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## The Attack on American Cities

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THE ATTACK ON AMERICAN CITIES  
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Richard C. Schragger\*

*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. City-state conflicts over the municipal minimum wage, LGBT anti-discrimination, 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.<sup>1</sup> 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 federal immigration authorities.<sup>2</sup> Trump’s Executive Order on Immigration threatens cities that do not cooperate with the loss of federal funds. 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.<sup>3</sup>

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<sup>1</sup> Michelee Ye Hee Lee, *Fact-checking Trump’s rhetoric on crime and the ‘American carnage’*, THE WASHINGTON 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://www.washingtonpost.com/news/fact-checker/wp/2017/01/30/fact-checking-trumps-rhetoric-on-crime-and-the-american-carnage/?utm_term=.b256778bc38b).

<sup>2</sup> THE WHITE HOUSE: OFFICE OF THE PRESS SECRETARY, STATEMENT ON SANCTUARY CITIES RULING (2017).

<sup>3</sup> THE WHITE HOUSE: OFFICE OF THE PRESS SECRETARY, EXECUTIVE ORDER PROTECTING THE NATION FROM FOREIGN TERRORISTS ENTRY INTO THE UNITED STATES (2017).; *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir.), as amended (May 31, 2017), as amended (June 15, 2017), cert. granted, 137 S. Ct. 2080 (2017); *Washington v. Trump*, 858 F.3d 1168 (9th Cir. 2017).

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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 sub-divisions. 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.<sup>4</sup> 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.<sup>5</sup> Michigan adopted legislation that bars local governments from regulating paid sick days, wages, scheduling, and hours or benefits disputes.<sup>6</sup> In North Carolina, the state legislature adopted a “bathroom bill” that was designed to strike down local transgender civil rights ordinances. Before it was repealed, the same law also preempted municipal minimum wage, contracting, employment discrimination, and public accommodations ordinances.<sup>7</sup>

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 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.<sup>8</sup> 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 preempt local regulations.”<sup>9</sup>

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<sup>4</sup> Texas Senate Bill No. 4, Texas Eighty-Fifth Legislature, 2017.

<sup>5</sup> Ariz. Rev. Stat. Ann. § 41-194.01.

<sup>6</sup> Michigan House Bill No. 4052, Michigan Ninety-Eighth Legislature – Regular Session of 2015.

<sup>7</sup> North Carolina House Bill No. 2, North Carolina 2015 General Assembly – 2016 Second Extra Session.

<sup>8</sup> *City of Cleveland v. State of Ohio*, No. 17CV-2672 (Court of Common Pleas, Franklin County, Ohio Civil Division March 20, 2017); *El Paso County et al. v. The State of Texas*, No. 5:17-cv-00459 (W.D. Texas, San Antonio Division filed May 22, 2017); *North Carolina v. City of Charlotte*, No. 13-CRS-12678, (General Court of Justice Superior Court Division Oct. 2014); *City of Greensboro v. Guilford Cty. Bd. Of Elections*, No. 1:15-CV-559, 2017 WL 1229736 (M.D.N.C. Apr. 3, 2017).

<sup>9</sup> Patrick Svitek, *Abbott wants “broad-based law” that pre-empts local regulations*, THE TEXAS TRIBUNE (March 21, 2017, 12 PM), <https://www.texastribune.org/2017/03/21/abbott->

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This hostility to city government is not new.<sup>10</sup> 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 "to a large degree the history of the relations of states to metropolitan cities in this country is a history of repeated injuries . . . repeated usurpations."<sup>11</sup> 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.<sup>12</sup> Those cities have also been pressing the existing limits of their regulatory authority in areas like labor and employment, anti-discrimination 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. In 1910, 45.6 percent of the country still lived in rural areas. In 2010, 80.7 percent of U.S. population was urban.<sup>13</sup> Moreover, the Supreme Court's one-person/one-vote decisions of the early 1960s were meant to remedy the malapportionment problems endemic to state legislatures, dominated as they were by rural interests.<sup>14</sup> 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

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supports-broad-based-law-pre-empting-local-regulations/.

<sup>10</sup> Gerald Frug and other local government theorists have been drawing attention to cities' relative political and legal weakness for a generation. See generally GERALD FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS (1999); FRUG & BARRON, CITY BOUND: HOW STATES STIFLE URBAN INNOVATION (2013). This Article's attention to constitutional anti-urbanism complements that work.

<sup>11</sup> Robert C. Brooks, *Metropolitan Free Cities*, 30 POLITICAL SCIENCE QUARTERLY 222 (1915).

<sup>12</sup> Parag Khanna, *How much economic growth comes from our cities?*, WORLD ECONOMIC FORUM (Apr. 13, 2016), <https://www.weforum.org/agenda/2016/04/how-much-economic-growth-comes-from-our-cities/>.

<sup>13</sup> *Urban Percentage of the Population for the States*, Historical, IOWA STATE UNIVERSITY IOWA COMMUNITY INDICATORS PROGRAM, <http://www.icip.iastate.edu/tables/population/urban-pct-states>.

<sup>14</sup> See *Reynold v. Sims*, 377 U.S. 533, 547-51 (1964).

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, the Democrat Hillary Clinton won a total of 489 counties—and 88 out of 100 of the most populous.<sup>15</sup> By contrast, Donald Trump, running from the political right as a populist, won a total of 2,623 counties.<sup>16</sup> Clinton won the popular vote on the votes of the most urban citizens; Trump won the presidency on the votes of everyone else. Additionally, Clinton's counties constituted 64 percent of America's economic activity, while Trump's added up to only 36 percent.<sup>17</sup>

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<sup>18</sup>) that local self-government is generally valuable. It also assumes that the appropriate powers of municipal government are contested 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 ones' political commitments.

Part I describes the twenty-first century attack on the 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"<sup>19</sup> anti-urbanism. This Part describes how state-based federalism hinders municipal power generally,

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<sup>15</sup> Sydney Schaedel, *Clinton Counties*, FACTCHECK (Dec. 9, 2016), <http://www.factcheck.org/2016/12/clinton-counties/>.

<sup>16</sup> *Id.*

<sup>17</sup> 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/>.

<sup>18</sup> For such a defense, see RICHARD SCHRAGGER, *CITY POWER: URBAN GOVERNANCE IN A GLOBAL AGE* (2016).

<sup>19</sup> *Younger v. Harris*, 401 U.S. 37, 44 (1971).

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.<sup>20</sup>

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 post-War 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 city-state 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 non-cities. Cities and their wider metropolitan areas now contain the bulk of the American population and are the primary economic drivers of their states, 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 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

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<sup>20</sup> Paul Diller has recently made a similar argument. Paul A. Diller, *Reorienting Home Rule: Part 1-The Urban Disadvantage and State Lawmaking*, 77 LA. L. REV. 287, 291 (2016). I recount some of his claims below and develop additional ones.

respond to public health threats; and prevent cities from protecting vulnerable minority groups.<sup>21</sup>

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.<sup>22</sup> 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.<sup>23</sup>

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.<sup>24</sup> The nature of these grants vary 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.

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<sup>21</sup> See generally National League of Cities, CITY RIGHTS IN AN ERA OF STATE PREEMPTION, 2017, <http://www.nlc.org/sites/default/files/2017-03/NLC-SML%20Preemption%20Report%202017-pages.pdf>; Lori Riverstone-Newell, *The Rise of Preemption Laws in Response to Local Policy Innovation*, 47 PUBLIUS 403-425 (2017).

<sup>22</sup> 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 (David Levi-Faur, ed., 2011).

<sup>23</sup> Paul A. Diller, *The City and the Private Right of Action*, 64 STAN. L. REV. 1109, 1118 (2012); See Gary Schwartz, *The Logic of Home Rule and the Private Law Exception*, 20 UCLA L. REV. 671 (1973).

<sup>24</sup> *Lewis et al. v. Bentley et al.*, No. 2:16-CV-690-RDP (N.D. Ala. Feb. 1, 2017); *Florida Retail Federation, Inc. v. The City of Coral Gables*, No. 2016-018370-CA-01, (11<sup>th</sup> Judicial Circuit for Miami-Dade County, Florida Feb. 2, 2017); *City of Cleveland v. State of Ohio*, No. 17CV-2672 (Court of Common Pleas, Franklin County, Ohio Civil Division March 20, 2017).



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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). ALEC is a pro-business lobbying organization. It, and others like it, seek 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.<sup>25</sup>

The firearms industry has been particularly successful in large part because the National Rifle Association has acted aggressively at the state level. Forty-three states have adopted broad preemption statutes related to firearms and ammunition. Eleven of those states have an absolute bar on municipal firearms regulation, permitting no exceptions whatsoever.<sup>26</sup> Notably, New Mexico implemented this rule through an amendment to the state constitution.<sup>27</sup> As one state legislator has stated: “There are lots of areas where home rule certainly applies, but this is not one of them. Not when it comes to an unalienable, natural, God-given right for people to protect themselves.”<sup>28</sup>

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<sup>25</sup> AMERICAN LEGISLATIVE EXCHANGE COUNCIL, <https://www.alec.org/about/> (last visited July 10, 2017).

<sup>26</sup> These states are Arkansas, Indiana, Iowa, Kentucky, Michigan, New Mexico, Oregon, Rhode Island, South Dakota, Utah, and Vermont. Ark. Code Ann. §14-54-1411 (1993); Ind. Code Ann. §35-47-11.1-2 (2011); Iowa Code Ann. §724.28 (1990); Ky. Rev. Stat. Ann. §65.870 (2012); Mich. Comp. Laws Ann. §123.1102 (2015); N.M. Const. Art. II §6 (1986); Or. Rev. Stat. §166.170 (1995); R.I. Gen. Laws Ann. §11-47-58 (1986); S.D. Codified Laws §7-18A-36 (1983), §9-19-20 (1983), §8-5-13 (1983); Utah Code §76-10-500 (1999); Vt. Stat. Ann. §24-2295 (1987). N.M. Const. Art. II §6 (1986).

<sup>27</sup> N.M. Const. Art. II §6 (1986).

<sup>28</sup> Matt Valentine, *Disarmed, How Cities Are Losing the Power to Regulate guns*, THE ATLANTIC (Mar. 6, 2014), <https://www.theatlantic.com/politics/archive/2014/03/disarmed->

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 individually regarding two preempted ordinances – passed in 1957 and 1984, respectively – that prohibited the discharge of firearms in certain areas or city properties.<sup>29</sup> Although the city had not enforced either provision for years, the ordinances remained on the books.<sup>30</sup> 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.<sup>31</sup>

The regulation of tobacco and similar products has also been a common subject of preemptive state legislation. Thirty-one states have some form of preemption of local regulation of tobacco products.<sup>32</sup> Two states, Washington and Michigan, preempt advertising, licensure, smoke-free indoor air, and youth access. The other twenty-nine states preempt some combination of advertising, licensure, smoke-free indoor air, and youth access. Ten states specifically preempt the 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.<sup>33</sup> Washington’s legislature passed a comprehensive regulation of vapor products in 2016 that includes a section preempting local regulation of vapor products.<sup>34</sup>

Conflicts over the provision of municipal broadband, or high-speed internet services, have also arisen in the last decade. At least seventeen states

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<sup>29</sup> *Florida Carry, Inc. v. City of Tallahassee*, No. 1D15-5520, slip op. at 3-4 (Fla. Dist. Ct. App. Feb. 3, 2017) (citing ordinances).

<sup>30</sup> *Id.* at 4-5.

<sup>31</sup> *Id.* at 21-22 (“[S]ection 790.33, as it currently stands, does not prohibit the re-publication or re-printing of the void ordinances.”).

<sup>32</sup> CTR. FOR DISEASE CONTROL & PREV. PREEMPTION ON ADVERTISING, LICENSURE, SMOKE-FREE INDOOR AIR, AND YOUTH ACCESS (2016), <https://www.cdc.gov/statesystem/preemption.html>.

<sup>33</sup> ARK. CODE ANN. § 26-57-267 (2016) (amended April 7, 2015); IOWA CODE §§ 453A.56, 435A.1 (2016) (amended May 23, 2014); NEV. REV. STAT. § 202.249(4) (2016) (amended June 1, 2013); OKLA. STAT. tit. 37 § 600.10 (2016) (amended April 25, 2014); S.C. CODE ANN. § 16-17-504 (2016) (amended June 7, 2013); S.D. CODIFIED LAWS §§ 34-46-20, 34-46-6 (2016) (amended March 28, 2014); WASH. REV. CODE § 70.345.210 (2016) (effective June 28, 2016).

