The Attack on American Cities

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American cities are under attack. The last few years have witnessed an explosion of preemptive legislation challenging and overriding municipal ordinances across a wide range of policy areas. State–city conflicts over the municipal minimum wage, LGBT antidiscrimination, and sanctuary city laws have garnered the most attention, but these conflicts are representative of a larger trend toward state aggrandizement. These legal challenges to municipal regulation have been accompanied by an increasingly shrill anti-city politics, emanating from both state and federal officials. This Article describes this politics by way of assessing the nature of—and reasons for—the hostility to city lawmaking. It argues that anti-urbanism is a long-standing and enduring feature of American federalism and seeks to understand how a constitutional system overtly dedicated to the principles of devolution can be so hostile to the exercise of municipal power. The Article also provides a current accounting of state preemptive legislation and assesses the cities' potential legal and political defenses. It concludes that, without a significant rethinking of state-based federalism, the American city is likely to remain vulnerable.

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Introduction

American cities are under attack. The last few years have witnessed an explosion of preemptive state legislation challenging and overriding municipal ordinances across a wide range of policy areas. These legal challenges to municipal regulation have been accompanied by an increasingly shrill anti-urban politics. Anti-city rhetoric suffused the 2016 presidential election, during which the Republican candidate for President, Donald Trump, painted a portrait of American cities as violent, decaying, depraved, and corrupt.[1] As President, Trump has repeatedly decried the actions of so-called "sanctuary cities"—those cities that have refused to comply with federal immigration mandates or have resisted cooperating with

1. Michelle Ye Hee Lee, *Fact-Checking Trump's Rhetoric on Crime and the 'American Carnage'*, WASH. POST (Jan. 30, 2017), https://www.washingtonpost.com/news/fact-checker/wp/2017/01/30/fact-checking-trumps-rhetoric-on-crime-and-the-american-carnage/?utm_term=.b256778bc38b [https://perma.cc/5Bp9-VD9X].

federal immigration authorities.[2] Trump's Executive Order on Immigration threatens cities that do not cooperate with the loss of federal funds.[3] The Order has been challenged by a number of cities, and both the Fourth and Ninth Circuit Courts of Appeals have granted preliminary injunctions against it.[4]

The federal threat to sanctuary cities, however, is a small piece of the overall legal assault on cities, which emanates mostly from the states and goes well beyond immigration policy. As a federal constitutional matter, states exercise plenary power over their political subdivisions. Even in states that provide for some measure of constitutional "home rule" protection, cities are usually not immune from contrary state commands.

Recent state legislative actions intended to "rein in" wayward cities are illustrative. In response to assertions by some local officials in Texas that they would not cooperate with federal authorities in enforcing federal immigration laws, the Texas Legislature adopted SB4, which bars cities and local officials from adopting any ordinance, rule, or practice that limits the enforcement of federal immigration laws on threat of criminal and civil penalties and removal from office.[5] The Arizona Legislature has adopted a law that requires the Attorney General to investigate local laws at the request of any state legislator and withhold state funds where a local law conflicts with state law.[6] Michigan adopted legislation that bars local governments from regulating paid sick days, wages, scheduling, and hours or benefits disputes.[7] In North Carolina, the state legislature adopted a "bathroom bill" that was designed to strike down local transgender civil rights ordinances.[8] Before it was repealed, the same law also preempted municipal minimum wage, contracting, employment discrimination, and public-accommodations ordinances.[9]

In all these cases, and many more, state legislatures have been motivated by hostility to local regulation—and in almost all cases to regulations adopted

2. Press Release, The White House, Statement on Sanctuary Cities Ruling (Apr. 25, 2017), https://www.whitehouse.gov/the-press-office/2017/04/25/statement-sanctuary-cities-ruling [https://perma.cc/G8GS-XB4H].

3. Exec. Order No. 13,768, 82 Fed. Reg. 8,799 (Jan. 25, 2017).

4. Int'l Refugee Assistance Project v. Trump, 857 F.3d 554 (4th Cir. 2017), *vacated as moot*, 138 S. Ct. 353 (2017) (vacated and remanded due to expiration by its own terms); Washington v. Trump, 858 F.3d 1168 (9th Cir. 2017); *see also* City of Chicago v. Sessions, No. 17-C-5720, 2017 WL 4081821 (N.D. Ill. Sept. 15, 2017) (enjoining the Justice Department's imposition of conditions on sanctuary cities' receipt of federal funds).

5. S.B. 4, 85th Leg., Reg. Sess. (Tex. 2017). A federal district court enjoined portions of SB4. City of El Cenizo v. Texas, 264 F. Supp. 3d 744 (W.D. Tex. 2017).

6. ARIZ. REV. STAT. ANN. § 41-191.01 (2017). The Arizona Supreme Court upheld portions of the state's preemption law. State *ex rel.* Brnovich v. City of Tucson, 399 P.3d 663 (Ariz. 2017).

7. H.B. 4052, 98th Leg., Reg. Sess. (Mich. 2015).

8. H.B. 2, 2016 Gen. Assemb., 2d Extra Sess. (N.C.).

9. H.B. 142, 2017 Gen. Assemb., Reg. Sess. (N.C.).

by specific cities. Cities such as Cleveland, New York, Detroit, Birmingham, El Paso, Austin, Miami, Charlotte, Greensboro, and others have been the main targets of their respective legislatures' preemptive legislation.[10] Openly disdainful of municipal regulation, the Texas Governor has stated that he favors a "broad-based law by the state of Texas that says across the board, the state is going to pre-empt local regulations."[11]

This hostility to city government is not new.[12] The American city's legal and political autonomy has long been precarious. In 1915, Robert Clarkson Brooks, a professor of economics and political science at Swarthmore College, observed that "[t]o a large degree the history of the relations of states to metropolitan cities in this country is 'a history of repeated injuries' . . . [and] 'repeated usurpations.'"[13] Recent state legislative challenges to city authority, however, arrive after a relatively quiescent period during the second half of the twentieth century, when state–local relations were somewhat stable even if city finances often were not. Strikingly, the attack on American cities is occurring at the very moment that cities are experiencing an economic and popular resurgence.[14] Those cities have also been pressing the existing limits of their regulatory authority in areas like labor and employment, antidiscrimination law, immigration, and environmental protection. As in the past, state legislators seem to be quick to intervene when cities exercise their economic and regulatory muscle in ways that threaten vested interests.

Even so, one might be surprised that the old rural–urban political dynamic that characterized early-twentieth-century hostility to cities has reasserted itself in the beginning of the twenty-first century. In 1910, 54.4% of the country still lived in rural areas; in 2010, 80.7% of the U.S. population was urban.[15] Moreover, the Supreme Court's one-person, one-vote decisions

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10. *See, e.g.*, City of Greensboro v. Guilford Cty. Bd. of Elections, 251 F. Supp. 3d 935 (M.D.N.C. 2017); City of Charlotte v. North Carolina, No. 13-CRS-12678, 2014 WL 5139410 (N.C. Super. Ct. Oct. 13, 2014); City of Bexley v. State, No. 17CV–2672, 2017 WL 5179520 (Ohio Ct. Com. Pl. June 2, 2017); Complaint at 1–3, El Paso Cty. v. State, No. 5:17-cv-00459 (W.D. Tex. May 22, 2017), 2017 WL 2240170.

11. Patrick Svitek, *Abbott Wants "Broad-Based Law" That Pre-empts Local Regulations*, TEX. TRIB. (Mar. 21, 2017), https://www.texastribune.org/2017/03/21/abbott-supports-broad-based-law-pre-empting-local-regulations/ [https://perma.cc/W64C-H88Q].

12. Gerald Frug and other local government theorists have been drawing attention to cities' relative political and legal weakness for a generation. *See generally* GERALD E. FRUG & DAVID J. BARRON, CITY BOUND: HOW STATES STIFLE URBAN INNOVATION 231 (2008); GERALD E. FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS 5 (1999). This Article's attention to constitutional anti-urbanism complements that work.

13. Robert C. Brooks, *Metropolitan Free Cities*, 30 POL. SCI. Q. 222, 222 (1915).

14. Parag Khanna, *How Much Economic Growth Comes from Our Cities?*, WORLD ECON. F. (Apr. 13, 2016), https://www.weforum.org/agenda/2016/04/how-much-economic-growth-comes-from-our-cities/ [https://perma.cc/29RK-N2MN].

15. *Urban Percentage of the Population for States, Historical*, IOWA ST. U., http://www.icip.iastate.edu/tables/population/urban-pct-states [https://perma.cc/W3KX-TAHA].

of the early 1960s were meant to remedy the malapportionment problems endemic to state legislatures, dominated as they were by rural interests.[16] Despite these demographic and legal shifts, cities continue to be embattled in ways that observers of the early twentieth century would recognize.

The recent spate of preemptive state legislation reveals the deep roots of constitutional anti-urbanism. Those roots are the subject of this Article, which argues that anti-urbanism is an enduring feature of American federalism. Cities *qua* cities are not represented in state or national legislatures. So too, the equal representation of states in the Senate privileges rural voters over urban ones. And the mere existence of states competing for power limits the possibilities for decentralizing power to cities.

This structural anti-urbanism reflects and reinforces the widening political gap between American cities and other parts of the country. That the United States is no longer a rural nation has not prevented large segments of the population from defining themselves in opposition to those city dwellers who do not appear to share small-town, suburban, or rural values. This stark cultural divide is reflected in politics. In the 2016 presidential election, Democrat Hillary Clinton won a total of 489 counties—88 out of the 100 most populous.[17] By contrast, Donald Trump, running from the political right as a populist, won a total of 2,623 counties.[18] Clinton won the popular vote on the votes of urban citizens; Trump won the presidency on the votes of everyone else. Additionally, Clinton's counties constituted 64% of America's economic activity as measured by the total 2015 output, while Trump's added up to only 36%.[19]

This Article describes the current preemption landscape in the states, offers an account of American constitutional anti-urbanism, and assesses potential city defenses. The Article's central descriptive goal is to understand how an institutional system overtly dedicated to the principles of devolution can be so hostile to the exercise of city power. The Article assumes (without explicit defense[20]) that local self-government is generally valuable. It also assumes that the appropriate powers of municipal government are contested

16. *See* Reynolds v. Sims, 377 U.S. 533, 547–51 (1964) (acknowledging that disparities in district populations diluted the significance of urban votes).

17. Ronald Brownstein, *How the Election Revealed the Divide Between City and Country*, ATLANTIC (Nov. 17, 2016), https://www.theatlantic.com/politics/archive/2016/11/clinton-trump-city-country-divide/507902/ [https://perma.cc/8MY6-6MWC]; Sydney Schaedel, *Clinton Counties*, FACTCHECK.ORG (Dec. 9, 2016), http://www.factcheck.org/2016/12/clinton-counties/ [https://perma.cc/FP8H-PVJY].

18. *See* Schaedel, *supra* note 17.

19. Mark Muro & Sifan Liu, *Another Clinton-Trump Divide: High-Output America vs Low-Output America*, BROOKINGS (Nov. 29, 2016), https://www.brookings.edu/blog/the-avenue/2016/11/29/another-clinton-trump-divide-high-output-america-vs-low-output-america/ [https://perma.cc/R2AG-7CXK].

20. For such a defense, see RICHARD SCHRAGGER, CITY POWER: URBAN GOVERNANCE IN A GLOBAL AGE 18–42 (2016).

and that the character of intergovernmental relations in any given historical period generally reflects substantive political commitments. It proceeds nonetheless on the assumption that an understanding of the American city's status in the U.S. constitutional order is valuable regardless of one's political commitments.

Part I describes the twenty-first century attack on American cities by canvassing preemptive state legislation across a number of policy areas. The purpose is to show both the recency and the breadth of state law preemption.

Part II turns to "Our Federalism's"[21] anti-urbanism. This Part describes how state-based federalism hinders municipal power generally, rehearses how the U.S. Constitution favors rural over urban voters specifically, and describes the deficiencies of state constitutional home rule provisions. I argue that the U.S. intergovernmental system is generally anti-city.[22]

Part III places this "anti-urban constitution" in the context of the historic skepticism of the exercise of city power. It describes a number of distinct forms of anti-urbanism, placing them in the context of the twentieth century's history of suburban growth. Even before the explosive rise of the postwar suburbs, policymakers had sought to fix society by fixing the city—often by trying to rid the city of its urban character or by seeking to liberate citizens from the congestion, dangers, and threats of urban life. Part III concludes with a discussion of resurgent populist anti-urbanism—visible in the rhetoric of the 2016 presidential election and reflected in a series of recent high profile state–city conflicts.

Part IV considers the legal and political options available to cities in responding to these conflicts, both in the context of specific preemptive legislation and more generally. The limits of litigation and legal reform are manifest when anti-urbanism seems to be such a pervasive feature of the U.S. constitutional structure and the wider political culture. Without a significant rethinking of state-based federalism, the American city is likely to remain vulnerable.

One need not share a concern with the city's vulnerability to recognize that federalism in an urban age is and will continue to be about the divide between cities and noncities. Cities and their wider metropolitan areas now contain the bulk of the American population and are the primary economic drivers of their states, their regions, and the nation. The focus on states in our federalism distracts from this important long-term demographic and economic shift. Old debates about state dignity, political safeguards, or anti-commandeering are less responsive in a new urban age in which the most important political and economic divisions do not track state lines. If

21. *See* Younger v. Harris, 401 U.S. 37, 44 (1971).

22. Paul Diller has recently made a similar argument. Paul A. Diller, *Reorienting Home Rule: Part 1–The Urban Disadvantage in National and State Lawmaking*, 77 LA. L. REV. 287, 291 (2016). I recount some of his claims below and develop additional ones.

federalism is to have any force as an idea, it must wrestle with this current reality.

I. Conflictual Federalism: A Review of State Law Preemption

I start with an abbreviated review of the current preemption landscape in the states. The range of preemptive state laws is significant. Those laws constrain cities' revenue-raising and spending capacities; prevent cities from adopting environmental, labor, or wage laws; limit the ability for cities to respond to public-health threats; and prevent cities from protecting vulnerable minority groups.[23]

That being said, this review is both selective and a snapshot. It is selective in that it does not canvass the full panoply of state laws, nor does it address federal law preemption except incidentally. The growth of the states' regulatory and administrative apparatus over the course of the twentieth century parallels the rise of the federal regulatory state.[24] Any discussion of preemption thus has to assume that state law is ubiquitous and generally predominates. Indeed, doctrinally, the private law and criminal law exceptions to local home rule powers have held that the state's criminal, tort, contract, domestic-relations, and property law are not subject to local modification.[25]

I too assume a background in which local law is subordinate to state law across most arenas, even if that subordination has been somewhat ameliorated by broad state grants of municipal authority—either through state constitutions or state enabling statutes. The point of this mapping is to illustrate how those general grants are being narrowed and to highlight the reach of specifically targeted preemption laws gaining currency in the states. This is a snapshot insofar as the state preemption landscape remains volatile. New preemptive legislation is being proposed in every state legislative session, as are statutes that would repeal existing preemptive laws.

It should also be noted that cities are litigating at least some of these preemptive state efforts, invoking various principles, including their respective state constitutions' home rule grants.[26] The nature of these grants

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23. *See generally* NAT'L LEAGUE OF CITIES, CTR. FOR CITY SOLUTIONS, CITY RIGHTS IN AN ERA OF PREEMPTION: A STATE-BY-STATE ANALYSIS (2017), http://www.nlc.org/sites/default/files/2017-03/NLC-SML%20Preemption%20Report%202017-pages.pdf [https://perma.cc/FBM3-SAF6] [hereinafter CITY RIGHTS]; Lori Riverstone-Newell, *The Rise of State Preemption Laws in Response to Local Policy Innovation*, 47 PUBLIUS: J. FEDERALISM 403 (2017).

24. Marc T. Law & Sukkoo Kim, *The Rise of the American Regulatory State: A View from the Progressive Era*, *in* HANDBOOK ON THE POLITICS OF REGULATION 113, 114 (David Levi-Faur ed., 2011).

25. Paul A. Diller, *The City and the Private Right of Action*, 64 STAN. L. REV. 1109, 1118–19 (2012); *see* Gary T. Schwartz, *The Logic of Home Rule and the Private Law Exception*, 20 UCLA L. REV. 671, 677 (1973) (recognizing the existence of exceptions to the home rule grants).

26. Lewis v. Bentley, No. 2:16-CV-690-RDP, 2017 WL 432464, at *1 (N.D. Ala. Feb. 1, 2017) (regarding Birmingham's authority to establish minimum wage legislation); City of Bexley v. State,

varies widely across the states. At its simplest, state constitutions or enabling acts provide cities with the general authority to legislate for the health, safety, and welfare of the local populace, though almost always subject to override by state law.

These general grants were adopted in part to allow local governments to engage in the day-to-day regulatory activities of government without having to seek specific authorization from the state legislature. But these grants have been significantly undermined by the growth of preemptive state legislation, which removes particular issues from local control or limits city authority across an entire category of regulation. At some point, a "general" grant of authority ceases to be general when a state, through cumulative preemptive legislation, substantially narrows the practical contours of local authority.

A. Industry-Specific Preemption

A range of specific industries, from those selling firearms to those that deal in pesticides, have sought and successfully lobbied for state preemption of local regulations. In many cases, there appears to be a partnership between the private interests that seek to avoid local regulation and legislators at the state level, exemplified by organizations such as the American Legislative Exchange Council (ALEC).[27] ALEC is a pro-business lobbying organization. It seeks to facilitate relationships and efforts between state legislative branches and private industries by providing model legislation, networking opportunities, and lobbying services on behalf of its members.

The firearms industry has been particularly successful in large part because the National Rifle Association has acted aggressively at the state level. Firearm- and ammunition-specific preemption statutes have been enacted in forty-three states.[28] Of these states, eleven have adopted absolute preemption of municipal firearm regulations, barring any exceptions.[29] New

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No. 17CV-2672, 2017 WL 5179520, at *5 (Ohio Ct. Com. Pl. June 2, 2017) (regarding state versus municipal authority to regulate micro-wireless systems); Brief for Defendant-Appellee, Fla. Retail Fed'n, Inc. v. City of Coral Gables, No. 2016-018370-CA-01, 2017 WL 4884062, at *4 (Fla. Cir. Ct. Sept. 18, 2017) (regarding the constitutionality of overruling city's Styrofoam ban).

27. *See* AM. LEGIS. EXCHANGE COUNCIL, https://www.alec.org/about/ [https://perma.cc/5GY9-VANT].

28. *Preemption of Local Laws*, L. CTR. TO PREVENT GUN VIOLENCE, http://smartgunlaws.org/gun-laws/policy-areas/other-laws-policies/preemption-of-local-laws/ [https://perma.cc/CZF2-CJ9A].

29. These states are Arkansas, Indiana, Iowa, Kentucky, Michigan, New Mexico, Oregon, Rhode Island, South Dakota, Utah, and Vermont. N.M. CONST. art. II, § 6 (amended 1986); ARK. CODE ANN. § 14-54-1411 (2017) (effective July 30, 1993); IND. CODE § 35-47-11.1-2 (2017) (effective July 1, 2011); IOWA CODE ANN. § 724.28 (2017) (effective Apr. 5, 1990); KY. REV. STAT. ANN. § 65.870 (West 2017) (effective July 12, 2012); MICH. COMP. LAWS § 123.1102 (2017) (effective Mar. 28, 1991); OR. REV. STAT. § 166.170 (2017) (effective May 30, 1995); 11 R.I. GEN. LAWS § 11-47-58 (2017) (effective 1986); S.D. CODIFIED LAWS §§ 7-18A-36, 8-5-13, 9-19-20 (2017) (effective 1983); UTAH CODE ANN. § 76-10-500 (West 2017) (effective May 3, 1999); VT. STAT. ANN. tit. 24, § 2295 (2017) (effective May 9, 1988).

Mexico implemented this broad preemption rule by amending the state constitution.[30] As one state legislator has stated: "There are lots of areas where home rule certainly applies, . . . [b]ut this is not one of them. Not when it comes to an unalienable, natural, God-given right for people to protect themselves."[31]

A number of states have included penalty provisions in their firearm preemption statutes, in some cases authorizing private parties to bring civil actions against local officials for violations. Relying on a Florida statute with such a provision, two firearms-rights groups recently sued Tallahassee, its mayor, and three city commissioners in their individual capacities regarding two preempted ordinances—passed in 1957 and 1984, respectively—that prohibited the discharge of firearms in certain areas or city properties.[32] Although the city had not enforced either provision for years, the ordinances remained on the books.[33] The plaintiffs argued that by failing to repeal the ordinances, the city and its officials were liable. In a technical, narrow holding, an intermediate state appellate court held that in not repealing the old ordinances, the city had not actually "promulgated" preempted ordinances as required for penalties to apply under the statute.[34]

Over thirty states have some form of tobacco-related state preemption laws.[35] The Washington and Michigan laws preempt advertising, licensure, smoke-free indoor air, and youth access. The other states preempt some combination of these tobacco-related activities. Ten states specifically preempt licensure of vending machines containing tobacco products. At least seven states have preempted the local regulation of e-cigarettes, and others, such as Oklahoma, have acted by amending their tobacco preemption statutes to explicitly preempt the regulation of e-cigarettes and related vapor products.[36] Washington's legislature passed a comprehensive regulation of

30. N.M. CONST. art. II, § 6 (amended 1986).

31. Matt Valentine, *Disarmed: How Cities Are Losing the Power to Regulate Guns*, ATLANTIC (Mar. 6, 2014), https://www.theatlantic.com/politics/archive/2014/03/disarmed-how-cities-are-losing-the-power-to-regulate-guns/284220/ [https://perma.cc/BL5S-NK3P].

32. Fla. Carry, Inc. v. City of Tallahassee, 212 So. 3d 452, 455–56 (Fla. Dist. Ct. App. 2017).

33. *Id.* at 456.

34. *Id.* at 464–65 ("[S]ection 790.33, as it currently stands, does not prohibit the re-publication or re-printing of the void ordinances. . . . The fact that Appellees refused to remove the ordinances from the City's Code does not constitute prohibited conduct under the statute.").

35. *Map of Preemption on Advertising, Licensure, Smokefree Indoor Air, and Youth Access*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/statesystem/preemption.html [https://perma.cc/2GSJ-C6MZ].

36. ARK. CODE ANN. § 26-57-267 (2017) (effective July 22, 2015); IOWA CODE § 453A.56 (2017) (original version at 1991 Iowa Acts 495); NEV. REV. STAT. § 202.249 (2017) (codified as amended at 1991 Nev. Stat. 644); OKLA. STAT. tit. 37, § 600.10 (2017) (effective July 1, 1994) (to be recodified at OKLA. STAT. tit. 63, § 1-220.20); S.C. CODE ANN. § 16-17-504 (2017) (effective June 7, 2013); S.D. CODIFIED LAWS § 34-46-20 (2017) (effective Mar. 28, 2014), § 34-46-6 (2017) (effective Mar. 4, 1994); WASH. REV. CODE § 70.345.210 (2017) (effective June 28, 2016).

vapor products in 2016, which includes a section preempting local regulation of vapor products.[37]

Conflicts over the provision of municipal broadband, or high-speed internet services, have also arisen in the last decade. At least seventeen states have preempted local broadband provision.[38] State preemptive legislation either explicitly bars public entities from providing broadband services or creates barriers meant to disincentivize local governments from pursuing municipal broadband capacity.[39] Bans on local governments operating broadband services can be clear-cut and unambiguous[40] or based on certain categories.[41] A number of states have also erected procedural barriers to the municipal provision of broadband, requiring ballot initiatives (Colorado, Louisiana, and Minnesota),[42] feasibility studies (Virginia),[43] or proof that local incumbent providers cannot or will not provide broadband to the local community (California and Michigan).[44] A particularly contentious example occurred in North Carolina, where a 2015 FCC ruling blocking the state's preemptive statute was overruled by the Sixth Circuit, resulting in North Carolina cities losing municipal broadband capabilities.[45]

The sharing economy, another relatively new phenomenon with the advent of companies such as Uber and Airbnb, is another field in which industry is actively pursuing state preemptive legislation. Laws in thirty-seven states preempt local regulation of ride-sharing platforms, or "transportation network companies" (TNCs) such as Uber and Lyft.[46] Home-sharing platforms, such as Airbnb, have not been the focus of as much legislation, likely due to their novelty. However, states such as New York and Arizona have started to act on this topic, though with different objectives. Arizona, by statute, chose to absolutely prohibit counties from disallowing short-term rentals,[47] while New York criminalized short-term rentals of less

37. WASH. REV. CODE § 70.345.210 (2017) (effective June 28, 2016).

38. CITY RIGHTS, *supra* note 23, at 3; *see also* Nixon v. Mo. Mun. League, 541 U.S. 125, 128 (2004) (holding that federal law does not preempt state laws that bar municipalities from providing telecommunications services or facilities).

39. James Baller, *State Restrictions on Community Broadband Services or Other Public Communications Initiatives (as of August 10, 2016)*, BALLER STOKES & LIDE (2016), http://www.baller.com/wp-content/uploads/BallerHerbstStateBarriers8-10-16.pdf [https://perma.cc/FEQ9-YMEP] [hereinafter Baller Report].

40. *See, e.g.*, TEX. UTIL. CODE ANN. §§ 54.201–06 (West 2017).

