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## The Dilemma of Localism in an Era of Polarization

**ABSTRACT.** Localism, the discourse of local legal power and state-local relations, has returned to the center of national attention, driven by gridlock at the federal level and sharply rising political and cultural conflicts between cities and their states. In recent years, states have aggressively sought to constrain, eliminate, and even criminalize local policy discretion across an array of policy domains. Cities and their advocates have just as aggressively fought back—in litigation, in the political arena, and in popular discourse.

Advocacy for resurgent local empowerment is raising anew what has long been the central dilemma of localism: how can a vertical allocation of authority in our legal system reflect a general commitment to devolution and decentralization, yet at the same time check the worst excesses of local parochialism? Local governments can be great fonts of democracy, community, and policy innovation, but they can also be exclusionary and stubbornly unwilling to account for the external consequences of local decision-making.

This Essay proposes a new approach to the dilemma of localism in an era of polarization. To calibrate the allocation of state/local power in the current social and political reckoning, the normative dimensions of localism must be more directly confronted. In delineating values to determine where subsidiarity is most appropriately constrained, aspects of state law not always associated with state-local relations can provide normative guidance. State constitutional individual-rights provisions, addressing equality and equity in many states, as well as employment, education, social welfare, and the environment, bear on the normative commitments states have undertaken. And the too-often neglected idea that when states delegate authority to local governments, local governments must act cognizant of the broader general welfare of the state provides a complementary structural principle to import normative concerns into the vertical allocation of power.

To be sure, there are limits to the judicial capacity to apply a more equitable localism, and the values at issue are contestable. But a normative lens on localism foregrounds what is truly at stake in contemporary state/local conflicts. In short, it is critical to ask not just what localism is, but what localism is for. Properly framed, law can find a jurisprudential and institutional path to an answer.



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## INTRODUCTION

On August 28, 2015, St. Louis enacted an ordinance that would have raised the minimum wage in the city to \$11 per hour. The move sparked a protracted fight with the Missouri General Assembly over state preemption that included an en banc Missouri Supreme Court decision<sup>1</sup> and a legislative override making clear that Missouri's cities cannot regulate minimum wages. In the end, the state prevailed, rolling back wage increases that had already begun to change the economic and social landscape of the city.<sup>2</sup>

The fight between St. Louis and Missouri over the minimum wage is hardly an outlier today. Once-neglected questions concerning the state-local relationship and the basic role of cities and other local governments in our federal system have recently taken on renewed urgency.<sup>3</sup> Traditionally, states have invoked their power over local authority periodically to vindicate concerns about statewide regulatory uniformity or to address particularly significant interlocal conflicts. As rising political and cultural polarization exacerbates long-standing urban/rural conflicts, however, progressive cities find themselves increasingly at odds with conservative state legislatures. The state-level redistricting that followed the 2010 census, which accelerated unified partisan control in many states, intensified this conflict, contributing to a sharp increase in state intervention in local policy making.<sup>4</sup>

States in recent years have preempted local initiatives and removed local authority across a wide array of policy domains.<sup>5</sup> Charlotte, for example, found itself in a conflict that garnered national attention when North Carolina barred

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1. See *Coop. Home Care, Inc. v. City of St. Louis*, 514 S.W.3d 571 (Mo. 2017) (finding that the city had acted within its home-rule authority and was not substantively preempted and striking down a state preemption statute for procedural defects in enactment).
  2. See David A. Graham, *How St. Louis Workers Won and Then Lost a Minimum-Wage Hike*, ATLANTIC (Aug. 29, 2017), <https://www.theatlantic.com/business/archive/2017/08/st-louis-minimum-wage-preemption/538182> [<https://perma.cc/5F2G-RKVV>].
  3. See Lori Riverstone-Newell, *The Rise of State Preemption Laws in Response to Local Policy Innovation*, 47 PUBLIUS 403 (2017); *City Rights in an Era of Preemption: A State-by-State Analysis 2018 Update*, NAT'L LEAGUE CITIES (2018), <https://www.nlc.org/sites/default/files/2017-03/NLC-SML%20Preemption%20Report%202017-pages.pdf> [<https://perma.cc/N434-J5QQ>].
  4. See Kenneth A. Stahl, *Preemption, Federalism, and Local Democracy*, 44 FORDHAM URB. L.J. 133, 140, 143-45 (2017); David Swindell et al., *Navigating the Waters Between Local Autonomy and State Preemption*, ALLIANCE FOR INNOVATION 17 (Oct. 2017), <https://transformgov.org/sites/transformgov.org/files/2017%20BIG%20Ideas%20Work%20Paper.pdf> [<https://perma.cc/5PLZ-CX6X>] (analyzing factors that exacerbate preemption conflicts).
  5. The examples in this paragraph are described in detail below. See *infra* Part I.

the city's effort to add LGBT protection to its municipal antidiscrimination ordinance. States have overridden local laws addressing not just minimum wages, but also paid sick leave, fair scheduling, and other employee protections. States are also barring local policies that welcome immigrants and protect public safety by facilitating law enforcement cooperation with immigrant communities in so-called sanctuary cities. Similar conflicts are playing out in public health, housing, environmental protection, firearm safety, the sharing economy, broadband, and other areas.