<sup>34</sup> WASH. REV. CODE § 70.345.210 (2016) (effective June 28, 2016).

have preempted local broadband provision. State preemptive legislation either explicitly bars public entities from providing broadband services, or creates barriers meant to disincentive local governments from pursuing municipal broadband capacity. Bans on local governments operating broadband services can be clear cut and unambiguous<sup>35</sup> or based on certain categories.<sup>36</sup> A number of states have also erected procedural barriers to the municipal provision of broadband, requiring ballot initiatives (Colorado, Louisiana, Minnesota), feasibility studies (Virginia), or proof that local incumbent providers cannot or will not provide broadband to the local community (California and Michigan). 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.<sup>37</sup>

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. Thirty-seven states have passed statutes preempting local regulations of ride-sharing platforms, or "transportation network companies" (TNCs).<sup>38</sup> Home sharing platforms, such as Airbnb, have seen far less legislative action, likely due to their recency. Arizona and New York have both acted on the topic, though with different objectives. Arizona, by statute, chose to absolutely prohibit counties from disallowing short-term rentals, while New York criminalized short-term rentals of less than thirty days, as well as the advertisement of such practices.<sup>39</sup> 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. Missouri and Idaho have explicitly preempted localities from banning plastic bags, as has New York recently.<sup>40</sup> Texas has pending legislation on the issue.<sup>41</sup> Florida has preempted the regulation of Styrofoam.

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<sup>35</sup> Texas Utilities Code, § 54.201 et seq.

<sup>36</sup> Nevada Statutes § 268.086, §710.147.

<sup>37</sup> *Tennessee v. Federal Communications Commission*, 832 F.3d 597 (2016).

<sup>38</sup> *See, e.g.* TENN. CODE ANN. § 65-15-302 (enacted May 20, 2015).

<sup>39</sup> ARIZ. REV. STAT. § 11-269.17 (enacted May 12, 2016); N.Y. MULT. D. LAW § 121 (Consol. 2017) (effective Oct. 21, 2016).

<sup>40</sup> Henry Grabar, *Andrew Cuomo's Bizarre Logic for Killing New York City's Plastic Bag Fee*, SLATE (Feb. 15, 2017, 2:24 PM), [http://www.slate.com/blogs/moneybox/2017/02/15/new\\_york\\_gov\\_andrew\\_cuomo\\_is\\_a\\_plastic\\_bag.html](http://www.slate.com/blogs/moneybox/2017/02/15/new_york_gov_andrew_cuomo_is_a_plastic_bag.html).

<sup>41</sup> *State Plastic and Paper Bag Legislation*, NATIONAL CONF. OF STATE LEGS., <http://www.ncsl.org/research/environment-and-natural-resources/plastic-bag->

Other local environmental regulations have invited state opposition. As of 2013, twenty-nine states had explicitly preempted local pesticide regulation. Most of these states' laws read very similarly to ALEC's *Model State Preemption Act*. This Act states that "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."<sup>42</sup>

Oklahoma and Texas have explicitly preempted local regulation of hydraulic fracturing, or fracking. Oklahoma's preemptive statute provides that political subdivisions "may not effectively prohibit or ban any oil and gas operations, including oil and gas exploration, drilling, fracture stimulation, completion, production, maintenance, plugging and abandonment, produced water disposal, secondary recovery operations, flow and gathering lines or pipeline infrastructure..." with few exceptions.<sup>43</sup> The Oklahoma statute went into effect on August 21, 2015. The Texas statute, also passed in 2015, is very similar.<sup>44</sup> The Colorado Supreme Court invalidated two cities' bans on fracking and the storage of fracking waste within the cities' limits in 2016,<sup>45</sup> as violating the state's Oil and Gas Conservation Act.<sup>46</sup> Ohio has also preempted local authority to regulate fracking, leading one local official to complain that "[w]hat the drilling industry has bought and paid for in campaign contributions it shall receive."<sup>47</sup>

### *B. Labor, Employment, and Anti-Discrimination Preemption*

In addition to industry-specific regulation, states are actively preempting more general municipal labor, employment, and anti-

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legislation.aspx; S.B. 1806, 84<sup>th</sup> Leg., Reg. Sess. (Tex. 2015); S.B. 7336, 2017 Leg., Reg. Sess. (N.Y. 2017).

<sup>42</sup> Matthew Porter, *State Preemption Law: The Battle for Local Control of Democracy*, BEYOND PESTICIDES, <http://www.beyondpesticides.org/assets/media/documents/lawn/activist/documents/StatePreemption.pdf>.

<sup>43</sup> OKLA. STAT., tit. 52, § 137.1 (2016) (effective Aug. 21, 2015).

<sup>44</sup> TEX. NAT. RES. CODE ANN. § 81.0523 (West 2015) (effective May 18, 2015).

<sup>45</sup> *City of Longmont Colo. V. Colo. Oil & Gas Ass'n*, 369 P.3d 573 (Col. 2016).

<sup>46</sup> *Id.* at 54.

<sup>47</sup> Billy Corriher, *Big-Money Courts Decide Fate of Local Fracking Rules*, CENTER FOR AMERICAN PROGRESS (Jan. 9, 2017, 9:04 AM), <https://www.americanprogress.org/issues/courts/reports/2017/01/09/296113/big-money-courts-decide-fate-of-local-fracking-rules/>.

discrimination 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.<sup>48</sup> Many of these statutes were adopted in the last five years. Although a handful of cities have successfully defended their local minimum wage laws,<sup>49</sup> state preemptive laws have generally been upheld. 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.”<sup>50</sup>

Local employee benefits and paid and unpaid leave regulations have also been preempted. At least twelve states have enacted laws that preempt local authority to regulate the benefits private employers provide their employees.<sup>51</sup> At least fifteen states have enacted laws that preempt local

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<sup>48</sup> Wisconsin Code 104.001; N.H. Code § 279:21. 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 Nicole DuPuis, et al., *City Rights in an Era of Preemption: A State-by-State Analysis*, National League of Cities 6 (2017).; Ohio Senate Bill 331.; N.C. Gen. Stat. § 95-25.1.; Ala. Code 25-7-41(9)(b). The Kentucky Supreme Court held that the state’s minimum wage law preempts local authority to create minimum wage laws, but, as the dissent noted, the statute in question does not explicitly preempt such authority; it merely mandates a statewide minimum wage. See Ryland Barton, *Kentucky Supreme Court Strikes Down Louisville Minimum Wage Ordinance*, Kentucky Public Radio (Oct. 20, 2016). For the statute, see KRS §337.275.; M.C.L.S. § 123.1385.; Mo. Rev. Stat. § 285.055 (unless local ordinances were implemented by Aug. 28, 2015).; M.C.A. § 17-1-51.; Okla. Stat. tit. 40, § 160.; R.I. Gen. Laws § 28-12-25.; Fla. Stats. § 218.077(2).; Tenn. Code Ann. § 50-2-112.; K.S.A. § 12-16,130.; In.C. § 22-2-2-10.5.; 43 P.S. § 333.114a.; Utah Code 34-40-106.; O.C.G.A. § 34-4-3.1.; Tex. Lab. Code § 62.0515.; S.C. Code Ann. § 6-1-130.; Or. Rev. Stat. § 653.017.; C.R.S. § 8-6-101(3)(a).; La. R.S. § 23:642(A)(3).; Id.C. § 44-1502.; VA SB. 704 (failed and would have allowed localities to adopt minimum wage ordinances)

<sup>49</sup> 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>.

<sup>50</sup> Joseph O’ Sullivan, *Lawmaker Proposes Striking Down Local Minimum-Wage Laws*, The Seattle Times (Jan. 26, 2016, 5:42 PM), <http://www.seattletimes.com/seattle-news/politics/lawmaker-proposes-striking-down-local-minimum-wage-laws/>.

<sup>51</sup> These states include: Alabama (2016), North Carolina (2016), Michigan (2015), Missouri (2015), Arizona (2013), Florida (2013), Indiana (2013), Kansas (2013), Tennessee (2013), Mississippi (2013), Georgia (2004), and Pennsylvania (1996). Ala. Code 25-7-41; N.C. Gen. Stat. § 95-25.1; M.C.L.S. § 123.1386 (including wages or benefits in the prevailing community). See also M.C.L.S. § 123.1391 (cannot require giving of specific fringe benefits or covering expenses), and M.C.L.S. § 123.1389 (scheduling and hours); Mo. Rev. Stat. § 285.055; A.R.S. § 23-204. See also A. R. S. § 23-205 (scheduling but not benefits

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authority to regulate the amount of paid or unpaid leave that private employers provide their employees.<sup>52</sup> Seventeen states have preempted local governments from passing laws requiring companies in their jurisdiction to provide paid family leave.<sup>53</sup>

While not yet as active, the local regulation of wage theft has recently drawn some attention of state legislators. Currently only Tennessee has passed a law directly preempting local authorities from regulating wage theft by private employers.<sup>54</sup> Other states, such as Pennsylvania and Arizona, may have statutes that control the topic, but only indirectly.<sup>55</sup> On collective bargaining, by contrast, at least twenty-eight states have “Right to Work” laws, which bar private employers from discriminating against employees on

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more generally). A.R.S. § 23-364(I) states otherwise but there is no indication that A.R.S. § 23-204 is not current; Fla. Stats. § 218.077; In.C. § 22-2-16-3.; K.S.A. § 12-16,130; Tenn. Code Ann. § 7-51-1802 (solely health insurance benefits); M.C.L.S. § 123.1386. (refers to fringe benefits); O.C.G.A. § 34-4-3.1; Chris Potter, Court Rejects as “Unenforceable” Two Pittsburgh Labor Ordinances, Pittsburgh Post-Gazette (Dec. 22, 2015, 4:29 p.m.). 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.”).

<sup>52</sup> These states include: Alabama (2016), Wisconsin (2016), North Carolina (2016), Oregon (2016), Michigan (2015), Missouri (2015), Oklahoma (2014), Arizona (2013), Indiana (2013), Florida (2013), Kansas (2013), Mississippi (2013), Tennessee (2013), Louisiana (2012), and Pennsylvania (1996). Ala. Code 25-7-41. See also Code of Ala. § 11-80-16; Wis. Stat. § 103.10. (preempted in part by ERISA)(only applies 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); N.C. Gen. Stat. § 95-25.1; Or. Rev. Stat. § 653.661 (only applies to sick leave); M.C.L.S. § 123.1388; Mo. Rev. Stat. § 285.055 (unless local ordinances were implemented by Aug. 28, 2015); Okla. Stat. tit. 40, § 160; A.R.S. § 23-204; In.C. § 22-2-16-3; Fla. Stats. § 218.077; K.S.A. § 12-16,130; M.C.A. § 17-1-51; Tenn. Code Ann. § 7-51-1802; La. R.S. § 23:642; Chris Potter, Court Rejects as “Unenforceable” Two Pittsburgh Labor Ordinances, Pittsburgh Post-Gazette (Dec. 22, 2015, 4:29 p.m.). 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.”); O.C.G.A. § 34-4-3.1 (does not refer to leave but preempts “all...employment benefits”).

<sup>53</sup> These states are Arizona, Georgia, Florida, Indiana, Kansas, Louisiana, Maryland, Mississippi, Missouri, Michigan, New Hampshire, North Carolina, Oklahoma, Oregon, Tennessee, Wisconsin, and Virginia. NAT. LEAGUE OF CITIES, CITY RIGHTS IN AN ERA OF PREEMPTION: A STATE BY STATE ANALYSIS, (2017), <http://nlc.org/sites/default/files/2017-02/NLC%20Preemption%20Report%202017.pdf>.

<sup>54</sup> Tenn. Code Ann. § 50-2-113.

<sup>55</sup> *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.”). Philadelphia has passed such an ordinance but it may be illegal; ARS § 23-364.

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the basis of union membership. These laws preempt local regulations to the contrary.<sup>56</sup>

A number of states have recently enacted laws that preempt local authority to issue ordinances prohibiting or allowing private employers to discriminate in hiring, discharge, wage, and other employment practices.<sup>57</sup> Additional states may implicitly preempt local authorities from regulating discrimination, depending on how their statutes are interpreted by the courts.<sup>58</sup>

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,<sup>59</sup> Ohio,<sup>60</sup> and Tennessee<sup>61</sup> have enacted laws that prohibit local governments from promulgating ordinances which require private contractors that acquire municipal contracts to hire some specified amount of local residents, or which 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.<sup>62</sup>

A number of states have also enacted laws that prohibit local governments from mandating the wages which private contractors fulfilling a municipal contract pay their employees.<sup>63</sup> North Carolina has enacted a law

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<sup>56</sup> These states include: Missouri (2017), Kentucky (2017), Alabama (1953 – statute; 2016 – constitutional amendment), West Virginia (2016), Wisconsin (no expressed mention of preemption, however)(2015), Michigan (2012), Indiana (2012), Oklahoma (2001), Idaho (1985), Louisiana (1976), Wyoming (1963). Kansas (1958), Utah (1955), Mississippi (1954), South Carolina (1954), Nevada (1951), Georgia (1947), Iowa (1947), Arkansas (1947), Texas (1947), Virginia (1947), North Dakota (1947), North Carolina (1947), Tennessee (1947), Arizona (1946), South Dakota (1946), Nebraska (1946), and Florida (1944). New Hampshire may become the 29<sup>th</sup> "Right to Work" state.

<sup>57</sup> N.C. Gen. Stat. § 143-422.2; SB 202. *See also* Elizabeth Reiner Platt, *States Attempting to Preempt LGBT-Friendly Municipalities*, Public Rights, Private Conscience Project, Columbia Law School (Feb. 11, 2016); Utah Code § 34A-5-102.5; HB 600 (2011).