41. *See, e.g.*, NEV. REV. STAT. ANN. §§ 268.086, 710.147 (West 2017).

42. Baller Report, *supra* note 39, at 1–3.

43. *Id.* at 4–5.

44. *Id.* at 1–2.

45. Tennessee v. Fed. Commc'ns Comm'n, 832 F.3d 597, 614 (6th Cir. 2016).

46. CITY RIGHTS, *supra* note 23, at 12; *see, e.g.*, TENN. CODE ANN. § 65-15-302 (2017) (effective May 20, 2015).

47. ARIZ. REV. STATE. ANN. § 11-269.17 (2017) (enacted May 12, 2016).

than thirty days, as well as the advertisement of such practices.[48] This early divergence in state approaches to the issue signals the likelihood of future conflict between states and their localities.

Certain materials used regularly by businesses, such as plastic and Styrofoam, have invited statewide preemptive legislation. In particular, local plastic-bag bans have drawn attention from state legislatures.[49] Missouri and Idaho have explicitly preempted localities from banning plastic bags, as has New York recently.[50] Texas has pending legislation on the issue.[51] Florida has preempted the regulation of Styrofoam.[52]

As of 2013, explicit preemption language targeting local pesticide regulation had been adopted in twenty-nine states.[53] Most of these states' laws follow the language of ALEC's Model State Preemption Act. The Act states:

> No city, town, county, or other political subdivision of this state shall adopt or continue in effect any ordinance, rule, regulation or statute regarding pesticide sale or use, including without limitation: registration, notification of use, advertising and marketing, distribution, applicator training and certification, storage, transportation, disposal, disclosure of confidential information, or product composition.[54]

Other local environmental regulations have invited state opposition. Oil-rich states like Oklahoma and Texas have specifically preempted local regulation of hydraulic fracturing, or fracking. The Oklahoma preemptive statute states that political subdivisions "may not effectively prohibit or ban any oil and gas operations, including oil and gas exploration, drilling, fracture

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48. N.Y. MULT. DWELL. LAW § 121 (Consol. 2017) (effective Oct. 21, 2016). After Airbnb sued to challenge the New York law, the city and the state entered into settlement agreements permanently blocking enforcement against Airbnb. Todd E. Soloway & Bryan T. Mohler, *Settlement Agreements with Airbnb Violate Separation of Powers*, N.Y. L.J. (Aug. 15, 2017), https://www.law.com/newyorklawjournal/almID/1202795577718 [https://perma.cc/NH2F-ZBAU] (discussing settlement agreements between New York City and Airbnb that prohibit enforcement of the statute against Airbnb).

49. CITY RIGHTS, *supra* note 23, at 23; *State Plastic and Paper Bag Legislation*, NAT'L CONF. ST. LEGISLATURES, http://www.ncsl.org/research/environment-and-natural-resources/plastic-bag-legislation.aspx#pending [https://perma.cc/YS54-MG7V].

50. S.B. 7336, 2017 Leg., Reg. Sess. (N.Y. 2017); Henry Grabar, *Andrew Cuomo's Bizarre Logic for Killing New York City's Plastic Bag Fee*, SLATE (Feb. 15, 2017), http://www.slate.com/blogs/moneybox/2017/02/15/new_york_gov_andrew_cuomo_is_a_plastic_bag.html [https://perma.cc/9XBL-YXA2].

51. S.B. 1806, 84th Leg., Reg. Sess. (Tex. 2015).

52. FLA. STAT. § 500.90 (2017) (preempting local regulation of polystyrene products).

53. MATTHEW PORTER, STATE PREEMPTION LAW: THE BATTLE FOR LOCAL CONTROL OF DEMOCRACY, http://www.beyondpesticides.org/assets/media/documents/lawn/activist/documents/StatePreemption.pdf [https://perma.cc/WPG8-SGLT].

54. *State Pesticide Preemption Act*, AM. LEGIS. EXCHANGE COUNCIL (Jan. 28, 2013), https://www.alec.org/model-policy/state-pesticide-preemption-act/ [https://perma.cc/TM9Q-AUZB].

stimulation, completion, production, maintenance, plugging and abandonment, produced water disposal, secondary recovery operations, flow and gathering lines or pipeline infrastructure," with few exceptions.[55] Both the Oklahoma statute and the Texas statute, which use similar language, were passed in 2015. In 2016, the Colorado Supreme Court stepped in to overturn local regulations when two cities banned fracking and the storage of fracking waste within their respective cities' limits because they violated the state's Oil and Gas Conservation Act.[56] Ohio has also preempted local authority to regulate fracking,[57] leading one local official to complain that "[w]hat the drilling industry has bought and paid for in campaign contributions it shall receive."[58]

B. Labor, Employment, and Antidiscrimination Preemption

In addition to industry-specific regulation, states are actively preempting more general municipal labor, employment, and antidiscrimination laws. Again, in many of these cases, industry and business are pursuing a statewide preemption strategy.

The leading example is the preemption of local minimum- or living-wage laws. At least twenty-five states have passed statutes preempting local authorities from mandating differing minimum wages for private employers.[59] Many of these statutes were adopted in the last five years.

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55. OKLA. STAT. tit. 52, § 137.1 (2017) (effective Aug. 21, 2015).

56. City of Longmont v. Colo. Oil & Gas Ass'n, 369 P.3d 573, 585 (Colo. 2016).

57. State *ex rel.* Morrison v. Beck Energy Corp., 37 N.E.3d 128, 137–38 (Ohio 2015).

58. Billy Corriher, *Big-Money Courts Decide Fate of Local Fracking Rules*, CTR. AM. PROGRESS (Jan. 9, 2017), https://www.americanprogress.org/issues/courts/reports/2017/01/09/296113/big-money-courts-decide-fate-of-local-fracking-rules/ [https://perma.cc/44AE-GNAA].

59. For the statutes, see ALA. CODE § 25-7-41(9)(b) (2017); COLO. REV. STAT. § 8-6-101(3) (2017); FLA. STAT. § 218.077(2) (2017); GA. CODE ANN. § 34-4-3.1 (2017); IDAHO CODE § 44-1502 (2017); IND. CODE § 22-2-2-10.5 (2017); KAN. STAT. ANN. § 12-16,130 (2017); LA. STAT. ANN. § 23:642(A)(3) (2017); MICH. COMP. LAWS SERV. § 123.1385 (LexisNexis 2017); MISS. CODE ANN. § 17-1-51 (2017); MO. REV. STAT. § 285.055 (2015) (unless local ordinances were implemented by Aug. 28, 2015), *repealed by* H.B. 1193 & 1194, 99th Gen. Assemb., Reg. Sess. (Mo. 2017); N.C. GEN. STAT. § 95-25.1 (2017); OKLA. STAT. tit. 40, § 160 (2017); OR. REV. STAT. § 653.017 (2017); 43 PA. CONS. STAT. ANN. § 333.114a (2017); 28 R.I. GEN. LAWS § 28-12-25 (2017); S.C. CODE ANN. § 6-1-130 (2017); TENN. CODE ANN. § 50-2-112 (2017); TEX. LAB. CODE ANN. § 62.0515 (West 2017); UTAH CODE ANN. § 34-40-106 (West 2017); WIS. STAT. § 104.001 (2017); *see also* S.B. 331, 131st Gen. Assemb. (Ohio 2016); S.B. 704, 2015 Gen. Assemb., Reg. Sess. (Va. 2015) (failed and would have allowed localities to adopt minimum wage). The New Hampshire minimum wage law does not explicitly preempt local authority to set wages, but New Hampshire is a Dillon's Rule state and they have not been delegated such authority. Therefore, they may not set their own minimum wages. *See* N.H. REV. STAT. ANN. § 279:21 (2017); CITY RIGHTS, *supra* note 23, at 6 ("New Hampshire . . . [has] had long-standing preemption because authority to regulate wages was never granted to cities."). The Kentucky Supreme Court held that the state's minimum wage law preempts local authority to create minimum wage laws, Ky. Rest. Ass'n v. Louisville/Jefferson Co. Metro Gov't, 501 S.W.3d 425, 430 (Ky. 2016), but, as the dissent noted, the statute in question does not explicitly preempt such authority, *id.* at 431–34 (Wright, J., dissenting); it merely mandates a statewide minimum wage. *See generally* KY. REV. STAT. ANN.

Although a handful of cities have successfully defended their local minimum wage laws,[60] state preemptive laws have generally been upheld.[61] A state legislator recently urged a ban on local minimum wage laws in Washington State, arguing that "[t]his is a simple check on city councils run by special interests and ideologues out of touch with the needs of the whole community."[62]

Local regulations of employee benefits and paid and unpaid leave have also been preempted. At least twelve states have enacted laws that preempt local authority to regulate the benefits private employers provide their employees.[63] At least fifteen states have enacted laws that preempt local authority to regulate the amount of paid or unpaid leave that private employers provide their employees.[64] Nineteen states have preempted local

§ 337.275 (West 2017); Ryland Barton, *Kentucky Supreme Court Strikes Down Louisville Minimum Wage Ordinance*, 89.3 WFPL (Oct. 20, 2016), http://wfpl.org/kentucky-supreme-court-strikes-down-louisville-minimum-wage-ordinance/ [https://perma.cc/2YHC-PMZS] (describing the effects of the majority opinion and the position of the dissenter).

60. Lynn Horsley, *Advocates of Local Control and Minimum Wage Score a Legal Victory in Missouri*, GOVERNING (Mar. 1, 2017), http://www.governing.com/topics/politics/tns-missouri-minimum-wage-ruling.html [https://perma.cc/V4P6-SD3V].

61. For more discussion of state preemption of local minimum wage regulation, see Riverstone-Newell, *supra* note 23, at 411–13.

62. Joseph O'Sullivan, *Lawmaker Proposes Striking Down Local Minimum Wage Laws*, SEATTLE TIMES (Jan. 26, 2016), http://www.seattletimes.com/seattle-news/politics/lawmaker-proposes-striking-down-local-minimum wage-laws/ [https://perma.cc/RQ64-8WLZ].

63. These states include: Alabama (2016), North Carolina (2016), Michigan (2015), Missouri (2015), Arizona (2013), Florida (2013), Indiana (2013), Kansas (2013), Mississippi (2013), Tennessee (2013), Georgia (2004), and Pennsylvania (1996). ALA. CODE § 25-7-41 (2017) (effective Feb. 25, 2016); FLA. STAT. § 218.077 (2017); GA. CODE ANN. § 34-4-3.1 (2017) (effective May 13, 2004); IND. CODE § 22-2-16-3 (2017) (effective July 1, 2013); KAN. STAT. ANN. § 12-16,130 (2017) (effective July 1, 2013); MICH. COMP. LAWS SERV. §§ 123.1386 (2017) (including wages or benefits in the prevailing community), .1391 (2017) (cannot require giving of specific fringe benefits or covering expenses), .1389 (2017) (effective June 30, 2015) (scheduling and hours); MISS. CODE ANN. § 17-1-51 (2017) (effective July 1, 2013); MO. REV. STAT. § 285.055 (2015), *repealed by* H.B. 1193 & 1194, 99th Gen. Assemb., Reg. Sess. (Mo. 2017); N.C. GEN. STAT. § 95-25.1 (2017) (effective Mar. 23, 2016); TENN. CODE ANN. § 7-51-1802 (2017) (effective Apr. 11, 2013) (addressing health insurance benefits only); *see also* ARIZ. REV. STAT. ANN. §§ 23-204 to -205 (2017) (scheduling but not benefits more generally). *But see* ARIZ. REV. STAT. ANN. § 23-364(I) (2017) (stating otherwise without indicating that § 23-204 is not current). For state law in Pennsylvania, see Bldg. Owners & Managers Ass'n of Pittsburgh v. City of Pittsburgh, 985 A.2d 711, 714 (Pa. 2009) (holding that Pennsylvania state law prohibits municipalities from regulating businesses by determining their "duties, responsibilities[,] or requirements"); Chris Potter, *Judge Rejects as 'Unenforceable' Two Pittsburgh Labor Ordinances*, PITTSBURGH POST-GAZETTE (Dec. 22, 2015), http://aww.post-gazette.org/local/city/2015/12/22/Allegheny-County-judge-strikes-down-city-sick-leave-ordinance/stories/201512220166 [https://perma.cc/99TM-UZLF].

64. These states include: Alabama (2016), North Carolina (2016), Oregon (2016), Wisconsin (2016), Michigan (2015), Missouri (2015), Oklahoma (2014), Arizona (2013), Florida (2013), Indiana (2013), Kansas (2013), Mississippi (2013), Tennessee (2013), Louisiana (2012), and Pennsylvania (1996). ALA. CODE §§ 25-7-41(b) (2017) (effective Feb. 25, 2016), 11-80-16 (2017) (effective Mar. 18, 2014); ARIZ. REV. STAT. ANN. § 23-204 (2017) (effective Apr. 30, 2013); FLA. STAT. § 218.077 (2017) (effective July 1, 2013); IND. CODE § 22-2-16-3 (2017) (effective July 1, 2013); KAN. STAT. ANN. § 12-16,130 (2017) (effective July 1, 2013); LA. STAT. ANN. § 23:642

governments from passing laws requiring companies in their jurisdictions to provide paid family leave.[65]

While not yet as active, the local regulation of wage theft has recently drawn some attention from state legislators. Currently, only Tennessee has passed a law directly preempting local authorities from regulating wage theft by private employers.[66] Other states, such as Pennsylvania and Arizona, may have statutes that control the topic, but only indirectly.[67] On collective bargaining, by contrast, at least twenty-eight states have "right-to-work" laws, which bar private employers from discriminating against employees on the basis of union membership. These laws preempt local regulations to the contrary.[68]

(2017) (effective Aug. 1, 2012); MICH. COMP. LAWS § 123.1388 (2017) (effective June 30, 2015); MISS. CODE ANN. § 17-1-51 (2017) (effective July 1, 2013); MO. REV. STAT. § 285.055 (2015), *repealed by* H.B. 1193 & 1194, 99th Gen. Assemb., Reg. Sess. (Mo. 2017); N.C. GEN. STAT. § 95-25.1 (2017) (effective Mar. 23, 2016); OKLA. STAT. tit. 40, § 160 (2017) (effective July 1, 2014); OR. REV. STAT. § 653.661 (2017) (effective Jan. 1, 2016) (only applies to sick leave); TENN. CODE ANN. § 7-51-1802 (2017) (effective Apr. 11, 2013); WIS. STAT. § 103.10 (2017) (effective July 1, 2016) (preempted in part by ERISA) (applying only to mandating leave for: medical reasons or family issues, including helping family members with medical conditions, helping family members relocate due to domestic assault, sexual assault, or stalking, or to seek services due to such issues, or to prepare to testify, testify, or participate in proceedings about such issues); *see* GA. CODE ANN. § 34-4-3.1 (2017) (effective May 13, 2004) (preempting "all . . . employment benefits" without referring to leave); *Bldg. Owners & Managers Ass'n of Pittsburgh*, 985 A.2d at 714; Chris Potter, *supra* note 63.

65. These states are Arizona, Georgia, Florida, Indiana, Kansas, Louisiana, Maryland, Michigan, Mississippi, Missouri, New Hampshire, North Carolina, Oklahoma, Oregon, Tennessee, Virginia, and Wisconsin. *See* CITY RIGHTS, *supra* note 23, at 8 ("Seventeen state[s] . . . preempt[ed] the ability of cities to pass laws mandating employers within their jurisdictions provide paid leave."); *Paid Sick Days Preemption Bills (Current Session)*, NAT'L PARTNERSHIP FOR WOMEN & FAM. (May 2017), http://www.nationalpartnership.org/issues/work-family/preemption-map.html ?referrer=https://www.google.com/ [https://perma.cc/N3FK-NSXQ].

66. TENN. CODE ANN. § 50-2-113 (West 2017) (effective July 10, 2014).

67. *See* 53 PA. CONS. STAT. § 2962(f) (2017); *Bldg. Owners & Managers Ass'n of Pittsburgh*, 985 A.2d at 714 (holding that Pennsylvania state law prohibits municipalities from regulating businesses by determining their "duties, responsibilities[,] or requirements"). Philadelphia has passed such an ordinance, but it may be illegal. Arizona has a similar statute. ARIZ. REV. STAT. ANN. § 23-364 (2017) (effective Dec. 9, 2016).

68. These states include: Kentucky (2017), Missouri (2017), Alabama (1953—statute; 2016—constitutional amendment), West Virginia (2016), Wisconsin (2015) (no expressed mention of preemption, however), Indiana (2012), Michigan (2012), Oklahoma (2001), Idaho (1985), Louisiana (1976), Wyoming (1963), Kansas (1958), Utah (1955), Mississippi (1954), South Carolina (1954), Nevada (1951), Arkansas (1947), Georgia (1947), Iowa (1947), Texas (1947), Virginia (1947), North Dakota (1947), North Carolina (1947), Tennessee (1947), Arizona (1946), South Dakota (1946), Nebraska (1946), and Florida (1944). ALA. CONST. art. I, § 36.05 (amended 2016); ARIZ. CONST. art. XXV (1946); ARK. CONST. amend. XXXIV, § 1 (1944); KAN. CONST. art. XV, § 12 (1957); MISS. CONST. art. VII, § 198A (amended 1960); NEB. CONST. art. XV, §§ 13–15 (1946); FLA. CONST. art. I, § 6 (1944); OKLA. CONST. art. XXIII, § 1A (amended 2001); S.D. CONST. art. VI, § 2 (1945); ARK. CODE ANN. § 11-3-301 (2017) (effective 1947); GA. CODE ANN. § 34-6-6 (2017) (effective 1947); IDAHO CODE ANN. § 44-2001 (2017) (effective 1985); IND. CODE § 22-6-6-8 (2017) (effective Feb. 1, 2012); IOWA CODE §§ 731.1–.8 (2017) (enacted 1947, recodified 1977); KY. REV. STAT. ANN. § 65.015 (West 2017); LA. STAT. ANN. §§ 23:981–:987 (2017) (effective 1976); MICH. COMP. LAWS § 123.1392 (2017) (effective June 30, 2015); MO.

A number of states have adopted laws preventing local governments from passing ordinances prohibiting private employers from discriminating in employment practices.[69] Additional states may implicitly preempt local authorities from regulating discrimination, depending on how their statutes are interpreted by the courts.[70]

In addition to preempting the local regulation of the private employment relationship, states have also limited cities' authority to dictate municipal contract terms with private parties doing business with the city. North Carolina,[71] Ohio,[72] and Tennessee[73] have enacted laws that prohibit local governments from promulgating ordinances that require private contractors that acquire municipal contracts to hire some specified amount of local residents, or that give preference to contractors that employ local residents over their competitors in bidding for municipal contracts. Cleveland is currently defending its "local hire" ordinance against Ohio's preemptive statute.[74]

A number of states have also enacted laws that prohibit local governments from mandating the wages that private contractors fulfilling a municipal contract pay their employees.[75] North Carolina has enacted a law

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REV. STAT. § 290.590 (2017); NEV. REV. STAT. ANN. §§ 613.250–.300 (2017) (effective 1953); N.D. CENT. CODE § 34-09-01 (2017) (effective 1947); N.C. GEN. STAT. § 95-78 (2017) (effective 1947); S.C. CODE ANN. § 41-7-10 (2017) (effective 1954); TENN. CODE ANN. §§ 50-1-201 to -206 (2017) (effective 1947); TEX. LAB. CODE §§ 101.001–.003 (West 2017) (effective 1993); UTAH CODE ANN. § 34-34-2 (2017) (effective 1955); VA. CODE ANN. §§ 40.1-58 to -69 (2017) (enacted 1947, amended 1970); W. VA. CODE ANN. §§ 21-1A-3 to -4 (2017) (effective May 5, 2016); WIS. STAT. ANN. § 111.04 (2017) (effective Mar. 11, 2015) (no expressed mention of preemption, however); WYO. STAT. ANN. §§ 27-7-108 to -115 (2017) (effective 1963).

69. *See, e.g.*, N.C. GEN. STAT. § 143-422.2 (2017) (emphasizing that it is the public policy of this "State" to protect and safeguard the equal protection right of employees); UTAH CODE § 34A-5-102.5 (West 2017); H.B. 600, 107th Gen. Assemb. (Tenn. 2017) (withdrawn); S.B. 202, 90th Gen. Assemb., Reg. Sess. (Ark. 2015); *see also* Elizabeth Reiner Platt, *States Attempting to Preempt LGBT-Friendly Municipalities*, COLUM. L. SCH. (Feb. 11, 2016), http://blogs.law.columbia.edu/publicrightsprivateconscience/2016/02/11/states-attempting-to-preempt-LGBT-friendly-municipalities/ [https://perma.cc/H2FZ-G39V].

70. KAN. STAT. ANN. § 44-1001 (West 2017); N.H. REV. STAT. ANN. § 354-A:1 (2017); S.C. CODE ANN. § 1-13-20 (2017).

71. H.B. 2, 2016 Gen. Assemb., 2d Extra Sess., (N.C.) (discussing statewide consistency in laws related to employment contracting).

72. H.B. 180, 131st Gen. Assemb., Reg. Sess. (Ohio 2016); *see also Cleveland Sues Ohio over Prohibition on Local Hiring Laws*, NEWS-HERALD (Aug. 24, 2016), http://www.news-herald.com/article/HR/20160824/NEWS/160829729 [https://perma.cc/Z2MJ-9DJ2] (discussing Cleveland's challenge to the bill).

73. TENN. CODE ANN. § 62-6-111(i)(2)(C) (West 2017).

74. City of Bexley v. State, No. 17CV-2672, 2017 WL 5179520 (Ohio Ct. Com. Pl. June 2, 2017); Robert Higgs, *National Coalition Joins Cleveland Fight to Save Fannie Lewis Law*, CLEVELAND.COM (June 15, 2017), http://www.cleveland.com/cityhall/index.ssf/2017/06/national_coalition_joins_cleve.html [https://perma.cc/TS57-M4XK].

75. These at least include North Carolina (2016), Tennessee (2013), Arizona (2011), Georgia (2005), and Utah (2001). ARIZ. REV. STAT. ANN. § 34-321(B) (2017); GA. CODE ANN. § 34-4-3.1

that prohibits local governments from passing ordinances that alter private contractors' employee leave policies as a condition of accepting a municipal contract.[76] North Carolina,[77] Tennessee,[78] and Georgia[79] prohibit municipalities from altering the employee benefits policies of private contractors that acquire municipal contracts as a condition of bidding for or receiving a public contract. Seven states have enacted laws prohibiting local governments from setting certain requirements for private contractors in bidding for or receiving a public contract. Some of these barred conditional requirements include mandatory collective bargaining and labor agreements.[80]

LGBT discrimination in employment and public accommodations has also been an area of state–city conflict. North Carolina's "bathroom bill" was intended to override Charlotte's ordinance protecting the rights of transgender people to use bathrooms and changing facilities that corresponded to their gender identity.[81] Wyoming had considered a bill making the use of any restroom not corresponding to one's birth sex a crime of public indecency.[82] South Dakota and Virginia had bathroom bills introduced in their 2017 state legislatures, and nineteen states considered such measures in 2016.[83] Texas is currently considering such a law.[84]

(2017); N.C. GEN. STAT. §§ 153A-449(a), 160A-20.1(a) (West 2017); TENN. CODE ANN. § 50-2-112(a)(1) (2017); UTAH CODE ANN. § 34-40-106(2) (West 2017).

76. N.C. GEN. STAT. §§ 153A-449(a), 160A-20.1 (West 2017).

77. *Id.*

78. TENN. CODE ANN. § 7-51-1802 (2017) (prohibiting mandatory health insurance only).

79. GA. CODE ANN. § 34-4-3.1 (2017) (prohibiting local law that seeks to control or affects wages that would occur if collective bargaining were required without referring to union agreements).

80. These include Alabama (2016), North Carolina (2013), Arizona (2011), Missouri (2007), Tennessee (2011), Georgia (2005), and Nevada (1953). ALA. CODE § 25-7-42 (2017); ARIZ. REV. STAT. ANN. § 34-321(C) (2017); GA. CODE ANN. § 36-91-21 (2017); MO. REV. STAT. § 34.209 (2017); NEV. REV. STAT. § 613.250 (2017); N.C. GEN. STAT. § 143-133.5 (2017); TENN. CODE ANN. § 12-4-903 (2017).

81. N.C. GEN. STAT. § 143-422.11 (repealed 2017); *see also* CITY RIGHTS, *supra* note 23, at 11 (noting that HB2 was passed in direct response to a Charlotte ordinance that prohibited sex discrimination in public facilities).

82. Joellen Kralik, *"Bathroom Bill" Legislative Tracking*, NAT'L CONF. ST. LEGISLATURES (July 28, 2017), http://www.ncsl.org/research/education/-bathroom-bill-legislative-tracking63595 1130.aspx [https://perma.cc/XES8-JK7R]; *see also* H.B. 0244, 64th Leg., Reg. Sess. (Wyo. 2017) (providing that a person is guilty of public indecency if the person "knowingly uses a public bathroom or changing facility . . . which does not correspond to the person's sex identified at birth by the person's anatomy").