Even more significantly, state oversight is turning punitive, with states threatening to withdraw funding from local governments and opening local governments to novel forms of liability over policy disputes.<sup>6</sup> States are now even exposing individual local officials to penalties—including removal from office, civil fines, and criminal sanctions—in preemption conflicts.<sup>7</sup> To call this a sea change in state-local relations would be an understatement.

Local governments and their advocates have hardly acquiesced, mounting a series of hotly contested lawsuits to defend local autonomy and local democracy. This burgeoning litigation challenging the new wave of preemption involves a variety of structural doctrines at the core of the state-local relationship, including home rule and state constitutional bans on special legislation. Recent cases have also involved federal constitutional claims, including equal protection, due process, and the First Amendment, reflecting the individual rights at issue in many of these conflicts. Somewhat surprisingly, given their nominal lack of formal authority, local governments have prevailed in a not-insignificant number of cases.<sup>8</sup>

At the fulcrum of these renewed conflicts is a critical question that is the focus of this Essay. Current advocacy for local governments is often motivated by interest in protecting local policies that advance equity and inclusion. The legal arguments advocates invoke in these conflicts, however, could just as easily be turned against the very values they are defending through local autonomy. After all, as much as local governments can advance economic fairness, social justice, and policy innovation, they can—and often do—use their power as a tool of exclusion, reinforcing racial and socioeconomic inequality.

This is the double-edged sword of localism: local empowerment can be used for desirable as well as pernicious ends. This dilemma raises the critical theoretical and doctrinal question whether it is possible to craft a coherent, principled

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6. See Erin Adele Scharff, *Hyper Preemption: A Reordering of the State-Local Relationship?*, 106 GEO. L.J. 1469 (2018); Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163 (2018).

7. See Scharff, *supra* note 6, at 1498-1502.

8. For an overview of the emerging jurisprudence, see *infra* Part I.

approach to local legal power justified by the traditional values associated with localism—preserving the space for local democracy, community, and participation, as well as fostering local innovation and the general benefits of political decentralization—but addressing the worst aspects of local parochialism when those values fail.<sup>9</sup>

It only takes a few examples to put the question in concrete terms. Is it possible to construct an approach to localism that protects Bloomington’s desire to enact inclusionary zoning from preemption by Indiana, while still vindicating New Jersey’s restrictions on local governments that use zoning to bar low-income people and people of color from a community? Is there an approach that can bar Texas from enacting a punitive anti-sanctuary-city law, but justify Illinois’s prosanctuary laws? The same question can be asked about Ohio’s preemption of a Cleveland law mandating local hiring in public projects versus California’s restriction on the City of Vista’s desire to avoid paying prevailing wages on public construction projects. Similar examples abound—indeed, they are baked into the very nature of contemporary localism.

Reconciling these crosscurrents is not particularly difficult if the goal is simply to vindicate policy preferences. It is perfectly consistent to support or reject local autonomy in the service of any particular outcome (such as more affordable housing or fewer regulatory restrictions on development), giving contingent support for an allocation of authority that tends to achieve that outcome. But the task is more challenging if the search is for a set of structural principles that can be applied consistently to delineate the allocation of state/local authority in ways that provide tools for advocates and legal actors to reflect the true stakes of the conflicts at issue.<sup>10</sup>

This question is hardly new in the literature, even if it has taken on new salience and a distinctive partisan valence.<sup>11</sup> Scholarly attempts to grapple with the

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9. In tackling this problem, it is helpful to remember that a variety of state and federal doctrines, both structural and rights-based, shape the metes and bounds of local legal identity. See Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 4 (1990). The constitutional status of state authority over local governments, once thought of as plenary, see *Hunter v. Pittsburgh*, 207 U.S. 161 (1907), has gradually been modified through waves of state constitutional home-rule reform, see David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2277–2322 (2003), while individual rights and the interpretation of state statutes also inform important aspects of the jurisprudence of localism.
  10. Cf. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).
  11. Nor is the question of general principles that offer the appropriate approach to vertical allocation of power unique to localism—the same issues pertain, albeit with different constraints, in the broader discourse of federalism. See Richard Briffault, “What About the ‘Ism’?” *Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303 (1994).