<sup>58</sup> Kansas Code 44-1001, et. seq; N.H. Code 354-A:1; S.C. Code 1-13-10 et. seq.

<sup>59</sup> N.C.G.A. HB 2.

<sup>60</sup> HB 180 (2016). *See also* Cleveland Sues Ohio over Prohibition on Local Hiring Laws, *The News-Herald* (Aug. 24, 2016, 11:54 a.m.).

<sup>61</sup> TN. Code 62-6-101, et. seq.

<sup>62</sup> *City of Cleveland v. State of Ohio*, No. 17CV-2672 (Court of Common Pleas, Franklin County, Ohio Civil Division March 20, 2017); Robert Higgs, *National Coalition Joins Cleveland Fight to Save Fannie Lewis Law*, *cleveland.com* (June 15, 2017, 10:46 AM), [http://www.cleveland.com/cityhall/index.ssf/2017/06/national\\_coalition\\_joins\\_cleve.html](http://www.cleveland.com/cityhall/index.ssf/2017/06/national_coalition_joins_cleve.html)

<sup>63</sup> At least North Carolina (2016), Tennessee (2013), Arizona (2011), Georgia (2005), and Utah (2001). N.C. Gen. Stat. § 153A-449 and N.C. Gen. Stat. § 160A-20.1. (Neither refer to wages explicitly but "employment practices."); Tenn. Code Ann. § 50-2-112; A.R.S. § 34-321(b).; O.C.G.A. § 34-4-3.1; Utah Code Ann. § 34-40-106.

which prohibits local governments from passing ordinances that alter private contractors' employee leave policies as a condition of accepting a municipal contract.<sup>64</sup> North Carolina,<sup>65</sup> Tennessee,<sup>66</sup> and Georgia<sup>67</sup> 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. A number of states prohibit local governments from requiring private contractors to engage in collective bargaining, become subject to labor agreements, or other related requirements as a condition of bidding for or receiving a public contract.<sup>68</sup>

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.<sup>69</sup> Wyoming has considered a bill making the usage of any restroom corresponding to one's birth sex a crime of public indecency.<sup>70</sup> South Dakota and Virginia had bathroom bills introduced in their 2017 state legislatures, and eighteen states considered such measures in 2016.<sup>71</sup> Texas is currently considering such a law.<sup>72</sup>

### *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

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<sup>64</sup> N.C. Gen. Stat. § 153A-449 and N.C. Gen. Stat. § 160A-20.1. (cannot regulate employers' "practices.")

<sup>65</sup> N.C. Gen. Stat. § 153A-449 and N.C. Gen. Stat. § 160A-20.1.

<sup>66</sup> Tenn. Code Ann. § 7-51-1802 (only prohibits mandating health insurance).

<sup>67</sup> O.C.G.A. § 34-4-3.1. (does not refer to union agreements but does prohibit seeking to control or affect wages which would occur if collective bargaining were required).

<sup>68</sup> These include Alabama (2016), North Carolina (2013), Arizona (2011), Missouri (2007), Tennessee (2011), Georgia (2005), and Nevada (1953). Ala. Code 25-7-42. See also Code of Ala. § 11-80-16; N.C. Gen. Stat. § 143-133.5; A.R.S. § 34-321(c); Mo. Rev. Stat. § 34.209. See also Mo. Rev. Stat. § 34.216; Tenn. Code Ann. § 12-4-903; O.C.G.A. § 36-91-21; N.R.S. 613.250.

<sup>69</sup> An Act to Provide for Single-Sex Multiple Occupancy Bathroom and Changing Facilities, N.C.G.S. § 143-422.11(b) (2016).

<sup>70</sup> National League of Cities, *City Rights in an Era of Preemption: A State-by-State Analysis* (2017).

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

<sup>72</sup> NAT. CONFERENCE OF STATE LEGISLATURES, "BATHROOM BILL" LEGISLATIVE TRACKING, <http://www.ncsl.org/research/education/-bathroom-bill-legislative-tracking635951130.aspx>.



spending. States dramatically limit locals' tax and spending ability through tax and expenditure limitations (TEs). Thirty-four states, as of 2015, imposed property tax rate limits on localities.<sup>73</sup> Thirty-five states impose limitations on tax levies, primarily through tax caps.<sup>74</sup> 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% of counties, 2% for cities and villages, and 2.5% for New York City and the counties therein.<sup>75</sup> Those caps can be overridden in certain circumstances. Five of the thirty-five states that impose these limitations do not provide for override procedures.<sup>76</sup>

Other states have imposed both tax and spending limitations. Colorado's Taxpayer Bill of Rights (TABOR), adopted in 1992, is an example. The statute requires that any tax increase or debt question be approved by the voters, and it imposes annual limits on both government revenue and spending.<sup>77</sup> The stringent limits on spending have led to recent bipartisan efforts to reform the law.<sup>78</sup>

Land use regulation and schools are another topic of traditional local concern that has seen recent preemption activity. Affordable housing requirements, or inclusionary zoning measures, have been preempted in at least eleven states.<sup>79</sup> Mississippi passed a law in 2013 explicitly exempting

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<sup>73</sup> *Significant Features of the Property Tax*, LINCOLN INST. OF LAND POLICY & GEORGE WASHINGTON INST. OF PUBLIC POLICY, [http://datatoolkits.lincolninst.edu/subcenters/significant-features-property-tax/Report\\_Tax\\_Limits.aspx](http://datatoolkits.lincolninst.edu/subcenters/significant-features-property-tax/Report_Tax_Limits.aspx).

<sup>74</sup> *Significant Features of the Property Tax*, *supra*.

<sup>75</sup> N.Y. CONST. art. VIII, § 10.

<sup>76</sup> DAVID J. BARRON & GERALD E. FRUG, *CITY BOUND: HOW STATES STIFLE URBAN INNOVATION* 233 (1st ed. 2008).

<sup>77</sup> <http://nlc.org/sites/default/files/2017-03/NLC-SML%20Preemption%20Report%202017-pages.pdf> P. 20-21

<sup>78</sup> TABOR Faces Renewed, Republican-Led Effort for an Overhaul at Twenty-Five Year Mark, *Denver Post*, Feb. 28, 2017, <http://www.denverpost.com/2017/02/26/tabor-colorado-bill-1187/>

<sup>79</sup> A.R.S. § 9-461.16.; C.R.S. § 38-12-301.; Tex. Local Gov't Code § 214.905; Ark. Code 14-54-1604; M.G.L. 40B §§ 20-23; Or. Rev. Stat. § 197.309; Joey Garrison, *Legal Threat Hangs Over Nashville Affordable Housing Proposal*, *The Tennessean* (Sept. 6, 2016, 7:04 a.m.). See also Joey Garrison, *Senate Bill would Prohibit Affordable Housing Mandates*, *The Tennessean* (Jan. 19, 2016, at 10:38 p.m.). See Tenn. Code § 66-35-102(b); RSA 674:59 . See also Cordell A. Johnston, *New Laws Require Updates to Zoning Ordinances*, *New Hampshire Municipal Association* (Dec. 2008).; *Southern Burlington County, NAACP v. Township of Mount Laurel*, 336 A.2d 713 (N.J. 1975).; R.I. Gen. Law 45-24-46.1. See also Rhode Island Statewide Planning Program, *Inclusionary Housing Zoning Guidance: A Handbook for Rhode Island Municipalities*; City of Raleigh Housing and Neighborhoods Department, *Affordable Housing Improvement Plan FY 2016-FY 2020* (mandatory inclusionary zoning is illegal but some cities have them (Chapel Hill, Davidson, and Montego) but other actions are allowed). *But see* Tyler Mulligan, *A Primer on*

charter schools from local rules, regulations, policies and procedures.<sup>80</sup> ALEC's model legislation on charter schools was distributed in 2016, with language resembling that of the Mississippi statute.<sup>81</sup>

Local immigration issues have also elicited state legislative attention—as conflicts over “sanctuary cities” have become more widespread.<sup>82</sup> 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.<sup>83</sup> The Arizona law was partially struck down by the Supreme Court in *Arizona v. United States* on the grounds that it was preempted by federal law. Some key provisions remain, however.<sup>84</sup> Since November 2016, at least fifteen additional states have proposed legislation to preempt sanctuary cities.<sup>85</sup> Of those states four do not have any known sanctuary cities: Arkansas, Idaho,

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Inclusionary Zoning, Coates' Cannons: NC Local Government Law (Nov. 16, 2016) (arguing that the law is uncertain regarding this issue.); Rhode Island Statewide Planning Program, Inclusionary Housing Zoning Guidance: A Handbook for Rhode Island Municipalities; M.G.L. 40B §§ 20-23.

<sup>80</sup> MISS. CODE ANN. § 37-28-45 (2016) (effective July 1, 2013).

<sup>81</sup> *The Next Generation Charter Schools Act*, AMERICAN LEGISLATIVE EXCHANGE COUNCIL, <https://www.alec.org/model-policy/amendments-and-addendum-the-next-generation-charter-schools-act/> (last visited Feb. 15, 2017).

<sup>82</sup> 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).

<sup>83</sup> Ariz. Rev. Stat. §11-1051 (2011); Ga. Code Ann. §36-80-23 (2009); Ind. Code Ann. §5-2-18.2-4 (2011); N.C. Gen. Stat. §153A-145.5 (2015); Mo. Rev. Stat. §67.307 (2009).

<sup>84</sup> *Arizona v. United States*, 567 U.S. 387 (2012).

<sup>85</sup> See, e.g., Brandon Mosely, *Bentley Says Alabama Will Not Support Sanctuary Cities*, ALABAMA POLITICAL REPORTER, Feb. 2, 2017, <http://www.alreporter.com/2017/02/01/bentley-says-alabama-will-not-support-sanctuary-cities/>; *Kansas Among Several States Looking to Ban Sanctuary Cities*, ASSOC. PRESS, Feb. 2, 2016, <http://ksn.com/2016/02/02/kansas-among-several-states-looking-to-ban-sanctuary-cities/>; Anjali Shastry, *Maryland Bill Aims to Punish Sanctuary Cities*, WASHINGTON TIMES, May 24, 2016, <http://www.washingtontimes.com/news/2016/jan/19/maryland-bill-aims-to-punish-sanctuary-cities/>; Greg Hilburn, *Sanctuary Cities Bill Dies; Lafayette, NOLA Avoid Penalties*, THE NEWS STAR, Jan. 19, 2016, <http://www.thenewsstar.com/story/news/2016/05/24/sanctuary-cities-bill-dies-lafayette-nola-avoid-penalties/84769550/>; *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](http://billingsgazette.com/news/state-and-regional/montana/city-enforcement-of-immigration-laws-before-panel/article_552b1c9f-f3e0-51bd-9064-1778ebfcf246.amp.html).

Oklahoma, and Tennessee.<sup>86</sup> Notably, a proposed law in Ohio would hold local government officials criminally liable for the acts of undocumented immigrants.<sup>87</sup> 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.<sup>88</sup>

#### *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 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.<sup>89</sup> 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

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<sup>86</sup> Benjamin Hardy, *Bill Introduced to Strip State Funds from Hypothetical Sanctuary Cities in Arkansas*, ARKANSAS 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>; Betsy Z. Russell, *Proposed Law in Idaho Would Discourage Sanctuary Cities*, THE SPOKESMAN-REVIEW, Jan. 30, 2017, <http://www.spokesman.com/stories/2017/jan/30/idaho-house-panel-introduces-immigration-bill-targ/>; Abby Broyles, *“You Incentivize a Lot of Bad Things,” Oklahoma Senator Files Bill to Ban Sanctuary Cities in Oklahoma*, KFOR, 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/>; Ariana Maia Sawyer, *Lawmaker Introduces Tennessee “Sanctuary City” Ban*, THE TENNESSEAN, Feb. 8, 2017, <http://www.tennessean.com/story/news/politics/2017/02/08/lawmaker-introduces-tennessee-sanctuary-city-ban/97166104/>.

<sup>87</sup> Summary, H.B. 179, 132nd Leg. (Ohio 2017), <https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA132-HB-179>; Jessie Balmert, *Criminal Penalties for Cranley & Sanctuary City Advocates?*, cincinnati.com (Feb. 6, 2017, 4:22 p.m.), <http://www.cincinnati.com/story/news/politics/2017/02/06/criminal-penalties-john-cranley-cincinnati-sanctuary-city-pushers/97542278/>

<sup>88</sup> S.B. 4, 85th Leg., 1st Sess. (Tx. 2017), <http://www.capitol.state.tx.us/tlodocs/851/billtext/pdf/SB00004E.pdf>; History, S.B. 4, 85th Leg., 1st Sess. (Tx. 2017), <http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=851&Bill=SB4> (last visited Aug. 4, 2017); Priscilla Alvarez, *Will Texas’s Crackdown on Sanctuary Cities Hurt Law Enforcement?*, THE ATLANTIC, June 6, 2017, <https://www.theatlantic.com/politics/archive/2017/06/texas-sb4-immigration-enforcement/529194/>.