83. *See* Kralik, *supra* note 82. Of the nineteen states that considered such legislation, one—North Carolina—enacted the legislation; the other eighteen states are Illinois, Indiana, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, Mississippi, New York, North Carolina, Oklahoma, South Carolina, South Dakota, Tennessee, Virginia, Washington, and Wisconsin. *Id.*

84. *Id.*

C. Local Authority Preemption

In addition to preempting local laws that seek to regulate private businesses, states have also preempted local authority in areas that come closer to the traditional core of municipal authority: revenue raising and spending. States dramatically limit locals' tax and spending abilities through tax and expenditure limitations (TELs). Thirty-five states, as of 2015, imposed property-tax-rate limits on localities.[85] Thirty-five states impose limitations on tax levies, primarily through tax caps.[86] New York, for example, limits the amount raised by taxes on real estate in any fiscal year to the amount equal to the following percentages of the average full valuation of taxable real estate: 1.5%–2% for counties, 2% for cities and villages, and 2.5% for New York City and the counties therein.[87] Those caps can be overridden in certain circumstances, though a number of states do not provide any override procedure.[88]

Other states have imposed both tax and spending limitations. Colorado's Taxpayer Bill of Rights (TABOR), adopted in 1992, is an example.[89] The constitutional amendment requires that any tax increase or debt question be approved by the voters, and it imposes annual limits on both government revenue and spending.[90] The stringent limits on spending have led to recent bipartisan efforts to reform the law.[91]

Land use regulation and schools are other topics of traditional local concern that have seen recent preemption activity. Affordable housing requirements, or inclusionary zoning measures, have been preempted in at least eleven states.[92] Mississippi passed a law in 2013 explicitly exempting

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85. *Significant Features of the Property Tax: Tax Limits*, LINCOLN INST. LAND POL'Y, http://datatoolkits.lincolninst.edu/subcenters/significant-features-property-tax/Report_Tax_Limits.aspx [https://perma.cc/S8K2-7PM8] [hereinafter *Tax Limits*]. For foundational work in the field, see FRUG & BARRON, *supra* note 12, at 80–82; DANIEL R. MULLINS & KIMBERLEY A. COX, ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, TAX AND EXPENDITURE LIMITS ON LOCAL GOVERNMENTS (1995).

86. *See Tax Limits*, *supra* note 85.

87. N.Y. CONST. art. VIII, § 10 (2002).

88. *Tax Limits*, *supra* note 85 (searching under "levy limit").

89. CITY RIGHTS, *supra* note 23, at 22 (citing COLO. CONST. art. X, § 20 (1992)).

90. COLO. CONST. art. X, § 20(4), (7)–(8) (1992).

91. John Frank, *TABOR Faces Renewed, Republican-Led Effort for an Overhaul at 25-Year Mark*, DENVER POST (Feb. 28, 2017), http://www.denverpost.com/2017/02/26/tabor-colorado-bill-1187/ [https://perma.cc/3X84-PHEN].

92. *E.g.*, ARIZ. STAT. § 9-461.16 (2017); ARK. CODE ANN. § 14-54-1604 (2017); COLO. REV. STAT. § 38-12-301 (2017); MASS. GEN. LAWS ch. 40B, §§ 20–23 (2017); OR. REV. STAT. § 197.309 (2017); TEX. LOC. GOV'T CODE § 214.905 (2017). For Tennessee, see TENN. CODE ANN. § 66-35-102(b) (2017); see also Joey Garrison, *Legal Threat Hangs over Nashville Affordable Housing Proposal*, TENNESSEAN (Sept. 6, 2016), http://www.tennessean.com/story/news/local/davidson%20/2016/09/06/legal-threat-hangs-over-nashville-affordable-housing-proposal/89782528/ [https://perma.cc/D79J-BYP4]; Joey Garrison, *State Bill Would Prohibit Affordable Housing Mandates*, TENNESSEAN (Jan. 19, 2016), http://www.tennessean.com/story/news/2016/01/19/state-bill-would-prohibit-affordable-housing-mandates/79003712/ [https://perma.cc/Z64T-RBZP]. For New

charter schools from local rules, regulations, policies, and procedures.[93] ALEC's model legislation on charter schools was distributed in 2016, with language resembling that of the Mississippi statute.[94]

Local immigration issues have also elicited state legislative attention—as conflicts over sanctuary cities have become more widespread.[95] While there are constitutional limits on the federal government's ability to force local compliance with immigration laws, those limits do not necessarily apply to state laws—something I will say more about in Part IV.

Arizona, Georgia, Indiana, North Carolina, and Missouri all have bans against sanctuary cities that predate the 2016 election.[96] The Arizona law that contained the sanctuary city ban was partially struck down by the Supreme Court in *Arizona v. United States*[97] on the ground that it was preempted by federal law.[98] Some key provisions remain, however.[99] Since November 2016, at least fifteen additional states have proposed legislation to preempt sanctuary cities.[100] Of those states, four do not have any known sanctuary

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Hampshire, see N.H. REV. STAT. ANN. § 674:59 (2017); see also Cordell A. Johnston, *New Hampshire Town and City: New Laws Require Updates to Zoning Ordinances*, N.H. MUN. ASS'N (Dec. 2008), https://www.nhmunicipal.org/TownAndCity/Article/131 [https://perma.cc/UDM2-GBT8]. In New Jersey, the judiciary has rejected the municipality's inclusive zoning measure. S. Burlington Cty. NAACP v. Twp. of Mount Laurel, 336 A.2d 713, 730–31 (N.J. 1975). For Rhode Island, see 45 R.I. GEN. LAWS § 45-24-46.1 (2017); see also CITY OF RALEIGH HOUS. & NEIGHBORHOODS DEP'T, AFFORDABLE HOUSING IMPROVEMENT PLAN: FY 2016-FY 2020 (noting that mandatory inclusionary zoning is illegal but some cities have them (Chapel Hill, Davidson, and Monteo) but other actions are allowed); R.I. DEP'T OF ADMIN.: DIV. OF PLANNING, HANDBOOK ON: DEVELOPING INCLUSIONARY ZONING (2006), http://www.planning.ri.gov/documents/comp/Handbook%20on%20Developing%20Inclusionary%20Zoning.pdf [https://perma.cc/8HQ3-2EZP]. *But see* MASS. GEN. LAWS ch. 40B, §§ 20–23 (2017); Tyler Mulligan, *A Primer on Inclusionary Zoning*, COATES' CANONS (Nov. 16, 2010), https://canons.sog.unc.edu/a-primer-on-inclusionary-zoning/ [https://perma.cc/54QE-BEYT] (arguing that the law is uncertain regarding this issue).

93. MISS. CODE ANN. § 37-28-45 (2017) (effective July 1, 2013).

94. *The Next Generation Charter Schools Act*, AM. LEGIS. EXCHANGE COUNCIL (Sept. 12, 2016), https://www.alec.org/model-policy/amendments-and-addendum-the-next-generation-charter-schools-act/ [https://perma.cc/56LS-BR4G].

95. *But cf.* Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1281–82 (2009) (discussing local immigration "noncooperation" laws, which thwart federal attempts to force states to assist with immigration enforcement, as examples of uncooperative federalism).

96. ARIZ. REV. STAT. ANN. § 11-1051 (2017) (effective July 29, 2010); GA. CODE ANN. § 36-80-23(b) (2017) (effective May 5, 2009); IND. CODE ANN. § 5-2-18.2-4 (2017) (effective July 1, 2017); MO. ANN. STAT. § 67.307 (2017) (effective Jan. 1, 2009); N.C. GEN. STAT. § 153A-145.5 (2017) (effective Oct. 1, 2015).

97. 567 U.S. 387 (2012).

98. *Id.* at 46. The sanctuary city ban was not at issue in the case.

99. *Id.* at 389 (holding three provisions of the Arizona law to be preempted by federal law, but declining to rule similarly on one section in the absence of a definitive state court interpretation of that section).

100. *See, e.g.*, *City Enforcement of Immigration Laws Before Panel*, BILLINGS GAZETTE (Jan. 14, 2013), http://billingsgazette.com/news/state-and-regional/montana/city-enforcement-of-immigration-laws-before-panel/article_552b1c9f-f3e0-51bd-9064-1778ebfcf246.amp.html [https://perma.cc/9QCY-SAYS] (discussing a proposed state law that would require cities to "help

cities: Arkansas,[101] Idaho,[102] Oklahoma,[103] and Tennessee.[104] Notably, a proposed law in Ohio would hold local government officials criminally liable for the acts of undocumented immigrants.[105] SB4 (recently adopted in Texas) overrides all municipal policies and practices that may limit the enforcement of federal immigration laws, and imposes civil and criminal penalties on local officials who do not comply.[106]

D. Punitive, Deregulatory, and Vindictive Preemption

SB4 is an example of a punitive form of preemption, similar to the Florida firearms statute mentioned already. Traditionally, cities with preempted ordinances simply stopped enforcing those ordinances and might

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enforce anti-immigration laws"); Greg Hilburn, *Sanctuary Cities Bill Dies; Lafayette, NOLA Avoid Penalties*, NEWS STAR (May 24, 2016), http://www.thenewsstar.com/story/news/2016/05/24/sanctuary-cities-bill-dies-lafayette-nola-avoid-penalties/84769550/ [https://perma.cc/SGY3-PPUD] (noting that a bill that would have restricted state funding to sanctuary cities did not pass); *Kansas Among Several States Looking to Ban Sanctuary Cities*, KSN.COM (Feb. 2, 2016), http://ksn.com/2016/02/02/kansas-among-several-states-looking-to-ban-sanctuary-cities/ [https://perma.cc/R5V9-VMLA] (discussing multiple proposed laws to either ban sanctuary cities or restrict funding to "cities that don't cooperate with immigration officials"); Brandon Moseley, *Bentley Says Alabama Will Not Support Sanctuary Cities*, ALA. POL. REP. (Feb. 2, 2017), http://www.alreporter.com/2017/02/01/bentley-says-alabama-will-not-support-sanctuary-cities/ [https://perma.cc/GB5B-TF98] (discussing a proposed state law that would require cities to "help enforce anti-immigration laws"); Anjali Shastry, *Maryland Lawmaker Aims to Punish Sanctuary Cities*, WASH. TIMES (Jan. 19, 2016), http://www.washingtontimes.com/news/2016/jan/19/maryland-bill-aims-to-punish-sanctuary-cities/ [https://perma.cc/3E3Z-U4DM] (stating that Maryland would debate whether to enact a law punishing sanctuary cities).

101. Benjamin Hardy, *Bill Introduced to Strip State Funds from Hypothetical 'Sanctuary Cities' in Arkansas*, ARK. TIMES (Dec. 2, 2016), http://www.arktimes.com/ArkansasBlog/archives/2016/12/02/bill-introduced-to-strip-state-funds-from-hypothetical-sanctuary-cities-in-arkansas [https://perm.cc/FAT2-68C7].

102. Betsy Z. Russell, *Proposed Law in Idaho Would Discourage Sanctuary Cities and Direct Law Enforcement to Question People's Immigration Status*, SPOKESMAN-REV. (Jan. 30, 2017), http://www.spokesman.com/stories/2017/jan/30/idaho-house-panel-introduces-immigration-bill-targ/ [https://perma.cc/8LB2-LYYL].

103. Abby Broyles, *"You Incentivize a Lot of Bad Things," Oklahoma Senator Files Bill to Ban Sanctuary Cities in Oklahoma*, OKLA.'S NEWS 4 (Feb. 1, 2017), http://kfor.com/2017/02/01/you-incentivize-a-lot-of-bad-things-oklahoma-senator-files-bill-to-ban-sanctuary-cities-in-oklahoma/ [https://perma.cc/CE4N-8G88].

104. Ariana Maia Sawyer, *Lawmaker Introduces Tennessee 'Sanctuary City' Ban*, TENNESSEAN (Feb. 8, 2017), http://www.tennessean.com/story/news/politics/2017/02/08/lawmaker-introduces-tennessee-sanctuary-city-ban/97166104/ [https://perma.cc/XH3Y-RURK].

105. *See* H.B. 179, 132d Gen. Assemb., Reg. Sess. (Ohio 2017) (providing removal and prosecution of the local government officers). For further explanation of the bill, see Jessie Balmert, *Criminal Penalties for Cranley & Sanctuary City Advocates?*, CINCINNATI.COM (Feb. 6, 2017), http://www.cincinnati.com/story/news/politics/2017/02/06/criminal-penalties-john-cranley-cincinnati-sanctuary-city-pushers/97542278/ [https://perma.cc/H79G-PUX7].

106. S.B. 4, 85th Leg., Reg. Sess. (Tex. 2017) (enacted); *see* TEX. GOV'T CODE §§ 752.053, .056 (West 2017); TEX. PENAL CODE ANN. § 39.07 (West 2017); *see also* Priscilla Alvarez, *Will Texas's Crackdown on Sanctuary Cities Hurt Law Enforcement?*, ATLANTIC (June 6, 2017), https://www.theatlantic.com/politics/archive/2017/06/texas-sb4-immigration-enforcement/529194/ [https://perma.cc/S423-JUGX].

repeal them after express preemption. Punitive preemptive laws seek to deter cities from—and punish cities for—passing ordinances that are in conflict with state law.[107] These punitive laws fall into three broad categories: privately enforced civil penalties against local officials and governments, state-enforced fiscal sanctions for local governments, and criminal penalties (and possibly removal) for elected officials.[108] A number of state firearms preemption statutes are punitive in design, as noted above.

A broader form of punitive preemption was adopted by Arizona in 2016.[109] It requires the Arizona Attorney General to investigate local laws at the request of any state legislator.[110] If the Attorney General finds the ordinance in conflict with state law or the Arizona constitution, the local government must resolve the violation within thirty days or face a loss of shared state money.[111] Similar measures have been adopted in Texas and Florida and are under consideration by other states.[112]

More common are state laws that preempt for no obvious regulatory purpose. In the conventional case, state law expressly preempts local law or impliedly does so by occupying a field—that is, by replacing a local regulatory scheme with a statewide one. The purpose of the state legislation is not only to preempt but to advance a substantive policy goal or advance statewide interests in uniformity and consistency. But much of recent state law preemption is simply deregulatory. The state law does not replace a local scheme of regulation with a contrary state one, but rather simply bars the locality from regulating at all.

Professor Richard Briffault has called this "deregulatory preemption."[113] It operates by frustrating or blocking local regulations simpliciter. For example, the Florida legislature has adopted statutes preventing local governments from regulating smoking, fire sprinklers, nutrition and food policy, the sale or use of polystyrene products, hoisting equipment, beekeeping, fuel terminals, wireless alarm systems, paid sick leave and other employment benefits, moving companies, biomedical waste

107. *See Legal Strategies to Counter State Preemption and Protect Progressive Localism: A Summary of the Findings of the Legal Effort to Address Preemption (LEAP) Project*, BETTER BALANCE (Aug. 9, 2017), https://www.abetterbalance.org/resources/legal-strategies-to-counter-state-preemption-and-protect-progressive-localism-a-summary-of-the-findings-of-the-legal-effort-to-address-preemption-leap-project/ [https://perma.cc/Q7Z6-J6BG] [hereinafter *Legal Strategies*].

108. *See id.* (giving as examples several states that have adopted various punitive preemption measures since 2011).

109. It was introduced as SB 1487, codified at ARIZ. REV. STAT. § 41-194.01 (2017).

110. *Id.*

111. *Id.*

112. FLA. STAT. § 790.33 (2017) (providing up to $5,000 penalties for elected officials who violate preemption); TEX. GOV'T CODE § 752.056 (West 2017) (withholding state revenues from sanctuary jurisdictions); *see also* H.B. 76, 64th Leg., 1st Reg. Sess. (Idaho 2017) (withholding sales tax funds from government entities that prohibit or discourage the enforcement of immigration law).

113. Thanks to Richard Briffault for this insight.

in city landfills, plastic bags, and milk and frozen desserts.[114] In addition, Florida and other states are considering blanket preemption laws that bar localities from regulating any "business, profession, and occupation unless the regulation is expressly authorized by general law."[115] A more far-reaching proposal is to preempt the local regulation of matters relating to "commerce, trade, and labor."[116] These statutes function merely to deny localities certain regulatory powers, rather than to protect actual policies adopted at the state level.

Finally, there is a strand of what might be called vindictive or retaliatory preemption. Retaliatory preemption occurs when state law preempts more local authority than is necessary to achieve the state's specific policy goals, when the state threatens to withhold funds in response to the adoption of local legislation, or when the state threatens all cities with preemptive legislation in response to one city's adoption of a particular policy or ordinance. The bathroom bill adopted in North Carolina was a form of vindictive preemption. Not only did the legislature preempt Charlotte's local transgender access ordinance, it also preempted all other North Carolina cities' antidiscrimination, contracting, and minimum wage laws.[117]

State legislatures can threaten retaliation informally as well. An example is the targeting of sanctuary cities in Texas and other states with the threat of new broad-based preemption bills that limit municipal power across the board.[118] The withdrawal of local authority to regulate entire subject matters is a potent threat meant to chill cities' adoption of particularly disfavored policies.

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114. FLA. STAT. § 386.209 (2017) (smoking); § 633.206 (2017) (fire safety); § 500.90 (2017) (polystyrene products); § 489.113(11) (2017) (hoisting equipment); § 568.10 (2017) (confiscation of liquors); § 163.3206 (2017) (fuel terminals); § 553.793 (2017) (wireless alarm systems); § 218.077 (2017) (wage and employment benefits); § 507.13 (2017) (movers of household); § 381.0098(8) (2017) (landfills); § 403.7033 (2017) (plastic bags); § 502.232 (2017) (milk and frozen desserts).

115. H.B. 17, 25th Leg., Commerce Comm. (Fla. 2017) (bill rejected); *see also* Riverstone-Newell, *supra* note 23, at 417–18 (noting the trend in preemption laws being interpreted as encompassing all state laws, rather than discrete policy areas); Jeff Weiner, *Local Governments Decry Bill that Would Limit Regulations*, ORLANDO SENTINEL (Mar. 17, 2017), http://www.orlandosentinel.com/news/politics/os-legislature-ban-local-regulations-20170307-story.html [https://perma.cc/SN37-PYKE] (noting concern over the overbreadth of H.B. 17).

116. S.B. 1158, 25th Leg., Comm. on Commerce & Tourism (Fla. 2017) (bill rejected). For more information on the bill, see FLA. SENATE, https://www.flsenate.gov/Session/Bill/2017/01158 [https://perma.cc/UFK6-6EDC].

117. H.B. 2, 2016 Gen. Assemb., 2d Extra Sess. (N.C.).

118. Madlin Mekelburg, *Local Officials Fear State Retaliation over 'Sanctuary Cities' Lawsuits*, EL PASO TIMES (July 6, 2017), http://www.elpasotimes.com/story/news/politics/texlege/2017/07/06/local-officials-fear-state-retaliation-over-sanctuary-cities-lawsuits/444215001/ [https://perma.cc/FD7N-3JRY] (describing Texas localities' concern that Governor Abbot would retaliate against them for filing suit over the new sanctuary city law).

II. Our Federalism's Anti-Urbanism

Why such hostility to city regulation? In many cases, state preemption represents the normal workings of a multitiered system of government. As is clear from the landscape of state preemptive laws, preemption is often a strategy of industry and trade groups seeking more favorable legislation at the state level. There is nothing particularly surprising about this shifting of scales; it occurs in any federal or quasi-federal system in which there is significant overlap of regulatory authority. The vertical fragmentation of authority in a three-tiered political system provides for multiple bites at the legislative apple.

The rise of state law preemption does not merely reflect a concerted string of strategic victories by deregulation-seeking interest groups, however. The recent spate of preemptive state legislation also reflects a structural bias against local government—in particular against city government. What these preemptive state laws illustrate is the continuing political and policy hostility to the exercise of municipal authority writ large.

As I argue below, an enduring feature of American federalism is its anti-urbanism. State-based federalism appears by design to produce weak cities. Cities are vulnerable to state intervention because regional governments have many reasons to ignore or override local decision makers. First, states and state officials are in competition with cities and city officials for political power and economic spoils. Second, the U.S. Constitution favors rural over city voters—favoritism that is exacerbated by a first-past-the-post electoral system that permits political gerrymandering. But even if gerrymandering were outlawed, cities would still be vulnerable to state intervention. The structure of state-based federalism itself impedes the decentralization of real authority to substate governments. And third, home rule protections—in states that have them—tend to limit city power instead of advancing it.

A. The Problem of States

As to the first point, the history and more recent prominence of state–city conflicts suggest that the exercise of municipal power is regularly contested. That local governments lack power in a federal system might at first be surprising, but as a number of commentators have pointed out, federal systems of government tend to be *less* decentralized than unitary ones.[119]

119. *See* Frank B. Cross, *The Folly of Federalism*, 24 CARDOZO L. REV. 1, 35–36, 39–40 (2002) (arguing that the benefits of decentralization are derived primarily from independent local governments and that unitary, rather than federal, governments provide greater authority to local municipalities); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 911, 914 (1994) (contending that federalism and decentralization are distinct concepts and that the structure of federal governments, as opposed to unitary governments, discourages decentralization); *see also* Pradeep Chhibber & E. Somanathan, Are Federal Nations Decentralized? Provincial Governments and the Devolution of Authority to Local Government 2, 4, 8 (May 28, 2002) (unpublished manuscript) (on file with Stanford University)

Instead of fostering local power, the existence of regional governments appears to impede it.

What is it about U.S. states that impedes the devolution of power to U.S. cities? There are a number of possibilities. First, implementation and monitoring in a unitary government are costly, and so we might expect such a government to devolve significant powers and responsibilities to smaller-scaled entities, many of them smaller than U.S. states. The boundaries of regional governments—and this is certainly true of American states—are fairly arbitrary. Each state's jurisdictional reach is a function of geography and history, not a result of a considered evaluation of the needs of a particular geographically concentrated population. City boundaries, on the other hand, can roughly cohere with an identifiable constituency. In the absence of strong cultural or historical reasons militating in favor of a particular federal structure, municipal or metro-area boundaries seem more relevant to governing than do regional ones.

Second, and relatedly, in a federal system, regional or state governments take up the policy space that would otherwise be occupied by local governments. As Frank Cross and others have argued, the existence of a regional tier of government always impedes localism because it introduces a constraint on local officials, who otherwise would have unmediated relationships with their own constituents and with the central authority.[120]

No doubt, a central authority can be dictatorial, as in any hierarchical system. But often central officials need the assistance and cooperation of local officials to implement national directives—and so might be more responsive to the exercise of local discretion, something regional government officials might be less inclined to do. Moreover, because states share so much political and policymaking space with their local governments, state preferences will likely predominate. Elisabeth Gerber and Daniel Hopkins have found that municipal policy outcomes tend to diverge when there is less shared authority between cities, states, and the federal government in a given policy arena.[121]

Indeed, state lawmakers very much conceive of themselves as representing "local" constituencies—as in fact do many members of Congress. This points to a third reason for the dominance of states in a federal

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(positing that federal government systems, in contrast with unitary systems, are less decentralized because they use a middle government tier—states—that reduce resources to and weaken local governments). *But see* Roderick M. Hills, Jr., *Is Federalism Good for Localism? The Localist Case for Federal Regimes*, 21 J.L. & POL. 187, 191–95, 210 (2005) (criticizing Cross, Rubin, and Feeley).

120. *See* Cross, *supra* note 119, at 27–28, 33–36 (arguing that local government power is significantly curtailed by state governments, which often limit decentralization at the local level).

121. Elisabeth R. Gerber & Daniel J. Hopkins, *When Mayors Matter: Estimating the Impact of Mayoral Partisanship on City Policy*, 55 AM. J. POL. SCI., 326, 327–29, 337 (2011) (suggesting that mayoral partisanship has a greater effect on local policy when state and federal governments exercise less authority).

system: vertical redundancy.[122] City leaders do not enjoy a monopoly on local representation, nor are cities *qua* cities represented in the state or national legislatures. Instead, numerous elected officials—in statehouses and in Congress—can validly assert that they represent locals, even as they do not represent the city as a whole. The political competition that results is invariably going to result in state legislative aggrandizement. There is no good political reason for state officials to act with restraint as long as they are being responsive to their particular slice of the electorate. Because state legislators are exercising "local" power, they do not perceive a significant tension between local control and state preemptive legislation.

This problem of vertical political competition drove the original movement for home rule at the turn of the century. State legislators, seeing political and economic opportunities in the burgeoning industrial city, began to govern the city directly from the state legislature.[123] State and local political machines were either entwined or state machines co-opted local ones. In an effort to clean up municipal government, Progressive Era reformers sought to insulate the city from state legislative interference. Home rule was not only an effort to free cities from control by rural interests, but was meant to free the city from the state's political machine, including the city's own state legislative delegation.[124] This was largely a "good government" strategy. Reformers sought first to insulate city government from a (corrupt and meddling) state government after which they could proceed to the business of electing pro-reform candidates within the city.

As the Progressive reformers understood, political competition in combination with state-level representation of "local" interests generate significant incentives for state officials to intervene. Unlike the rural county or the bedroom suburb, the city is the chief focus of this intervention, for a number of obvious reasons. First, the primary infrastructure and wealth of a state are often concentrated in its cities or in wider metropolitan areas. That was certainly the case at the turn of the century, when state legislators sought to apportion the city's spoils to favored interests.

To be sure, the demographic landscape is more complicated today, as suburbanization has led in many cases to the deconcentration of population from the central city. But that fact should not be overstated. The trend away from the central city has reversed in many places. And the city–suburb line is simply less relevant, in terms of density, relative amounts of retail and office space, and commuting patterns. Moreover, even declining

122. *See generally* SCHRAGGER, *supra* note 20, at 89–96.