dilemma of localism have fallen along several general lines.<sup>12</sup> Some scholars have argued in favor of subsidiarity—the concept that authority in a political order should rest with the level of governance closest to those governed—without significant qualification, taking the position that the benefits of devolution and decentralization outweigh the costs of local empowerment. This approach has the virtue of consistency, but ultimately pays insufficient attention to the risks of exclusion and other local threats to fundamental values. Other scholars have advanced approaches to calibrating the balance of state and local power that look to the states to strike the right balance or that emphasize more functional or formal grounds of decision. These perspectives likewise offer much wisdom, but the states in the present environment are too often untrustworthy stewards of their oversight authority, and traditional functional and formal approaches obscure the underlying nature of the conflicts at issue.<sup>13</sup>

This Essay argues for a different approach. It takes as its premise the inherently normative nature of the allocation of power in the states. This normativity is implicit in much of the discourse—and occasionally rises to the surface in the jurisprudence—but it is important to be forthright about the unavoidability of making often deeply contested normative choices, rather than applying nominally functional or formal approaches, in structuring local power.<sup>14</sup>

The critical task then becomes discerning the appropriate content for that normativity. The Essay argues for drawing on the intersection of two areas of state constitutional doctrine. The first is state individual-rights provisions, from which courts and litigants can derive operative values. The existence of these provisions demonstrates that states are not, in fact, indifferent to considerations

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12. See *infra* Section II.B.

13. Some scholars have reacted to the dilemma of localism by offering provocative, far-reaching proposals for fundamentally reordering state-local relations or rethinking the nature of local identity. See *infra* note 92. These accounts have value in pushing the boundaries of our conceptions of localism, but they can be challenging to translate into practical jurisprudence. Given the immediacy of the conflicts facing the legal system, this Essay takes a more pragmatic, doctrinal focus, while still recognizing that it is worth attending to more foundational concerns.

14. To be clear, this Essay explores consequences of the premise that subsidiarity is an appropriate general principle to shape localism, subject to a burden of justifying allocations of power to other levels of government. See Daniel Weinstock, *Cities and Federalism*, 55 *NOMOS* 259, 269–75 (2014). This premise is subject to contestation, of course, and our federal and state constitutional system has a decidedly more centralizing bent as a matter of positive law. See *infra* note 96. A perspective more skeptical of devolution would shift the dilemma of localism to the somewhat different question of whether, in any instance, there is justification for local authority.

of equity, inclusion, and similar concerns.<sup>15</sup> Indeed, nearly every state has some form of equality norm enshrined in its state constitution.<sup>16</sup> Many states, moreover, have provisions that advance education, social welfare, environmental protection, and similar commitments, however thinly realized they may be in practice.<sup>17</sup>

A second, distinct source of normative content for localism lies in the often-ignored concept that the *general welfare* of the state is inherent in the delegation of legal authority to geographically bounded local communities. This structural principle has the potential to be deeply normative, given that the inquiry into what constitutes the general welfare of a state transcends the interests of any locality. Taking this concept seriously would mean that state delegation carries inherent limits on the ability of local governments to wall themselves off from the larger context in which their policies operate. Thus, the logic of home rule—even in states that have recognized strong protection for local autonomy—can nonetheless focus attention on particularly important normative externalities that embody the most pernicious aspects of parochialism.<sup>18</sup>

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15. As discussed below, *infra* Section III.A, this is not to dismiss the potential for federal constitutional rights to serve as normative guidance as well. For state courts deciding challenging questions of state structure, however, one reason for looking to *state* constitutional rights provisions (as opposed to federal) is that doing so holistically reflects the allocation of state and local authority of each given state’s overall legal and constitutional culture. When seeking a normative baseline for vertically distributing legal power, state constitutions are thus the appropriate starting point. Variation among the states gives force to this argument, allowing each state to make its own normative commitments.

16. For discussions of state equality guarantees, see, for example, Stanley H. Friedelbaum, *State Equal Protection: Its Diverse Guises and Effects*, 66 ALB. L. REV. 599 (2003); Jeffrey M. Shaman, *The Evolution of Equality in State Constitutional Law*, 34 RUTGERS L.J. 1013 (2003); and Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195 (1985).