<sup>89</sup> See, e.g., <http://www.abetterbalance.org/wp-content/uploads/2017/08/Summary-of-LEAP-Findings.pdf>

(and possibly removal) for elected officials. 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.<sup>90</sup> It requires the Arizona Attorney General to investigate local laws at the request of any state legislator.<sup>91</sup> If the Attorney General finds the ordinance in conflict with state law or the Arizona constitution, the local government must resolve the violation within 30 days or face a loss of shared state money.<sup>92</sup> Other states are considering similar measures.<sup>93</sup>

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 replacement. 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.”<sup>94</sup> 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, bio-medical waste in city landfills, plastic bags, milk, and frozen desserts.<sup>95</sup> 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 law.”<sup>96</sup> A more far-reaching proposal is

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<sup>90</sup> SB 1487, codified at ARIZ. REV. STAT. § 41-194.01 (2017).

<sup>91</sup> *Id.* § 49-194.01.A.

<sup>92</sup> *Id.* § 49-194.01.B.

<sup>93</sup> *E.g.*, Texas S.B. 4 (2017) (withholding state revenues from sanctuary jurisdictions); Idaho H.B. 76 (2017) (similar); FLA. STAT. § 790.33(3)(c) (2017).

<sup>94</sup> Richard Briffault, presentation June 2017, Fordham Law School.

<sup>95</sup> §386.209, Fla. Stat.; §553.73(17), Fla. Stat.; §509.032, Fla. Stat.; §500.90, Fla. Stat.; §489.113(11), Fla. Stat.; §586.10, Fla. Stat.; §163.3206(3), Fla. Stat.; §553.793, Fla. Stat.; §218.077, Fla. Stat.; §507.13, Fla. Stat.; §381.0098(8), Fla. Stat.; §403.7033, Fla. Stat.; §502.232, Fla. Stat.

<sup>96</sup> See Lori Riverstone-Newell, *The Rise of State Preemption Laws in Response to Local Policy Innovation*, 47 PUBLIUS 403, 417-18 (2017), [https://oup.silverchair.cdn.com/oup/backfile/Content\\_public/Journal/publius/47/3/10.1093\\_publius\\_pjx037/2/pjx037.pdf](https://oup.silverchair.cdn.com/oup/backfile/Content_public/Journal/publius/47/3/10.1093_publius_pjx037/2/pjx037.pdf) (noting the trend in preemption laws being interpreted as encompassing all state laws, rather discrete policy areas); History, H.B. 17, 25th Leg. (Fl. 2017), Local Regulation Preemption, <https://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=57289>;

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to preempt the local “regulation of matters relating to commerce, trade, and labor.”<sup>97</sup> 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’s cities’ anti-discrimination, contracting, and minimum wage laws.<sup>98</sup>

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.<sup>99</sup> The withdrawal of local authority to regulate entire subject matters is a potent threat meant to chill cities’ adoption of particular disfavored policies.

## II. OUR FEDERALISM’S ANTI-URBANISM

Why such hostility to city regulation? In many cases, state preemption represents the normal workings of a multi-tiered 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

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H.B. 17, 25th Leg. (Fl. 2017), Local Regulation Preemption, <http://www.flsenate.gov/Session/Bill/2017/17/BillText/c1/PDF>; Jeff Weiner, *Local Governments Decry Bill That Would Limit Regulations*, THE ORLANDO SENTINEL (Mar. 17, 2017), <http://www.orlandosentinel.com/news/politics/os-legislature-ban-local-regulations-20170307-story.html>

<sup>97</sup> See S.B. 1158, 25th Leg. (Fl. 2017), <http://www.flsenate.gov/Session/Bill/2017/1158/BillText/Filed/HTML>; Bill Track, S.B. 1158, 25th Leg. (Fl. 2017), Regulation of Commerce, Trade, and Labor, <https://www.billtrack50.com/BillDetail/837690>

<sup>98</sup> North Carolina House Bill No. 2, North Carolina 2015 General Assembly – 2016 Second Extra Session.

<sup>99</sup> See Madlin Mekelburg, *Cities Fear State Backlash for Suits*, EL PASO TIMES, July 9, 2017, at A4 (describing Texas localities’ concern that Gov. Abbott would retaliate against them for filing suit over the new sanctuary cities law).

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; that favoritism 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 sub-state 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 city-state conflicts suggests 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.<sup>100</sup> 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 is costly, and so we might expect such a government to devolve significant powers and responsibilities to smaller-

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<sup>100</sup> See Frank B. Cross, *The Folly of Federalism*, 24 *Cardozo L. Rev.* 1 (2002); see also Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 *UCLA L. Rev.* 903 (1994); Pradeep Chhibber & E. Somanathan, *Are Federal Nations Decentralized? Provincial Governments and the Devolution of Authority to Local Government* (May 2002), <http://web.stanford.edu/class/polisci313/papers/ChhibberJune03.pdf>. *But see generally* Roderick M. Hills Jr., *Is Federalism Good for Localism? The Localist Case for Federal Regimes*, 21 *J.L. & Pol.* 187, 215 (2005) (criticizing Cross, Rubin, and Feeley).

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. The states’ 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,<sup>101</sup> 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.

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.<sup>102</sup>

Indeed, state lawmakers very much conceive of themselves as representing “local” constituencies—as in fact do many members of the U.S. Congress. This points to a third reason for the dominance of states in a federal system: vertical redundancy. 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

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<sup>101</sup> See Frank B. Cross, *The Folly of Federalism*, 24 *Cardozo L. Rev.* I (2002).

<sup>102</sup> See Elisabeth R. Gerber & Daniel J. Hopkins, *When Mayors Matter: Estimating the Impact of Mayoral Partisanship on City Policy*, 55 *AMERICAN JOURNAL OF POLITICAL SCIENCE* 326 (2011).

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.<sup>103</sup> State and local political machines were 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.<sup>104</sup> 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 is often concentrated in its cities or in the wider metropolitan area. 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 de-concentration 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 post-industrial 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 effects more constituencies and impacts more interest groups. Those constituencies and interest groups

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<sup>103</sup> DAVID R. BERMAN, *LOCAL GOVERNMENT AND THE STATES* 57-61 (2003) (“State legislatures, in effect, became ‘spasmodic city councils.’”).

<sup>104</sup> *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.”).



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 non-city 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 non-city 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.<sup>105</sup>

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, congestion pricing, a millionaire tax, the living wage, and universal pre-K.<sup>106</sup> 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.

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<sup>105</sup> For evidence of increasing state-city conflict, see Katherine Levine Einstein & David M. Glick, *Cities in American Federalism: Evidence of State-Local Government Conflict from a Survey of Mayors*, [http://sites.bu.edu/kleinstein/files/2017/01/Federalism\\_V10\\_NotBlind.pdf](http://sites.bu.edu/kleinstein/files/2017/01/Federalism_V10_NotBlind.pdf)

<sup>106</sup> Marc Santora, *Cuomo Vows to Defend Charter Schools, Setting Up Another Battle With de Blasio*, THE NEW YORK TIMES (March 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://www.nytimes.com/2014/03/05/nyregion/cuomo-vows-to-defend-charter-schools-setting-up-another-battle-with-de-blasio.html?_r=0); Jimmy Vielkind, *Shared anxiety over Trump helps cool Cuomo- de Blasio feud*, POLITICO (Jan. 30, 2017, 5:30 AM), <http://www.politico.com/states/new-york/albany/story/2017/01/trump-thaws-cuomo-de-blasio-feud-109138>; Michael M. Grynbaum & Thomas Kaplan, *Pre-K Plan Puts Cuomo at Odds With de Blasio on Funding*, THE NEW YORK TIMES (Jan. 21, 2014), <https://www.nytimes.com/2014/01/22/nyregion/cuomo-prekindergarten-proposal.html>; Thomas Kaplan, *Cuomo Rejects Another Plan by de Blasio: Minimum Wage*, THE NEW YORK TIMES (Feb. 11, 2014), <https://www.nytimes.com/2014/02/12/nyregion/cuomo-rejects-another-plan-by-de-blasio-minimum-wage.html>.

*B. Malapportionment*

American anti-urbanism is not simply a function of state-based federalism, however. Certain kinds of federal systems (for examples, 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.<sup>107</sup>

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, the U.S. Senate favors low population, rural states over high population, urban ones.<sup>108</sup> 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.”<sup>109</sup>

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 low population 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 states generally fall into the top half of states in density. 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.<sup>110</sup> Population has moved steadily out of the agricultural mid-west and toward the urbanized coasts.<sup>111</sup> And while there

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<sup>107</sup> Paul A. Diller, *Reorienting Home Rule: Part 1-The Urban Disadvantage and State Lawmaking*, 77 LA. L. REV. 287, 291 (2016).

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

<sup>109</sup> *Id.* at 322.

<sup>110</sup> Reid Wilson, *Fastest-growing counties show growth in Florida, Western US*, THE HILL (March, 23 2017, 12:34 PM), <http://thehill.com/homenews/state-watch/325415-fastest-growing-counties-show-growth-in-florida-western-us> (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).

<sup>111</sup> See UNITED STATES DEPARTMENT OF AGRICULTURE: ECONOMIC RESEARCH

have been declines in populations in upper mid-western cities, the growth in Sunbelt cities and metro areas has more than compensated.<sup>112</sup> 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.<sup>113</sup>

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.<sup>114</sup> Particularly as 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 *Reynold v. Sims*,<sup>115</sup> 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.

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SERVICE, SHIFTING GEOGRAPHY OF POPULATION CHANGE (2017).

<sup>112</sup> 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/>.

<sup>113</sup> U.S. Census Bureau, Population Division, *Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2016* (2017), <https://factfinder.census.gov/bkmk/table/1.0/en/PEP/2016/PEPANNRES/0400000US08|0400000US13|310M300US12060|310M300US19740>.

<sup>114</sup> In 1950, the most populous state, New York, had a population of 14,830,192, while the least populous state, Alaska, had 226,167, a difference of 14,701,549. 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 150%. U.S. Census Bureau, *Census of Population and Housing*, <https://www.census.gov/prod/www/decennial.html>. See MICHAEL RATCLIFFE, U.S. CENSUS BUREAU, *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://www2.census.gov/geo/pdfs/reference/ua/Century_of_Defining_Urban.pdf) (Noting that "[i]n 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, *UNITED STATES SUMMARY: 2010*, at 13 tbl. 7 (2012), <https://www.census.gov/prod/cen2010/cph-2-1.pdf> (providing data on urban and rural populations, which demonstrates an overall increase in urban populations over time).

<sup>115</sup> *Reynold v. Sims*, 377 U.S. 533, 547-51 (1964).

Nevertheless, the effect of one-person/one-vote on cities was and is complicated. At the time of *Baker v. Carr*,<sup>116</sup> advocates believed that they were remedying the urban disadvantage in state legislatures by pursuing one-person/one-vote. But there is some evidence that despite malapportionment, non-urban state legislators often deferred to urban representatives in policy areas that were highly salient to city constituencies. 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.<sup>117</sup> 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.<sup>118</sup> Diller observes that “in states like Michigan, North Carolina, and Ohio, Republicans lost the state popular vote for House candidates yet comfortably won the majority of the state’s House seats.”<sup>119</sup> State legislative races are often similarly skewed by district lines that protect Republicans and limit the number of Democratic seats, despite statewide majorities favoring Democrats.

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” less 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

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<sup>116</sup> 369 U.S. 186 (1962).

<sup>117</sup> Paul A. Diller, *Reorienting Home Rule: Part 1-The Urban Disadvantage and State Lawmaking*, 77 LA. L. REV. 287, 291 (2016).

<sup>118</sup> See Nate Cohen, *Debate is Over: Gerrymandering is Crucial to GOP’s Hold on the House*, NY 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://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)

<sup>119</sup> *Id.* at 326.

pointed out, Republicans would do better than Democrats because their voters are not so geographically concentrated.<sup>120</sup>

According to many recent studies, this geographical sorting by affiliation is increasing. In twenty-five states, the state senate, house, and governorship is controlled by Republicans. In six states, Democrats similarly dominate.<sup>121</sup> 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 non-city 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 the U.S. Congress, when Republicans govern, cities are going to be marginalized, as their votes are not needed.

### *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 underrepresentation.<sup>122</sup>

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.<sup>123</sup> 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.<sup>124</sup>

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

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<sup>120</sup> Jowei Chen & Jonathan Rodden, *Unintentional Gerrymandering: Political Geography and Electoral Bias in Legislatures*, 8 *QUARTERLY JOURNAL OF POLITICAL SCIENCE* 239, 242 (2013).

<sup>121</sup> *State Government Trifectas*, Ballotpedia.org, [https://ballotpedia.org/State\\_government\\_trifectas](https://ballotpedia.org/State_government_trifectas) (last visited Aug. 2, 2017).

<sup>122</sup> *Reynold v. Sims*, 377 U.S. 533, 556-57 (1964).

<sup>123</sup> DAVID R. BERMAN, *LOCAL GOVERNMENT AND THE STATES* 62 (2003).