123. DAVID R. BERMAN, LOCAL GOVERNMENT AND THE STATES: AUTONOMY, POLITICS, AND POLICY 57–61 (2003) ("State legislatures, in effect, became 'spasmodic city councils.'").

124. *Id*. at 62 ("By the late nineteenth century, urban reformers linked together through associations such as the National Municipal League set off in quest of local home rule and a form of local government insulated from state government that would enable cities to cope with the pressures of industrialization and urbanization.").

postindustrial American cities often continue to hold significant land-based, institutional, and infrastructural wealth. Leading civic institutions are also often found in the larger municipalities in their states, and particularly in capital cities.

Second, cities are often the most concentrated and populated jurisdictions in a state. Because they are often larger than other individual local-government units, the exercise of city power affects more constituencies and impacts more interest groups. Those constituencies and interest groups will naturally gravitate to the state legislature to seek relief.

Third, again because of size and diversity, cities may be more heterogeneous in terms of political preferences—both internally and in relation to noncity jurisdictions. Political heterogeneity will produce more—and at times, more controversial—governing.

And finally, fourth, cities simply need more government than do rural or suburban local jurisdictions. The range of city policies that can produce conflict is large. So too, the ideological distance between noncity legislators, who may resist on principled grounds the expansion of government, and city legislators, who may require "bigger" government to resolve urban issues, may be quite significant.[125]

These features of state-based federalism are independent of particular party affiliations. Whether Democrats or Republicans hold power locally or at the state level, the impulse to govern from the state is similar. Andrew Cuomo and Bill de Blasio are both Democrats, but the Governor of New York and the Mayor of New York City are regularly at odds when it comes to city policymaking. Cuomo, in conjunction with the New York state legislature, opposed or co-opted de Blasio's policies regarding charter schools,[126] congestion pricing,[127] a millionaire tax,[128] the living wage,[129] and universal

125. For evidence of increasing state–city conflict, see Katherine Levine Einstein & David M. Glick, *Cities in American Federalism: Evidence on State–Local Government Conflict from a Survey of Mayors*, 47 PUBLIUS: J. FEDERALISM 599 (2017).

126. Marc Santora, *Cuomo Vows to Defend Charter Schools, Setting Up Another Battle with de Blasio*, N.Y. TIMES (Mar. 4, 2014), https://www.nytimes.com/2014/03/05/nyregion/cuomo-vows-to-defend-charter-schools-setting-up-another-battle-with-de-blasio.html?_r=0 [https://perma.cc/H7LN-EN6T].

127. J. David Goodman, *Mayor de Blasio Says He 'Does Not Believe' in Congestion Pricing*, N.Y. TIMES (Aug. 21, 2017), https://www.nytimes.com/2017/08/21/nyregion/de-blasio-congestion-pricing.html [https://perma.cc/35TL-AN4J].

128. Jimmy Vielkind, *Shared Anxiety over Trump Helps Cool Cuomo-de Blasio Feud*, POLITICO (Jan. 30, 2017), https://www.politico.com/states/new-york/albany/story/2017/01/trump-thaws-cuomo-de-blasio-feud-109138 [https://perma.cc/FA7S-44ZU].

129. Thomas Kaplan, *Cuomo Rejects Another Plan by de Blasio: Minimum Wage*, N.Y. TIMES (Feb. 11, 2014), https://www.nytimes.com/2014/02/12/nyregion/cuomo-rejects-another-plan-by-de-blasio-minimum-wage.html [https://perma.cc/6UK6-Q9MM].

pre-K.[130] To be sure, New York is somewhat unique because of its size, scale, and importance. The city draws both attention and resistance from internal and external constituencies. But so do many other less well-known cities in every other state. The existence of regional governments that are governed by legislators elected by local constituencies guarantees that kind of scrutiny.

B. Malapportionment

American anti-urbanism is not simply a function of state-based federalism, however. Certain kinds of federal systems (for example, systems in which cities *qua* cities are represented) might be more amenable to local governing. The problem for American cities is exacerbated by a state-based system that favors rural over urban jurisdictions. As Professor Paul Diller has thoroughly documented, anti-urban bias is built into the basic structure of the U.S. Constitution and is a notable feature of state and congressional legislative districting.[131]

As to the former, the malapportionment of the Senate is a significant impediment to city power. As commentators have repeatedly observed, by giving each state equal suffrage in the U.S. Senate, the U.S. Constitution favors less populated, rural states over highly populated, urban ones.[132] The result is that states in the rural Midwest such as Wyoming, Montana, and the Dakotas are significantly overrepresented, while more urban states, like California and New York, are significantly underrepresented. As Diller concludes, "the U.S. Senate's egregious violation of one-person, one-vote works to the distinct detriment of voters in highly populous states with major metropolitan areas."[133]

To be sure, a state's total population may not be an accurate proxy for the state's urban population. A small state's population might be concentrated in one large city while a large state's population might be more evenly dispersed. If less populated states have a high percentage of urban dwellers, then the Senate's malapportionment could favor urban areas over rural ones—think Connecticut, Rhode Island, and Delaware, for instance.

That being said, the measures of population density in the states tend to reflect total population, at least roughly. Nine of the top fifteen states in population are also among the top fifteen in density, and higher population

130. Michael M. Grynbaum & Thomas Kaplan, *Pre-K Plan Puts Cuomo at Odds with de Blasio on Funding*, N.Y. TIMES (Jan. 21, 2014), https://www.nytimes.com/2014/01/22/nyregion/cuomo-prekindergarten-proposal.html [https://perma.cc/FC8F-AAAT].

131. Paul A. Diller, *Reorienting Home Rule: Part 1–The Urban Disadvantage and State Law-making*, 77 LA. L. REV. 287, 291 (2016).

132. *Id.*

133. *Id.* at 322.

states generally fall into the top half of states in density.[134] Moreover, metropolitan areas seem to be growing the fastest, both across the country and within states, as the top five fastest growing counties from 2015–2016 were all near various cities.[135] Population has moved steadily out of the agricultural Midwest and toward the urbanized coasts.[136] And while there have been declines in populations in upper-Midwestern cities, the growth in Sunbelt cities and metro areas has more than compensated.[137] Consider that the Atlanta metropolitan statistical area (MSA) contributes 56% of the population of Georgia and that the Denver MSA contributes 51% of Colorado's.[138]

The effect of shifting populations toward metropolitan areas is increasing gaps between high-population/higher density places and low-population/lower density places. The difference between the most populous state and the least has increased dramatically, and so has the gap between the most populated parts of particular states and the least.[139] Particularly as

134. *Resident Population Data: Population Density*, U.S. CENSUS BUREAU, https://www.census.gov/2010census/data/apportionment-dens-text.php [https://perma.cc/5QRP-LBJC] (data collected in 2010 indicating that eight out of the fifteen are among the top in population density).

135. Reid Wilson, *Fastest-Growing Counties Show Growth in Florida, Western US*, HILL (Mar. 23, 2017), http://thehill.com/homenews/state-watch/325415-fastest-growing-counties-show-growth-in-florida-western-us [https://perma.cn/28E2-UXV9]. Harris County, Texas, is near Houston; Maricopa County, Arizona, is near Phoenix; Clark County, Nevada, is near Las Vegas; King County, Washington, is near Seattle; Tarrant County, Texas, is near Fort Worth.

136. *Shifting Geography of Population Change*, U.S. DEP'T AGRIC. (June 13, 2017), https://www.ers.usda.gov/topics/rural-economy-population/population-migration/shifting-geography-of-population-change/ [http://perma.cc/6CC2-3C9B] (noting population loss in Midwestern nonmetropolitan counties and population growth along the Pacific, Atlantic, and Gulf coasts).

137. Tanvi Misra, *The Rise of the Sun Belt*, CITYLAB (Dec. 30, 2016), https://www.citylab.com/equity/2016/12/us-population-growth-rate-sun-belt-states/511844/ [https://perma.cc/KY6S-2QUT].

138. *Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2016*, U.S. CENSUS BUREAU, https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk [https://perma.cc/RX62-PTZK].

139. In 1950, the most populous state, New York, had a population of 14,830,192, while the least populous territory, Alaska, had 128,643, a difference of 14,701,549. U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, CENSUS OF POPULATION: 1950, at 32-6, 51-4 (1952). The gap has grown with each decennial census, with an estimated gap for 2010 between California (population: 37,253,956) and Wyoming (population: 563,626) of 36,690,330, an increase of almost 150%. U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, CALIFORNIA: 2010—SUMMARY POPULATION AND HOUSING CHARACTERISTICS 2 (2012); U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, WYOMING: 2010—SUMMARY POPULATION AND HOUSING CHARACTERISTICS 2 (2012); *see* MICHAEL RATCLIFFE, A CENTURY OF DELINEATING A CHANGING LANDSCAPE: THE CENSUS BUREAU'S URBAN AND RURAL CLASSIFICATION, 1910 TO 2010, at 1–3 (2015), https://www2.census.gov/geo/pdfs/reference/ua/Century_of_Defining_Urban.pdf [https://perma.cc/LXX5-4UHN] ("In the 100 years of [urban–rural] classification, the urban population has increased from 45 percent of the nation's total in 1910 to nearly 81 percent in 2010."); U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, UNITED STATES SUMMARY: 2010, at 13–15 tbl.7 (2012), https://www.census.gov/prod/cen2010/cph-2-1.pdf [https://perma.cc/S656-FNRJ] (providing data on urban and rural populations, which demonstrates an overall increase in urban populations over time). For further information, see *Census of Population and Housing*, U.S.

metropolitan-area populations take up ever larger proportions of their states as well as increasing percentages of the total population of the nation, the Senate's malapportionment will continue to result in significant underrepresentation of urban interests. The malapportionment of the Electoral College, which allocates votes on the basis of a state's total congressional representation, also results in bias against urban voters.

State and congressional legislative districting also leads to an anti-urban bias. State legislative and congressional districts have to abide by the one-person, one-vote rule explicitly stated in *Reynolds v. Sims*,[140] so as a matter of theory cities should do no better or worse than other parts of a state in Congress or in state legislatures.

Nevertheless, the effect of one-person, one-vote on cities was and is complicated. At the time of *Baker v. Carr*,[141] advocates believed that they were remedying the urban disadvantage in state legislatures by pursuing one-person, one-vote.[142] But there is some evidence that despite malapportionment, nonurban state legislators often deferred to urban representatives in policy areas that were highly salient to city constituencies.[143] Following the apportionment cases, however, suburban interests gained representation at a cost to both rural and urban constituencies. Those suburban interests were in some cases less willing to defer to cities than were the rural legislators.

Add to this partisan gerrymandering and geographical sorting and the legislative anti-urban bias is magnified.[144] The gerrymandering story is well known, with Democrats outpolling Republicans nationally and in many states, but still falling well short of legislative majorities in the House.[145] Diller observes that "[i]n states like Michigan, North Carolina, and Ohio, Republicans lost the statewide popular vote for House candidates yet comfortably won the majority of the state's House seats."[146] State legislative races are often similarly skewed by district lines that protect Republicans and

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CENSUS BUREAU, https://www.census.gov/prod/www/decennial.html [https://perma.cc/3V8V-4ZGA].

140. 377 U.S. 533, 547–51 (1964).

141. 369 U.S. 186 (1962).

142. Roy A. Schotland, *The Limits of Being "Present at the Creation"*, 80 N.C. L. REV. 1505, 1505 (2002) ("Doubtless some observers will persist in believing that the *Baker* Court intended to 'help the cities.'").

143. *Id.* at 1505 & n.2.

144. Diller, *supra* note 131, at 291.

145. *See* Nate Cohn, *Debate Is Over: Gerrymandering Is Crucial to G.O.P.'s Hold on House*, N.Y. TIMES (Aug. 2, 2017), https://www.nytimes.com/2017/08/02/upshot/its-time-to-end-the-old-debate-over-gerrymandering.html?smprod=nytcore-ipad&smid=nytcore-ipad-share&_r=0 [https://perma.cc/3XSD-LVUV] (noting that gerrymandering likely cost the Democrats seven to twelve congressional seats in 2012).

146. Diller, *supra* note 131, at 326; *see also* Brief for Int'l Mun. Lawyers Ass'n as Amici Curiae in Support of Appellees, Gill v. Whitford, 137 S. Ct. 268 (2017) (No. 16-1161).

limit the number of Democratic seats, despite statewide majorities favoring Democrats.[147]

Of course, if Democrats and Republicans were evenly distributed throughout a state, such gerrymanders would be difficult to make. But they are not. Democrats are heavily represented in urban areas, and those areas are relatively easy to isolate, either by chopping them up and absorbing them into larger Republican-controlled districts, or by concentrating them into a few, safe Democratic districts.

The anti-urban bias is not direct; it is a function of a political bias that emerges because rural and suburban voters tend to vote Republican, while urban dwellers tend to vote Democratic, and increasingly so. Democrats are able to win the statewide vote because they amass huge majorities in uncompetitive, urban districts. Republicans more readily control statehouses and congressional seats because they amass smaller majorities in gerrymandered rural and suburban districts. Republicans "waste" fewer votes because their base is more evenly distributed across the state. Indeed, even in the absence of gerrymandering, as Jowei Chen and Jonathan Rodden have pointed out, Republicans would do better than Democrats because their voters are not so geographically concentrated.[148]

According to many recent studies, this geographical sorting by affiliation is increasing.[149] In twenty-five states, the state senate, house, and governorship are controlled by Republicans; in six states, Democrats similarly dominate.[150] In states in which Republicans dominate, cities are increasingly isolated, despite generating significant Democratic votes.

A consequence is that one of the two major American political parties can almost entirely ignore a state's urban constituents. At least when it comes to the House and to state legislatures, Republicans can govern comfortably without the cities, relying almost exclusively on noncity voters. Democrats are less able to do the same with rural and suburban voters, who are not as concentrated into particular districts. Statewide races require a more geographically neutral strategy, of course. But in many states and in Congress, when Republicans govern, cities are going to be marginalized, as their votes are not needed.

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147. David A. Lieb, *Analysis Indicates Partisan Gerrymandering Has Benefitted GOP*, U.S. NEWS (June 25, 2017), https://www.usnews.com/news/best-states/virginia/articles/2017-06-25/ap-analysis-shows-how-gerrymandering-benefited-gop-in-2016 [https://perma.cc/9PEN-9SWZ].

148. Jowei Chen & Jonathan Rodden, *Unintentional Gerrymandering: Political Geography and Electoral Bias in Legislatures*, 8 Q.J. POL. SCI. 239, 241–43, 247 (2013).

149. *See, e.g.*, BILL BISHOP & ROBERT G. CUSHING, THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICA IS TEARING US APART 5–15 (2008); Paul Taylor, *The Demographic Trends Shaping American Politics in 2016 and Beyond*, PEW RES. CTR. (Jan. 27, 2016), http://www.pewresearch.org/fact-tank/2016/01/27/the-demographic-trends-shaping-american-politics-in-2016-and-beyond/ [https://perma.cc/XSS6-DBTM].

150. *State Government Trifectas*, BALLOTPEDIA, https://ballotpedia.org/State_government_trifectas [https:/perma.cc/2E8P-3G75].

C. Home Rule Failure

The persistent anti-urban bias of state and national legislators has long been a concern. The marginalization of cities occupied reformers well before the rise of computerized gerrymandering, and (as noted) the one-person, one-vote cases sought directly to address the problem of urban under-representation.[151]

Most significantly, the development of home rule in the states was an effort to protect cities—especially big cities—from a legislature that refused to let them govern.[152] The failure of home rule thus requires discussion, for it was intended to prevent the legislative targeting of cities, but it has become mostly toothless in that regard.[153]

Recall that the first state constitutional home rule provisions were urged by reformers responding in many cases to a series of attacks on the city. Those attacks included the famous "ripper bills": state statutes that transferred control of specific municipal responsibilities or entire municipal departments to state agencies or officers, or that simply removed local elected officials altogether.[154] Ripper bills were common. As Lyle Kossis notes, in New York alone, the state passed 212 laws in 1870 that controlled local functions in towns and villages throughout the state.[155] The well-known "Pittsburgh ripper" of 1901 removed the city's mayor from office.[156]

Home rule constitutional reforms, accompanied in many cases by bans on special legislation—which bar state legislatures from targeting specific cities—limited some of these more egregious practices. But the original

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151. *E.g.*, Reynolds v. Sims, 377 U.S. 533, 556–57 (1964); Gray v. Sanders, 372 U.S. 368, 379 (1963).

152. BERMAN, *supra* note 123, at 62.

153. For an excellent account of the "failed promise of intrastate federalism," see Kenneth A. Stahl, *Preemption, Federalism, and Local Democracy*, 44 FORDHAM URB. L.J. 133, 163–77 (2017) (discussing the principles of intrastate federalism, its practical limitations and failures, and potential solutions).

154. Richard Briffault, *Voting Rights, Home Rule, and Metropolitan Governance: The Secession of Staten Island as a Case Study in the Dilemmas of Local Self-Determination*, 92 COLUM. L. REV. 775, 805–06 (1992); Lyle Kossis, Note, *Examining the Conflict Between Municipal Receivership and Local Autonomy*, 98 VA. L. REV. 1109, 1125–26 (2012).

155. *See* Kossis, *supra* note 154, at 1126:

> For example, one ripper bill in Michigan was used to transfer the provision of local utilities to state boards, and another in New York was used to lodge control over local police forces in the state capitol. Perhaps most strikingly, Pennsylvania used a ripper bill to transfer control over the construction of City Hall in Philadelphia to the state. What is more, ripper bills were quite common. In New York alone, the state passed 212 laws in 1870 that controlled local functions in towns and villages throughout the state.

For the New York statistics, Kossis's note cites HOWARD LEE MCBAIN, THE LAW AND THE PRACTICE OF MUNICIPAL HOME RULE 8 (1916).

156. FRANK C. HARPER, PITTSBURGH: FORGE OF THE UNIVERSE 149–54 (1957); LINCOLN STEFFENS, THE SHAME OF THE CITIES 138–42 (1957); *see also* C.D. Scully, Note, *Pittsburg: The Pittsburg Ripper*, ANNALS AM. ACAD. POL. & SOC. SCI., Mar. 1902, at 135, 135–36.

version of home rule usually limited city power to matters of "local" concern, and local concern was almost always interpreted narrowly by state courts and against the background presumption that the state still held the general police power.[157] Many reformers—even at the time—were unimpressed. As Robert Brooks noted in his 1915 *Political Science Quarterly* article, "Metropolitan Free Cities," even the most liberal home rule schemes reserve "a goodly number of powers" to the state, "stop[ping] just short of the limits within which it would confer any real freedom upon our cities."[158]

Modifications to home rule in the 1950s and 1960s sometimes gave cities more flexibility, though still limited autonomy. Instead of limiting the exercise of city power to "local" matters, some states adopted blanket grants of the police power to local governments, subject to the denial of that power by a specific act of the state legislature.[159] This "legislative" home rule permits local governments wide discretion in initiating legislation, but no or very limited protection against state law preemption.[160] The upshot is that local governments are still vulnerable to a state's exercise of its police power. And home rule initiatives in the 1950s and 1960s did not include the power to modify the state's "private law"—tort, contract, property, and domestic relations.[161] The limited reach of home rule is strikingly apparent.

Even if state constitutional home rule provisions had more teeth, however, commentators have questioned the conceptual viability of grants of local authority detached from substantive policies. Judge David Barron, for example, has argued that "[l]ocal governments do not—indeed, cannot—possess anything like local legal autonomy," and that though cities "may operate within a legal structure that seems committed to securing their right to home rule, . . . that same structure subjects them to a variety of legal limitations."[162] As Barron argues, home rule is not an identifiable sphere of local autonomy, but rather a constellation of grants and limitations that "powerfully influences the substantive ways in which cities and suburbs act."[163]

Barron concludes that our current, late-twentieth-century version of home rule favors suburban power to protect property values over urban power to promote equality.[164] Courts conventionally hold that zoning and other land use matters fall within the core of home rule authority, thus

157. Richard Briffault, *Home Rule and Local Political Innovation*, 22 J.L. & POL. 1, 18–19 (2006).

158. Robert C. Brooks, *Metropolitan Free Cities: A Thoroughgoing Municipal Home Rule Policy*, 30 POL. SCI. Q. 222, 229–30 (1915).

159. *See* Diller, *supra* note 131, at 1118.

160. *See id.* at 1119.

161. *Id.* at 1115.

162. David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2263 (2003).

163. *Id.*

164. *Id.*

vindicating a power that often favors exclusionary suburbs.[165] At the same time, courts are skeptical of city efforts to annex territory, adopt rent control, or embrace other policies that might redistribute away from property owners or that might benefit cities to the detriment of suburbs.[166]

Similarly, Professor Kenneth Stahl has argued that the common conception of home rule as a boundary between local and nonlocal results in a skewed version of local power, one that is associated with the protection of home and family as opposed to the regulation of the market.[167] Courts tend to treat land use, education, and housing as quintessentially local, while the municipal regulation of commercial and other market actors is often rejected based on the imperative of "statewide uniformity."[168] Home rule is most robust insofar as it is associated with protection of a sphere of home life—those matters that are "private" and "associational."[169] By contrast, home rule has less traction when it comes to commercial or redistributional policies—those policies that seem somehow more "public" and "transactional."[170]

What both Barron and Stahl highlight is home rule's anti-urban bias. Localism is protected by home rule grants. But that localism is of a certain kind, more readily enjoyed by suburban jurisdictions and easily effaced when locals seek to regulate powerful commercial and financial actors.[171] Cities that seek to regulate global financial capital find their powers circumscribed, despite the significant local costs that deregulated transnational mobile capital often imposes.

Home rule cannot avoid this bias. To the extent that cross-border commercial interests are disproportionately located in cities, city power by definition threatens "nonlocal" interests. By design, home rule does not readily permit the regulation of cross-border markets. In other words, home

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165. *See, e.g.*, 2 W. MIKE BAGGETT & BRIAN THOMPSON MORRIS, TEXAS PRACTICE GUIDE: REAL ESTATE LITIGATION § 8:11 (2017) (explaining that both statute and case law grant broad zoning powers to Texas municipalities).

166. *See* Barron, *supra* note 162, at 2263 ("[T]he current rules of American local government law produce a form of home rule that assumes and reinforces a view of private property that disables local communities from promoting a different kind of development.").

167. Kenneth A. Stahl, *Local Home Rule in the Time of Globalization*, 2016 BYU L. REV. 177, 185–86 (2016).

168. *See* Am. Fin. Servs. Ass'n v. City of Oakland, 104 P.3d 813, 832 (Cal. 2005) (stressing the importance of uniform statewide regulations of commercial activities); *see also* Town of Telluride v. Lot Thirty-Four Venture, L.L.C., 3 P.3d 30, 39–40 (Colo. 2000) (determining that a rent-control policy in an isolated mountain town implicated a state interest of uniform economic policy and was therefore void).

169. Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1878 & n.108 (1994) (showing how courts give authority to local governments when the controversy is close to the "associational rights of individuals").

170. *See* Stahl, *supra* note 167, at 185–86.

171. *See id.* at 181–82 & nn.10–13 (acknowledging that courts regularly strike down local laws which regulate commercial and financial actors); *see also* Rick Su, *Have Cities Abandoned Home Rule?*, 44 FORDHAM URB. L.J. 181, 195 (2017) (suggesting that cities have been complicit in undermining the concept of home rule).

rule is "suburban." The combination of powers and limitations that constitutes the "local" has a substantive valence of suburban autonomy.

III. Forms of Anti-Urbanism

That home rule would favor forms of "suburban" power is unsurprising. The rise of the suburbs is a central trope of twentieth-century American political development. At midcentury, the deconcentration of central city populations began in earnest; Detroit's population was at its height from 1940 to 1950, when it topped out at 1.85 million residents as a result of WWII wartime growth.[172] The flight from the central city has been a driving force in state and national politics, aided and abetted by a range of government policies and reinforced by a rhetoric and ideology of suburban localism. Certainly, to understand the attack on the cities then, one must understand the suburban century.

The distinction between the dangerous city and the pastoral country was not invented in the twentieth century, however. The perception of the city as a problem to be fixed or a danger to be avoided existed long before the 1960s' riots. Thomas Jefferson thought that the city was unfit for a free, republican people, describing the "mobs of great cities" as a "degeneracy" and a "canker" on a country's constitution.[173] The Victorian city was identified with deviance, criminality, and corruption, at least when it came to the ethnic masses.

This Part identifies a number of strands of anti-urbanism that continue to shape attitudes toward the exercise of city power. The enduring anti-urban narrative suggests that the city is badly governed, bad for citizens' welfare, and bad for the nation. This narrative has encouraged past- and present-day efforts to beautify the city, to bring the civilizing benefits of nature to its inhabitants, or to disperse the urban population altogether. These efforts accelerated at the turn of the century, with the rise of the great industrial cities; they continued as those cities entered decline in the late twentieth century; and they persist despite the urban resurgence of the last few decades.

A. Antidemocratic Anti-Urbanism

The first strand of anti-urbanism consists of a skepticism of municipal government that takes root in the Progressive Era and that has never been entirely shaken. That skepticism begins with a conventional view—adopted then and still prevalent now—that American cities at the turn of the century were abysmally governed. As Jon Teaford notes in his study of late-1800s municipal government, observers of the newly industrializing American

172. *Detroit Population History 1900-2000*, SOMACON, http://www.somacon.com/p469.php [https://perma.cc/JEH8-UMYQ].

173. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 165 (William Peden ed., 1972).

cities generally agreed that the governing of those cities was a "conspicuous failure."[174] "[W]ithout the slightest exaggeration," wrote Andrew White in 1890 while president of Cornell, "the city governments of the United States are the worst in Christendom—the most expensive, the most inefficient, and the most corrupt."[175]

Teaford resists this historical narrative—his book is titled *The Unheralded Triumph* and he recites the great accomplishments of American cities in this period, despite their (mostly undeserved) reputation for poor governance.[176] So too have urban historians revised their accounts of the role of urban bosses and political machines in providing social services to the poor in an era of limited government.[177]

Yet the defining urban narrative cannot get far from the continual clash between bosses and reformers—"against a roughly sketched backdrop of municipal disarray."[178] Municipal politics is viewed as more corrupt than state or national politics, more prone to capture by special interests, more wasteful, and more incompetent.[179]

This narrative originally served to underwrite a reform agenda that often linked progressive good government reformers with business or corporate interests.[180] To be sure, Progressive Era reformers were often committed to using government—and in particular municipal government—to ameliorate social ills.[181] But they were also dedicated to technocratic solutions and were skeptical of machine politics. To accomplish their ends, Progressives often recommended replacing a "strong mayor" form of city government with a city manager model—giving over day-to-day control of city business to a nonelected professional.[182] This was of a piece with Progressive policy more generally—the impulse to shift power away from locally elected officials to state boards and commissions.[183]

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174. JON C. TEAFORD, THE UNHERALDED TRIUMPH: CITY GOVERNMENT IN AMERICA, 1870–1900, at 1 (1984).

175. *Id.* (quoting Andrew D. White, *City Affairs Are Not Political*, FORUM, Dec. 1890, at 357, 357).

176. *See id.* at 3–6 (giving various municipal accomplishments in the late nineteenth century and arguing that critics of American cities of that era "focused microscopic attention on [their] failures while overlooking [their] achievements").

177. *See, e.g.*, JOHN M. ALLSWANG, BOSSES, MACHINES, AND URBAN VOTERS 19–22 (1986) (noting that machine bosses were a major source of social services at the time).

178. TEAFORD, *supra* note 174, at 3.

179. *Id.*

180. *See* Barron, *supra* note 162, at 2292–93.

181. *See generally* Richard L. McCormick, *The Discovery that Business Corrupts Politics: A Reappraisal of the Origins of Progressivism*, 86 AM. HIST. REV. 247 (1981).

182. SCHRAGGER, *supra* note 20, at 101 (citing Harold Wolman, *Local Government Institutions and Democratic Governance*, *in* THEORIES OF URBAN POLITICS, 135, 138–39 (David Judge et al. eds., 1995)).

183. Richard C. Schragger, *Can Strong Mayors Empower Weak Cities? On the Power of Local Executives in a Federal System*, 115 YALE L.J. 2542, 2548 (2006) [hereinafter Schragger, *Strong*

Versions of this original reform agenda continue to emerge, often in mayoral contests. The idea of the "CEO mayor" who can bring discipline to municipal government and run it more efficiently is a common one.[184] Underlying these appeals to corporate competence is a general distrust of municipal power, a retreat to expertise, the valorization of business acumen as an antidote to municipal failure, and a suspicion of mass, unmediated urban democracy—a set of themes that municipal reformers have long asserted.

There have been dissenters to this original Progressive agenda. Frederic Howe, who served in the Ohio Senate and on the Cleveland City Council, is an example. Writing in 1905, he resisted the notion that the city should be treated as a business concern, to be run by businessmen.[185] He also resisted reformers' efforts to put the city's affairs in the hands of expert boards and commissions, arguing that urban reformers had "voted democracy a failure" and had convinced themselves that "mass government will not work in municipal affairs."[186]

In contrast, Howe argued for a robust urban democracy. He titled his 1905 book *The City: The Hope of Democracy*, and he advocated a popularly elected mayoralty with sufficient powers to act.[187] "The boss," he argued, "appears under any system, whether the government be lodged with the mayor, the council, with boards, or commissions."[188] But a centrally elected official can be held accountable in a way that numerous boards and commissions cannot. "Distrust of democracy has inspired much of the literature on the city," Howe wrote.[189] Taking power out of the hands of urban citizens was not the answer to municipal corruption. Urban citizens should instead be trusted to run their own affairs, as Howe believed that:

> [w] ith home rule secured, with popular control attained, with the city free to determine what activities it will undertake, and what shall be its sources of revenue, then the city will be consciously allied to definite ideals, and the new civilization, which is the hope as well as the problem of democracy, will be open to realization.[190]

Howe was in the minority, however. The current structure of state–local relations is generally the one inherited from Progressive Era constitution

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Mayors] ("The corporate model also dovetailed nicely with Progressive Era reformers' faith in expert administration."); *see also* SCHRAGGER, *supra* note 19, at 65–66; JON C. TEAFORD, THE RISE OF THE STATES: EVOLUTION OF AMERICAN STATE GOVERNMENT 20–24 (2002).

184. Schragger, *Strong Mayors*, *supra* note 183, at 2576 ("Municipal policymakers came to believe that the professionalization of city management would do more to promote city efficiency than its politicization.").

185. FREDERIC C. HOWE, THE CITY: THE HOPE OF DEMOCRACY 1–2 (1905).

186. *Id.* at 1.

187. *Id.* at 180.

188. *Id.* at 185.

189. *Id.* at 1.

190. *Id.* at 313.

makers in the early part of the twentieth century, though modified in various ways to limit city government, not to extend its reach.[191] After a brief flirtation with a strong mayor system, reformist organizations generally backed the council-manager model of municipal government, and that model remains dominant.[192] So does the division of authority among boards and commissions. Skeptical of local democracy, this institutional structure leads to the diffusion of authority, the dividing-up of government functions, and deference to state legislatures. It is supported by a long-standing narrative of municipal corruption—a deeply held belief that locally elected officials cannot be trusted.

In the present day, *antidemocratic* anti-urbanism is best illustrated by state takeovers of fiscally distressed municipalities. Despite the enormous structural reasons for the industrial city's long-term decline during the second half of the twentieth century, a conventional view has been that a city in fiscal crisis is a city whose politics is deeply deficient. This is the conventional story of the fiscal crises of the early 1970s, when cities like New York struggled and when urban observers asserted that cities were "ungovernable."[193]

Like the Progressives, present-day reformers turn to institutional fixes to attempt to solve macroeconomic problems. Michigan has appointed emergency managers for numerous struggling cities, the most well known being Detroit.[194] In light of the assumed links between fiscal failure and political failure, the necessity of imposing some external control over that city seemed obvious, even unavoidable. Scholars and policymakers advocate "dictatorships for democracy"—disbanding the city council and mayoralty

191. Starting in the 1970s, states added limits on the cities' taxing powers, an addition to the restrictions on debt adopted by Progressive Era reformers. *See* SCHRAGGER, *supra* note 20, at 220 ("[C]onstitutionalized fiscal policy is a product of a nineteenth-century reaction to state and municipal debt and a twentieth-century movement to restrict taxation . . . [resulting in] constraints designed to limit local fiscal flexibility.").

192. *See* Richard Schragger, *Strong Mayors*, *supra* note 183, at 2547–49 (comparing the short-lived nature of the "mayor's official ascendency" with the council-manager plan, which "was, and continues to be, attractive, as evinced by the steady increase in the number of cities that have adopted the [] plan").

193. *See*, *e.g.*, DOUGLAS YATES, THE UNGOVERNABLE CITY: THE POLITICS OF URBAN PROBLEMS AND POLICY MAKING 1–2, 5 (1977) (arguing that despite the drastic increase in spending levels during the 1970s, with New York City leading the way, cities did not provide solutions to growing urban problems, bolstering the conclusion that "the city is fundamentally ungovernable"); David Judge, *Pluralism* (pointing out that experiences in New York led commentators to assert that "policy making was fragmented to the point of chaos" and "such cities were deemed to be ungovernable" (internal quotations omitted)), *in* THEORIES OF URBAN POLITICS 13, 24–25 (David Judge et al. eds., 1995). For a recent revisionist account of the standard narrative, see KIM PHILLIPS-FEIN, FEAR CITY: NEW YORK'S FISCAL CRISIS AND THE RISE OF AUSTERITY POLITICS 4–7 (2017) (arguing that New York's fiscal crisis should not be understood as a parable of municipal fiscal irresponsibility).

194. An excellent treatment of these takeovers is Michelle Wilde Anderson, *The New Minimal Cities*, 123 YALE L.J. 1118 (2014).

and bringing in an unelected receiver to put the city's finances back on track—ostensibly to return a healthy city to its constituents.[195] It should be noted that these receiverships are often for indefinite terms and a number of them have continued for years.

Takeovers of fiscally distressed cities seem not to elicit significant objection, except sometimes by the residents of those places. In the case of Michigan, most cities that have been placed into receivership or the equivalent are majority black and significantly poor.[196] That a city of more than half-a-million residents could be stripped of elected municipal government might be surprising if it were applied to a state or a suburban jurisdiction. But the trope of city mismanagement is a powerful one. Receiverships are defended on the grounds of endemic corruption and political failure.[197] Democratic accountability is the problem—not the solution—in these cases.

There are two weaknesses to this reasoning. The first is that there is no evidence that corruption or political failure is the *cause* of municipal fiscal distress—as opposed to a symptom. The crisis of the postindustrial city has been long in the making. Detroit has been declining for over fifty years. Deindustrialization, white flight, disinvestment, and concentrated poverty are not caused by mismanagement, though they can be exacerbated by it. Importantly, as Teaford observes, the "corrupt," machine-run cities of the industrial age were enormously successful if measured by economic and population growth, or in terms of public infrastructure.[198] And when that age ended, even those industrial cities with a history of relatively "clean" municipal government did not escape the structural forces undermining their local economies.[199]

Second, it is not at all evident that suspending municipal democracy can solve management failures. A powerful counterexample is Flint, Michigan, whose unelected manager shifted the city's water supply to save money and persisted in the plan despite significant popular opposition and evidence that

195. *See* Clayton P. Gillette, *Dictatorships for Democracy: Takeovers of Financially Failed Cities*, 114 COLUM. L. REV. 1373, 1433 (2014).

196. Michelle Wilde Anderson, *Democratic Dissolution: Radical Experimentation in State Takeovers of Local Governments*, 39 FORDHAM URB. L.J. 577, 590–91 (2012).

197. *See* Gillette, *supra* note 195, at 1384, 1408, 1419 (listing numerous instances of city governments dominated by pervasive corruption that were replaced by receiverships and suggesting that receiverships may be appropriate in cases such as these where democratic procedures have been manipulated by local officials).

198. TEAFORD, *supra* note 174, at 3–6.

199. *See* Richard C. Schragger, *Decentralization and Development*, 96 VA. L. REV. 1837, 1880 (2010) (citing Rebecca Menes, *Limiting the Reach of the Grabbing Hand: Graft and Growth in American Cities, 1880–1930*, *in* CORRUPTION AND REFORM: LESSONS FROM AMERICA'S ECONOMIC HISTORY 69 (Edward L. Glaeser & Claudia Goldin eds., 2006)).

the water system was poisoning Flint residents.[200] Emergency managers' lack of political accountability should be a strike against their appointment, not an advantage.[201]

Whatever one's views of the causes or effects of municipal mismanagement, the idea that mismanagement cannot be corrected by the normal democratic process appears to be applied with special rigor to cities. Something about city politics elicits deep skepticism from elites and technocrats. As Frederic Howe argued, reformers tend to view municipal democracy as a failure and municipal government as properly run by professionals.[202] The usual response to local political pathology is not to expand public involvement but to contract it in the name of better governance.

B. Anti-City Anti-Urbanism

A second strand of anti-urbanism is more far-reaching, for it treats the city as a "problem" that cannot be solved through better governance. This *anti-city* strand of anti-urbanism is best captured by its most famous critic, the urbanist Jane Jacobs, who was inspired to write her seminal *The Death and Life of Great American Cities* in 1961 in response to a century of planning policy.[203] As Jacobs famously argued, everything about late-twentieth-century city planning seemed intended to "do the city in."[204] Widely accepted principles of planning seemed directed toward destroying urban life, instead of encouraging it. In reviewing the results of a generation of urban renewal, highway building, and public-housing developments in American cities, Jacobs concluded that "[t]his is not the rebuilding of cities. This is the sacking of cities."[205]

Jacobs placed the blame squarely on an anti-city "pseudoscience of city planning," full of superstitions and an obsession with bringing the benefits of healthy living to urban dwellers.[206] Her history of urban planning is sometimes tendentious, but it generally tracks the elites' preoccupation with urban disorder. It begins with the Englishman Ebenezer Howard, a self-trained urban reformer, who offered the Garden City as an antidote to the

200. Richard Schragger, *Flint Wasn't Allowed Democracy*, SLATE (Feb. 8, 2016), http://www.slate.com/articles/news_and_politics/jurisprudence/2016/02/a_big_reason_for_the_flint_water_crisis_no_democracy_there.html [https://perma.cc/BL3G-T2HU].

201. *See id.* ("Emergency managers answer to nobody but the one state official who can hire and fire them. State officials, in fact, don't *want* appointed managers to be responsive to local constituents. That is the whole point of appointing a manager—to prevent him or her from responding too readily to the costly demands of city constituents.").

202. HOWE, *supra* note 185, at 1–2.

203. JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES (1961).

204. *Id.* at 17.

205. *Id.* at 4.

206. *Id.* at 13.

crowded and congested London of the late-nineteenth century.[207] Howard founded the Garden Cities Association in 1899—now known as the Town and County Planning Association. The Garden City, based on the principles of Howard's only book, *Tomorrow: A Peaceful Path to Real Reform* (later retitled as *Garden Cities of Tomorrow*), was to be a planned community, limited in population, close to nature—"conceived as an alternative to the city, and as a solution to city problems."[208]

But the Garden City's real import was its approach to planning: a rigid separation of uses—commercial, industrial, and residential; an emphasis on "wholesome housing"; an obsession with the healthful qualities of nature; and a commitment to a suburban-style landscape.[209] These features were taken up by Progressive planners in the 1920s.

They were also given the imprimatur of the law, through the rapid adoption of zoning codes throughout the country. Famously, in *Village of Euclid v. Ambler Realty Co.*,[210] decided in 1926, the Court upheld single-family residential zoning, likening apartment buildings to obnoxious and dangerous land uses.[211] The lower court had actually struck down the zoning restriction, observing that its primary purpose was to "classify the population and segregate them according to their income or situation in life."[212]

The *Lochner* era Supreme Court had no trouble, however, upholding a regulation that significantly reduced property values so long as it protected the values of home and family.[213] Justice Sutherland, writing as if straight from a Garden City planning manual, observed that "the segregation of residential, business, and industrial buildings" will "increase the safety and security of home life [and] greatly tend to prevent street accidents, especially to children, by reducing the traffic and resulting confusion in residential sections."[214] It will also, he declared, "decrease noise and other conditions which produce or intensify nervous disorders [and] preserve a more favorable environment in which to rear children, etc."[215] Apartment houses, by contrast, "destroy[]" residential districts, acting as "mere parasite[s]" and "interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes."[216] Apartment houses further "depriv[e] children of the privilege of quiet and open spaces for play, enjoyed by those in more favored

207. *Id.* at 17.
208. *Id.* at 18.
209. *Id.* at 18–19.
210. 272 U.S. 365 (1926).
211. *Id.* at 394.
212. Ambler Realty Co. v. Village of Euclid, 297 F. 307, 316 (N.D. Ohio 1924).
213. *Village of Euclid*, 272 U.S. at 384.
214. *Id.* at 394.
215. *Id.*
216. *Id.*

localities[]—until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed."[217]

Almost fifty years later in 1974, Justice Douglas would channel this same idyllic vision of the single-family residential district in *Village of Belle Terre v. Boraas*.[218] In writing to uphold a zoning ordinance restricting single-family occupancy to related individuals, Douglas argued that "[t]he police power is not confined to elimination of filth, stench, and unhealthy places."[219] It is also, he wrote, permissible for cities to "lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people."[220]

The impact of zoning on urban design cannot be underestimated. It was part of a larger movement to disperse, decentralize, and deconcentrate the city. Jacobs places the blame on the "Decentrists."[221] As she puts it, this group of thinkers and planners were interested in "decentraliz[ing] great cities, thin[ning] them out, and dispers[ing] their enterprises and populations into smaller, separated cities or, better yet, towns."[222] The Garden City was soon followed by Le Corbusier's Radiant City. A Swiss–French architect, designer, and planner—and one of the pioneers of modern architecture—Le Corbusier was hugely influential into the 1960s. His Radiant City imagined a great metropolis consisting of towers in parks accompanied by expressways to accommodate automobiles. Planners took these ideas up at midcentury. The superblock, the public-housing complex, and the suburban office park are the inheritance of Le Corbusier.

Indeed, as Jacobs tells it (and only a little facetiously), it is the planners' obsession with grass that destroys the American city at midcentury.[223] Their belief that cities are noisy, congested, dangerous, and unhealthful led them to promote forms of planning that stripped city neighborhoods of their human scale, that demonized street life, that minimized the mixing of commercial and residential uses, and that treated grassy spaces as necessary for the full realization of the good life.[224]

These design elements had a moralizing valence—poor living conditions were associated with poverty as well as with deviance and criminality. Slum clearance and large-scale public housing were promoted as

217. *Id.*

218. 416 U.S. 1 (1974).

219. *Id.* at 9.

220. *Id.*

221. JACOBS, *supra* note 1203, at 20.

222. *Id.*

223. *Id.* at 110–11.

224. *See id.* at 20, 22 (describing the belief held by many city planners that the street was a bad place and that houses should therefore be turned inward to face sheltered greens, providing the "illusion of isolation and suburbany privacy").

an uplift strategy—as long as the designs came "bedded with grass."[225] "[G]rass, grass, grass"[226]—as Jacobs writes, mimicking a half-century of urban planning zeal—"Isn't it wonderful! Now the poor have everything!"[227]

Urban renewal was the most consequential government-supported effort along these lines. Begun as a policy to replace deteriorating slum housing with improved housing, urban renewal often failed dramatically. In part that is because project planners could only see physical decline. They equated poor housing conditions with poor social outcomes and did not anticipate the dramatic effects of displacement on poor and often minority communities.[228] For African Americans in the inner city, urban renewal was tantamount to "Negro removal" and the wholesale displacement of long-standing African-American neighborhoods was tremendously damaging.[229] Many ethnic white neighborhoods were also displaced by renewal programs or in some cases highway building.[230]

Moreover, though urban renewal began as a housing program, it became a way to "renew" the city—to improve its tax base, attract new residents, and compete with the suburbs.[231] Downtown business interests sought urban renewal funds to "clean up" central business districts and make them more attractive. The new development was often based on a suburban model. Cities put shopping malls or festival marketplaces downtown, sought to make their streets amenable to automobiles, and then built highways to bring suburbanites to the city's core. City beautification efforts were directed toward suburbanites, not toward existing city residents—who had been displaced in many cases.

The injustices of urban renewal were evident by the 1960s, when Jacobs was writing. There are many reasons for the failure of American urban-development policy in this period. Suburbanization and deindustrialization were powerful forces arrayed against the industrial city, to be sure. But also, as one commentator has noted, "urban renewal failed because it was anti-

225. *Id.* at 6–7.

226. *Id.* at 22.

227. *Id.* at 15.

228. Jacqueline Leavitt, *Urban Renewal Is Minority Renewal*, L.A. TIMES (Oct. 11, 1996), http://articles.latimes.com/1996-10-11/local/me-52672_1_urban-renewal [https://perma.cc/M4NG-VLDN].

229. Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 47 (2003).

230. STEVEN CONN, AMERICANS AGAINST THE CITY: ANTI-URBANISM IN THE TWENTIETH CENTURY 168, 177 (2014).

231. *See* CONN, *supra* note 230, at 166–68 ("Urban renewal began its life as a housing program, though it was later expanded."); Pritchett, *supra* note 229, at 29–30 (examining the interplay between urban renewal and the expansion of public and private eminent-domain powers). For a discussion of urban renewal with specific reference to New Haven, Connecticut, see DOUGLAS W. RAE, CITY: URBANISM AND ITS END 312–60 (2003).

urban." [232] Significant government investments in central cities were animated by a suburban planning ethos and a concomitant lack of faith in existing urban neighborhoods, especially if they were poor and disheveled.[233] There was an assumption that poor urban neighborhoods were themselves a cause of poverty, not simply a result of it.

To be sure, the Victorian city and the industrial city that followed *were* often congested, dangerous, and sometimes violent places—for the poor and working class in particular. But the poverty (and the foreignness) of the urban resident was certainly not *caused* by cities. Jacobs argued that, in thinking that they could plan their way out of poverty, elite reformers adopted a "paternalistic, if not authoritarian" approach focused on beautification and uplift, instead of on the needs of actual city dwellers.[234] All this was accomplished through government policy, often at great expense. As Jacobs observed, "There is nothing economically or socially inevitable about either the decay of old cities or the fresh-minted decadence of the new unurban urbanization."[235] If the city is the problem—independent of discrimination, poverty, joblessness, or crime—then policy will be directed toward remedying urbanism. Twentieth-century urban policy has mostly been anti-urban even when it has been intended to help city dwellers.

Indeed, despite Jacobs's now-canonical status in schools of planning and architecture, *anti-city* anti-urbanism continues to exert a powerful subterranean force. Consider that remedying poverty is often confused with improving the neighborhood—when the two may have little to do with one another. Increased investment in a particular urban neighborhood does not signal a reduction in poverty. The gains to development rarely run to existing residents in any case, and the central theme of urban development in the twenty-first century has been gentrification—which from the perspective of existing residents looks like any other form of displacement.[236] When we say that a particular city "is doing better," we may mean that it has attracted wealthier residents, that its retail spaces are less vacant, that its housing is of a higher quality, or that its tax rolls are fatter. But it is not at all clear that the poor who live there now, or who lived there in the recent past, are any richer.

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232. CONN, *supra* note 2230, at 166.

233. RAE, *supra* note 231, at 312–15; *see also* CONN, *supra* note 230, at 166 ("[City planners held] a flawed set of assumptions about what should be destroyed and what should be built in its place, a misconception that the urban should be made more suburban . . . ."); JACOBS, *supra* note 203, at 20 ("[G]ood city planning must aim for at least an illusion of isolation and suburbany privacy.").

234. JACOBS, *supra* note 203, at 19.

235. *Id.* at 7.

236. *See, e.g.*, MATT HERN, WHAT A CITY IS FOR: REMAKING THE POLITICS OF DISPLACEMENT 7–8, 60 (2016) (describing the impact of gentrification on the residents of Albina, the one major Black neighborhood in Portland).

Moreover, poor, urban neighborhoods still receive outsized blame for their residents' poverty. The old anti-urban themes of dispersal and deconcentration haunt contemporary social welfare and urban policy. William Julius Wilson's famous 1987 book, *The Truly Disadvantaged*, asserted that extreme, territorially concentrated poverty is a chief barrier to black mobility and suggested a solution: move poor people out of concentrated-poverty neighborhoods and into neighborhoods with a more diverse socioeconomic makeup.[237] This idea continues to be a powerful one in social policy circles. It is at the heart of "moving to opportunity" pilot projects that take residents of predominantly poor urban neighborhoods and move them to wealthier suburban neighborhoods. It is also the impetus behind "mixed-income" public housing and the push to put such housing in the suburbs.[238]

No doubt, suburban racial and income exclusion limit opportunities for individual poor and minority families to access better services by moving there. Almost by definition, richer neighborhoods are better funded than poorer ones. Suburban residents often have better access to good public services. Mixed-income neighborhoods are by definition going to be less poor than the alternative.

But there is also an undercurrent of anti-urbanism in the notion that urbanites need to move to the suburbs to succeed. The evidence is actually uncertain regarding the social and economic outcomes for specific movers.[239] And in many cases, residential location itself does not seem to be doing the work. Maybe those urbanites just need better funded public services. Yet social welfare policy continues to be preoccupied with the deficiencies of city neighborhoods themselves, both in terms of those neighborhoods' physical attributes and their sociological makeup.[240]

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237. *See* WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY 55–62, 157–59 (1987) ("It seems . . . the most realistic approach to the problems of concentrated inner-city poverty is to provide ghetto underclass families and individuals with the resources that promote social mobility.").

238. Richard A. Webster, *New Orleans Public Housing Remade After Katrina. Is It Working?*, TIMES-PICAYUNE (Mar. 22, 2016), http://www.nola.com/katrina/index.ssf/2015/08/new_orleans_public_housing_dem.html [https://perma.cc/LMT6-5Y3D].

239. *See, e.g.*, Raj Chetty et al., *The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment*, 106 AM. ECON. REV. 855, 857–59 (2016) (studying the Department of Housing and Urban Development's Moving to Opportunity experiment's long-term impacts and finding positive effect on college attendance and income for people who moved before age thirteen, but finding slightly negative economic effects for people who moved as adolescents and minimal or no effect on adults' economic outcomes); Jens Ludwig et al., *Long-Term Neighborhood Effects on Low-Income Families: Evidence from Moving to Opportunity*, 103 AM. ECON. REV. 226, 227 (2013) (studying the HUD experiment's impacts and finding mental and physical health improvements, but a lack of impact on children's education and adults' earnings). For a critique of "moving to opportunity" and other dispersal strategies, see David Imbroscio, *Urban Policy as Meritocracy: A Critique*, 38 J. URB. AFFAIRS 79, 89–92 (2016).

