penalty, which is easier to apply, because it does not require the court to determine the actual injury suffered by the plaintiff. On the other hand, this language may mean that, in cases where the plaintiff is a private party, both the penalty *and* the damages are applicable, which could potentially expose the city to \$150,000 of liability. What is clear is that both of these amounts are much larger than the civil fees in most other super preemption provisions.<sup>156</sup> This is likely due to the fact that the fees are attributable to the city itself and not an individual official.

Whether civil liability takes the form of damages or a penalty, the effect is generally the same. Local governments and local officials are rarely in a financial position where they can comfortably afford these awards. For that reason, individuals operating under these super preemption regimes will likely take extra care to ensure they do not run afoul of one of these provisions.<sup>157</sup>

### 3. *Criminal liability*

At least two states have provided for criminal liability for officials who violate super preemption statutes. Kentucky passed a firearm statute similar in scope to many of the super preemption laws previously profiled in this Article.<sup>158</sup> However, in addition to creating the relatively common private right of action, this law took its punitive measures a step further, establishing that “a violation of the law’s provisions by a public servant constitutes a criminal infraction.”<sup>159</sup> These criminal provisions can result in up to a year of imprisonment for a local official found in violation of the preemption statute.<sup>160</sup>

Following Kentucky’s lead, Texas recently passed anti-sanctuary city legislation that, in addition to including the traditional civil penalties common in super preemption provisions, also included criminal penalties

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<sup>156</sup> Compare ARIZ. REV. STAT. ANN. § 13-3108(I) (2017) (establishing \$50,000 in civil penalties), *and id.* at (K)(2) (establishing \$100,000 in civil damages), with FLA. STAT. § 790.33(3)(c) (2017) (establishing only \$5,000 in civil fines), *and* MISS. CODE ANN. § 45-9-53(5)(c) (2017) (establishing only \$1,000 in civil damages).

<sup>157</sup> Local officials might be less risk averse if they knew that their city government would indemnify them for their damages or cover their legal fees. However, many of these super preemption laws prevent the use of public funds for this purpose. *See* Scharff, *supra* note 97, at 1501 (describing such a provision in the Florida firearm preemption statute).

<sup>158</sup> *See* KY. REV. STAT. ANN. § 65.870(6) (2017).

<sup>159</sup> KY. REV. STAT. ANN. § 65.870(6) (2017).

<sup>160</sup> KY. REV. STAT. ANN. § 532.090(1) (1975).

for local violators. The law forbids localities from adopting policies that would prevent law enforcement officers from complying with federal immigration detainer requests.<sup>161</sup> This law was passed in response to many Texas cities (and cities across the country) refusing to comply with federal immigration detainer requests on the grounds that such federal mandates ran afoul of the Supreme Court's anti-commandeering doctrine.<sup>162</sup> A critical feature of the anti-commandeering doctrine, however, is that it only protects cities from federal commandeering in their capacities as political subdivisions of *states*.<sup>163</sup> Through Texas's law, cities lose their ability to justify their sanctuary activities on anti-commandeering grounds because their actions now violate both federal *and state* policy. As a penalty for noncompliance, this law states that an official who "knowingly fails to comply with the detainer request" can be charged with a Class A misdemeanor resulting in up to \$4,000 in fines and one year in prison.<sup>164</sup>

Criminal penalties are particularly powerful in that they carry a degree of moral opprobrium that civil damages lack. While the primary aim of civil proceedings is to make the wronged party whole again, the American criminal justice system has the added purpose of *punishing* the party that has violated some norm that our state holds dear. By attaching the "criminal" label to local officials in violation of these preemption statutes, the state is not only signaling that the official inflicted damage against the opposing party, but also that the official committed an offense that was morally reprehensible from the perspective of the polity.<sup>165</sup>

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<sup>161</sup> Tex. S.B. 4, 85th Leg., R.S. (2017) (§ 1.01, adding §§ 752.051–752.057 to the Texas penal code).

<sup>162</sup> See Ian Millhiser, *Breaking: Federal Judge Blocks Trump's Attack on 'Sanctuary Cities'*, THINKPROGRESS (April 25, 2017), <https://thinkprogress.org/jeff-sessions-amateurish-unconstitutional-assault-on-immigrants-dd6ab8a1671e/> ("Under the Supreme Court's 'anti-commandeering doctrine,' the feds cannot order a state or local government to participate in a federal program. Thus, while a state or municipality may voluntarily agree to have its police force participate in federal immigration enforcement, state and local governments also have an absolute right to refuse to do so.")

<sup>163</sup> See *Printz v. United States*, 521 U.S. 898, 935 (1997) ("The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or *those of their political subdivisions*, to administer or enforce a federal regulatory program.") (emphasis added); see also Defendants' Response to Applications for Preliminary Injunction at 16-17, *City of El Cenizo v. Texas*, 264 F. Supp. 3d 744 (W.D. Tex. 2017) (No. SA-17-CV-404-OLG) (arguing that while anti-commandeering doctrine restricts Congress's ability to direct state action, states do not have similar constraints on their ability to direct local action).

<sup>164</sup> Tex. S.B. 4, 85th Leg., R.S. (2017) (§ 5.02, adding a new § 39.07 to the Texas penal code).

<sup>165</sup> See generally, Paul D. Carrington, *The Moral Quality of the Criminal Law*, 54 NW. U. L. REV. 575 (1959) (discussing the role morality plays in our criminal justice system).

#### 4. Payment of legal fees

An additional feature of super preemption provisions is that they often stipulate that local officials accused of violating the statutes cannot use city funds to pay their legal fees.<sup>166</sup> On its face, this policy might seem egalitarian. After all, if a local official did violate the statute, why should city taxpayers have to foot the bill for their legal expenses? However, this appraisal ignores how these provisions tilt lawsuits in the state's favor—irrespective of which party has the better legal argument. Many local officials lack the personal funds necessary to mount a successful defense against a deep-pocketed state. While a local official may believe that she committed no wrong, her personal financial situation might force her to settle with the state. Faced with the options of either settling the case and simply paying damages, or paying an expensive legal team to mount a defense that they still might lose, it is not hard to see why some local officials chose the former.

The *Florida Carry* case illustrates how these financial constraints can play out in practice. As previously discussed, two gun-rights organizations brought the lawsuit against multiple Tallahassee city commissioners.<sup>167</sup> The super preemption statute stipulated that local officials could not use public funds to pay for their legal defense.<sup>168</sup> Meanwhile, the defendants were able to secure the legal and financial support of over a dozen advocacy organizations,<sup>169</sup> which was fortunate given that the court ultimately decided that the city committed no wrongdoing.<sup>170</sup> Had the city defendants lost, they likely would have been liable for expensive legal fees. Without the help of pro-bono support, the Tallahassee defendants likely would not have been able to mount a legal defense and instead may have been compelled to settle with the plaintiffs. This shows just how powerful these legal fees provisions can be: without adequate representation for defendants, plaintiffs may be all but assured of receiving an outcome favorable to the state regardless of the case's strength.