<sup>124</sup> For an excellent account of the “failed promise of intrastate federalism,” see Kenneth Stahl, *Preemption, Federalism, and Local Democracy*, 44 *FORDHAM URB. L. J.* 181 (2017).

officials altogether.<sup>125</sup> 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.<sup>126</sup> The well-known “Pittsburgh ripper” of 1901 removed the city’s mayor from office.<sup>127</sup>

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 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.<sup>128</sup> 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.”<sup>129</sup>

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. This “legislative” home rule permits local governments wide discretion in initiating legislation, but no or very limited protection against state law preemption. The upshot is that local governments are still vulnerable to the state’s exercise of its police power. And home rule initiatives in the 1950s and 60s did not include the power to

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<sup>125</sup> Lyle Kossis, *Examining the Conflict Between Municipal Receivership and Local Autonomy*, 98 Va. L. Rev. 1109, 1125-26 (2012); 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).

<sup>126</sup> “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.” Lyle Kossis, *Examining the Conflict between Municipal Receivership and Local Autonomy*, 98 Va. L. Rev. 1109, 1126 (2012) (citing Howard Lee McBain, *The Law and Practice of Municipal Home Rule* 8 (1916)).

<sup>127</sup> Lincoln Steffans, *The Shame of the Cities* (New York, 1957) 138-42; Frank C. Harper, *Pittsburgh: The Forge of the Universe* (New York, 1957), 149-54; Commonwealth of Pennsylvania Legislative Record, 1901; C.S. Scully, “The Pittsburgh Ripper,” *The Annals*, 19 (Mar. 1902), 299-300.

<sup>128</sup> Richard Briffault, *Home Rule and Local Political Innovation*, 22 J.L. & POL. 1, 18-19 (2006).

<sup>129</sup> Robert C. Brooks, *Metropolitan Free Cities*, 30 *POLITICAL SCIENCE QUARTERLY* 222 (1915).

modify the state’s “private law”—tort, contract, property, and domestic relations.<sup>130</sup> 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 local 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.”<sup>131</sup> 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.”<sup>132</sup>

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.<sup>133</sup> Courts conventionally hold that zoning and other land use matters fall within the core of home rule authority—thus vindicating a power that often favors exclusionary suburbs.<sup>134</sup> 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.<sup>135</sup>

Similarly, Professor Kenneth Stahl has argued that the common conception of home rule as a boundary between local and non-local 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.<sup>136</sup> 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 “state-wide uniformity.”<sup>137</sup> Home rule is most robust insofar as it is associated with protection of a sphere of home life—those matter that are “private” and “associational.”<sup>138</sup> By contrast, home rule

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<sup>130</sup> Paul A. Diller, *The City and the Private Right of Action*, 64 STAN. L. REV. 1109, 1172 (2012).

<sup>131</sup> David J. Barron, *Reclaiming Home Rule*, 116 Harv. L. Rev. 2255, 2263 (2003).

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

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

<sup>134</sup> § 8:11.Municipal zoning powers—Home-rule and general law cities compared, 2 Tex. Prac. Guide Real Estate Litig. § 8:11

<sup>135</sup> See Barron, *supra* note \_\_\_\_.

<sup>136</sup> Kenneth A. Stahl, *Local Home Rule in the Time of Globalization*, 2016 BYU L. REV. 177, 186 (2016).

<sup>137</sup> *American Financial Services Ass’n v. City of Oakland*, 34 Cal.4th 1239 (2005); *Town of Telluride v. Lot Thirty-Four Venture, L.L.C.*, 3 P.3d 30 (2000).

<sup>138</sup> Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal*

has less traction when it comes to commercial or redistributive policies—those policies that seem somehow more “public” and “transactional.”<sup>139</sup>

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.<sup>140</sup> 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 “non-local” interests. By design, home rule does not readily permit the regulation of cross-border markets. In other words, home rule is “suburban.” The combination of powers and limitations that constitute the “local” have 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 mid-century, the de-concentration of central city populations began in earnest; Detroit’s population was at its height from 1940-1950, when it topped out at 1.85 million residents as a result of WWII war-time growth.<sup>141</sup> 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.<sup>142</sup> The Victorian city was

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*Analysis*, 107 HARV. L. REV. 1841, 1859-60 (1994) (showing how courts give authority to local governments when the controversy is close to the “associational rights of individuals”).

<sup>139</sup> Kenneth A. Stahl, *Local Home Rule in the Time of Globalization*, 2016 BYU L. REV. 185 (2016).

<sup>140</sup> See *id.* Rich Su argues that cities have been complicit in the undermining of the concept of home rule. See Rick Su, *Have Cities Abandoned Home Rule?*, 44 FORDHAM URB. L. J. 181 (2017).

<sup>141</sup> DETROIT POPULATION HISTORY 1900-2000, <http://www.somaccon.com/p469.php>.

<sup>142</sup> <http://xroads.virginia.edu/~hyper/jefferson/ch19.html>



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. Anti-Democratic 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 1800's municipal government, observers of the newly industrializing American cities generally agreed that the governing of those cities was a “conspicuous failure.”<sup>143</sup> “Without the slightest exaggeration,” wrote Andrew White in 1890—then-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.”<sup>144</sup>

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. 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.<sup>145</sup>

Yet the defining urban narrative cannot get far from the continual clash between bosses and reformers—“against a roughly sketched backdrop of municipal disarray.”<sup>146</sup> Municipal politics is viewed as more corrupt than state or national politics, more prone to capture by special interests, more wasteful, and more incompetent.

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<sup>143</sup> JON TEAFORD, *THE UNHERALDED TRIUMPH, CITY GOVERNMENT IN AMERICA, 1870-1900* (1984).

<sup>144</sup> FRANCIS J. SICIUS, *THE PROGRESSIVE ERA: A REFERENCE GUIDE* 30 (2015).

<sup>145</sup> *See, e.g.*, JOHN M. ALLSWANG, *BOSSSES, MACHINES, AND URBAN VOTERS: AN AMERICAN SYMBIOSIS* 3-35 (1986)

<sup>146</sup> TEAFORD, *supra* note \_\_ at 3.

## *The Attack on American Cities*

This narrative originally served to underwrite a reform agenda that often linked progressive good government reformers with business or corporate interests. To be sure, Progressive Era reformers were often committed to using government—and in particular municipal government—to ameliorate social ills. 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 non-elected professional. 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.<sup>147</sup>

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.<sup>148</sup> 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.<sup>149</sup> 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.”<sup>150</sup>

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.<sup>151</sup> “The boss,” he argued, “appears under any system, whether the government be lodged with the mayor, the council, with boards, or commissions.”<sup>152</sup> But a centrally-elected official can be held accountable in a way that numerous boards and commissions cannot. “Distrust of democracy as inspired much of the literature on the city,” Howe wrote.<sup>153</sup> Taking power out of the hands of urban

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<sup>147</sup> See Richard Schragger, *Can Strong Mayors Empower Weak Cities? On the Power of Local Executives in a Federal System*, 115 YALE L.J. 2542 (2006).

<sup>148</sup> See *id.*

<sup>149</sup> FREDERIC C. HOWE, *THE CITY, THE HOPE OF DEMOCRACY* 1 (1905).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 180.

<sup>152</sup> *Id.* at 185.

<sup>153</sup> *Id.* at 1.

citizens was not the answer to municipal corruption. Urban citizens should instead be trusted to run their own affairs, as Howe believed that

With home rule secured, with popular control attained, with the city free to determine what activities it will undertake, and what shall be its source 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.<sup>154</sup>

Howe was in the minority, however. The current structure of state-local relations is generally the one inherited from Progressive Era constitution-makers in the early part of the twentieth century, though modified in various ways to limit city government, not extend its reach.<sup>155</sup> 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. 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, *anti-democratic* 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 1970's, when cities like New York struggled and when urban observers asserted that cities were "ungovernable."<sup>156</sup>

Like the progressives, present-day reformers turn to institutional fixes to attempt to solve macro-economic problems. Michigan has appointed emergency managers for numerous struggling cities, the most well-known being Detroit.<sup>157</sup> 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

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<sup>154</sup> *Id.* at 313.

<sup>155</sup> 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, CITY POWER, *supra* note \_\_\_ at 220.

<sup>156</sup> See, e.g., DOUGLAS YATES, THE UNGOVERNABLE CITY: THE POLITICS OF URBAN PROBLEMS AND POLICY MAKING (1977); David Judge, *Pluralism*, in THEORIES OF URBAN POLITICS, 13 (David Judge et al. eds., 1995).

<sup>157</sup> An excellent treatment of these takeovers is Michelle Wilde Anderson, *The New Minimal Cities*, 123 YALE L.J. 1118 (2014).

“dictatorships for democracy”—disbanding the city council and mayoralty, and bringing in an unelected receiver to put the city’s finances back on track—ostensibly to return a healthy city to its constituents.<sup>158</sup> 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.<sup>159</sup> 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. 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 post-industrial 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. 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.

Second, it is not at all evident that suspending municipal democracy can solve management failures. A powerful counter-example 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 the water system was poisoning Flint residents. Emergency managers’ lack of political accountability should be a strike against their appointment, not an advantage.<sup>160</sup>

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.

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<sup>158</sup> Clayton P. Gillette, *Dictatorships for Democracy*, 114 COLUMBIA L. REV. 1373 (2014).

<sup>159</sup> Michelle Wilde-Anderson, *Democratic Dissolution: Radical Experimentation in State Takeovers of Local Governments*, 39 FORDHAM URB. L.J. 577 (2012).

<sup>160</sup> See Richard Schragger, *Flint Wasn’t Allowed Democracy*, Slate, Feb. 8, 2016.

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. 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. As Jacobs famously argued, everything about late-twentieth century city planning seemed intended to “do the city in.”<sup>161</sup> 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.”<sup>162</sup>

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.<sup>163</sup> 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 crowded and congested London of the late nineteenth century.<sup>164</sup> 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.”<sup>165</sup>

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;

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<sup>161</sup> JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 17 (1961).

<sup>162</sup> *Id.* at 4.

<sup>163</sup> *Id.* at 13.

<sup>164</sup> *Id.* at 17.

<sup>165</sup> *Id.* at 18.

and a commitment to a suburban-style landscape.<sup>166</sup> 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 *Euclid v. Ambler Realty Co.*, decided in 1926, the Court upheld single-family residential zoning, likening apartment buildings to obnoxious and dangerous land uses.<sup>167</sup> 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.”<sup>168</sup>

The *Lochner*-Era Supreme Court had no trouble, however, upholding a regulation that significantly reduced property values so long it protected the values of home and family.<sup>169</sup> Justice Sutherland, writing as if straight from a Garden City planning manual, observed that “[t]he segregation of residential, business, and industrial buildings” will “increase the safety and security of home life; greatly tend to prevent street accidents, especially to children, by reducing the traffic and resulting confusion in residential sections.” 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.”<sup>170</sup> 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.”<sup>171</sup> Apartment houses further “depriv[e] children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities - - until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed.”<sup>172</sup>

Almost fifty years later in 1974, Justice Douglas would channel this same idyllic vision of the single-family residential district in *Belle Terre v. Borass*.<sup>173</sup> In writing to uphold a zoning ordinance restricting single-family occupancy to related individuals, Douglas argued that “the police power is not confined to elimination of filth, stench, and unhealthy places.”<sup>174</sup> It is also, he wrote, permissible for cities to “lay out zones where family values,

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<sup>166</sup> *Id.*

<sup>167</sup> *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394 (1926).

<sup>168</sup> *Amber Realty Co. v. Village of Euclid*, 297 F. 307, 316 (1924).

<sup>169</sup> *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926).

<sup>170</sup> *Id.* at 394.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

<sup>174</sup> *Id.* at 9.

youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.”<sup>175</sup>

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.” As she puts it, this group of thinkers and planners were interested in “decentralizing great cities, thin[ing] them out, and dispersing their enterprises and populations into smaller, separated cities or better yet, towns.”<sup>176</sup> 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 this ideas up at mid-century. 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 mid-century. Their belief that cities are noisy, congested, dangerous, and unhealthy 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.<sup>177</sup>

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 was promoted as an uplift strategy—as long as the designs came “bedded-down with grass.”<sup>178</sup> “Grass, grass, grass”—as Jacobs’ writes, mimicking a half-century of urban planning zeal—“Isn’t it wonderful! Now the poor have everything!”<sup>179</sup>

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.<sup>180</sup> For African-Americans in the inner city, urban renewal was

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<sup>175</sup> *Id.*

<sup>176</sup> JACOBS, *supra* note \_\_, at 20.

<sup>177</sup> *Id.* at 22.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 15.

<sup>180</sup> Jacqueline Leavitt, *Urban Renewal is Minority Renewal*, Los Angeles Times (Oct. 11, 1996), [http://articles.latimes.com/1996-10-11/local/me-52672\\_1\\_urban-renewal](http://articles.latimes.com/1996-10-11/local/me-52672_1_urban-renewal).

tantamount to Negro-removal, and the wholesale displacement of long-standing African-American neighborhoods was tremendously damaging.<sup>181</sup> Many ethnic white neighborhoods were also displaced by renewal programs or in some cases highway building.<sup>182</sup>

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. 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 any case.