240. *See* Imbroscio, *supra* note 239, at 89.

To be sure, the return to the city of the last few decades has witnessed an embrace of urbanism more generally. As I have noted, Jacobs's celebration of urban diversity, congestion, walkability, and public life has become canonical among planners.[241] It also seems to be attractive to residential consumers, as more Americans reject a suburbanized residential life. The most consequential planning movement of the last twenty-five years is called the "New Urbanism."[242]

Even with the renewed popularity of the central cities, however, it is notable that New Urbanist developments are predominantly located in greenfields.[243] They are planned communities, reproducing the look and feel of small towns and utilizing principles of planning developed in colonial times, not the planning principles of the industrial city.[244] Moreover, despite the urban resurgence, most development in the United States is still occurring outside the urban centers, in the suburban fringe. Some Americans are undoubtedly moving back into the central cities. But many more continue to prefer single-family homeownership (when they can afford it) in suburban neighborhoods, even as those neighborhoods may be designed to look and feel like small towns.[245]

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241. *See supra* text accompanying notes 195–97, 213–14. For an account of Jane Jacobs's broad acceptance, see Nathaniel Rich, *The Prophecies of Jane Jacobs*, ATLANTIC (Nov. 2016), https://www.theatlantic.com/magazine/archive/2016/11/the-prophecies-of-jane-jacobs/501104/ [https://perma.cc/85UP-JN9P].

242. *See* Andrés Duany & Emily Talen, *Looking Backward: Notes on a Cultural Episode* (describing New Urbanism principles and support for them in the design profession), *in* LANDSCAPE URBANISM AND ITS DISCONTENTS: DISSIMULATING THE SUSTAINABLE CITY 1, 1 (Andrés Duany & Emily Talen eds., 2013); Dan Trudeau, *New Urbanism as Sustainable Development?*, GEOGRAPHY COMPASS 435, 436–39 (June 25, 2013) (discussing the history of New Urbanism and distribution of New Urbanism projects).

243. Ivonne Audirac, *New Urbanism*, *in* 4 ENCYCLOPEDIA OF GEOGRAPHY 2024, 2027 (Barney Warf ed., 2010); AARON PASSELL, BUILDING THE NEW URBANISM: PLACES, PROFESSIONS, AND PROFITS IN THE AMERICAN METROPOLITAN LANDSCAPE 77 (2013).

244. ROBERT H. FREILICH ET AL., FROM SPRAWL TO SUSTAINABILITY: SMART GROWTH, NEW URBANISM, GREEN DEVELOPMENT, AND RENEWABLE ENERGY 171–73 (2010).

245. *Id.* at 4; *see also* ZILLOW GRP., CONSUMER HOUSING TRENDS REPORT 2016, at 14 (2016) ("A freestanding, single-family house is buyers' top choice, with 83 percent of all buyers seeking this home type."); Elena Holodny, *The Suburbs Are Making a Comeback*, BUS. INSIDER (Mar. 24, 2016), http://www.businessinsider.com/americans-moving-to-suburbs-rather-than-cities-2016-3 [https://perma.cc/RL42-VHWJ]; Kris Hudson, *Generation Y Prefers Suburban Home over City Condo*, WALL STREET J. (Jan. 21, 2015), https://www.wsj.com/articles/millennials-prefer-single-family-homes-in-the-suburbs-1421896797 [https://perma.cc/38WQ-DER2]; Chris Kirkham, *Suburbs Trying to Attract Millennials Diverge on Development Patterns*, WALL STREET J. (Aug. 26, 2016), https://www.wsj.com/articles/suburbs-trying-to-attract-millennials-diverge-on-development-patterns-1472251218 [https://perma.cc/SQ3Z-KKEF]; Mike Maciag, *Population Growth Shifts to Suburban America*, GOVERNING (June 2017), http://www.governing.com/topics/urban/gov-suburban-population-growth.html [https://perma.cc/W9JR-F46Y].

C. Antigovernment Anti-Urbanism

This brings me to a third strand of anti-urbanism. In his recent book, Steven Conn describes the linkage between American antigovernment sentiment and the rejection of big-city life.[246] In his description, the physical landscape of suburbanized America is coupled with a political landscape that is deeply suspicious of government.[247] This form of *antigovernment* anti-urbanism is, according to Conn, long-standing, but for the most part it is a twentieth-century phenomenon.[248] It constitutes a rejection of the city as a dense and diverse built environment as well as a rejection of the forms of municipal revenue-raising and regulation that would make such an environment possible.

Conn describes a century of thinkers, writers, planners, architects, and politicians who viewed the big-city as deeply threatening to the health of the republic.[249] Progressive urban reformers, regional planners, states'-righters, New Deal town-builders, back-to-the-landers, libertarians, Southern Agrarians, commune-dwellers, environmentalists, and small-is-beautiful decentralists did not all agree on the source of the problem or the role of government in providing solutions. But from whatever vantage point they had on the twentieth-century city, they all agreed that it was badly broken, and that the remedy was often dispersal, deconcentration, and decentralization.

Thus, we hear the famous architect Frank Lloyd Wright indicting the city as a "cancerous growth" and a "menace to the future of humanity"[250]; Lewis Mumford, regionalism's chief intellectual, arguing that "[t]he hope of the city lies outside itself . . . focus your attention on the cities . . . and the future is dismal"[251]; Thomas Hewes, former New Dealer, bemoaning the city as a place where big labor and big business collude, "abetted by big government"[252]; and Grant Wood, a central figure in a prominent school of Midwestern regionalist artists, writing against the "confusing cosmopolitanism, the noise, the too intimate gregariousness of the large city" in a diatribe entitled *The Revolt Against the City*.[253]

Not all these voices were explicitly antigovernment. Many, like Lewis Mumford, advocated significant government intervention to create a more congenial metropolitan landscape.[254] Nevertheless, the attack on big cities

246. CONN, *supra* note 230, at 296.
247. *Id.*
248. *Id.* at 294.
249. *Id.* at 60.
250. *Id.* at 88.
251. *Id.* at 65.
252. *Id.* at 113.
253. *Id.* at 121.
254. *Id.* at 69.

was often coupled with a plea for a more pastoral, local, responsive, and community-oriented civic life—along with denunciations of big-city centralization and collectivism.[255] *Antigovernment* anti-urbanism draws a direct connection between bigness and the loss of liberty; centralization and the absence of self-government; and density and the threat to American values.[256]

Indeed, Americans are not generally opposed to localism. Resistance to central authority is a continuing and pervasive political and cultural trope. But cities have been less able than the suburbs to assert the values of local autonomy over the course of the twentieth century. Cities are viewed as centralizers; suburbs and small towns are where local self-government is perceived to flourish.

Thus, we see that when the Court embraced localism in the 1970s, it did so in defense of suburban prerogatives, not in favor of urban empowerment. The rejection of an equal protection challenge to the financing of public schools in *San Antonio Independent School District v. Rodriguez*[257] meant that richer suburban school districts could continue to spend substantially more than poorer urban ones.[258] Justice Powell, the author of the majority opinion, was worried about the centralizing effects of equalization, which he thought could lead to the "national control of education"—a feature of regimes like those ruled by "Hitler, Mussolini[,] and all communist dictators."[259]

Powell had been the chairman of the Richmond, Virginia school board in the 1950s when it operated segregated schools (even after the *Brown* decision). His experience as the head of a relatively well-funded (for whites at least), segregated urban school district had little to do with the metropolitan landscape of the 1970s. In 1970, the Richmond school district was already 64.2% African American; the surrounding suburban school districts were overwhelmingly white.[260] As of 2017, Richmond city schools are 75% African American, 12.8% Hispanic, and 9% white.[261] Cities had already been eclipsed by the time *Rodriguez* was decided. Suburban school districts were

255. *Id.*

256. *Id.* at 62.

257. 411 U.S. 1 (1973).

258. *Id.* at 55.

259. Richard Schragger, San Antonio v. Rodriguez *and the Legal Geography of School Finance Reform*, *in* CIVIL RIGHTS STORIES 85, 99 (Myriam E. Gilles & Risa L. Goluboff eds., 2008).

260. Bradley v. Sch. Bd. of Richmond, 338 F. Supp. 67, 185 (1972); *see also* Eric Harrison, *Richmond to Stop Keeping White Students Together: Education: Virginia School District Used Racial 'Clustering' in Bid to Halt White Flight from Schools*, L.A. TIMES (Feb. 25, 1993), http://articles.latimes.com/1993-02-25/news/mn-751_1_school-district [https://perma.cc/QD4V-MN9C].

261. RICHMOND PUBLIC SCHOOLS, https://www.rvaschools.net/domain/6 [https://perma.cc/67Y8-UC8J].

the beneficiaries of a ruling affirming the legitimacy of decentralized and unequal school funding.

Milliken v. Bradley,[262] decided in 1974, put an exclamation mark on this durable city–suburb split. In *Milliken*, the district court adopted a metropolitan-wide desegregation plan for Detroit and the area's suburbs.[263] Detroit's schools were predominantly black; the suburban schools were overwhelmingly white.[264] Any desegregation remedy that did not include the suburbs would result in very little desegregation at all. Yet the Supreme Court held that the suburban districts could not be included in the plan.[265] Local government boundaries and the requirement that plaintiffs prove intentional discrimination placed an outside limit on judicial desegregation remedies.

De jure segregation could be remedied by a court, but the metropolitan-wide *de facto* segregation that divided city from suburb could not. "In *Milliken*," Myron Orfield has written, "the Supreme Court had in effect told whites that it was safe to flee and that it would protect them."[266] That flight had only accelerated in the aftermath of the riots of the 1960s. The two Americas of the 1968 Kerner Commission Report were the increasingly black city and the overwhelmingly white suburbs.[267] Localism and the pastoral ideal combined to enforce suburban prerogatives.[268] American cities were dangerous, overcrowded, and often burning. The suburbs were safe, light-filled, and protective of home and family.

More notable is that a "small government" ideology seemed to go hand in hand with the suburban ascendance.[269] Consider reapportionment. As I have already noted, *Baker v. Carr* and its progeny were supposed to have eliminated the urban disadvantage in state legislatures and the House of Representatives.[270] The results were and have been more complicated, however. One-person, one-vote did shift power away from lower populated rural districts. But it did not necessarily empower the cities, as reapportionment introduced a new factor in the state legislative political

262. 418 U.S. 717 (1974).

263. Bradley v. Milliken, 345 F. Supp. 914, 937 (E.D. Mich. 1972).

264. *Id.* at 932.

265. *Milliken*, 418 U.S. at 745, 750.

266. Myron Orfield, Milliken, Meredith, *and Metropolitan Segregation*, 62 UCLA L. REV. 363, 452 (2015).

267. OTTO KERNER ET AL., REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 115–20 (1968).

268. *See* Schragger, *supra* note 199, at 1878.

269. See generally KEVIN M. KRUSE, WHITE FLIGHT: ATLANTA AND THE MAKING OF MODERN CONSERVATISM (2005) for a description of the ideological connections between suburbanization and limited government. For the connections between suburbanization, limited government, and race, see DAVID M. P. FREUND, COLORED PROPERTY: STATE POLICY AND WHITE RACIAL POLITICS IN SUBURBAN AMERICA 45–59 (2007).

270. *See supra* note 133 and accompanying text.

calculus. The suburbs—which had been underrepresented as well—now had more power.

For Jesse Unruh, the legendary Democratic politician and California state treasurer, that meant weaker cities instead of stronger ones. "You damn fools," Unruh berated Roy Schotland, as Schotland reports, in the aftermath of *Baker v. Carr*,

> [Y]ou think you're helping the cities. The cities were taking care of themselves; we can work things out with the agricultural areas—because they don't care what we do so long as it doesn't interfere with them. But you've shifted power to the suburbs—all they care about is keeping taxes down, and that means real trouble.[271]

Was Unruh right? In part, it seems so. A low-tax, low-services government is what many suburbanites wanted and have sought throughout the course of the second half of the twentieth century. At the beginning of the century, suburban areas sought annexation with the big city to receive better services and access to municipal wealth and power.[272] But that changed as municipalities were able to provide the services themselves and at a lower cost.[273] The annexation and incorporation battles of the midcentury reflected suburban resistance to city annexation efforts—animated in large part by fear of higher tax bills.[274] So too, the conventional story about twentieth-century tax revolts, starting with Proposition 13 in California, is that they had and have been mostly driven by suburban antitax sentiment. The tax and expenditure limitations adopted in almost every state have limited cities' revenue-raising ability significantly.[275] So too, suburbs' use of fiscal zoning to prevent high-cost newcomers from coming into the jurisdiction has raised the cost of metropolitan-area housing and has reduced the ability of lower income minorities to enter suburban neighborhoods.[276]

Of course, suburban development was never possible without significant government support. As already noted, the structure of education financing in the states, in which local schools are generally paid for with local dollars, induces local governments to limit development and generally favors suburban jurisdictions over urban ones. State law constraints on annexation prevent cities from expanding their borders and capturing suburban-tax-base

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271. Schotland, *supra* note 142, at 1505.

272. *See* GARY J. MILLER, CITIES BY CONTRACT: THE POLITICS OF MUNICIPAL INCORPORATION 34 (1981) (discussing cities looking to annexation as a means of expanding their population and resource base).

273. *See id.* at 58–60 ("I think it's a good place to live because the taxes are low and we furnish a lot of free services.").

274. *Id.* at 81–82 ("[T]he most basic and pervasive common denominator for incorporation was the avoidance of high property taxation.").

275. *See supra* notes 85–88 and accompanying text.

276. DOUGLAS S. MASSEY ET AL., CLIMBING MOUNT LAUREL: THE STRUGGLE FOR AFFORDABLE HOUSING AND SOCIAL MOBILITY IN AN AMERICAN SUBURB 19–31 (2013).

growth. The ease of municipal incorporation and the ability to contract for local services allows small, suburban local governments to avoid the revenue demands of the big city while protecting their authority over land use and schools. One could also add the federal highway program, the mortgage interest deduction and other federal mortgage subsidies, development, and lending processes that favor the single-family, detached home.

The recitation of these suburban-shaping policies is familiar. But the ideology of antigovernment anti-urbanism is less appreciated.[277] That advocates of "small government" would reject big cities is almost definitional. Large cities require large municipal governments, the provision of expansive municipal services, and the raising of significant amounts of revenue. The provision of municipal services is expensive, and city government is often bureaucratic and wasteful. As Conn observes, city living also mandates tolerance of a certain collective, public life that appears to be antithetical to a tradition of rural or suburban individualism.[278] That individualism finds expression in a deep suspicion of government. If the "American way of life" includes private-property ownership, single-family homes, private-car ownership, and generally limited government, then city dwellers are not really American.[279] Against the backdrop of a limited government, pastoral, property-rights-based ideology, cities are inherently suspect.

D. Populist Anti-Urbanism

That suspicion appears to have found voice in a renewed populist anti-urbanism. The simmering alienation from the city has appeared in the form of a politics of urban resentment. Donald Trump's rhetoric during the campaign and thereafter, in particular, provided a dystopian view of the city—one that many commentators observed was out of touch with present realities. The President's anti-urban rhetoric did not create the backlash against the cities, but it has fanned the flames of a nascent populist anti-urbanism.

President Trump's view that cities are wasteful, violent, corrupt, and full of dangerous racial and ethnic minorities is not, as we have seen, unusual. His perception that cities are abysmally managed is also a long-standing trope. Speaking to a crowd in Dimondale, Michigan, on the 2016 campaign trail, then-presidential candidate Donald Trump summarized his prescription for American cities in a rhetorical statement: "You're living in poverty, your

277. Kruse's excellent book again provides a roadmap. *See generally* KRUSE, *supra* note 269.

278. *See* CONN, *supra* note 230, at 62.

279. *Id.* at 2; *cf.* Emily Badger & Quoctrung Bui, *Why Republicans Don't Even Try to Win Cities Anymore*, N.Y. TIMES (Nov. 2, 2016), https://www.nytimes.com/2016/11/03/upshot/why-republicans-dont-even-try-to-win-cities-anymore.html?mcubz=0 [https://perma.cc/7ASA-6KKF] (expounding the ways Republican candidates have characterized big cities as detached from "real America").

schools are no good, you have no jobs, 58% of your youth is unemployed—what the hell do you have to lose?"[280] As he echoed at multiple presidential debates against Hillary Clinton, President Trump asserted that American "inner cities are a disaster" filled with "the Latinos, Hispanics," and "the African Americans" living in a world where they "get shot walking to the store," "have no education," and "have no jobs."[281]

The racially inflected, violent city is not a new perception, but it is new to hear it so vocally articulated by a presidential candidate and then President who grew up in New York City and made his fortune in urban real estate. President Trump appears to subscribe to a reductive view of American cities: seeing them as distinguished from nonurban places by violence while wracked by policy mistakes and the failure of Democratic politicians to adequately meet their needs. In an exchange with Congressman John Lewis, President Trump tweeted that the Congressman should "spend more time on fixing and helping his district, which is in horrible shape" and "crime infested."[282] As President Trump put it, the Atlanta Congressman's "burning and crime infested inner-cit[y]" would best be served by his joining President Trump's policy agenda.[283]

Populist anti-urbanism usually leans to the political right. In the second half of the twentieth century, the Republican Party has generally been allied with anti-urban conservatives,[284] while the Democratic Party has been the party of big-city ethnic and minority groups and municipal unions. The New Deal coalition was an urban one; so too was the Democrats' civil-rights coalition of the 1950s and 1960s.

Even so, it is striking how complete the party split between cities and noncities has become in recent elections. Ted Cruz, the junior Texas Senator,

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280. Tom LoBianco & Ashley Killough, *Trump Pitches Black Voters: 'What the Hell Do You Have to Lose?'*, CNN (Aug. 19, 2016), http://www.cnn.com/2016/08/19/politics/donald-trump-african-american-voters/index.html [https://perma.cc/2394-TXLG].

281. Jenée Desmond-Harris, *Why Donald Trump Says "The" Before "African Americans" and "Latinos"*, VOX (Oct. 20, 2016), http://www.cnn.com/2016/08/19/politics/donald-trump-african-american-voters/index.html [https://perma.cc/2394-TXLG].

282. Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 14, 2017, 4:22 PM), https://twitter.com/realDonaldTrump/status/820425770925338624 [https://perma.cc/HE5N-9EYM]; Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 14, 2017, 6:50 AM), https://twitter.com/realDonaldTrump/status/820251730407473153 [https://perma.cc/Z6XM-QE3Y]. For more discussion, see Reena Flores, *Trump Blasts Civil Rights Icon John Lewis in Twitter Attack*, CBS NEWS (Jan. 14, 2017), http://www.cbsnews.com/news/trump-blasts-civil-rights-icon-john-lewis-in-twitter-attack/ [https://perma.cc/3QBL-2BKR].

283. Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 14, 2017, 6:22 PM), https://twitter.com/realDonaldTrump/status/820425770925338624 [https://perma.cc/FX7J-JE7E].

284. KRUSE, *supra* note 269, at 254 (stating that President Nixon's support was based in the suburbs, not in urban areas); *see also* Kevin Baker, *How the G.O.P. Became the Anti-Urban Party*, N.Y. TIMES (Oct. 6, 2012), http://www.nytimes.com/2012/10/07/opinion/sunday/republicans-to-cities-drop-dead.html?mcubz=0 [https://perma.cc/8MAY-ALTZA] ("[T]he fact is that cities don't count anymore—at least not in national Republican politics.").

famously derided "New York values" in the 2016 Republican primary—a message to social and fiscal conservatives of where his own values lay.[285]

There is a reactionary history to this kind of populist anti-urbanism. At the turn of the twentieth century, the fear of ethnic masses animated anti-city sentiment. Professor Conn quotes the Reverend Josiah Strong's indictment of the city in his popular 1885 book *Our Country: Its Possible Future and Its Present Crisis*.[286] Strong's list of fears included immigration, Romanism, and socialism. "The City," however, is where "each of the dangers . . . [are] enhanced and all are focalized."[287]

In the 1920s and 1930s, anti-city sentiment had a regional flavor—southerners in particular attacked the large east-coast cities as part of a wider southern sectionalist agenda. As Edward Shapiro observes, "agrarians"—and others who called themselves "decentralists" or "distributists"—emphasized the pervasiveness of the conflict between rural and urban America, and argued that large-scale industrialization was leading to the concentration of property and political power into fewer hands, the dispossession of the propertied middle class of shopkeepers and small manufacturers, and the destruction of rural independence.[288] In their classic manifesto, *I'll Take My Stand*, published in 1930, the Southern Agrarians warned that the South was becoming an economic colony of the Northeast. Invoking a romanticized version of the South, they appealed to a Jeffersonian image of American yeoman greatness and urged a return to rural virtues. Radio personalities throughout the region joined the crusade against chain stores and northern bankers and industrialists, who they argued were putting the South "in chains."[289]

Trumpian anti-urbanism similarly shares a resentment of the big city, a fear of racial and ethnic difference, and a sense that urban policies and values are contrary to the values of the rest of America. It is not surprising that the most high profile state–city conflicts have involved immigration, guns, LGBT antidiscrimination, and environmental regulation. In Texas, Governor

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285. Theodore Schleifer, *Ted Cruz Talks to New Yorkers About New York Values*, CNN (Mar. 24, 2016), http://www.cnn.com/2016/03/23/politics/ted-cruz-new-york-values/index.html [https://perma.cc/RR6H-5MBZ].

286. CONN, *supra* note 230, at 15 (citing REV. JOSIAH STRONG, OUR COUNTRY: ITS POSSIBLE FUTURE AND ITS PRESENT CRISIS 179–80 (1885)).

287. *Id.*

288. *See* Edward S. Shapiro, *Decentralist Intellectuals and the New Deal*, 58 J. AM. HIST. 938, 943 (1972).

289. *See* Richard C. Schragger, *The Anti-Chain Store Movement, Localist Ideology, and the Remnants of the Progressive Constitution, 1920–1940*, 90 IOWA L. REV. 1011, 1024–26, 1054 (2005). The continued salience of regionalism is amply illustrated by recent battles over the removal of Confederate monuments. A number of Southern states, including most recently Alabama, have adopted statutes barring local governments from removing Confederate statues and memorials. *See* Kasi E. Wahlers, Recent Developments, *North Carolina's Heritage Protection Act: Cementing Confederate Monuments in North Carolina's Landscape*, 94 N.C. L. REV. 2176, 2182 (2016).

Abbott said the state's new law banning sanctuary cities[290] was "doing away with those that seek to promote lawlessness in Texas."[291] Governor Abbott also called a special 2017 summer session of the legislature in part to consider legislation to restrict cities' powers.[292] "As your governor," Abbott has promised, "I will not allow Austin, Texas, to Californiaize the Lone Star State."[293] That city has engendered the Governor's particular antipathy. "As you leave Austin and start heading north, you start feeling different," Abbott has told appreciative audiences.[294] "Once you cross the Travis County line, it starts smelling different. And you know what that fragrance is? Freedom. It's the smell of freedom that does not exist in Austin, Texas."[295]

In North Carolina, the Governor at the time, Pat McCrory, called Charlotte's transgender antidiscrimination ordinance a "mandate on private businesses" that prompted the statewide debate about bathroom policy.[296] The North Carolina legislature's Republican leaders, Tim Moore and Phil Berger, said the city's policy was radical, had prompted the state to respond with its bathroom law in order to protect families, and ultimately had cost the city jobs.[297] A number of Texas pastors have supported a similar Texas ban, asserting that "[w]e are in the throes of a deliberate attempt to try to strip our nation from its Judeo-Christian heritage to the embracement of doctrines of

290. S.B. 4, 85th Leg., Reg. Sess. (Tex. 2017) (enacted).

291. Press Release, Greg Abbott, Governor, Office of the Tex. Governor, Texas Bans Sanctuary Cities (May 7, 2017), https://gov.texas.gov/news/post/Texas-Bans-Sanctuary-Cities [https://perma.cc/R5GD-X7UA]; *see also* Madlin Mekelburg, *Local Officials Fear State Retaliation over 'Sanctuary Cities' Lawsuits*, EL PASO TIMES (July 6, 2017), https://www.elpasotimes.com/story/news/politics/texlege/2017/07/06/local-officials-fear-state-retaliation-over-sanctuary-cities-lawsuits/444215001/ [https://perma.cc/E2J6-DQPZ].

292. Press Release, Greg Abbott, Governor, Office of the Tex. Governor, Governor Abbott Announces Special Session (June 6, 2017), https://gov.texas.gov/news/post/governor-abbott-announces-special-session [https://perma.cc/V7N4-XM6Y] (listing on the special session's agenda "[p]reventing cities from regulating what property owners do with trees on private land," "[p]reventing local governments from changing rules midway through construction projects," and "[s]peeding up local government permitting process[es]"); *see also* Sandhya Somashekhar, *Red States Try to Make Blue Cities Toe the Line*, WASH. POST, July 2, 2017, at A8 (including a Governor Abbott quote that "[i]t's the smell of freedom that does not exist in Austin, Texas").