#### 5. Removal from office

A final common feature of many super preemption statutes are provisions that provide for the removal from office of local officials who

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<sup>166</sup> See, e.g., MISS. CODE ANN. § 45-9-53(5)(c) (2017); FLA. STAT. § 790.33(3)(d) (2017).

<sup>167</sup> *Fla. Carry*, 212 So. 3d at 455–56.

<sup>168</sup> FLA. STAT. § 790.33(3)(d) (2017).

<sup>169</sup> Sean Rossman, *City Gets Support in Pro-Gun Lawsuit*, TALLAHASSEE DEMOCRAT (June 15, 2016), <https://www.tallahassee.com/story/news/2016/06/15/city-gets-support-pro-gun-lawsuit/85944658/>.

<sup>170</sup> *Fla. Carry*, 212 So. 3d at 465–66.

violate the law's terms. Both Florida and Arizona's firearm statutes include language that calls for the termination of employment or removal from office of any local official who passes a law in conflict with the state's gun policy.<sup>171</sup> Similar to the civil penalties discussed previously, these termination provisions can have a chilling effect on local legislative activity if city officials are concerned that taking the wrong vote could cost them their jobs. These provisions also mirror some of the more retributive effects of the criminal penalties in the Kentucky and Texas laws in that they are solely concerned with punishing a recalcitrant local official. Finally, as this Article will argue, these removal provisions go beyond both civil and criminal penalties in one crucial way: they *permanently* end an individual official's ability to create policy change. While civil and criminal penalties may have a strong deterrent effect on the passage of future conflicting policies, the only way the state can ensure that a particular local official never again violates their preemption statute is to take away their lawmaking power entirely.

### PART III – UNDERSTANDING SUPER PREEMPTION'S MODERN APPEAL

One clear takeaway after exploring the landscape of super preemption provisions is that states are taking unprecedented measures to thwart particular policies of their urban centers. Progressive local action on gun control and immigration has been met with strong pushback from conservative state legislatures, resulting in overturned local ordinances, contentious court battles, and the potential for damaging punitive measures leveled against local actors. What is less clear is why these provisions have proliferated so quickly, and what additional purpose they serve beyond traditional preemptive legislation. Assuming super preemption has always been a lawful mechanism for combating undesirable local policies, why have states only recently chosen to enact these types of policies? Similarly, if traditional preemption has historically been an effective mechanism for stopping local policies, are super preemption's punitive measures adding any value?

This Part offers two potential answers to these pressing questions. First, this Part argues that, in order to understand super preemption's recent rise, one must first recognize the way in which partisan differences have hardened along the urban-rural divide. Today, perhaps more than at any other time in America's history, political ideology correlates almost

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<sup>171</sup> ARIZ. REV. STAT. ANN. § 13-3108(J) (2017); FLA. STAT. § 790.33(3)(e) (2017).

perfectly with a person's proximity to the urban core.<sup>172</sup> Whereas historically urban and rural residents may have found common cause over politics,<sup>173</sup> increasingly the policy preferences of urban residents are diametrically opposed to those of their rural neighbors. This fact, coupled with the dominance of rural legislators in state politics,<sup>174</sup> helps to explain why state legislatures are striking down politically charged local policies with unprecedented impunity. Second, this Part argues that, while traditional justifications for super preemption fail to explain the purpose behind these punitive policies, by taking a more expansive view of local politics, one can begin to see that these measures serve very real ends. Using Gerken's three-part explanation for the value of local, minority decisionmaking,<sup>175</sup> this Article contends that, although traditional preemption has been effective at stopping expressions of local self-governance, state legislatures use super preemption to combat the two other goals of local policymaking: contributing to the marketplace of ideas and allowing minority communities the opportunity to develop their political identities.

*A. The Increasing Political Importance of the Urban-Rural Divide*

In *Federalist Number 10*, James Madison warned against the dangers of factionalism in America's fledgling republic.<sup>176</sup> According to him, although factions—particularly local factions—were an unavoidable reality in democratic governance, factionalism's more corrosive effects could be dulled by extending the republic's geographic sphere.<sup>177</sup> With a large enough polity, no one faction could obtain and hold on to power. Instead, factions would rise and fall over time as the polity's size and diversity caused political coalitions to shift gradually.<sup>178</sup> While a particular group's interests might align on one issue, that faction would almost certainly break apart in future political battles when its members found cause to

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<sup>172</sup> Cf. Stahl, *supra* note 12, at 136–39 (describing this phenomenon as it has manifested in North Carolina's urban centers).

<sup>173</sup> See *id.* at 149 (“In the past, when both parties had rural and urban voters, partisanship eased the tension between them by uniting them against a common enemy—the other party.”).

<sup>174</sup> See *id.* at 136–143 (describing the way rural, legislators have used gerrymandering tactics to create Republican majorities in red states countrywide).

<sup>175</sup> Gerken, *supra* note 26.

<sup>176</sup> See Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1106, 1127 (1980) (discussing how Madison's fear of factionalism presaged modern American suspicion of institutions that exist between the state and individuals).

<sup>177</sup> See THE FEDERALIST NO. 10, at 64 (James Madison) (Jacob E. Cooke ed., 1961).

<sup>178</sup> See ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 30 (1956) (describing how the instability of democratic majorities protects minority groups from political exploitation).



partner with other diverse interests on some other issue.<sup>179</sup> For Madison, this theory of factionalism helped justify the move toward a larger, more centralized government.<sup>180</sup> By expanding the geographic boundaries of the government's constituency, Madison hoped to thwart the entrenchment of local factions that he believed poisonous to a well-functioning republic.

For much of American history Madison's solution to factionalism has appeared effective.<sup>181</sup> By funneling our political activity through two national parties, geographic difference could only gain so much political traction.<sup>182</sup> For a party to find political success, it would have to strive to appeal to northern and southern, eastern and western, urban and rural constituencies. This political necessity for the most part ensured that no party could completely adopt one locality's provincialism. America's large national stage also helped ensure that geographic coalitions shifted from time to time. Citizens saw that, while they may be on the losing side during one political battle, their enemies could become their allies during the next fight, preventing the formation of sectional "cleavages" along consistent geographic, racial, or ideological lines.<sup>183</sup> With the notable exception of the violent battle between the north and south over slavery, American politics never truly metastasized along geographic lines.<sup>184</sup> For years urban Democrats in the north occupied the same party as rural Democrats from southern states.<sup>185</sup> That kind of geographic diversity in our political parties has become increasingly rare.<sup>186</sup>

In the current political environment, politics and geography are becoming increasingly intertwined. These political cleavages have not formed along northern and southern, or eastern and western divides as they might have in the past, but along urban and rural lines. As evidence of this

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<sup>179</sup> See ROBERT A. DAHL, *DEMOCRACY IN THE UNITED STATES* 279 (4th ed. 1981).

<sup>180</sup> See THE FEDERALIST NO. 10, at 64 (James Madison) (Jacob E. Cooke ed., 1961) ("Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens. . . .").

<sup>181</sup> See Stahl, *supra* note 12, at 148 (noting that for much of American history this system worked "reasonably well," with the notable exception of the Civil War).