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-urban.”<sup>183</sup> 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. 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* congested, dangerous, and often 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. In thinking that they could plan their way out of poverty, Jacobs argued, elite reformers adopted a “paternalistic, if not authoritarian” approach focused on beautification and uplift, instead on the needs of actual city dwellers.<sup>184</sup> All this was accomplished through government policy, often at great expense. As Jacobs writes, “[t]here is nothing economically or socially inevitable about either the decay of old cities or the fresh-minted decadence of the new unurban urbanization.”<sup>185</sup> If the city is the problem—independent of discrimination,

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<sup>181</sup> Wendell E. Pritchett, *The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE LAW & POLICY REVIEW 1 (2003).

<sup>182</sup> STEVEN CONN, AMERICANS AGAINST THE CITY: ANTI-URBANISM IN THE TWENTIETH CENTURY 167 (2014).

<sup>183</sup> *Id.* at 166.

<sup>184</sup> JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES 19 (1961).

<sup>185</sup> *Id.* at 7.



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' 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.<sup>186</sup> 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.

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 socio-economic make-up.<sup>187</sup> This idea continues to be a powerful one in social policy circles. It is at the heart of “moving to opportunity” pilot projects—which 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.<sup>188</sup>

No doubt, suburban racial and income exclusion limits 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.

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<sup>186</sup> See generally, MATT HERN, *WHAT A CITY IS FOR: REMAKING THE POLITICS OF DISPLACEMENT* (2016).

<sup>187</sup> WILLIAM J. WILSON, *THE TRULY DISADVANTAGED* (1987).

<sup>188</sup> Richard A. Webster, *New Orleans Public Housing remade after Katrina. Is it working?*, THE TIMES-PICAYUNE (Mar. 22, 2016, 9:55 AM), [http://www.nola.com/katrina/index.ssf/2015/08/new\\_orleans\\_public\\_housing\\_dem.html](http://www.nola.com/katrina/index.ssf/2015/08/new_orleans_public_housing_dem.html).

## *The Attack on American Cities*

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 in regard to the social and economic outcomes for specific movers.<sup>189</sup> 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 by the deficiencies of city neighborhoods themselves, both in terms of those neighborhoods' physical attributes and their sociological make-up.<sup>190</sup>

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' celebration of urban diversity, congestion, walkability, and public life has become canonical among planners. 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."<sup>191</sup>

Even with the renewed popularity of the central cities, however, it is notable that new urbanist developments are predominantly located in greenfields. 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. 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,

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<sup>189</sup> 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 (2015). 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 13, 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) (also studying the HUD experiment's impacts and finding mental and physical health improvements, but a lack of impact on children's education and adult's earnings).

<sup>190</sup> See Imbroscio, *supra* note \_\_ at 89.

<sup>191</sup> See Andres Duany & Emily Talen, *Looking Backward: Notes on a Cultural Episode*, in *LANDSCAPE URBANISM AND ITS DISCONTENTS: DISSIMULATING THE SUSTAINABLE CITY* 1, 1 (Andres Duany & Emily Talen eds., 2013) (describing New Urbanism principles and support for them in the design profession); Dan Trudeau, *New Urbanism as Sustainable Development?* 7 GEOGRAPHY COMPASS 435, 436-39 (2013) (discussing history of New Urbanism and distribution of New Urbanism projects).

even as those neighborhoods may be designed to look and feel like small towns.

*C. Anti-Government Anti-Urbanism*

This brings me to a third strand of anti-urbanism. In his recent book, Steven Conn describes the linkages between American anti-government sentiment and the rejection of big-city life.<sup>192</sup> In his description, the physical landscape of suburbanized America is coupled with a political landscape that is deeply suspicious of government. This form of *anti-government* anti-urbanism is, according to Conn, long-standing, but for the most part it is a twentieth century phenomenon. 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. 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, de-concentration, 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”<sup>193</sup>; Lewis Mumford, regionalism’s chief intellectual, arguing that “the hope of the city lies outside itself. Focus your attention on the cities . . . and the future is dismal”<sup>194</sup>; Thomas Hewes, former New Dealer, bemoaning the city as a place where big labor and big business collude, “abetted by big government”<sup>195</sup>; 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*.<sup>196</sup>

Not all these voices were explicitly anti-government. Many, like Lewis Mumford, advocated significant government intervention to create a

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<sup>192</sup> STEVEN CONN, *AMERICANS AGAINST THE CITY: ANTI-URBANISM IN THE TWENTIETH CENTURY* (2014).

<sup>193</sup> *Id.* at 88.

<sup>194</sup> *Id.* at 65.

<sup>195</sup> *Id.* at 113.

<sup>196</sup> *Id.* at 121.

more congenial metropolitan landscape.<sup>197</sup> Nevertheless, the attack on the big cities 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. *Anti-government* anti-urbanism draws a direct connection between bigness and the loss of liberty; centralization and the absence of self-government; density and the threat to American values.

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 to assert the values of local autonomy than have the suburbs 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 v. Rodriguez* meant that richer suburban school districts could continue to spend substantially more than poorer urban ones.<sup>198</sup> 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 dictatorships.”<sup>199</sup>

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 1974, the Richmond school district was already 64.2% African-American; the surrounding suburban school districts were overwhelmingly white.<sup>200</sup> As of 2017, Richmond city schools were 75% African-American, 12% Hispanic, and 9% white.<sup>201</sup> Cities had already been eclipsed by the time *Rodriguez* was decided. Suburban school districts were the beneficiaries of a ruling affirming the legitimacy of decentralized and unequal school funding.

*Milliken v. Bradley*, decided in 1974, put an exclamation mark on this durable city-suburb split. In *Milliken*, the district court adopted a

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<sup>197</sup> *Id.* at 69.

<sup>198</sup> *San Antonio v. Rodriguez*, 411 U.S. 1 (1973).

<sup>199</sup> Quoted in Richard Schragger, *San Antonio v. Rodriguez and the Legal Geography of School Finance Reform*, in *CIVIL RIGHTS STORIES* 85 (GOLUBOFF AND GILLES, EDS. 2008).

<sup>200</sup> Eric Harrison, *Richmond to Stop Keeping White Students Together : Education : Virginia School District used racial ‘clustering’ in bid to halt white flight from schools*, *LOS ANGELES TIMES* (Feb. 25, 1993), [http://articles.latimes.com/1993-02-25/news/mn-751\\_1\\_school-district](http://articles.latimes.com/1993-02-25/news/mn-751_1_school-district).

<sup>201</sup> Richmond Public Schools, <https://www.rvaschools.net/domain/6>.

metropolitan-wide desegregation plan for Detroit and the area's suburbs.<sup>202</sup> Detroit's schools were predominantly black; the suburban schools were overwhelmingly white. 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.<sup>203</sup> 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."<sup>204</sup> 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.<sup>205</sup> Localism and the pastoral ideal combined to enforce suburban prerogatives. 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.<sup>206</sup> 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. 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 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," Roy Schotland reports Unruh berating him 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-

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<sup>202</sup> *Bradley v. Milliken*, 345 F. Supp. 914 (1972).

<sup>203</sup> *Milliken v. Bradley*, 418 U.S. 717 (1974).

<sup>204</sup> Myron Orfield, *Milliken, Meredith, and Metropolitan Segregation*, 62 UCLA L. REV. 384, 452 (2015).

<sup>205</sup> NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, KERNER REPORT (1968).

<sup>206</sup> See generally KEVIN KRUSE, *WHITE FLIGHT: ATLANTA AND THE MAKING OF MODERN CONSERVATISM* (2007), 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* (2007).

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.<sup>207</sup>

Was Unruh right? In part, it seems. 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. But that changed as municipalities were able to provide the services themselves and at a lower cost. The annexation and incorporation battles of mid-century reflected suburban resistance to city annexation efforts—animated in large part by fear of higher tax bills.<sup>208</sup> 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 anti-tax sentiment. The tax and expenditure limitations adopted in almost every state have limited cities' revenue-raising ability significantly. 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 for lower income minorities to enter suburban neighborhoods.<sup>209</sup>

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 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 anti-government anti-urbanism is less appreciated.<sup>210</sup> That advocates of “small government” would reject big cities is almost

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<sup>207</sup> Roy A. Schotland, *The Limits of Being “Present at the Creation”*, 80 N.C. L. REV. 1505 (2002).

<sup>208</sup> See, e.g., GARY MILLER, *CITIES BY CONTRACT: THE POLITICS OF MUNICIPAL INCORPORATION* (1981).

<sup>209</sup> See DOUGLAS MASSEY, ET AL., *CLIMBING MOUNT LAUREL: THE STRUGGLE FOR AFFORDABLE HOUSING AND SOCIAL MOBILITY IN AN AMERICAN SUBURB* (2013).

<sup>210</sup> Kruse's excellent book again provides a roadmap. See KRUSE, *WHITE FLIGHT*, supra note \_\_.

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.<sup>211</sup> 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.<sup>212</sup> 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.

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 longstanding trope. Speaking to a crowd in Dimondale, Michigan on the 2016 campaign trail, then presidential candidate Donald J. Trump summarized his prescription for American cities in a rhetorical statement: “You’re living in poverty, your schools are no good, you have no jobs, 58% of your youth is unemployed – what the hell do you have to lose?”<sup>213</sup> As he echoed at multiple presidential debates against Hillary Clinton, in President Trump’s eyes the 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.”<sup>214</sup>

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<sup>211</sup> Conn, *supra* note \_\_\_\_, at 62.

<sup>212</sup> *Id.* at 2; cf. Emily Badger & Quoc Trung Bui, *Why Republicans Don’t Try to Win Cities*, NY TIMES, Nov. 3, 2016.

<sup>213</sup> Tom LoBianco and Ashley Killough, *Trump pitches black voters: ‘What the hell do you have to lose?’*, CNN (Aug. 19, 2016, 8:22 PM), <http://www.cnn.com/2016/08/19/politics/donald-trump-african-american-voters/index.html>.

<sup>214</sup> Jenee Desmond-Harris, *Why Donald Trump says “the” before “African Americans” and “Latinos”*, VOX (Oct. 20, 2016, 12:50 PM),

The racially inflected, violent city is not a new perception; to hear it so vocally articulated by a presidential candidate and then President—and one who grew up in New York City and made his fortune in urban real estate—is. Trump appears to subscribe to a reductive view of American cities; seeing them as distinguished from their non-urban 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.”<sup>215</sup> 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.<sup>216</sup>

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,<sup>217</sup> 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 Democrat’s civil rights coalition of the 1950s and 60s.

Even so, it is striking how complete the party split between cities and non-cities has become in recent elections. Ted Cruz, the Texas Senator, famously derided “New York values” in the 2016 Republican primary—a message to social and fiscal conservatives of where his own values lay.<sup>218</sup>

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*. 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.”<sup>219</sup>

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<https://www.vox.com/2016/10/20/13342646/donald-trump-african-americans-latinos-race-racism-inner-city>.

<sup>215</sup> Reena Flores, *Trump blasts civil rights icon John Lewis in Twitter attack*, CBS NEWS (Jan. 14, 2017, 11:28 AM), <http://www.cbsnews.com/news/trump-blasts-civil-rights-icon-john-lewis-in-twitter-attack/>.

<sup>216</sup> *Id.*

<sup>217</sup> See KRUSE, *supra* note \_\_; see Kevin Baker, *How the GOP Became the Anti-Urban Party*, NY Times, Oct. 7, 2012

<sup>218</sup> Theodore Schleifer, *Ted Cruz talks to New Yorkers about New York values*, CNN POLITICS (Mar. 24, 2016, 2:00 PM), <http://www.cnn.com/2016/03/23/politics/ted-cruz-new-york-values/index.html>.

<sup>219</sup> Quoted in CONN, *supra* note \_\_ at 15.



## *The Attack on American Cities*

In the 1920s and 30s, anti-city sentiment had a regional flavor—southerners in particular attacked the large east coast cities as part of a wider southern sectional 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.<sup>220</sup> 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.”<sup>221</sup>

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 city-state conflicts have involved immigration, guns, LGBT anti-discrimination, and environmental regulation. In Texas, Governor Abbott said the state’s new law banning sanctuary cities<sup>222</sup> was “doing away with those that seek to promote lawlessness in Texas.”<sup>223</sup> Governor Abbott also called a special 2017 summer session of the legislature in part to consider legislation to restrict cities’ powers.<sup>224</sup> “As your

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<sup>220</sup> See Edward S. Shapiro, *Decentralist Intellectuals and the New Deal*, 58 J. AM. HIST. 938, 943 (1972).

<sup>221</sup> See Richard C. Schragger, *The Anti-Chain Store Movement, Localist Ideology, and the Remnant of the Progressive Constitution 1920-1940*, 90 IOWA L. REV. 1011 (2005).

<sup>222</sup> S.B. 4, 85th Leg., Reg. Sess. (Tex. 2017), <http://www.capitol.state.tx.us/tlodocs/85R/billtext/pdf/SB00004F.pdf#navpanes=0>.

<sup>223</sup> Press Release, Off. Tex. Gov. Greg Abbott, Texas Bans Sanctuary Cities: Governor Abbott Signs Legislation Banning Sanctuary Cities in Texas (May 7, 2017), <https://gov.texas.gov/news/post/Texas-Bans-Sanctuary-Cities>. See also Madlin Mekelburg, *Cities Fear State Backlash for Suits*, EL PASO TIMES, July 9, 2017, at A4 (describing Texas localities’ concern that Gov. Abbott would retaliate against them for filing suit over the new sanctuary cities law).