293. *Id.*

294. *Id.*

295. Jonathan Tilove, *Gov. Abbott: Austin Stinks and So Does 'Sanctuary Sally'*, STATESMAN (June 6, 2017), http://www.statesman.com/news/state—regional-govt—politics/gov-abbott-austin-stinks-and-does-sanctuary-sally/goq6JEihda4PzADg2lOMgO/ [https://perma.cc/BK2J-LM9R].

296. Katie Zezima, *For Charlotte, an Unintended Fallout*, WASH. POST, May 11, 2016, at A3.

297. *Mayor Roberts' Radical Bathroom Sharing Ordinance Costs Charlotte PayPal*, PHIL BERGER (Apr. 5, 2016), http://www.philberger.org/mayor_roberts_radical_bathroom_sharing_ordinance_costs_charlotte_paypal [https://perma.cc/7UJ6-E7A9]; *see also* Jim Morrill, *NC's GOP Lawmakers Blame Charlotte Mayor Jennifer Roberts for Paypal Loss*, CHARLOTTE OBSERVER (Apr. 6, 2016), http://www.charlotteobserver.com/news/politics-government/article70074112.html [https://perma.cc/ERZ3-UZ8Z].

demons: socialism, communism, Marxism, Darwinism, secular humanism."[298]

An ongoing theme of populist anti-urbanism is the threat that wayward cities pose to the nation as a whole. As Trump's executive order claims, sanctuary jurisdictions and cities are causing "immeasurable harm to the American people and to the very fabric of our Republic" by failing to enforce federal immigration laws.[299] Remarking on violence in Chicago, President Trump tweeted that he would "send in the Feds" and give "federal help" unless the mayor ended the "horrible 'carnage.'"[300]

Social issues seem to evoke the strongest reactions. But economic issues may be more pertinent.[301] The Southern Agrarians were resisting the dislocations caused by the agricultural, industrial, and retail revolutions of the early twentieth century. Present-day anti-urban populism appears to be animated by a similar dissatisfaction with large-scale national and global economic processes.

The city is often associated—on both the political right and left—with these processes. The city is the location of corporate headquarters, large-scale global finance, and free-trade cosmopolitanism. Global trade benefits residents of certain large urban centers—global cities like New York, London, Tokyo, and Los Angeles. But open borders, immigration, and corporate finance are perceived as enemies of extractive economies in rural places and of declining midsized industrial cities. This seems to be a global phenomenon. Consistent with this political geography, the residents of London and its immediate environs voted overwhelmingly against leaving the European Union, while much of the rest of Britain voted to exit.

The economic gap between growing and diverse urban metropolises and declining and increasingly homogenous rural and smaller cities is reflected in a cultural and political gap.[302] Ironically then, the recent success of American cities has inaugurated heightened conflict between cities and states and between cities and the nation. The more wealthy and populous cities become, the more those conflicts will arise.

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298. Chuck Lindell, *Pastors Press for Transgender Bathroom Bill: 'Let the House vote'*, STATESMAN (Aug. 3, 2017), http://www.statesman.com/news/pastors-press-for-transgender-bathroom-bill-let-the-house-vote/tWvO8WgimYAsAGfDMMDo7I/ [https://perma.cn/9LF3-AHDG].

299. Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

300. Nikita Vladimirov, *Trump: 'I Will Send in the Feds' if Chicago Doesn't Fix Violence*, HILL (Jan. 24, 2017), http://thehill.com/blogs/blog-briefing-room/news/315994-trump-i-will-send-in-the-feds-if-chicago-doesnt-fix-carnage [https://perma.cc/6KBK-KKNW].

301. *See* Nancy Isenberg & Andrew Burstein, *Cosmopolitanism vs. Provincialism: How the Politics of Place Hurts America*, HEDGEHOG REV., Summer 2017, at 58.

302. William H. Frey, *Census Shows Nonmetropolitan America Is Whiter, Getting Older, and Losing Population: Will It Retain Political Clout?*, BROOKINGS (June 27, 2017), https://www.brookings.edu/blog/the-avenue/2017/06/27/census-shows-nonmetropolitan-america-is-whiter-getting-older-and-losing-population/ [https://perma.cc/Z5VP-7EJD].

IV. City Defenses

The attack on American cities is driven by a combination of corporate deregulatory opportunism, culture-war hostility, and economic populism. The enduring nature of American anti-urbanism is notable. Despite the supposed "triumph" of the city in what some have called a "new golden age of the city,"[303] American cities are increasingly in a defensive posture, fending off broad-based attacks on their ability to govern.

What are potential city defenses? This Part begins by evaluating the legal arguments available to cities in resisting state centralization.[304] Litigating preemption cases using the frame of local home rule is often quite difficult in light of the limitations of those grants. Other city defenses involve deploying state or federal constitutional guarantees to protect local regulation. These efforts do not vindicate city power directly, and so risk winning the litigation battle but losing the conceptual war.

This Part then turns to the politics of city power. Federalism's anti-urban bias, the dominance of the suburbs, and the effects of political sorting cannot be undone with legal arguments. The cities' central defenses are political; cities need allies in the state legislature or in the governor's office. Whether this is possible may turn on large-scale demographic changes. Over the last few decades, central cities have seen their populations and economies stabilize and in some cases expand. At the same time, the United States has become a "metropolitan" country—its population and economic productivity increasingly located in large-scale, metro-area agglomerations. Both the "urban resurgence" and metropolitan growth have coincided with state–city conflict.

A. City Legal Defenses

Legal responses to the attack on city authority predictably begin with appeals to principles of federalism and home rule. The Supreme Court's federalism precedents provide some limit on federal overrides of municipal law, while state home rule provisions can sometimes serve as a resource against state legislative preemption. Both are fairly weak constraints on federal and state power, however.

1. Federalism.—Consider first federalism. Recall that the Court does not distinguish cities from states when considering federalism objections to federal lawmaking. The "state" officials in the *Printz* case, which held that

303. EDWARD GLAESER, TRIUMPH OF THE CITY: HOW OUR GREATEST INVENTION MAKES US RICHER, SMARTER, GREENER, HEALTHIER, AND HAPPIER 2 (2011).

304. Some of this work has been done previously in law reviews and elsewhere, as the sources cited below indicate. The discussion that follows is informed by those sources as well as by conversations I have had with my local government law colleagues—especially those mentioned in the star footnote above. *See Legal Strategies*, *supra* note 107.

state officials cannot be "commandeered" by the federal government to administer federal law, were locally elected sheriffs.[305] Municipal law-making is no more or less immune from federal interference than state law generally—the Supreme Court does not draw a distinction between local and state for purposes of its commandeering and coercive spending doctrines.[306]

Donald Trump's threat to withhold funds from sanctuary cities thus is subject to constitutional restraints contained in the *Printz* line of cases as well as those enunciated most recently in *National Federation of Independent Business v. Sebelius*.[307] The federal government may not order local officials to directly enforce federal law or threaten states with the loss of funding in such a way that is coercive.[308] Courts have already ruled that Trump's sanctuary cities executive order violates both prohibitions.[309] The Tenth Amendment is a ready—if limited—tool for cities to use in resisting federal commands.

The cities' deployment of state sovereignty has serious pitfalls, however. For purposes of the Court's federalism doctrine, city officials are clothed with the sovereignty and dignitary interests of their states. But when state and municipal officials disagree, the Supreme Court's doctrine and rhetoric of state sovereignty reinforce state power. The constitutional principle of state sovereignty lends itself to the view that municipalities are "mere instrumentalities" of their states, without independent constitutional status, rights, or authority.[310] On this view, states can control, commandeer, or entirely eliminate their local governments. The rhetoric of state sovereignty stands as a barrier against the recognition of even a limited federal constitutional principle of local or municipal self-government.

There is no necessary reason why this should be so. Kathleen Morris has argued, for instance, that the federal constitutional doctrine of city status is untethered from state law.[311] States themselves treat their municipalities as more than mere instrumentalities under certain circumstances—the

305. Printz v. United States, 521 U.S. 898, 898 (1997).

306. Municipalities are treated differently from states for other purposes, however. Municipalities do not share the state's antitrust immunity. See Cmty. Commc'ns Co. v. City of Boulder, 455 U.S. 40, 57 (1982). Also, a municipality is a "person" subject to suit under 42 U.S.C. § 1983. Monell v. Dep't of Soc. Servs. of the City of New York, 436 U.S. 658, 690–91 (1978).

307. 567 U.S. 519 (2012).

308. *Id.* at 585.

309. Cty. of Santa Clara v. Trump, 250 F. Supp. 3d 497, 508 (N.D. Cal. 2017); *see also* City of Chicago v. Sessions, No. 17-C-5720, 2017 WL 4081821, at *1 (N.D. Ill. Sept. 15, 2017) (granting Chicago's motion for preliminary injunction on conscription, but not coercion, grounds).

310. Hunter v. City of Pittsburgh, 207 U.S. 161, 178 (1907); Kathleen S. Morris, *The Case for Local Constitutional Enforcement*, 47 HARV. CIV. RTS.-CIV. LIB. L. REV. 1, 3–5, 26 (2012) (describing the doctrine that resulted from the Supreme Court's holding in *Hunter v. City of Pittsburgh*, and challenging its soundness).

311. Morris, *supra* note 310, at 28.

recognition of home rule municipalities is an example.[312] Morris argues that the federal constitutional doctrine of city status should follow the states' lead—recognizing some forms of local autonomy where states already do so.[313]

A more far-reaching constitutional argument for a right of municipal self-government could be grounded in the Tenth Amendment's anti-commandeering principle. The Tenth Amendment reserves powers to the states and, separately, to the people, independent of the states.[314] Justices have observed on occasion that federalism guarantees serve as protections for popular sovereignty and not simply as guarantees of state sovereignty.[315] A right to local self-government has not been recognized by the Supreme Court. But the principles of the Tenth Amendment that reserve certain powers to the people could be interpreted to embody some form of constitutional home rule.

How would such an anti-commandeering principle apply? Consider SB4, the recently enacted Texas anti-sanctuary city provision that requires local officials to comply with federal immigration law on threat of civil and criminal liability.[316] Under existing Supreme Court precedent, federal immigration officials cannot order local police to spend money, allocate resources, or provide personnel to enforce federal law—this would be the unlawful commandeering of local officials under the Tenth Amendment.[317] So too under existing precedent, the state of Texas cannot spend money, allocate resources, or provide personnel to create its own parallel immigration-enforcement authority—that power is generally reserved to the federal government.[318]

SB4, however, compels local officials to enforce federal law despite these twin structural limitations on the location of immigration enforcement. If the protections of the Tenth Amendment run to the state of Texas, then one would assume that the state could waive this protection.[319] However, if the Tenth Amendment runs to the people, then Texas cannot force cities to do

312. *Id.* at 34.

313. *See id.* at 32–33, 43–44 (arguing that constitutional silence on local government status should lead to deference to state law).

314. U.S. CONST. amend. X.

315. New York v. United States, 505 U.S. 144, 181–82 (1992) (declaring Congress's "departure from the constitutional plan cannot be ratified by the 'consent' of state officials" because the constitutional division of power is for the benefit of the individual, not the State or state officials).

316. *See supra* note 102 and accompanying text.

317. *See* Printz v. United States, 521 U.S. 898, 935 (1997) ("Congress cannot compel the States to enact or enforce a federal regulatory program.").

318. Arizona v. United States, 567 U.S. 387, 394 (2012) (finding that the federal government has broad powers over immigration).

319. *But see New York*, 505 U.S. at 181–86 (rejecting the argument that consenting to infringement of state sovereignty may waive the protections of the Tenth Amendment); Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).

what the state or the federal governments cannot each do separately.[320] Local officials, in other words, could assert their own anti-commandeering objection in the relatively unique circumstance when the state and federal governments are separately disabled from acting. To allow them to overcome the anti-commandeering principle by acting in concert undermines an important check provided by the vertical separation of powers.

A municipal anti-commandeering principle would admittedly be novel—though the principle is sound if one assumes that the people act most immediately through their local governments. Courts have recognized that states do not exercise plenary power over their political subdivisions when federal law operates directly on those subdivisions, or when constitutional law requires some local freedom from state law commands. There is a limited "shadow doctrine" of local-government status that could be invoked to make out a larger anti-commandeering claim.[321]

That being said, a local anti-commandeering principle would require some judicial creativity. It is much more likely for cities to invoke federal law preemption to protect themselves against contrary state commands.[322] The leading argument against Texas's SB4 is that by deputizing local-government officials to enforce immigration laws, Texas has created an enforcement apparatus that is preempted by federal law. The federal primacy in immigration, the need for uniformity, and the problems of disparate local enforcement are standard arguments[323]—they are only unusual in the case of SB4 because the current administration will not bring them. The current administration *wants* Texas to commandeer local officials to enforce federal immigration laws. Many Texas cities, by contrast, do not want to become immigration enforcers for political as well as professional and public safety

320. *Cf.* Bond v. United States, 564 U.S. 211, 222 (2011) ("By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power.").

321. Richard C. Schragger, *Reclaiming the Canvassing Board:* Bush v. Gore *and the Political Currency of Local Government*, 50 BUFF. L. REV. 393, 395–96, 407–09 (2002). Local governments have been treated independently from their states in a number of contexts. *See* Lawrence Cty. v. Lead-Deadwood Sch. Dist. No. 40-1, 469 U.S. 256, 258 (1985) (holding that states cannot interfere with federal funds granted to localities); Cmty. Commc'ns Co. v. City of Boulder, 455 U.S. 40, 53 (1982) (holding that local ordinances are not "state action" for purposes of the Sherman Act); Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690–91 & n.54 (1978) (holding that the Eleventh Amendment does not bar municipal liability); Milliken v. Bradley, 418 U.S. 717, 744–45 (1974) (holding that for federal constitutional purposes the relevant boundary lines for desegregation are local school districts and not states as a whole); Avery v. Midland Cty., 390 U.S. 474, 480 (1968) (holding that local governments must adhere to the "one person, one vote" principle); Louisiana *ex rel.* Folsom v. Mayor of New Orleans, 109 U.S. 285, 288 (1883) (ruling that a judgment against a locality cannot be collected from the state).

322. *See*, *e.g.*, City of El Cenizo v. Texas, 264 F. Supp. 3d 744, 758 (W.D. Tex. 2017).

323. *See id.* at 760–61, 769–70 (highlighting the cities' contentions that SB4 is preempted because it "generally upsets the careful balance . . . struck between encouraging local assistance and preserving local discretion," invades the federal government's "exclusive control of immigration," hinders the creation of uniform training and enforcement policies, and conflicts with federal law).

reasons.[324] These are good reasons, and courts should consider them when determining the legitimacy of SB4. But ultimately, the question turns on a conflict between state and federal law. Cities' invocation of federal law preemption is opportunistic.

2. Home Rule.—City recourse to federal preemption suggests how weak the concept of city self-government is as a conceptual matter. A more direct way to defend against state law preemption is via state constitutional home rule guarantees or via other state constitutional provisions that prevent the targeting of municipalities for special treatment. The difficulty, as I have noted already, is that most states have embraced a form of constitutional home rule that cannot resist explicit state law preemption.[325] Cities often have the power of initiative—they can adopt a wide range of legislation without prior authorization from the state. What cities do not often enjoy is the power of immunity—they cannot generally assert local law's supremacy over a duly and properly enacted state statute that conflicts.

It is for that reason that SB4 will be almost impossible to defeat on home rule grounds in Texas.[326] Other states can be slightly more amenable. Paul Diller has noted that approximately fifteen states provide for some degree of local legislative immunity, though most do so for structural or personnel matters alone.[327] Structural decisions are those that concern the form of local government—the number of city councilors and like issues. Personnel matters are decisions about the city's own employment practices, its hiring and firing policies. Most states do not provide for local regulatory or fiscal immunity—the kind of immunity most at issue in cases of state–city conflict.

In those few states that do, courts often have to determine whether a municipal ordinance is a matter of "local concern" immune from contrary state enactments.[328] In Colorado, for example, courts consider a number of factors, including the need for statewide uniformity and the impact of local policy on nonresidents.[329] Uniformity and extraterritoriality considerations often doom local legislation in anything but the narrowest sphere. As I already observed, local intervention to regulate cross-border markets is almost always going to have extraterritorial effects. By definition, such enactments will fail the standard tests for "local" legislation. In Colorado,

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324. For a discussion of the reasons that locals are better suited to enforce such laws, see Daniel I. Morales, *Transforming Crime-Based Deportation*, 92 NYU L. REV. 698, 751–53 (2017).

325. *See supra* note 151 and accompanying text.

326. Texas home rule powers cannot be exercised on any matter that has been preempted by state law. *See* TEX. MUN. LEAGUE, HANDBOOK FOR MAYORS AND COUNCILMEMBERS 10 (2015) ("[H]ome rule cities look to the state constitution and state statutes to determine what they may not do." (emphasis omitted)).

327. Paul A. Diller, *Reorienting Home Rule: Part 2–Remedying the Urban Disadvantage Through Federalism and Localism*, 77 LA. L. REV. 1045, 1067 (2017).

328. *Id.* at 1068.

329. *Id.*

courts also look to "tradition" to determine the appropriate sphere of local authority.[330] This criteria too limits cities to those powers to which the state has already acceded.[331]

Generality requirements in state constitutions can have more teeth. In Ohio, for example, courts have struck down preemptive state legislation when it has not been part of a comprehensive, statewide enforcement scheme, did not operate uniformly across the state, or was essentially intended to override a local police-power regulation rather than replace it with the state's own conduct-regulating statute.[332] Ohio is an outlier, however. Most states' generality requirements are mere formalities; they merely prevent the legislature from specifically identifying a city for special regulation.[333]

Home rule provisions in state constitutions do not interpret themselves—there is often textual room to create more space for local authority. Courts, however, are generally wary of broad grants of local power. State court judges tend to be amenable to arguments for statewide uniformity. And because state judges tend to rise through state party political systems, their allegiance is unlikely to run to cities. State judges are by definition part of a statewide professional, political, and cultural apparatus. Many are elected and thus have to be responsive to a political party that is in turn responding to an increasingly polarized electorate.[334] If they are appointed, those judges are likely to reflect their appointer's political makeup.[335] To uphold the exercise of local authority where it matters, state judges have to resist the direct interests of the state legislature, and often their own policy proclivities.

That does not mean that state judges do not have some interest in the principle of home rule. In certain cases, that principle might override a judge's contrary policy preferences. But generally, judicial decisions distributing powers among different levels of government tend to reflect

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330. *Id.*

331. *Id.* Also, tradition seems to be considered less important than other concerns of statewide impact. *See id.* ("Of the Colorado Supreme Court's factors, tradition perhaps is the most suspect.").

332. *See* City of Canton v. State, 766 N.E.2d 963, 964–65 (Ohio 2002) ("[G]eneral law[s under] . . . home rule analysis . . . must (1) be part of a statewide and comprehensive legislative enactment, (2) apply to all parts of the state alike and operate uniformly throughout the state, (3) set forth police, sanitary, or similar regulations, rather than purport only to grant or limit legislative power of a municipal corporation to set forth police, sanitary, or similar regulations, and (4) prescribe a rule of conduct upon citizens generally.").

333. Diller, *supra* note 327, at 1073.

334. For a history of judicial elections, see JED HANDELSMAN SHUGERMAN, THE PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA 4 (2012).

335. *See*, *e.g.*, Michael Kiefer, *Brewer Fills Arizona Courts with Republican Judges*, ARIZ. REPUBLIC (Sept. 28, 2012), http://archive.azcentral.com/arizonarepublic/news/articles/2012/09/12/20120912brewer-fills-arizona-courts-republican-judges.html [https://perma.cc/8KUG-AEP7] (noting how Arizona has seen strong correlations between the political affiliation of its governors and appointed judges since 1991).

substantive policy commitments, as Laurie Reynolds has argued.[336] This is unsurprising: federalism decisions in the Supreme Court tend to break along partisan lines.[337] So too, one would expect policy preferences to infect the judicial determination of what is appropriately "local" and what is not.

3. Equal Protection.—In the absence of a clear and administrable procedural approach to the division of state and local authority, cities might instead assert substantive constitutional claims that generate a space for local authority. The preemption fight is generally stacked against the cities—their home rule authority is narrowly constrained by ostensibly "neutral" criteria. But local authority can be exercised in the form of constitutional litigation itself. Cities represent their constituents' constitutional interests directly or assert the city's own constitutional authority to protect.

Two kinds of litigation are relevant here. The first involves cases in which cities assert locals' constitutional rights. Starting about two decades ago, the San Francisco City Attorney's Office made a concerted effort to become an impact litigation arm of the municipal community.[338] Consistent with San Francisco's political agenda, the city attorney sought constitutional change through the courts, including and most prominently in pursuit of marriage equality in the years leading up to the same-sex marriage decision, *Obergefell v. Hodges*.[339]

City impact litigation is supported both as a legal and political matter in San Francisco, and the effectiveness and reach of that office have been difficult to reproduce elsewhere. California is particularly amenable to the bringing of municipal constitutional and statutory claims. Under California law, cities have standing to bring a wide range of actions on behalf of their residents.[340] The city attorney is elected, and has generally viewed his job as bringing constitutional claims on behalf of the city. City supported and funded litigation is a strategy for advancing local political aims. The

336. Laurie Reynolds, *Home Rule, Extraterritorial Impact, and the Region*, 86 DENV. L. REV. 1271, 1292–93 (2009).

337. *See, e.g.*, Frank B. Cross & Emerson H. Tiller, *The Three Faces of Federalism: An Empirical Assessment of Supreme Court Federalism Jurisprudence*, 73 S. CAL. L. REV. 741, 770 (2000) (concluding that the ideological aspect of federalism "predominates in the Supreme Court's federalism decisions").

338. *See* Kathleen S. Morris, *Cities Seeking Justice: Local Government Litigation in the Public Interest*, *in* HOW CITIES WILL SAVE THE WORLD: URBAN INNOVATION IN THE FACE OF POPULATION FLOWS, CLIMATE CHANGE AND ECONOMIC INEQUALITY 254, 254 (Ray Brescia & John Travis Marshall eds., 2016).

339. 135 S. Ct. 2584 (2015); *see also Dennis Herrera Re-elected by Voters as City Attorney*, CITY & COUNTY S.F. (Nov. 4, 2009), http://sfgov.org/tmp_home/newsarchive/sf_news/2009/11/dennis-herrera-reelected-by-voters-as-city-attorney.html [https://perma.cc/FUB3-B9ZL] (describing how the head of the San Francisco City Attorney's Office spearheaded the first government lawsuit challenging the constitutionality of laws banning same-sex marriage).

340. Morris, *supra* note 310, at 33 n.196.

constitutional injuries are not necessarily peculiar to San Francisco residents, but may have special resonance there.

A second type of litigation involves situations in which the absence or withdrawal of local authority is itself a structural component of the constitutional injury. Consider state takeovers of failing municipalities, as previously mentioned. City officials and local citizens have resisted such takeovers on the ground that they extinguish local electoral democracy—receivership laws generally suspend the authority of the mayor and city council and grant broad powers to a state-appointed official. In Michigan, as we have seen, state receivers have been appointed predominantly in majority-black cities, potentially giving rise to an equal protection claim.[341] Advocates have argued that these takeovers have a disparate impact on African-American residents of the state.

These kinds of claims are difficult to bring as they require the showing of animus under *Washington v. Davis*[342] and the standards articulated in *Village of Arlington Heights v. Metropolitan Housing Development Corp*.[343] In *Lewis v. Bentley*, plaintiffs argued that the Alabama legislature acted with discriminatory intent when it preempted Birmingham's living wage law.[344] The plaintiffs claimed that preempting city wage minimums disproportionately affected African-American residents of the state and reinforced the existing racial wage gap that has persisted in Alabama since the Jim Crow era.[345] A federal district court rejected the equal protection claim—instead accepting that the legislature's stated justification of state wage uniformity was legitimate.[346]

School finance equalization litigation also involves a constitutional injury that turns on the capacity for local governments to adequately exercise local power. The original *Rodriguez* litigation asserted a violation of equal protection on the grounds that state systems like Texas's made it impossible

341. Julie Bosman & Monica Davey, *Anger in Michigan over Appointing Emergency Managers*, N.Y. TIMES (Jan. 22, 2016), https://www.nytimes.com/2016/01/23/us/anger-in-michigan-over-appointing-emergency-managers.html [https://perma.cc/2GGP-GS2A] (describing local unhappiness in majority black cities over state appointments that they view as undemocratic and disenfranchising).

342. Washington v. Davis, 426 U.S. 229, 246–48 (1976) (stating that the need for discriminatory purpose for a validated equal protection claim); *see also* Lewis v. Bentley, No. 2:16-CV-690-RDP, 2017 WL 432464, at *1, *13 (N.D. Ala. Feb. 1, 2017) (rejecting an equal protection challenge to an Alabama statute overriding Birmingham's minimum wage ordinance).

343. 429 U.S. 252, 264–66 (1977) (requiring that racially discriminatory intent be shown to be "a motivating factor" in the state action and affirming that discriminatory impact alone is not dispositive proof of discriminatory intent).

344. *Bentley*, 2017 WL 432464, at *11.

345. For a discussion, see Brief for Partnership for Working Families and the Southern Poverty Law Center Supporting Applicants at 2–3, 5–6, 11–12, Lewis v. Alabama, No. 17-11009 (11th Cir. June 12, 2017), 2017 WL 2671579.