<sup>182</sup> See *id.* ("Our modern two-party system, for example, has tended to give our political system a remarkable degree of stability by ensuring that political differences are channeled through the two major national parties."); see also Yascha Mounk, *The Rise of McPolitics*, THE NEW YORKER (July 2, 2018), <https://www.newyorker.com/magazine/2018/07/02/the-rise-of-mcpolitics> (describing how, historically, the two party system "yoked" "socially progressive Democrats in the North" to "segregationist Democrats in the South").

<sup>183</sup> Cf. DAHL, *supra* note 178 (warning that "[i]f all the cleavages occur along the same lines, if the same people hold opposing positions in one dispute after another, then the severity of conflicts is likely to increase").

<sup>184</sup> See Stahl, *supra* note 12, at 148.

<sup>185</sup> Mounk, *supra* note 182.

<sup>186</sup> See *id.*

fact one need not look any further than America's recent presidential elections. In 2012, President Obama won fewer counties nationwide than any Democratic candidate in recent memory.<sup>187</sup> And yet, Obama was reelected by a healthy margin over opponent Mitt Romney due in large part to his garnering of 69 percent of the votes in cities with over half a million people.<sup>188</sup> Hillary Clinton, the Democratic presidential candidate in 2016, was able to improve on that number, winning 71 percent of the vote in those metro areas.<sup>189</sup>

Multiple explanations abound for the stark political cleavage along urban-rural lines. One explanation, attributed to journalist Bill Bishop, is that this geographic divide is the result of a decades-long geographic reorganization that he calls "the big sort."<sup>190</sup> According to Bishop, America's partisan differences have gradually bled outside the boundaries of the political arena, coming to characterize the near entirety of personal identities.<sup>191</sup> Increasingly, how Americans see themselves politically has become synonymous with how they see themselves culturally, socially, racially, religiously, sexually, and, often, economically.<sup>192</sup> Historically, Democrats and Republicans attracted supporters of different races, religions, and ideologies.<sup>193</sup> Today, however, both parties have become more homogenous in these regards, with Republicans increasingly becoming the party of white, evangelical, conservatives, and Democrats becoming the party of everyone else.<sup>194</sup> This alignment of the various facets of personal identities along political lines has become so strong that individuals no longer want to live next to neighbors of opposing political stripes.<sup>195</sup> If being a Republican suggests that a person is not simply opposed to a set of policies that Democrats support, but to the very identity of Democrats as individuals, why would that person want to live next to someone of the opposite party? Bishop argues that this trend has resulted in a "post-materialist" geographic reorganization whereby people no longer

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<sup>187</sup> *Id.* at 142.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> BILL BISHOP, *THE BIG SORT* (2008).

<sup>191</sup> *Id.* at 8–9.

<sup>192</sup> For a detailed analysis of how our politics have gradually come to align across racial, religious, and economic lines, see generally LILLIANA MASON, *UNCIVIL AGREEMENT: HOW POLITICS BECAME OUR IDENTITY* (2018).

<sup>193</sup> See *id.*; see also Mounk, *supra* note 182.

<sup>194</sup> *Id.* ("Party affiliation is influenced more by factors like race and religion than by local interests or political traditions.")

<sup>195</sup> BISHOP, *supra* note 190.

choose where they live purely based on economic considerations, but instead on lifestyle choices that closely mirror political divides.<sup>196</sup>

Unlike Bishop, who sees our current geopolitical divide as the result of *voluntary* sorting, other scholars point to the current “stickiness” of residential patterns as another explanation for why our politics have hardened along urban/rural lines.<sup>197</sup> These theorists posit that, due to various land use, housing, and occupational licensing policies, disadvantaged demographics have become increasingly unable to access high-opportunity locales.<sup>198</sup> Whether it be the rural high school student stuck in a struggling town because her family cannot afford the booming metro center’s artificially high housing prices,<sup>199</sup> or the low-income minority individual stuck in a disadvantaged urban neighborhood because of the surrounding suburb’s exclusionary zoning practices, for many Americans, where they live is a product of the legal forces that keep them stuck in a particular place. In this way, it is less that our politics determines our geography as Bishop would contend, but that our geography, and all of its attendant economic realities, determines our politics.

A third, albeit related, theory points to the way globalization has caused the economic fortunes of our cities and their surrounding rural areas to drastically diverge. According to Professor Kenneth Stahl, “globalization has created a huge geographic imbalance in economic fortunes as capital investment is increasingly directed towards urban centers and away from rural areas.”<sup>200</sup> In the past, urban and rural areas had a symbiotic relationship inside small, self-contained regional economies. The city depended on the surrounding rural areas for agricultural production, while the rural areas relied on their cities as markets where rural residents could sell their goods.<sup>201</sup> In this way the economic fortunes of these two

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<sup>196</sup> *Id.*

<sup>197</sup> See Ross Douhat, *We Should Treat Big Cities Like Big Corporations and Bust Them Up*, DALLAS NEWS (Mar. 28, 2016), <https://www.dallasnews.com/opinion/commentary/2017/03/28/treat-big-cities-like-big-corporations-bust> (arguing that while our urban centers may be economically successful, their economic benefits have not been equally accessible to disadvantaged demographics due to their high costs of living and highly segregated residential patterns).

<sup>198</sup> See David Schleicher, *Stuck! The Law and Economics of Residential Stagnation*, 127 YALE L.J. 78, 78 (2017).

<sup>199</sup> See Scott Beyer, *The Verdict Is In: Land Use Regulations Increase Housing Costs*, FORBES (Sept. 30, 2016), <https://www.forbes.com/sites/scottbeyer/2016/09/30/the-verdict-is-in-land-use-regulations-increase-housing-costs/#287858c4162a> (arguing that restrictive zoning regulations decrease the supply of available housing in high demand cities, thereby artificially raising the prices of the existing housing stock).

<sup>200</sup> Stahl, *supra* note 12, at 150.

<sup>201</sup> Cf. Cecilia Tacoli, *Rural-Urban Interdependence*, in ACHIEVING URBAN FOOD AND NUTRITION SECURITY IN THE DEVELOPING WORLD (2000) (describing the importance of the surrounding rural areas to urban centers in the developing world).

geographies were linked: if the city failed, the surrounding rural areas failed, and if the city succeeded, the surrounding areas also, likely, succeeded. Today that economic link between cities and their rural neighbors has been severed. As America moves away from agriculture and manufacturing and toward a knowledge-based economy, cities become less reliant on the surrounding land for their economic success.<sup>202</sup> Moreover, as trade barriers fall, immigration policies become more liberal, and mechanized agriculture becomes the norm, America's rural citizens are seeing their economic fortunes decline as a result of policies often championed by urban residents.<sup>203</sup>

Stahl notes that this divergence of economic fortunes has turned urban-rural politics into a zero-sum game.<sup>204</sup> Whereas in the past, it may have harmed rural residents to resist policies supported by their urban neighbors, today rural denizens likely will not experience serious repercussions for taking that political stance.<sup>205</sup> For example, pro-immigrant policies like sanctuary city provisions directly benefit urban areas because they increase cities' abilities to access both the high-skill and low-skill workers that their economies require to operate.<sup>206</sup> Conversely, those same policies have the potential to undercut the economic opportunities of residents living in surrounding rural areas who may have to compete with low-skill immigrant workers for the shrinking pool of agricultural jobs in their communities.<sup>207</sup> For this reason rural residents may be more inclined to support anti-urban preemption measures than they would have in years past.