<sup>224</sup> Press Release, Off. Tex. Gov. Greg Abbott, Governor Abbott Announces Special Session (June 6, 2017), <https://gov.texas.gov/news/post/governor-abbott-announces-special-session> (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”). See also Sandhya Somashekhar, *Red States Try to Make Blue Cities Toe the Line*, WASH. POST, July 2, 2017, at A8 (including a Gov. Abbott quote that “[i]t’s the smell of freedom that does not exist in Austin, Texas”).

governor,” Abbott has promised, “I will not allow Austin, Texas, to Californiaize the Lone Star State.” 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. “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.”<sup>225</sup>

In North Carolina, the Governor at the time, Pat McCrory, called Charlotte’s transgender anti-discrimination ordinance a “mandate on private businesses” that prompted the statewide debate about bathroom policy.<sup>226</sup> 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.<sup>227</sup> 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 demons: socialism, communism, Marxism, Darwinism, secular humanism.”<sup>228</sup>

An on-going 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.<sup>229</sup> 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’.”<sup>230</sup>

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<sup>225</sup> Jonathan Tilove, *Austin Stinks and so Does ‘Sanctuary Sally’*, American Statesmen, June 6, 2017, <http://www.statesman.com/news/state--regional-govt--politics/gov-abbott-austin-stinks-and-does-sanctuary-sally/goq6JEihda4PzADg2IOMgO/>

<sup>226</sup> Katie Zezima, *For Charlotte, An Unintended Fallout*, WASH. POST, May 11, 2016, at A3.

<sup>227</sup> *Mayor Roberts’ Radical Bathroom Sharing Ordinance Costs Charlotte PayPal*, PHILBERGER.ORG, [http://www.philberger.org/mayor\\_roberts\\_radical\\_bathroom\\_sharing\\_ordinance\\_costs\\_charlotte\\_paypal](http://www.philberger.org/mayor_roberts_radical_bathroom_sharing_ordinance_costs_charlotte_paypal) (last visited Aug. 3, 2017). See also Jim Morrill, *GOP Blames Mayor for Loss of PayPal Jobs*, CHARLOTTE OBSERVER, Apr. 6, 2016, at 6A.

<sup>228</sup> Chuck Lindell, Pastors press for transgender bathroom bill: ‘Let the House vote’, Statesman (Aug. 3, 2017, 6:07 PM), <http://www.statesman.com/news/pastors-press-for-transgender-bathroom-bill-let-the-house-vote/tWvO8WgimYAsAGfDMMDo7I/>

<sup>229</sup> THE WHITE HOUSE: OFFICE OF THE PRESS SECRETARY, EXECUTIVE ORDER: ENHANCING PUBLIC SAFETY IN THE INTERIOR OF THE UNITED STATES (2017).

<sup>230</sup> Nikita Vladimirov, *Trump: ‘I will send in the Feds’ if Chicago doesn’t fix violence*, THEHILL (Jan. 24, 2017, 9:52 PM), <http://thehill.com/blogs/blog-briefing-room/news/315994-trump-i-will-send-in-the-feds-if-chicago-doesnt-fix-carnage>.

## *The Attack on American Cities*

Social issues seem to evoke the strongest reactions. But economic issues may be more pertinent.<sup>231</sup> 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 mid-sized 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.<sup>232</sup> 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.

### 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,”<sup>233</sup> 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.<sup>234</sup>

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<sup>231</sup> Cf. Nancy Isenberg & Andrew Burstein, *Cosmopolitanism vs. Provincialism: How the Politics of Place Hurts America*, 19 HEDGEHOG REV. 58 (2017).

<sup>232</sup> William 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/>

<sup>233</sup> EDWARD GLAESER, TRIUMPH OF THE CITY: HOW OUR GREATEST INVENTION MAKES US RICHER, SMARTER, GREENER, HEALTHIER, AND HAPPIER 2 (2012).

<sup>234</sup> 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

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, 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 has coincided with city-state 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 law-making. The “state” officials in the *Printz* case, which held that state officials cannot be “commandeered” by the federal government to administer federal law, were locally-elected sheriffs.<sup>235</sup> 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.<sup>236</sup>

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well as by conversations I have had with my local government law colleagues—especially those mentioned in the star footnote above. *See also* <http://www.abetterbalance.org/wp-content/uploads/2017/08/Summary-of-LEAP-Findings.pdf>

<sup>235</sup> *Printz v. U.S.*, 521 U.S. 898 (1997).

<sup>236</sup> Municipalities are treated differently from states for other purposes, however. Municipalities do not share the state’s antitrust immunity. *See* Community Communications

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 those enunciated most recently in *NFIB v. Sebelius*. 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.”<sup>237</sup> Courts have already ruled that Trump’s sanctuary cities executive order violates both prohibitions.<sup>238</sup> 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 reinforces 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.<sup>239</sup> 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.<sup>240</sup> States themselves treat their municipalities as more than “mere instrumentalities” under certain circumstances—the recognition of home rule municipalities is an example. 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.

A more far-reaching constitutional argument for a right of municipal self-government could be grounded in the Tenth Amendment’s anti-commandeering principle.<sup>241</sup> The Tenth Amendment reserves powers to the states and, separately, to the people, independent of the states. Justices have

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Co. v. City of Boulder, 455 U.S. 40, 57 (1982). Also, under *Monell v. Department of Social Serv.*, 436 U.S. 658 (1978), a municipality is a “person” subject to suit under 42 U.S.C. sec. 1983.

<sup>237</sup> *Nat’l Fed’n of Indep. Bus. V. Sebelius*, 567 U.S. 519, 585 (2012).

<sup>238</sup> *Cty. of Santa Clara v. Trump*, No. 17-CV-00485-WHO, 2017 WL 1459081, at \*2 (N.D. Cal. Apr. 25, 2017), reconsideration denied, No. 17-CV-00485-WHO, 2017 WL 3086064 (N.D. Cal. July 20, 2017). *See also* *City of Chicago v. Jefferson Beauregard Sessions III*, Civ. Act. 1:17-cv-5720 (U.S. Dist. Ct. N. Dist. Ill.)

<sup>239</sup> *Hunter v. Pittsburgh*, 207 U.S. 161 (1907); Kathleen S. Morris, *The Case for Local Constitutional Enforcement*, 47 HARV. C.R.-C.L. L. REV. 3 (2012) (describing the doctrine that resulted from the Supreme Court’s holding in *Hunter v. City of Pittsburgh*, and going on to challenge the validity and soundness of that rule.).

<sup>240</sup> *Id.*

<sup>241</sup> U.S. CONST. amend. X.

observed on occasion that federalism guarantees serve as protections for popular sovereignty and not simply as guarantees of state sovereignty.<sup>242</sup> 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.<sup>243</sup> 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. So too under existing precedent, the state of Texas cannot spend money, allocate resources, and provide personnel to create its own parallel immigration enforcement authority—that power is generally reserved to the federal government.<sup>244</sup>

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.<sup>245</sup> However, if the Tenth Amendment runs to the people, then Texas cannot force cities to do what the state or the federal governments cannot each do separately.<sup>246</sup> 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 sub-divisions when

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<sup>242</sup> *New York v. United States*, 505 U.S. 144, 147 (1992) (“A departure from the Constitution’s plan for the intergovernmental allocation of authority cannot be ratified by the ‘consent’ of state officials, since the Constitution protects state sovereignty for the benefit of individuals, not States or their governments, and since the officials’ interests may not coincide with the Constitution’s allocation.”).

<sup>243</sup> Texas Senate Bill No. 4, Texas Eighty-Fifth Legislature, 2017.

<sup>244</sup> *Arizona v. United States*, 132 S. Ct. 2492, 2494-95 (2012) (holding that the Federal Government has broad powers over immigration).

<sup>245</sup> *But see* *New York*, 505 U.S. at 147; *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

<sup>246</sup> *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.”).

federal law operates directly on those sub-divisions, 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.<sup>247</sup>

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. 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—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 reasons. These are good reasons, and courts should consider them when determining the legitimacy of SB4.<sup>248</sup> 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

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<sup>247</sup> 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 Cnty. 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); *Cnty. Comm’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, 691 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 Cnty., Tex.*, 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).

<sup>248</sup> Daniel Morales discusses the reasons that locals are better suited to enforce such laws in *Transforming Crime-Based Deportation*, 92 NYU L. REV. 698, 751-53 (2017).

noted already is that most states have embraced a form of constitutional home rule that cannot resist explicit state law preemption. 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.<sup>249</sup> 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.<sup>250</sup> 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.<sup>251</sup> In Colorado, for example, courts consider a number of factors, including the need for statewide uniformity and the impact of local policy on non-residents.<sup>252</sup> Uniformity and extra-territoriality 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, courts also look to “tradition” to determine the appropriate sphere of local authority.<sup>253</sup> This criteria too limits cities to those powers to which the state has already acceded.<sup>254</sup>

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, state-wide 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

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<sup>249</sup> TEXAS MUNICIPAL LEAGUE, LOCAL GOVERNMENT IN TEXAS (2015). Texas home rule powers cannot be exercised on any matter that has been preempted by state law.

<sup>250</sup> Paul A. Diller, *Reorienting Home Rule: Part 2—Remedying the Urban Disadvantage Through Federalism and Localism*, 77 LA. L. REV. 1045, 1067 (2017).

<sup>251</sup> *Id.* at 1068.

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> Also, tradition seems to be considered less important than other concerns of statewide impact. *See Northglenn v. Ibarra*, 62 P.3d 151, 155–56 (Colo. 2003).



conduct-regulating statute.<sup>255</sup> 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.

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.<sup>256</sup> If they are appointed, those judges are likely to reflect their appointer's political makeup.<sup>257</sup> 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 substantive policy commitments, as Laurie Reynolds has argued.<sup>258</sup> This is unsurprising; federalism decisions in the Supreme Court tend to break along partisan lines.<sup>259</sup> 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

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<sup>255</sup> *Cleveland v. State*, 989 N.E.2d 1072, 1087 (Ohio Ct. App. 2013); *City of Canton*, 766 N.E.2d at 964 (citing 147 Ohio Laws, Part IV, 7986 (effective March 30, 1999)).

<sup>256</sup> For a history of judicial elections, see JED H. SHUGERMAN, *PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA* 4 (2012).

<sup>257</sup> Michael Kiefer, *Brewer fills Arizona Courts with Republican Judges*, THE ARIZONA REPUBLIC (Sep. 28, 2012, 11:30 PM), <http://archive.azcentral.com/arizonarepublic/news/articles/2012/09/12/20120912brewer-fills-arizona-courts-republican-judges.html> (noting how Arizona has seen strong correlations between the political affiliation of their governors and appointed judges since 1991).

<sup>258</sup> Laurie Reynolds, *Home Rule, Extraterritorial Impact, and the Region*, 86 DEN. U. L. REV. 1271 (2009).

<sup>259</sup> See, e.g., Frank Cross & Emerson Tiller, *The Three Faces of Federalism: An Empirical Assessment of Supreme Court Federalism Jurisprudence*, 73 S. CAL. L. REV. 741, 770 (2000).

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 are 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.<sup>260</sup> Consistent with San Francisco’s political agenda, the city attorney sought constitutional change through the courts, including most prominently in pursuing the goal of marriage equality in the years leading up to the same-sex marriage decision, *Obergefell v. Hodges*.<sup>261</sup>

City impact litigation is supported both as a legal and political matter in San Francisco, and the effectiveness and reach of that office has 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.<sup>262</sup> 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 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.<sup>263</sup> Without

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<sup>260</sup> See Kathleen S. Morris, *Cities Seeking Justice: Local Government Litigation in the Public Interest in HOW CITIES WILL SAVE THE WORLD* (Brescia & Marshall, eds. 2016).

<sup>261</sup> *Dennis Herrera re-elected by voters as City Attorney*, CITY AND COUNTY OF SAN FRANCISCO (Nov. 4, 2009), [http://sfgov.org/tmp\\_home/newsarchive/sf\\_news/2009/11/dennis-herrera-reelected-by-voters-as-city-attorney.html](http://sfgov.org/tmp_home/newsarchive/sf_news/2009/11/dennis-herrera-reelected-by-voters-as-city-attorney.html) (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.).

<sup>262</sup> Kathleen S. Morris, *The Case for Local Constitutional Enforcement*, 47 HARV. C.R.-C.L. L. REV. 33 (2012) (explaining California law).

<sup>263</sup> Julie Bosman & Monica Davey, *Anger in Michigan Over Appointing Emergency Managers*, The New York Times (Jan. 22, 2016),

evidence of animus, however, such claims are difficult to pursue after *Washington v. Davis*.<sup>264</sup>

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 for low-property-wealth school districts to raise the same funds as high-property-wealth districts for the same taxing effort.<sup>265</sup> 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.<sup>266</sup>

These kinds of cases empower local governments by way of vindicating equal protection guarantees. The most prominent case is *Romer v. Evans*.<sup>267</sup> In *Romer*, the Supreme Court held that Amendment 2, which barred Colorado local governments from adopting LGBT protective anti-discrimination 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.<sup>268</sup> *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.<sup>269</sup>

Before it was repealed, North Carolina's HB2—the bathroom bill—had a similar structure to Amendment 2.<sup>270</sup> 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

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<https://www.nytimes.com/2016/01/23/us/anger-in-michigan-over-appointing-emergency-managers.html> (describing local unhappiness in majority black cities over state appointments that they view as undemocratic and disenfranchising.)