346. *Bentley*, 2017 WL 432464, at *11 (stating that plaintiffs did not allege facts showing intentional racial discrimination as required to support their equal protection claim).

for low-property-wealth school districts to raise the same funds as high-property-wealth districts for the same taxing effort.[347] After the *Rodriguez* Court rejected their federal claims, plaintiffs pursued similar claims under state constitutional education clauses, seeking additional funding for poorer school districts or the equalization of property-tax wealth across local jurisdictions.[348]

These kinds of cases empower local governments by way of vindicating equal protection guarantees. The most prominent case is *Romer v. Evans*.[349] In *Romer*, the Supreme Court held that Amendment 2, which barred Colorado local governments from adopting LGBT protective antidiscrimination laws, was unconstitutional—both because of its breadth and because it undermined the ability for local pro-gay majorities to gain protections in local jurisdictions with pro-gay majorities.[350] *Romer* relied in part on a line of Supreme Court cases from the civil rights era that struck down state or local electoral or procedural modifications that were designed to make it more difficult for African Americans to gain and exercise local political power.[351]

Before it was repealed, North Carolina's HB2[352]—the bathroom bill—had a similar structure to Amendment 2. In response to the city of Charlotte's adoption of a transgender bathroom ordinance that permitted individuals to use the public bathroom that corresponded with their gender identity, the legislature passed a law mandating that public bathrooms and changing facilities be restricted to individuals of their biological sex.[353] HB2 also barred the adoption of local antidiscrimination ordinances, but unlike Amendment 2 in Colorado, North Carolina's statute did not explicitly target pro-gay local ordinances for repeal. Instead, it merely preempted all local antidiscrimination laws with a statewide law that did not include LGBT persons as a protected class.[354]

Both Colorado's Amendment 2 and North Carolina's HB2 withdrew authority from local governments to adopt antidiscrimination legislation protecting vulnerable populations. Under conventional state-preemption analysis, these kinds of statutes are unremarkable. But *Romer* treats the

347. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 15–16 (1973).

348. Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 391–93 (Tex. 1989).

349. 517 U.S. 620 (1996).

350. *Id.* at 633.

351. *See, e.g.*, Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 487 (1982) (holding that states may not allocate government power nonneutrally by explicitly using a racial decision); Gordon v. Lance, 403 U.S. 1, 4 (1971) (distinguishing cases that struck down state laws for diluting a group's voting power); Hunter v. Erickson, 393 U.S. 385, 392–93 (1969) (determining that a municipal government may not enact policies that make it harder for a particular group to pass legislation benefitting it); Reitman v. Mulkey, 387 U.S. 369, 381 (1967) (holding that states may not authorize private discrimination).

352. H.B. 2, 2016 Gen. Assemb., 2d Extra Sess. (N.C.).

353. *Id.*

354. *Id.*

preemption of local authority as a component of the constitutional injury. At its broadest reading, *Romer* preserves a limited space for the exercise of local power free from state preemption.

In what circumstances a shift of decision-making authority from the local to the state would constitute an equal protection violation is uncertain. I have argued elsewhere that preemptive state legislation should be suspect when it overrides local laws that extend equal benefits to a normally unpopular group and when there are no good reasons for statewide regulation.[355] The combination of the absence of good reasons for centralized regulation, the unpopularity of the group, and the group's ability to obtain some measure of protection from local majorities will be indicative of statewide animus, an impermissible motive for government regulation.

HB2 seemed to share many of these characteristics. Charlotte's transgender bathroom ordinance applied only to public restrooms and changing facilities.[356] It did not have extraterritorial effects, did not upset the state's interest in uniformity, and did not regulate cross-border markets. The state legislation seemed driven by fear and misunderstanding of transgender persons and a sense of disgust associated with their use of restrooms and locker rooms. The exclusion of LGBT persons from state public-accommodation laws, when they had previously been included in some cities, also seemed gratuitous. As in *Romer*, the withdrawal of city-specific ordinances protecting LGBT persons seemed unwarranted by anything but hostility to an unpopular group that had gained some measure of equal treatment in sympathetic local jurisdictions.

To be sure, *Romer* is an enigma. The Supreme Court has not extended it beyond its currently narrow confines, and there are few cases applying it in a case of state–local conflict.[357] There is a fair amount of judicial work necessary to get from *Romer* to striking down statutes like HB2.

So too, a set of arguments would have to be developed to move from *Romer* to striking down a statute like Texas's SB4—which similarly preempts local authority to deal more equitably with a disfavored class. With SB4, the state could be accused of targeting Hispanic people or undocumented immigrants—again by overriding the policy gains they have made in particular cities where they have sympathetic majorities.

These arguments are latent in *Romer* itself, but too much can be made of the potential for equal protection challenges in defense of local autonomy.

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355. *See* Richard C. Schragger, *Cities as Constitutional Actors: The Case of Same-Sex Marriage*, 22 J.L. & POL. 147, 185 (2005). *But cf.* Schuette v. Coal. to Defend Affirmative Action, 134 S. Ct. 1623, 1638 (2014) (plurality opinion) (rejecting a challenge to a Michigan constitutional amendment prohibiting state universities' use of race-based preferences).

356. CHARLOTTE, N.C., CITY CODE ch. 12, art. III, §§ 12-58 to -59 (2017).

357. An example of the Sixth Circuit adopting a localist reading of *Romer* can be found in Equal. Found. of Greater Cincinnati v. City of Cincinnati, 128 F.3d 289, 295 (6th Cir. 1997), *cert. denied*, 525 U.S. 943 (1998).

Equal protection precedents are available to cities that seek to defend against state overrides of local antidiscrimination statutes. But the current reach of these precedents is limited and does not offer a systematic path to real home rule.

B. City Political Defenses

HB2 is useful for analyzing the city's possible legal defenses to preemptive state legislation. But it is more relevant to examining the city's political defenses. Notably, HB2 was never tested in court—its repeal[358] short-circuited a full judicial hearing.[359] But that is representative—very little preemptive legislation is ultimately susceptible to legal challenge. Instead, city resistance normally takes place within the legislative arena, in fights over legislation and repeal.

These preemption fights illustrate some features of the current politics of state–city relations. First, local policy fights are never just "local"—they are often waged by national interest groups on both sides. The nationalization of state–local political fights makes them more difficult to resolve. Second, economic development interests exercise an outsized influence in state–city political battles, though that influence is selective. And third, while demographic changes are shifting wealth and power back toward the central city, metropolitan-area populations are often still overwhelmingly suburban.[360] City leaders will need to seek allies among those metropolitan populations in order to make headway in often hostile state legislatures.

1. Cities and National Interest Groups.—That the city has become a highly salient site for national battles over everything from fracking to LGBT rights to plastic bags is obvious from the long list of preemptive state legislation discussed in Part I. As I have argued, cities have always attracted the attention of state legislators. In the nineteenth and early part of the twentieth century, state legislative machines saw in cities both political and economic opportunities. Ideological and deregulatory political battles, by

358. Corinne Segal, *What the North Carolina Legislation to Repeal the HB2 'Bathroom Bill' Actually Says*, PBS (Mar. 30, 2017), https://www.pbs.org/newshour/nation/watch-live-nc-legislature-debates-repeal-hb2-bathroom-bill [https://perma.cn/S8TM-U7HQ].

359. *Trial over North Carolina's Transgender Bathroom Law HB2 Delayed*, NBC NEWS (Sept. 3, 2016), https://www.nbcnews.com/feature/nbc-out/trial-over-north-carolina-s-transgender-bathroom-law-hb2-delayed-n642411 [https://perma.cn/BQ8A-8HNL]. Due to the trial being pushed back, the repeal in March of 2017 muted judicial review of HB2.

360. Jed Kolko, *How Suburban Are Big American Cities?*, FIVETHIRTYEIGHT (May 21, 2015), https://fivethirtyeight.com/features/how-suburban-are-big-american-cities/ [https://perma.cc/J22E-XEGZ] (explaining data showing that the recent growth of cities correlates not only with larger urban, but also suburban, populations).

contrast, generally have been fought at the national level, in the halls of the administrative state, and to a lesser extent in state houses.

Those fights continue. But in part because of state and federal inaction in particular regulatory arenas, and in part because political entrepreneurs have found opportunities at the local level, state–city conflicts have become increasingly salient.

A good example is the municipal living-wage movement and other pro-labor and anti-poverty efforts. These efforts have generally been spearheaded by national labor and anti-poverty groups working as part of a larger cross-city effort to regulate using the tools of municipal government.[361] At the same time, ALEC has made a concerted effort to promulgate model state legislation consistent with its industry-friendly, free-market positions.[362] As we have seen, ALEC has aggressively promoted a deregulatory agenda that seeks to override municipal business, licensing, or environmental regulation.[363]

That industry would seek to counter local regulation hostile to it is unsurprising. Regulated industries have long sought preemptive national or state legislation. As Lori Riverstone-Newell has observed, the tobacco and firearms industries successfully sought state protection from hostile local laws in the 1980s and 1990s.[364] As already noted, sharing economy firms, as well as telecommunications providers, have also sought blanket protective legislation at the state or federal level.[365] In these cases, the interests arrayed in favor of or against industry are national in scope—and the battle over a particular local regulation or a preemptive state law is part of a larger multistate political and policy fight.

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361. Steven Malanga, *How the "Living Wage" Sneaks Socialism into Cities*, CITY J. (Winter 2003), https://www.city-journal.org/html/how-%E2%80%9Cliving-wage%E2%80%9D-sneaks-socialism-cities-12397.html [https://perma.cc/4FGK-2UR3] (showing how the modern national living-wage movement arose out of a smaller movement in Baltimore in 1993, which is now a top-down countrywide force).

362. Molly Jackman, *ALEC's Influence over Lawmaking in State Legislatures*, BROOKINGS (Dec. 6, 2013), https://www.brookings.edu/articles/alecs-influence-over-lawmaking-in-state-legislatures/ [https://perma.cc/H4JS-QM5U] (explaining how influential ALEC has been through its model legislation writing).

363. *Telecommunications Deregulation Policy Statement*, AM. LEGIS. EXCHANGE COUNCIL (Oct. 11, 2014), https://www.alec.org/model-policy/telecommunications-deregulation-policy-statement/ [https://perma.cc/Q5LR-LY7R].

364. Riverstone-Newell, *supra* note 23, at 405; *see also* Emily Badger, *Blue Cities Want to Make Their Own Rules. Red States Won't Let Them*, N.Y. TIMES (July 6, 2017), https://www.nytimes.com/2017/07/06/upshot/blue-cities-want-to-make-their-own-rules-red-states-wont-let-them.html [https://perma.cc/4YGN-68U4] (claiming current preemption laws have their genesis in the preemption laws that the tobacco industry and NRA lobbied for in the 1980s and 1990s).

365. Gerald B. Silverman, *Uber, Airbnb, Tech Companies Spend Big Bucks Lobbying in N.Y.*, BLOOMBERG (May 28, 2017), https://www.bna.com/uber-airbnb-tech-n73014451621/ [https://perma.cc/HJ7A-9AQP] (charting the rise in lobbying by tech firms in New York over the past three years).

The problem of legislative capture is apparent. State legislators often work part-time, are poorly paid, have limited staff, and have limited access to expertise. They depend heavily on interested parties to provide them with information. State legislative processes are notoriously opaque. At the same time, cities rarely have the resources to provide expertise, to marshal evidence, or to monitor state legislative activity or respond to proposed legislation. Only the largest cities have dedicated lobbyists in state capitols. And the organizations that represent cities within the state—Leagues of Municipalities or Leagues of Cities—tend to be fractured and weak.

The lack of a concerted municipal *qua* municipal voice in state–city preemption debates means that specific policy interest groups tend to drive intergovernmental relations. Charlotte's transgender access law thus becomes a statewide and nationwide flashpoint in the left–right culture wars over LGBT rights.[366] Similarly, municipal minimum wage fights and state anti-sanctuary city laws are ideological—reflecting the interests of national interest groups and national political conflicts.

The nationalization of local politics has been much remarked upon.[367] Local voters are increasingly voting their national political identity instead of identifiable local interests, and the paucity of pragmatic centrists in statehouses is increasingly apparent.[368] This may mean that the give-and-take of intrastate compromise politics is less likely to occur, and that what might have been viewed as a "city" or "rural" bill is now effectively an "issue" bill—deserving of no particular geographical deference. The rural or suburban legislator is less likely to give big city policymaking a pass under this regime. Those legislators are responding to voters who have stronger ideological than geographical commitments.

2. Corporate Cosmopolitanism.—HB2 in North Carolina is a good example of a local ideological fight that may have garnered less reaction in a less hyperpolarized and nationalized political environment. It is also an

366. Mark Price, *Social Media Erupts as Charlotte Rescinds LGBT Rights Law in HB2 Trade Off*, CHARLOTTE OBSERVER (Dec. 19, 2016), http://www.charlotteobserver.com/news/local/article121747648.html [https://perma.cc/VJ3Z-3KKT] (describing the public reaction on Twitter over the HB2 controversy).

367. *See* Alan I. Abramowitz & Steven Webster, *The Rise of Negative Partisanship and the Nationalization of U.S. Elections in the 21st Century*, 41 ELECTORAL STUD. 12, 15–16, 18 (2016) (arguing that the shift since the 1980s towards more and more negative partisanship has led to party loyalty and straight-ticket voting being dramatically more pronounced than before, which has in turn "nationalized" state and local elections). One implication of these voting patterns is that parties do not cater to the median voter at the state and local level. *See* David Schleicher, *Federalism and State Democracy*, 95 TEXAS L. REV. 763, 765–68 (2017).

368. Craig Fehrman, *All Politics Is National*, FIVETHIRTYEIGHT (Nov. 7, 2016), https://fivethirtyeight.com/features/all-politics-is-national/ [https://perma.cc/ML4F-MHPM] (charting the phenomenon of how local-level politics is starting to become increasingly polarized in a way that reflects the national political scene).

example of how economic development remains a central concern of state and local politicians and an important driver of policy.

In the case of HB2, the most significant political pressure groups were large-scale national corporations—specifically professional sports leagues. Charlotte is home to professional basketball and football teams and hosts professional golf tournaments. The National Basketball Association (NBA) and the National Collegiate Athletic Association (NCAA) in particular have been vocal about LGBT nondiscrimination, and both threatened to withdraw their tournaments and events from North Carolina locations.[369] Other companies threatened to suspend planned expansions in the state.[370]

Private, corporate boycotts as a means to induce policy change have been effective in a number of states. In addition to North Carolina, three states—Indiana, Arizona, and Georgia—have seen private businesses threatening to boycott in-state business over discriminatory state laws.[371] These efforts have generally been deployed in the context of LGBT antidiscrimination. In the case of HB2, back channel discussions between Charlotte and the legislature sought a compromise outcome to prevent the flight of high-visibility sports and entertainment events from the state and the city.[372] This pressure resulted in the repeal of HB2, accompanied by a moratorium on all municipal private-sector employment and public-accommodation ordinances until December 1, 2020.[373] As a result, Charlotte's antidiscrimination law was struck, but North Carolina's more far-reaching bathroom law was struck as well. Local power to adopt antidiscrimination ordinances was not vindicated, but it was not entirely preempted either.

Two observations are worth making. First, it is notable that the primary arguments against HB2 were economic and driven by the threat of corporate flight. Critics accused the legislature and governor of sacrificing the state's economic health to an ideological fight, and the threat of boycott and withdrawal was an effective inducement for the legislature to reconsider.

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369. *In Bitter Divide, Repeal of North Carolina LGBT Law Fails*, ESPN (Dec. 21, 2016), http://www.espn.com/college-sports/story/_/id/18329901/ncaa-nba-bans-north-carolina-remain-hb2-repeal-fails [https://perma.cc/MR26-PZHD].

370. Ryan Bort, *A Comprehensive Timeline of Public Figures Boycotting North Carolina over the HB2 'Bathroom Bill'*, NEWSWEEK (Sept. 14, 2016), http://www.newsweek.com/north-carolina-hb2-bathroom-bill-timeline-498052 [https://perma.cc/N58X-FRAA].

371. Sarah Parvini & Nigel Duara, *In Conservative Indiana, Bemusement Amid Boycott Threats over Religious Freedom Law*, L.A. TIMES (Mar. 28, 2015), http://www.latimes.com/nation/la-na-ff-indiana-religion-law-20150328-story.html [https://perma.cc/UW7K-KAJ3]; Maria Puente, *Hollywood Studios Threaten to Boycott Georgia If Controversial Law Signed*, USA TODAY (Mar. 24, 2016), https://www.usatoday.com/story/life/movies/2016/03/24/hollywood-studios-threaten-boycott-georgia-if-controversial-law-signed/82206760/ [https://perma.cc/KL97-DRTS].

372. Colin Campbell & Jim Morrill, *Lawmakers Vote Thursday on Deal to Repeal HB2*, CHARLOTTE OBSERVER (Mar. 29, 2017), http://www.charlotteobserver.com/news/politics-government/article141566264.html [https://perma.cc/59CB-4KN4].

373. H.B. 142, 2017 Gen. Assemb., Reg. Sess. (N.C.).

Cities like Charlotte are economic engines for their states, especially if those cities and their immediate surrounding metropolitan areas are homes to corporate headquarters and a high percentage of industry, corporate, and business leaders.

For cities, corporate "cosmopolitans" can be effective allies, though certainly not across the whole range of issues. Corporate officials' policy preferences on social issues may be more consonant with urban dwellers more generally. LGBT antidiscrimination, for example, may be both familiar to corporate decision makers and consistent with the corporate mission. Economic and regulatory issues, by contrast, may not be. Local regulatory and redistributive policies may find fewer corporate allies. If Charlotte was proposing a local minimum wage, it is likely the interests would line up differently.

Second, cities can more readily exercise power through alliances with statewide elected officials, who tend to be less ideologically polarized and more sympathetic to urban constituencies. As previously discussed, dense metropolitan areas are put to a disadvantage by state legislative gerrymandering. That disadvantage disappears in statewide races in which candidates have to appeal to voters from throughout the state. North Carolina is again an example. The Republican incumbent governor, Pat McCrory, who signed the bathroom bill, was defeated in a subsequent election in part because of his stance on the bill.[374] In many states with hostile state legislatures, city power is possible only through alliances with statewide elected officials, especially governors.

3. Metro-Area Demographics.—In the face of a hostile or somewhat hostile state legislature, the city's political influence will ultimately turn on the metropolitan-area population's identification with the city's interests. As commentators have observed, the large-scale agglomerations that make up the nation's MSAs drive state and national economies.[375] These census-defined regions are often centered on one or two large cities but are not coextensive with those cities. The city population is often dwarfed by the surrounding metropolitan-area population, which is located in suburban towns and smaller municipalities or in a large suburban county. Central cities

374. Colin Campbell, *McCrory Takes Parting Shots at HB2 Opponents, ACC as Cooper Becomes Governor*, NEWS & OBSERVER (Dec. 31, 2016), http://www.newsobserver.com/news/politics-government/state-politics/article123985324.html [https://perma.cc/7B98-Q38Z] ("He said HB2 likely played a major role in his election defeat, and he blamed the Charlotte City Council—which passed a nondiscrimination ordinance that prompted HB2—as well as the LGBT advocacy groups that backed economic boycotts of the state.").

375. *See* BRUCE KATZ & JENNIFER BRADLEY, THE METROPOLITAN REVOLUTION: HOW CITIES AND METROS ARE FIXING OUR BROKEN POLITICS AND FRAGILE ECONOMY 1–2 (2013).

have witnessed a revival over the last two decades. This urban resurgence has been more than matched by metropolitan-wide growth, however.

Metropolitan politics is complicated. In some places, city–suburb divisions still predominate. But as metro-area suburbs become increasingly dense and more ethnically diverse, the sociological, cultural, and economic lines between "city" and "suburb" are blurring. Whether this means that suburban voters will come to identify with city voters is another question. City leaders still have to convince metro-area residents that the city's health and welfare is in their interest.

Proponents of regional government have been making these kinds of arguments for some fifty years, urging suburban voters to ally with central cities to ensure that those cities are economically robust and that city neighborhoods are not in decline. Few suburbanites have been persuaded. Suburban voters have generally not been interested in consolidating school districts, sharing revenue with the central city, or creating regional planning or metro-wide governing bodies. The racial and economic divisions between city and suburb have generally been too deep to produce meaningful cooperation, let alone collective or regional government.

Two kinds of demographic shifts could auger a political change. The first is the rising wealth and economic primacy of the central city. As noted, the urban resurgence of the last few decades has led to population and economic gains in downtown business districts. The popularity of the city as a place for work, residence, and recreation gives the city some leverage, both in relation to the wider metro community and to the state as a whole. In Charlotte, for example, the city's site as a location for professional sports franchises provides it with some leverage in its negotiations with the legislature. Economically robust cities are more likely to be able to pursue social welfare legislation like the living wage, and also to be able to defend those policies against state objection. Simply having access to more stable municipal resources makes a significant difference in the political and fiscal life of the city. The less fiscally dependent the city is on the state, the more autonomy it can exercise.

The second demographic shift is the increasing economic diversity of the suburbs. As I have mentioned, the suburbs are becoming more ethnically diverse. They have also for some time been more economically diverse, often to their detriment. Struggling and poor suburban location are commonplace. Central cities are no longer the primary locations for the poorest metropolitan-area residents.[376] Alan Ehrenhalt has called this combination of

376. *See* Elizabeth Kneebone & Natalie Holmes, *U.S. Concentrated Poverty in the Wake of the Great Recession*, BROOKINGS (Mar. 31, 2016), https://www.brookings.edu/research/u-s-concentrated-poverty-in-the-wake-of-the-great-recession/ [https://perma.cc/5ZAQ-V8YQ] (observing that suburbs have the largest and fastest growing poor populations).

increased wealth in the central city and increased poverty in the suburbs "the great inversion."[377]

Does this "great inversion" imply city political strength? As I have already noted, the twenty-first-century reaction to urban resurgence seems in some cases to be resentment.[378] To the extent that non-metro or non-city populations are less connected to the expanding cosmopolitan economy, their interests will diverge from city dwellers.[379] Add to this a sense of cultural distance and one can immediately understand why state legislators might have the view that cities are lawless and have been "circumventing the process that's in place" or "overstep[ping] their bounds."[380]

To be sure, the state–city split reflects a Democratic/Republican split—and the fact that the ideological distance between the parties is significant and growing. For cities operating in such a political environment, the need for both corporate and metro-area allies is essential. The structural, cultural, and political anti-city biases are otherwise difficult to overcome.

Conclusion

The attack on the cities is not simply a function of present-day polarized American politics. Anti-urbanism is instead deeply embedded in the structure of American federalism, as I have been arguing. The relative weakness of the American city has often puzzled observers, who note that the U.S. constitutional system is otherwise highly decentralized. The puzzle is more explainable once one appreciates the political and cultural distinction between local autonomy and city power. The U.S. intergovernmental system supports local autonomy of a certain form; it does not support city power.

If one accepts this descriptive claim about the nature of American federalism, then one can proceed to ask why it matters. For some, the states' primacy in the constitutional system may be not only defensible but worthy of celebration. Others might find the Constitution's anti-urban bias to be troubling for reasons of equal treatment or because it generates disfavored policy outcomes.

In any case, the form that our current federalism takes requires justification. Home rule advocates at the turn of the twentieth century argued

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377. ALAN EHRENHALT, THE GREAT INVERSION AND THE FUTURE OF THE AMERICAN CITY 1 (2012).

378. *See supra* subpart III(D); *see also* KATHERINE J. CRAMER, THE POLITICS OF RESENTMENT: RURAL CONSCIOUSNESS IN WISCONSIN AND THE RISE OF SCOTT WALKER (2016).

379. *See* William H. Frey, *Census Shows Nonmetropolitan America Is Whiter, Getting Older, and Losing Population: Will It Retain Political Clout?*, BROOKINGS (June 27, 2017), https://www.brookings.edu/blog/the-avenue/2017/06/27/census-shows-nonmetropolitan-america-is-whiter-getting-older-and-losing-population/ [https://perma.cc/VAD3-WRLP].

380. Reid Wilson, *GOP Aims to Rein in Liberal Cities*, HILL (Jan. 5, 2017), http://thehill.com/homenews/campaign/312766-gop-aims-to-rein-in-liberal-cities [https://perma.cc/5P34-G5JA].

that state dominance over the rising industrial cities was corrosive of accountable government, democratic transparency, good policy, and material advancement. Those arguments are familiar ones to both supporters of state-based federalism and those who would like to push federalism down to the city level.[381]

Another set of arguments in favor of federalism focuses on minority rights and the benefits of fragmented government. If the most consequential political and cultural divide of twenty-first-century America is the division between urbanites and non-urbanites, then state-based federalism will not be responsive. City power is necessary to vindicate the values of diversity, majority rule, and local self-government.

As American cities regain some of the economic vitality that they lost at midcentury, these kinds of arguments for home rule will exert more force. The emerging state–city conflicts are already evidence of a demographic and economic shift. Whether an urban-based home rule movement will be one result of this shift is an open question. Whether such a form of home rule will be so domesticated as to have little force is another.

381. *See* SCHRAGGER, *supra* note 120; *Panel Recap: Localism and Democracy*, CONSTITUTION IN 2020, http://www.constitution2020.org/taxonomy/term/19 [https://perma.cc/SUG9-7A2Z].