No single theory provides a full explanation for the convergence of political identification and geography. Instead, each of these three theories (voluntary sorting, geographic "stickiness," and globalization—along with numerous others) probably play some role in America's growing

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<sup>202</sup> Stahl, *supra* note 12, at 152.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 154–55 (noting that Republican state legislators “have little disincentive to take actions that harm cities because, in today's global economy, cities are already so completely disconnected from rural areas that an urban economic downturn is unlikely to have ripple effects on the places Republicans care about”).

<sup>206</sup> *Cf. id.* at 153 (describing the aim of sanctuary city policies as signaling “friendliness to immigrants”).

<sup>207</sup> See Katherine Fennelly, *Why Immigration Worries Americans—Especially Rural Residents*, SCHOLAR STRATEGY NETWORK (Feb. 2012), <http://www.scholarsstrategynetwork.org/brief/why-immigration-worries-americans-%E2%80%93-especially-rural-residents> (“In rural focus groups, hostility toward immigrants and the belief that there are too many in the community was strongest among low-income, white residents who worry that they face competition for jobs and believe that foreign residents have access to undeserved benefits.”).

geopolitical divide. But the sway that geography holds over modern American politics can only partially explain the rise of super preemption. After all, the fact that urban and rural residents hold different political beliefs does not necessarily lead to a world where rural interests dominate state legislatures.<sup>208</sup> Fortunately, political science may have an answer to the question of what fuels the success of rural conservatives in American state legislatures: gerrymandering.

Gerrymandering is the practice by which state legislative leaders draw legislative districts to advantage one political party over the other.<sup>209</sup> In order to understand its political power, one need not look any further than the state that provided the backdrop to the *Florida Carry* saga. Florida's status as a perennial swing state needs little explanation. The state is almost evenly divided between Republicans and Democrats.<sup>210</sup> In 2008, Obama won the state by less than three percentage points.<sup>211</sup> In 2012, he won it by less than one.<sup>212</sup> And in 2016, Trump won it by less than two.<sup>213</sup> In the 2012 presidential race, no state in the nation produced a closer electoral result than Florida.<sup>214</sup> One would therefore be forgiven for believing that the state's political parity in presidential elections must carry over to state elections. But instead of a near-even split between Republicans and Democrats in Tallahassee, Florida's legislative chambers skew overwhelmingly Republican, with conservatives holding virtual supermajorities in both houses.<sup>215</sup>

What causes this glaring partisan disparity? Over the past two decades, Republican leaders have engineered a legislative map that almost perfectly

<sup>208</sup> See Stahl, note 12, at 136–43.

<sup>209</sup> See Christopher Ingraham, *This is the Best Explanation of Gerrymandering You Will Ever See*, WASH. POST (Mar. 1, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/03/01/this-is-the-best-explanation-of-gerrymandering-you-will-ever-see> (defining gerrymandering as “drawing political boundaries to give your party a numeric advantage over an opposing party”).

<sup>210</sup> Ledyard King, *Democrats Seize Advantage Registering Florida Voters*, USA TODAY (Oct. 10, 2016), <https://www.usatoday.com/story/news/politics/elections/2016/10/10/democrats-seize-advantage-florida-registering-new-voters/91865978/> (noting that, as of 2016, Florida had 4.6 million registered Republicans and 4.7 million registered Democrats).

<sup>211</sup> *Election Results 2008: Florida*, N.Y. TIMES (Dec. 9, 2008), <https://www.nytimes.com/elections/2008/results/states/florida.html>.

<sup>212</sup> *Election 2012: Florida*, N.Y. TIMES, <https://www.nytimes.com/elections/2012/results/states/florida.html> (last visited Dec. 12, 2017).

<sup>213</sup> NEW YORK TIMES, *Florida Presidential Race Results: Donald J. Trump Wins*, N.Y. TIMES (Aug 1, 2017), <https://www.nytimes.com/elections/results/florida-president-clinton-trump>.

<sup>214</sup> David Catanese, *The 10 Closest States in the 2016 Election*, U.S. NEWS (Nov. 14, 2016, 4:39 PM), <https://www.usnews.com/news/the-run-2016/articles/2016-11-14/the-10-closest-states-in-the-2016-election>.

<sup>215</sup> Dan Sweeney, *GOP Easily Keeps Control of Florida Legislature*, SUN SENTINEL (Nov. 8, 2016, 10:54 PM), <http://www.sun-sentinel.com/news/politics/fl-election-florida-legislature-20161108-story.html>.

maximizes their electoral advantage across the state.<sup>216</sup> That Republican leadership have been able to do this with such ease is due in part to the very political sorting that this Article describes. Democratic voters have gradually coalesced inside a handful of Florida's urban areas.<sup>217</sup> Although these urban communities do not perfectly align with the state's legislative districts, those tasked with drawing legislative maps have packed these urban voters inside a small number of left-leaning urban districts, while generously dispersing rural Republican voters across the majority of the remaining districts. This process, known as "vote wasting," creates a handful of solidly-blue urban districts that may vote 80 or 90 percent Democratic, as well as a sizeable number of rural districts that will reliably vote for Republicans, but only at a rate of 55 or 60 percent.<sup>218</sup> Under a fairer map, those excess Democratic urban voters would have been more evenly distributed throughout the surrounding rural and suburban districts. Because Republicans control the mapmaking process, they are able to draw districts that both advantage their party *and* almost perfectly mirror the rural-urban divide.

None of this is to dispute the notion that there may be benefits to the compact urban districts drawn in states like Florida. Indeed, compact and homogenous districts may actually lead to better political representation for multiple reasons. First, elected officials in these districts likely do not have to travel great distances to meet with their constituents, which means more time listening to constituent concerns and less time on the road. Additionally, elected officials in these districts are more likely to reflect the demographic make-up of their district. If a district is drawn to include mostly members of one race, one religion, or constituents from one city or one neighborhood, it is quite likely that district's representative will share those demographic traits and therefore be more acutely attuned to the needs of those groups. However, the fact that state legislatures' current gerrymandering practices may come with some benefits does not diminish the fact that these practices have helped harden the differences between

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<sup>216</sup> Cf. Stephen Wolf, *One Key Reason Why Republicans Dominate in State Legislatures: They Drew Most of the Districts*, DAILY KOS (Nov. 26, 2016, 1:47 PM), <https://www.dailykos.com/stories/2016/11/26/1599841/-One-key-reason-why-Republicans-so-dominant-in-state-legislatures-They-drew-most-of-the-districts> (attributing the Florida Republican Party's legislative success to their ability to control the districting process).

<sup>217</sup> Matthew Isbell, *The Disappearing Swing Counties of Florida*, MCI MAPS (June 8, 2015), <http://mcimaps.com/the-disappearing-swing-counties-of-florida/> (describing the increasing urbanization of Florida's Democratic voters).

<sup>218</sup> See Stahl, *supra* note 12, at 167.