<sup>264</sup> *Washington v. Davis*, 426 U.S. 229, 247 (1976) (stating 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 \*13 (N.D. Ala. Feb. 1, 2017) (rejecting equal protection challenge to Alabama statute overriding Birmingham's minimum wage ordinance).

<sup>265</sup> *San Antonio Indep. Sch. Dist. V. Rodriguez*, 411, U.S. 1, 11 (1973).

<sup>266</sup> *Edgewood Indep. Sch. Dist. V. Kirby*, 777 S.W.2d 391, 391-93 (Tex. 1989).

<sup>267</sup> *Romer v. Evans*, 517 U.S. 620 (1996).

<sup>268</sup> *Id.* at 633.

<sup>269</sup> These are cases involving “discriminatory restructuring of governmental decisionmaking.” See, e. g., *Hunter v. Erickson*, 393 U. S. 385 (1969); *Reitman v. Mulkey*, 387 U. S. 369 (1967); *Washington v. Seattle School Dist. No. 1*, 458 U. S. 457 (1982); *Gordon v. Lance*, 403 U. S. 1 (1971).

<sup>270</sup> North Carolina House Bill No. 2, North Carolina 2015 General Assembly – 2016 Second Extra Session.

identity, the legislature passed a law mandating that public bathrooms and changing facilities be restricted to individuals of their biological sex.<sup>271</sup> HB2 also barred the adoption of local anti-discrimination 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 anti-discrimination laws with a state-wide law that did not include LGBT persons as a protected class.<sup>272</sup>

Both Colorado's Amendment 2 and North Carolina's HB2 withdrew authority from local governments to adopt anti-discrimination legislation protecting vulnerable populations. Under conventional state preemption analysis, these kinds of statutes are unremarkable. But *Romer* treats the 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.<sup>273</sup> 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 state-wide 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.<sup>274</sup> It did not have extraterritorial effects, did not upset the state's interest in uniformity, and did not regulate cross-border markets. The 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.

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<sup>271</sup> *Id.*

<sup>272</sup> H.B. 2, 2nd Extra Sess. (N.C. 2016).

<sup>273</sup> See Richard Schragger, *Cities as Constitutional Actors: The Case of Same-Sex Marriage*, 22 J. LAW & POLIT. 147 (2005). *But cf.* Schuette v. Coalition to Defend Affirmative Action, 134 S. Ct. 1623 (2014) (plurality rejecting a challenge to a Michigan constitutional amendment prohibiting state universities' use of race-based preferences).

<sup>274</sup> CITY OF CHARLOTTE, CHARLOTTE'S NONDISCRIMINATION ORDINANCE AND N.C. HOUSE BILL 2 (HB2) (2016).

## *The Attack on American Cities*

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.<sup>275</sup> 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 Hispanics 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. Equal protection precedents are available to cities that seek to defend against state overrides of local anti-discrimination 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 short-circuited a full judicial hearing.<sup>276</sup> 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 city-state 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 city-state political battles, though that influence is selective. And third, while demographic changes are shifting wealth and power back toward the central

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<sup>275</sup> An example of the Sixth Circuit adopting a localist reading of *Romer* can be found in *Equality Foundation of Great Cincinnati v. City of Cincinnati*, 128 F.3d 289 (1997), cert. denied 525 U.S. 943. *But cf. Schuette*, 134 S.Ct. at 1623.

<sup>276</sup> Corinne Segal, *What the North Carolina legislation to repeal the HB2 bathroom bill' actually says*, PBS NEWSHOUR (Mar. 30, 2017, 11:27 AM), <http://www.pbs.org/newshour/rundown/watch-live-nc-legislature-debates-repeal-hb2-bathroom-bill/>; *Trial Over North Carolina's Transgender Bathroom Law HB2 Delayed*, ASSOCIATED PRESS (Sep. 3, 2016, 11:40 AM), <http://www.nbcnews.com/feature/nbc-out/trial-over-north-carolina-s-transgender-bathroom-law-hb2-delayed-n642411>. Due to the trial being pushed back, the repeal in March of 2017 muted judicial review of HB2.

city, metropolitan-area populations are often still overwhelmingly suburban.<sup>277</sup> City leaders will need to seek allies among those metropolitan populations in order to make leeway 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 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, city-state 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.<sup>278</sup> At the same time, ALEC has made a concerted effort to promulgate model state legislation consistent with its industry-friendly, free-market positions.<sup>279</sup> As we have seen, ALEC has aggressively promoted a deregulatory agenda that seeks to override municipal business, licensing, or environmental regulation.<sup>280</sup>

That industry would seek to counter local regulation hostile to it is unsurprising. Regulated industries have long sought preemptive national or

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<sup>277</sup> Jed Kolko, *How Suburban Are Big American Cities?*, *FiveThirtyEight*, (May 21, 2015, 6:39 AM), <https://fivethirtyeight.com/features/how-suburban-are-big-american-cities/> (explaining how data shows that the recent growth of cities has not always been correlated with larger urban, rather than suburban, populations).

<sup>278</sup> Steven Malanga, *How the "Living Wage" Sneaks Socialism into Cities*, *CITY JOURNAL* (2003), <https://www.city-journal.org/html/how-%E2%80%9Cliving-wage%E2%80%9D-sneaks-socialism-cities-12397.html> (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).

<sup>279</sup> 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/> (explaining how influential ALEC has been through its model legislation writing).

<sup>280</sup> AMERICAN LEGAL EXCHANGE COUNCIL, *TELECOMMUNICATIONS DEREGULATION POLICY STATEMENT (Amended)* (2014).

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.<sup>281</sup> As already noted, sharing economy firms, as well as telecommunications providers—have also sought blanket protective legislation at the state or federal level.<sup>282</sup> 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 multi-state political and policy fight.

The problem of legislative capture is apparent. State legislators often work part-time, are poorly paid, have limited staff, and 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 counter-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 inter-governmental relations. Charlotte's transgender access law thus becomes a state- and nation-wide flash-point in the left-right culture wars over LGBT rights.<sup>283</sup> 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.<sup>284</sup> Local voters are increasingly voting their national political identity instead of

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<sup>281</sup> See Lori Riverstone-Newell, *The Rise of Preemption Laws in Response to Local Policy Innovation*, 47 *PUBLIUS* 403-425 (2017); see also Emily Badger, *Blue States Want to Make Their Own Rules. Red States Won't Let Them*, *THE NEW YORK TIMES: THEUPSHOT* (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>.

<sup>282</sup> Gerald B. Silverman, *Uber, Airbnb, Tech Companies Spend Big Bucks Lobbying in N.Y.*, *BLOOMBERG BNA* (May 28, 2017), <https://www.bna.com/uber-airbnb-tech-n73014451621/> (charting the rise in lobbying by tech firms in New York over the past three years).

<sup>283</sup> Mark Price, *Social media erupts as Charlotte rescinds LGBT rights law in HB2 trade off*, *THE CHARLOTTE OBSERVER* (Dec. 19, 2016, 11:20 AM), <http://www.charlotteobserver.com/news/local/article121747648.html> (describing the nationwide public frenzy over the HB2 controversy).

<sup>284</sup> Alan I. Abramowitz & Steven Webster, *The Rise of Negative Partisanship and The Nationalization of U.S. Elections in the 21<sup>st</sup> Century*, 41 *ELECTORAL STUDIES* 12 (2016) (arguing that the shift since the 1980s towards more and more negative political party rhetoric has led to party loyalty and straight-ticket voting being dramatically more pronounced than before). One implication of these voting patterns is that parties do not cater

identifiable local interests, and the paucity of pragmatic centrists in statehouses is increasingly apparent.<sup>285</sup> This may mean that the give-and-take of intra-state 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 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 non-discrimination, and both threatened to withdraw their tournaments and events from North Carolina locations.<sup>286</sup> Other companies threatened to suspend planned expansions in the state.<sup>287</sup>

Private, corporate boycotts as a means to induce policy change have been effective in a number of states. In addition to North Carolina, Indiana, Arizona, and Georgia have seen private businesses threatening to boycott in-state business over discriminatory state laws.<sup>288</sup> These efforts have generally

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to the median voter at the state and local level. See David Schleicher, *Federalism and State Democracy*, 95 TEXAS LAW REV. 763 (2017).

<sup>285</sup> Craig Fehrman, All Politics Is National, FiveThirtyEight (Nov. 7, 2016), <https://fivethirtyeight.com/features/all-politics-is-national/> (charting the phenomenon of how local level politics is starting to become increasingly polarized in a way that reflects the national political scene.).

<sup>286</sup> *In bitter divide, repeal of North Carolina LGBT law fails*, ESPN (Dec. 22, 2016), [http://www.espn.com/college-sports/story/\\_id/18329901/ncaa-nba-bans-north-carolina-remain-hb2-repeal-fails](http://www.espn.com/college-sports/story/_id/18329901/ncaa-nba-bans-north-carolina-remain-hb2-repeal-fails).

<sup>287</sup> Ryan Bort, *A Comprehensive Timeline of Public Figures Boycotting north Carolina Over the HB2 ‘Bathroom Bill’*, NEWSWEEK (Sep. 14, 2016, 5:06 PM), <http://www.newsweek.com/north-carolina-hb2-bathroom-bill-timeline-498052>.

<sup>288</sup> Maria Puente, *Hollywood Studios threaten to boycott Georgia if controversial law signed*, USA TODAY (Mar. 24, 2016, 2:13 PM), <https://www.usatoday.com/story/life/movies/2016/03/24/hollywood-studios-threaten-boycott-georgia-if-controversial-law-signed/82206760/>; Sarah Parvini & Nigel Dura, *In*



been deployed in the context of LGBT anti-discrimination. In the case of HB2, backchannel 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.<sup>289</sup> 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.<sup>290</sup> As a result, Charlotte's anti-discrimination law was struck, but North Carolina's more far-reaching bathroom law was struck as well. Local power to adopt anti-discrimination 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. 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 anti-discrimination, 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

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*conservative Indiana, bemusement amid boycott threats over religious freedom law*, LOS ANGELES TIMES (Mar. 28, 2015, 7:32 PM), <http://www.latimes.com/nation/la-na-ff-indiana-religion-law-20150328-story.html>.

<sup>289</sup> Colin Campbell & Jim Morrill, *Lawmakers vote Thursday on deal to repeal HB2*, THE CHARLOTTE OBSERVER (Mar. 29, 2017, 6:33 PM), <http://www.charlotteobserver.com/news/politics-government/article141566264.html>.

<sup>290</sup> 2017 North Carolina House Bill No. 142, North Carolina 2017 General Assembly - 2018 Regular Session.

signed the bathroom bill, was defeated in a subsequent election, in part because of his stance on the bill.<sup>291</sup> 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 metropolitan statistical areas (MSAs) drive state and national economies.<sup>292</sup> 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 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.

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<sup>291</sup> Colin Campbell, *McCrary takes parting shots at HB2 opponents, ACC as Cooper becomes governor*, THE NEWS & OBSERVER (Dec. 31, 2016, 3:43 PM), <http://www.newsobserver.com/news/politics-government/state-politics/article123985324.html> ("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.").

<sup>292</sup> BRUCE KATZ & JENNIFER BRADLEY, *THE METROPOLITAN REVOLUTION: HOW CITIES AND METROS ARE FIXING OUR BROKEN POLITICS AND FRAGILE ECONOMY 2* (2013).

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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.<sup>293</sup> Alan Ehrenhalt has called this combination of increased wealth in the central city and increased poverty in the suburbs “the great inversion.”<sup>294</sup>

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.<sup>295</sup> 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.<sup>296</sup> 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 “overstepping” their “bounds.”<sup>297</sup>

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<sup>293</sup> 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/> (observing that suburbs have the largest and fastest growing poor populations.).

<sup>294</sup> ALAN EHRENHALT, *THE GREAT INVERSION AND THE FUTURE OF THE AMERICAN CITY* (2013).

<sup>295</sup> See, e.g., KATHERINE CRAMER, *THE POLITICS OF RESENTMENT* (2016) (discussing rural resentment in Wisconsin).

<sup>296</sup> William 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/>

<sup>297</sup> Reid Wilson, *GOP aims to rein in liberal cities*, THEHILL (Jan. 5, 2017, 6:00 AM), <http://thehill.com/homenews/campaign/312766-gop-aims-to-rein-in-liberal-cities>.

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To be sure, the city-state 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 not only be 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 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 "all-the-way-down" to the city level.<sup>298</sup>

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 mid-century, these kinds of arguments for home rule will exert more force. The emerging city-state conflicts are already evidence of a demographic and economic shift. Whether an urban-based home rule movement will be one

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<sup>298</sup> See Heather Gerken, *Forward: Federalism All the Way Down*, 124 HARV. L. REV. 6 (2010).

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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.