America's rural and urban communities along political lines and helped fuel the modern rise in preemptive activity.

This method of gerrymandering occurs in states across the country.<sup>219</sup> Facilitated by geopolitical distribution, Republicans from Arizona to North Carolina have been able to draw districts that reliably elect a majority of conservative legislators representing rural interests, and a minority of liberal legislators representing urban communities. This modern political trend helps explain super preemption's rise and the uptick in preemptive activity more generally. Unlike in decades past, where state legislative officials may have depended on both urban and rural voters for support, today, legislators rely on geographically- (and politically-) homogenous constituencies for electoral success. Given the already divergent economic fortunes of urban and rural communities, state legislatures' recent willingness to strike down policies that benefit urban constituencies should come as little surprise.

#### *B. Minority Dissent and the Purpose Behind Super Preemption*

While modern geopolitical trends help explain the timing of super preemption, they shed little light on its purpose. Indeed, the hardening of America's urban-rural divides should only suggest an uptick in preemptive activity generally, not the creation of a *new* mechanism for preempting local policies. And yet, a new mechanism has been created. This rapid proliferation of super preemption laws indicates that there must be something attractive about this tactic beyond what state legislatures have already achieved through traditional preemption legislation. But what is it? Why have state legislatures specifically chosen to enact these untested punitive measures instead of relying on the traditional instruments in their preemption toolkits?

Before offering an answer to that question, it is important to walk briefly through why it is that super preemption cannot stand solely on traditional justifications for preemptive activity. As stated previously, three of the most common justifications that courts and state officials offer for promoting preemptive action have been the desire for state uniformity, the state's interest in curbing extraterritoriality, and the benefits of preserving

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<sup>219</sup> Christopher Ingraham, *This is Actually What America Would Look Like Without Gerrymandering*, WASH. POST (Jan. 13, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/01/13/this-is-actually-what-america-would-look-like-without-gerrymandering> (illustrating the ubiquity of gerrymandering in the United States).

state and local core competencies.<sup>220</sup> Although each of these justifications is helpful for describing the purpose behind traditional preemption,<sup>221</sup> they fail to justify the punitive measures at play in super preemption. Take, for example, the arguments for preserving state uniformity. Courts traditionally argue that forcing businesses and individuals to navigate a patchwork of regulatory provisions as they move from one municipality to the next can be cumbersome.<sup>222</sup> Therefore, in order to promote economic efficiency and transparency in the law it is often beneficial to have a *single* set of laws on a topic as opposed to having regulations promulgated by every one of a state's subsidiary governments.<sup>223</sup> Traditional preemption promotes this end by providing state legislatures with a mechanism to strike down laws that deviate from the state's overarching regulatory scheme. But once the law is no longer operative, no further uniformity goals are advanced by punishing the locality or local official who voted for the city's ordinance. Businesses do not have an easier time navigating the state's regulatory landscape because a city official paid them civil damages. The harm in that scenario—too many business regulations—has been rectified via the traditional preemptive measure. Therefore, adding super preemption's punitive measures seems gratuitous. If it is not serving the state's underlying preemptive goal, why do it?

One argument is that super preemption is necessary because traditional preemption is actually ineffective at achieving its stated goals. While the state may attempt to strike down extraterritorial municipal laws through traditional preemption bills, localities are not obeying the state's directives and instead continue to enforce their local regulations. Though plausible, this response is unsatisfying as a justification for super preemption. There is little evidence that localities openly flout preemptive measures in

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<sup>220</sup> See, e.g., *City and County of Denver*, 788 P.2d at 768 (noting that the three factors the court considers when assessing whether a policy falls within the state's ambit include "need for statewide uniformity," "impact of the municipal regulation on persons living outside the municipal limits," and "whether a particular matter is one traditionally governed by state or by local government").

<sup>221</sup> This Article, however, does not address the merits of these justifications from a normative perspective.

<sup>222</sup> See, e.g., *N. Calif. Psychiatric Soc'y*, 178 Cal. App. 3d at 101 ("Certain areas of human behavior command statewide uniformity, especially the regulation of statewide commercial activities.").

<sup>223</sup> See, e.g., *Am. Fin. Serv. Ass'n*, 104 P.3d at 823 ("Moreover, it is beyond peradventure that effective regulation of mortgage lending, and in particular here abusive practices in such lending, 'requires uniform treatment throughout the state.'" (quoting *Chavez v. Sargent*, 339 P.2d 801, 810 (Cal. 1959))).



violation of their states' directives.<sup>224</sup> In the *Florida Carry* case, Tallahassee ceased enforcing its gun control ordinances years before the lawsuit commenced.<sup>225</sup> The city did not need a punitive measure to compel compliance; simply knowing that their law conflicted with the state's policy was incentive enough. Moreover, even in scenarios where cities continue enforcing preempted local laws, states have the ability to sue to compel compliance. Assuming a court finds that the locality's laws have, in fact, been preempted, a judge can strike down the ordinance and threaten to hold local officials in contempt of court should they continue their violation.<sup>226</sup> In this way, super preemption's punitive measures at best serve as a legislative proxy for the judiciary's powers of contempt. While that may animate some of the attraction to these policies, it seems too weak a justification to warrant super preemption's increasing popularity.

If traditional justifications for preemption do not explain super preemption's role, what can? One example that may help illustrate super preemption's subtle power is the story of San Francisco's 2004 decision to issue marriage licenses for same-sex couples. Between February and March of 2004, San Francisco Mayor Gavin Newsom issued approximately 4,000 marriage licenses to same-sex couples.<sup>227</sup> Within two weeks after Newsom issued his first license, California Governor Arnold Schwarzenegger and Attorney General Bill Lockyer filed petitions with the California Supreme Court, requesting a declaration that the Mayor's policy was unlawful.<sup>228</sup> Six months later, the court did just that.<sup>229</sup> Declaring that the Mayor's policy had been preempted by state law, the court ordered Newsom to end the unlawful practice and voided all licenses issued under the mayor's same-sex directive.<sup>230</sup>

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<sup>224</sup> See Scharff, *supra* note 97, at 1506 ("Lawmakers also have not put forward significant evidence of local governments undermining state laws in ways that traditional preemption doctrine cannot address.").

<sup>225</sup> See *Fla. Carry*, 212 So. 3d at 456.

<sup>226</sup> Scharff, *supra* note 97, at 1506 (noting that it is "possible to hold local officials in contempt for refusing to follow a court order"). Although this was not a preemption case, the Second Circuit took this very approach when the City of Yonkers, New York, refused to adopt the Court's required desegregation plan. See James Feron, *First Contempt Fine Is Paid by Yonkers over Housing Plan*, N.Y. TIMES (Aug. 4, 1988), <http://www.nytimes.com/1988/08/04/nyregion/first-contempt-fine-is-paid-by-yonkers-over-housing-plan.html>.

<sup>227</sup> See Dean E. Murphy, *California Supreme Court Voids Gay Marriages in San Francisco*, N.Y. TIMES (Aug. 12, 2004), <http://www.nytimes.com/2004/08/12/national/california-supreme-court-voids-gay-marriages-in-san-francisco.html>.

<sup>228</sup> See Rusty Dornin & David Mattingly, *Same-Sex Marriage Breaks for Weekend*, CNN (Feb. 21, 2004, 6:43 PM), <http://www.cnn.com/2004/LAW/02/21/same.sex/>.

<sup>229</sup> See Murphy, *supra* note 227.

<sup>230</sup> *Id.*

On paper, San Francisco's same-sex marriage story reads like a traditional case of successful state preemption. The city tried to pass a policy out of step with the state's laws, the state sued arguing that the law was preempted, the court agreed and overturned the local measure, and the city complied. Same-sex marriage licenses would not be issued again in San Francisco for another four years,<sup>231</sup> and the Supreme Court would not permanently legalize them for an additional five.<sup>232</sup> And yet, marriage equality advocates often tout San Francisco's month-long policy as a political success, citing the way same-sex marriage laws spread in the years after Newsom's directive.<sup>233</sup> How can one reconcile these two competing depictions? On one hand, it was a local policy that was overturned and voided only six months after it went into effect. On the other, it was a political act that helped precipitate national change. Understanding how these two portrayals can describe the same policy will help elucidate the power of local policymaking as well as the purpose behind super preemptive measures.

In her 2005 article *Dissenting by Deciding*, Professor Heather Gerken argues that while traditional forms of dissent (e.g. civil disobedience, casting a dissenting vote, drafting a dissenting opinion, etc.) receive outsized attention, one often-overlooked strategy is for minority communities to express dissenting views through local policy enactments.<sup>234</sup> According to Gerken, cities, states, juries, and courts give national minority groups the opportunity to "wield the authority of the state" by implementing their policy preferences through real laws with real implications.<sup>235</sup> Gerken describes this strategy as "acting radically," and contrasts it with more traditional forms of dissent where minorities "speak radically" (e.g. protest), or "act moderately" (e.g. bargaining for concessions with a minority vote).<sup>236</sup>

Acting radically provides minorities multiple advantages that traditional forms of dissent lack. First, acting radically allows minorities the opportunity to inject their views into the national marketplace of policy

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<sup>231</sup> See Jesse McKinley, *Same-Sex Marriages Begin in California*, N.Y. TIMES (June 17, 2008), <http://www.nytimes.com/2008/06/17/us/17weddings.html>.

<sup>232</sup> See Bill Mears, *Supreme Court Dismisses California's Proposition 8 Appeal*, CNN (June 27, 2013, 8:27 AM), <http://www.cnn.com/2013/06/26/politics/scotus-prop-8/index.html>.

<sup>233</sup> See Carla Marinucci, *Will Gavin Newsom's Post-Pride Glow Get Him the Governorship?*, S.F. CHRON. (July 5, 2015, 9:12 PM), <http://www.sfchronicle.com/politics/article/Will-Gavin-Newsom-s-post-Pride-glow-get-him-the-6367587.php> (quoting activists who credit Newsom's policy with being "the catalyst" for the events leading up to the Supreme Court's decision in *Obergefell v. Hodges*).

<sup>234</sup> See Gerken, *supra* note 26, at 1746–47.

<sup>235</sup> *Id.* at 1747.

<sup>236</sup> *Id.* at 1746–47.

ideas in a way that traditional dissent cannot.<sup>237</sup> Second, acting radically gives local minority communities the chance to “express and define” their *community’s* identity as opposed to the identity of a single dissenter.<sup>238</sup> Finally, acting radically grants minorities the opportunity to take part in the practice of self-governance, thereby forging valuable civic ties that will serve them well in future political endeavors.<sup>239</sup> To better understand how these three advantages work in practice, it may be helpful to view them through the context of the San Francisco same-sex marriage license fight.

First, Mayor Newsom’s directive illustrates how “acting radically” allows minority groups to engage with the marketplace of ideas more effectively than they could through traditional forms of dissent. Under traditional dissent, an outlier view expressed to the public may never warrant a response or may be dismissed outright as unworkable.<sup>240</sup> Dissenting by deciding, however, engages with the marketplace of ideas in a manner that is much harder to ignore.<sup>241</sup> Mayor Newsom’s policy did not just indicate to the country that cities could impact the theoretical debate over the definition of marriage, it illustrated that same-sex marriage was a viable option, in practice. In the wake of the Mayor’s decision, several other cities across the country followed suit, emboldened by the real example of an action that they may have never thought was possible.<sup>242</sup>

Moreover, Newsom’s decision forced the majority to respond in a way that traditional dissent often does not. If Governor Schwarzenegger, Attorney General Lockyer, and the members of the California Supreme Court disagreed with the Mayor’s decision, they could not simply let minority policy die through inattention. Majority leaders had to spend time and political capital to defeat the policy, making public their competing vision of marriage in the state and hoping it held up under public scrutiny. This response was particularly difficult for Democratic Attorney General Lockyer, who recognized that, by opposing the Mayor’s policy, he may alienate a sizeable portion of his political supporters. In siding with the

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<sup>237</sup> *See id.* at 1749.

<sup>238</sup> *Id.* at 1750.

<sup>239</sup> *See id.*

<sup>240</sup> *See id.* at 1761–62.

<sup>241</sup> *See id.* at 1762.

<sup>242</sup> *See e.g., San Jose Recognizes Gay Marriage*, CHI. TRIB. (Mar. 10, 2004), [http://articles.chicagotribune.com/2004-03-10/news/0403100284\\_1\\_gay-marriage-marriage-licenses-same-sex](http://articles.chicagotribune.com/2004-03-10/news/0403100284_1_gay-marriage-marriage-licenses-same-sex) (noting that both San Jose, California, and Asbury Park, New Jersey, began issuing same-sex marriage licenses after Newsom’s directive).

Governor, Lockyer nevertheless made a point to declare his support for same-sex policies like domestic partnerships and civil unions.<sup>243</sup>

This response would not have been necessary had Newsom simply written an op-ed or worked with his local legislative delegation to file a bill in the state legislature. His decision to “act radically” injected a policy into the marketplace of ideas in a way that both demanded a reaction from political opponents and provided cover for other cities to follow suit. His decision even compelled the California Supreme Court to rethink the issue, eventually leading to the court’s 2008 decision in *In re Marriage Cases* holding restrictions on same-sex marriage unconstitutional.<sup>244</sup> This illustrates the power of decisional dissent to affect real change outside the bounds of its immediate political jurisdiction.

Additionally, the Mayor’s decision provided gay rights activists with an unprecedented opportunity for community building and identity formation. After the Mayor’s decision, leaders on the left, prominent members of the gay community, and supporters of marriage equality engaged in a heated public debate about the appropriateness of the Mayor’s actions.<sup>245</sup> Massachusetts Congressman Barney Frank, one of the most prominent gay elected officials at the time, famously criticized the Mayor’s decision as an “illegitimate act” that undermined the rule of law.<sup>246</sup> Democrat and California Senator Diane Feinstein agreed, contending that the Mayor’s actions were “too much, too fast, too soon” when questioned regarding her opinion on the matter.<sup>247</sup> Conversely, gay activist and San Francisco Assemblyman Mark Leno rallied to the Mayor’s defense.<sup>248</sup> Previously content with simply getting a win on domestic partnerships, Leno stated that seeing couples become “spouses for life” changed his position on the matter.<sup>249</sup> Similarly, Matt Foreman, the head of the National Gay and Lesbian Task Force, admitted that when he first heard about the Mayor’s decision he was “skeptical.” But he went on to say that “the minute those pictures came out, waiting in line, going in, and getting married, it put a human face on this issue.”<sup>250</sup>

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<sup>243</sup> See Dornin & Mattingly, *supra* note 228.

<sup>244</sup> See *In re Marriage Cases*, 183 P.3d 384, 453 (Cal. 2008).

<sup>245</sup> See Joe Dignan, *Way Out Front*, GAY CITY NEWS (Mar. 3 2004), [https://gaycitynews.nyc/gcn\\_309/wayoutfront.html](https://gaycitynews.nyc/gcn_309/wayoutfront.html); Joe Dignan, *Too Much, Too Fast, Too Soon*, GAY CITY NEWS (Nov. 17 2004), [https://gaycitynews.nyc/gcn\\_346/toomuchtoofast.html](https://gaycitynews.nyc/gcn_346/toomuchtoofast.html).

<sup>246</sup> Dignan, *Too Much, Too Fast, Too Soon*, *supra* note 245.

<sup>247</sup> *Id.*

<sup>248</sup> Dignan, *Way Out Front*, *supra* note 245.

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

The Mayor's same-sex marriage decision forced a much-needed *internal* debate within the ranks of gay rights activists. What were the community's goals? How would they communicate those goals to the rest of the country? What methods would they use to achieve their ends? Who would lead the community and speak on its behalf? The way that the community answered those questions would have ramifications for the marriage equality movement moving forward. According to Professor Gerken, this internal debate is a common feature of local dissent, allowing "[o]pportunities for group members to hash out the connection between group and civic identity."<sup>251</sup> Had the Mayor simply stated his opinions in a speech, other members of his community could have dismissed the Mayor's words as representing his views and his alone. However, by expressing this minority opinion through the instruments of state authority, Newsom precipitated a conversation amongst his allies about how best to advance the goals of their movement.

The final advantage of dissent through local decisionmaking is that minority groups are able to engage in the act of self-government without having to compromise their views. For the month that Newsom's policy was in effect, San Francisco's gay community was able to do just that: govern themselves under the policies that they preferred. But that act of self-governance was cut short by the court's decision holding San Francisco's policy preempted by state law. In this way, traditional preemption was able to completely undermine one leg of Gerken's three-part framework for local decisionmaking: when the state successfully preempted the local action, the policy no longer carried the force of law and the act of self-governance ended.

Notably, while the court's preemption decision undermined San Francisco's act of self-governance, it had almost no impact on the other two advantages of local decisionmaking. The Mayor's decision still diversified the marketplace of ideas in a powerful way, prompting copycat legislation,<sup>252</sup> action from the Governor,<sup>253</sup> and comments from the President.<sup>254</sup> Additionally, the decision influenced the internal strategy of the gay rights community for years to come as more activists and

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<sup>251</sup> Gerken, *supra* note 26, at 1796.

<sup>252</sup> See Anne Hull, *Just Married, After 51 Years Together*, WASHINGTON POST (Feb. 29, 2004) [https://www.washingtonpost.com/archive/politics/2004/02/29/just-married-after-51-years-together/94c88fff-045d-46e3-b31c-04ab658608c6/?utm\\_term=.384dd748b131](https://www.washingtonpost.com/archive/politics/2004/02/29/just-married-after-51-years-together/94c88fff-045d-46e3-b31c-04ab658608c6/?utm_term=.384dd748b131) (describing how city officials in New Mexico, New York, and Chicago followed Newsom's lead).

<sup>253</sup> See Dornin & Mattingly, *supra* note 228.

<sup>254</sup> See Hull, *supra* note 252 (noting that "President Bush called for a constitutional amendment banning gay marriage" in the wake of the San Francisco directive).

policymakers gradually came to follow Newsom's lead on the issue.<sup>255</sup> Calls for domestic partnerships and civil unions waned as activists instead pushed for full marriage equality under the simple but powerful justification that "love is love."<sup>256</sup>

In effect, the Mayor's decision was able to help spark a societal movement without permanently changing local law. But would that have been the case if California's marriage provision had instead been a super preemption law? Engaging in this thought experiment helps illustrate the important ways super preemption differs from traditional preemption as a strategic tool. As a preliminary matter, had California's marriage law resembled modern super preemption provisions, it is highly unlikely that Newsom would have ever issued his marriage license directive in the first place. If conflicting with the state's law could have resulted in civil damages, criminal penalties, or termination from office, Newsom probably would have been deterred from taking such bold, dissenting action and instead opted for political self-preservation.

Moreover, even if Newsom had chosen to enact his policy, its lifespan would have likely been cut short if the Mayor had to pay for his legal costs out of pocket. The moment the Mayor was served process in a suit initiated by the state or a well-funded non-profit, he may have had to settle as opposed to engage in a potentially expensive legal battle where he stood a real risk of losing. This initial deterrence would have been particularly beneficial for the Governor and Attorney General. By forcing the Mayor to concede before his policy got off the ground, these statewide leaders would have been able to avoid spending valuable political capital in a fight as contentious as the one over same-sex marriage. Finally, if the Mayor had chosen to enact his policy and fight the legal battle to its end, he would have lost. This loss would not have simply ended the same-sex marriage policy in San Francisco, it likely would have resulted in the Mayor's removal from office as well as the removal of any local official who helped advance the policy. This would have had the effect of crippling the ranks of local leadership in San Francisco and stunting the City's emerging gay rights movement.

This hypothetical illustrates super preemption's strategic superiority over traditional preemptive measures. For a state legislator interested in suppressing local movements, traditional preemption is an unsatisfying

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<sup>255</sup> *See id.*

<sup>256</sup> Ben Jacobs, 'Love is Love': Obama Lauds Gay Marriage Activists in Hailing 'a Victory for America,' *GUARDIAN* (June 26, 2015), <https://www.theguardian.com/us-news/2015/jun/26/obama-gay-marriage-speech-victory-for-america>.

tool in that it only prevents the act of local self-governance (i.e. enacting policy). It does little to stop a locally-initiated policy from entering the marketplace of ideas and from influencing the way we conceptualize legislative options. Additionally, traditional preemption cannot stop the process of political mobilization that precedes legislative enactment. That process is critical for shaping a minority group's political and civic identity. It forces that group to grapple with internal disagreements and allows them to forge a cogent, battle-tested voice that they can use in future contests. Super preemption has a more expansive reach than traditional preemption in that it is able to address all aspects of local decisionmaking. By creating a system whereby local leaders will have to bear personal liability for initiating counter-majoritarian legislation, super preemption stands to stop both the political movement and the policy itself.

#### CONCLUSION

Although the primary purpose of this Article is to provide a descriptive account of this recent legislative trend, it is important to address just how troubling super preemption is from a normative perspective. Cities provide an unrivaled forum for democratic empowerment and community building. Indeed, early political theorists like Alexis de Tocqueville and John Stuart Mill described localities as schools for democratic empowerment, teaching citizens the skills they need to become active and responsible stewards of their democratic polity.<sup>257</sup> More recently, Professor Gerald Frug opined on the many civic advantages of decentralized government, including the ability to actively participate in the policy decisions that affect one's surroundings, the ability to experiment in solving local problems, and, perhaps most importantly, the "energy derived from democratic forms of organization."<sup>258</sup> According to Frug, these advantages, when employed correctly, allow us to abandon the idea that government is centered on the individual, and instead embrace a decentralized conception of government that places the public as its primary subject.<sup>259</sup>

But the advantages of local policymaking do not stem simply from the mechanics of small government. Local government without the ability to

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<sup>257</sup> See DE TOCQUEVILLE, *supra* note 30, at 60 ("Municipal institutions are to liberty what primary schools are to science; they bring it within the people's reach, they teach men how to use and how to enjoy it."); JOHN STUART MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* (1890), *reprinted in* ON LIBERTY AND OTHER ESSAYS 205, 413 (John Gray ed., 1991) (discussing the way local government can serve as political education for citizens in a democracy).

<sup>258</sup> GERALD FRUG, *CITY MAKING: BUILDING CITIES WITHOUT WALLS* 10 (1999).

<sup>259</sup> *Id.* at 9–10.

affect real change is not democracy. And yet, the proliferation of super preemption provisions inches America toward that world. By greatly disincentivizing local action on matters that cut against the states' wishes, super preemption chills the kind of democratic energy de Tocqueville, Mills, and Frug celebrate. If local officials are no longer willing to take actions that are out of step with the politics of the state as a whole, citizens—especially minority citizens—will gradually come to see local government as a forum unable to address their needs.

If super preemption stands to have such a damaging effect on local empowerment, what recourse do cities and their local officials have to push back? While the law on super preemption is still evolving, several promising legal tactics have emerged as potential defenses against these punitive measures. One such defense looks to the source of the locality's home rule power as a possible shield against state legislative meddling. As discussed previously, depending on their language, constitutional home rule provisions are sometimes interpreted as affording cities a protected sphere of legislative immunity over local affairs.<sup>260</sup> Just how far that sphere reaches depends on a variety of factors, including the whims and caprices of whatever judge is assigned to decide the matter.

However, successful home rule defenses are possible. Although this was not a super preemption case, recently in *City of Cleveland v. State of Ohio*, an Ohio trial court struck down a state statute preempting Cleveland's residential employment requirement for city-funded projects.<sup>261</sup> According to the Court, the state could only exercise its preemptive powers through "general laws" that regulate statewide conduct—not simply through laws that limit local authority.<sup>262</sup> While this case will likely find new life on appeal, it is immediately important in that it interprets an Ohio home rule provision that does not, on its face, afford localities more protection than many of the states profiled in this Article.<sup>263</sup> Indeed, a recent decision out of a trial court in Florida seemed to follow a similar line of thought, striking down a Florida statute that prevented the

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<sup>260</sup> See *supra* text accompanying notes 41–49.

<sup>261</sup> *City of Cleveland v. State of Ohio*, No. CV-16-868008, 2016 WL 9414089 (Ohio Ct. Com. Pl. Aug. 30, 2016) (judgment entry, with opinion and order granting permanent injunction).

<sup>262</sup> *Id.* at 4–5.

<sup>263</sup> Compare, e.g., OHIO CONST. art. XVIII, § 3 ("Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.") with FLA. CONST. art. VIII, § 2(b) ("Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise . . . power for municipal purposes except as otherwise provided by law.").



City of Coral Gables from regulating Styrofoam containers on the grounds that it violated the state's constitutional home rule amendment for Miami-Dade County.<sup>264</sup>

A second potential strategy for local officials interested in pushing back against super preemption provisions is to appeal to legislative immunity. As stated previously, legislators, even at the local level, have traditionally been afforded a degree of legislative immunity for work performed in their elected capacity. This means that officials cannot be held personally liable for the governmental decisions they make while in office. In *Bogan v. Scott-Harris*, the Supreme Court made clear that common law principles of legislative immunity extended to local officials, noting that “voting for an ordinance” or “signing into law an ordinance” are legislative acts that are afforded legal protection.<sup>265</sup> Although this case specifically dealt with legislative immunity as it related to federal statute 42 U.S.C. § 1983,<sup>266</sup> a judge may be willing to import a similar standard to state super preemption cases.

Finally, local officials might consider arguing that super preemption provisions violate their constitutional rights to free speech under the First Amendment to the United States Constitution. Under this theory, local legislators would contend that taking a political vote as a government officer is no different than expressing a political opinion through some other forum. If the latter is protected by First Amendment doctrine, it makes little sense why the former would be exposed to reprisal through super preemption provisions. Unfortunately, the Supreme Court held in *Nevada Commission on Ethics v. Carrigan*, that restrictions on a local legislator's votes are not restrictions on their speech as it is understood by the First Amendment.<sup>267</sup> While this case did not address the kinds of punitive provisions that have come to characterize super preemption laws,<sup>268</sup> it does at least indicate an initial unwillingness to afford legislative votes the protections of political speech. Therefore, in order to succeed in a First Amendment defense, local officials will have to draw a distinction between some of the severely punitive measures included in super preemption provisions (i.e. heavy fines, criminal penalties, termination of employment) and the relatively mild punishment at issue in *Carrigan*

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<sup>264</sup> See Fla. Retail Fed'n, Inc. v. City of Coral Gables, No. 2016-018370-CA-01 (Fla. Cir. Ct. Mar. 9, 2017).

<sup>265</sup> *Bogan v. Scott-Harris*, 523 U.S. 44, 55 (1998).

<sup>266</sup> *Id.* at 47.

<sup>267</sup> *Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 125 (2011).

<sup>268</sup> The case instead addressed a decision by the state ethics commission to censure a local commissioner. *Id.* at 117.

(legislative censure). Although the case law on this matter is still in its most nascent stages, a recent decision on Texas's sanctuary cities provision (SB 4) indicates that judges may be suspicious of the way these rather draconian measures curb political expression.<sup>269</sup>

Given super preemption's relative newness, it is unclear if any of these defenses would convince a judge to strike down these punitive measures. But it is imperative that local officials try. Super preemption has the ability to chill the kind of local political activity that has come to characterize our cities as "laboratories of democracy." Indeed, by targeting not only the policies enacted by our localities, but also the politics surrounding those enactments, the punitive provisions in super preemption laws can ground local political movements before they begin. Given that local government is one of the rare forums where political minorities can create real change, this chilling effect runs the added risk of further alienating an already-ostracized demographic. As America's residential patterns continue to break along partisan lines, the incentive for Republican state legislators to attack local policymaking will only increase. It is therefore critical that judges and local officials find ways to prevent some of the worst effects of this troubling practice.

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<sup>269</sup> See *City of El Cenizo v. Texas*, 264 F. Supp. 3d 744 (W.D. Tex. 2017) (order granting preliminary injunction), *aff'd in part, vacated in part sub nom.* *City of El Cenizo v. Texas*, 885 F.3d 332 (5th Cir. 2018).