17. See *infra* Section III.A.2.

18. Some home-rule states, such as California and Colorado, among others, recognize a theoretically irreducible core of “local” or “municipal” matters over which local governments enjoy both the ability to initiate policy without prior state approval and the power to trump the state in the case of conflicts with state law. See RICHARD BRIFFAULT & LAURIE REYNOLDS, *CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW* 349 (8th ed. 2016); Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1125-27 (2007). These are so-called *imperio* states, labeled in recognition of early case law that described this form of home rule as an empire within an empire—*imperium in imperio*. In most home-rule states, however, local governments enjoy broad initiative authority but relatively little immunity from state oversight. BRIFFAULT & REYNOLDS, *supra*, at 350; Diller, *supra*, at 1126. And the most state-focused version of local legal identity, known as “Dillon’s Rule,” still pertains in some jurisdictions or for some local governments in home-rule states. BRIFFAULT & REYNOLDS, *supra*, at 327-30; Diller, *supra*, at 1126-27.

The *interplay* between these mutually reinforcing sources of normative constraint on localism yields an important insight. Together, these doctrinal regimes can cabin the judicial role in discerning the outer boundaries of local authority within a general case for devolution and decentralization.<sup>19</sup> Any satisfying approach to the dilemma of localism must reflect normative values that are clearly discernible from within state constitutional law and that are equally grounded in the logic of local power itself.<sup>20</sup>

This framework carries challenges that are important to acknowledge. Most notable are the limits on the judicial capacity to apply a more equitable localism and the inherent contestability of the normative values at issue.<sup>21</sup> Yet these challenges are by no means insurmountable, and there is value in making as strong a case as possible for a normative lens on localism and in thinking through the limitations of that case with care. If nothing else, this Essay seeks to accomplish that first step.

The Essay proceeds in three Parts. The first canvases the rise of the new wave of state preemption of local policy discretion and the renewed salience it brings to the dilemma of localism. Part II frames that dilemma more precisely and explains the limits of past attempts to respond. Finally, Part III articulates an alternative framework that prioritizes normative considerations, allowing the legal system to privilege localism while tempering local empowerment at the margins. This balancing inevitably raises doctrinal and institutional challenges, but it invites just the conversation we need to have at this critical juncture.<sup>22</sup>

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19. It is important in approaching questions of localism to account for the multiple relationships that shape local legal identity—vertical (the local relationship with the state) and horizontal (interlocal relationships), as well as the relationship between local governments and both individuals and the private sector. See GERALD E. FRUG, RICHARD T. FORD & DAVID J. BARRON, *LOCAL GOVERNMENT LAW: CASES AND MATERIALS*, at vi (5th ed. 2010) (noting that local legal identity involves three kinds of interaction: “[B]etween cities and higher levels of government, between neighboring cities, and between cities and the people who live within their boundaries”).
  20. This Essay’s normative structural argument focuses primarily on the judicial interpretation of the appropriate balance between state and local authority in conflicts where that question arises. But other legal (and nonlegal) institutions also shape local legal identity, including state legislatures and Congress, federal and state administrative agencies, and even state constitutional drafters, given the relative frequency with which state constitutions are amended and revised. See generally GORDON L. CLARK, *JUDGES AND THE CITIES: INTERPRETING LOCAL AUTONOMY* (1985).
  21. See *infra* Section III.B.
  22. Scholars have begun to grapple with the current landscape of preemption and state/local conflicts. See, e.g., Richard Briffault, *The Challenge of the New Preemption*, 70 *STAN. L. REV.* 1995 (2018); Scharff, *supra* note 6; Schragger, *supra* note 6; Stahl, *supra* note 4. This burgeoning literature has done important work on emerging state/local conflicts, especially in terms of

## I. LOCALISM'S RENEWED URGENCY

The basic terms of local legal identity are once again fiercely contested. In the history of state-local relations there have been periodic moments in which fundamental questions of the balance of authority, devolution, and decentralization within the states have come forcefully to the surface. What then-Professor David Barron has described as the first wave of home-rule reform – following the nineteenth century's predominant state-centered approach<sup>23</sup> – was largely an effort of late nineteenth- and early twentieth-century urban reformers, channeling Progressive Era concerns about democratic failure and the need to professionalize governance.<sup>24</sup> A second wave of major home-rule reform, in the middle of the twentieth century, reflected significant shifts brought about by the postwar boom in suburban living.<sup>25</sup> Although there has always been a push and pull – legally, politically, and culturally – between states and their local governments, occasional constitutional moments occur when the basic terms of that balance are renegotiated.<sup>26</sup>

We have suddenly found ourselves in one of those constitutional moments.<sup>27</sup> It is difficult to say for certain why this is the case, but a few dynamics are at play. First, we are in an era of sharply polarized politics, exacerbated by patterns of geographic mobility in which the like-minded are increasingly living together, apart from those with differing political and cultural outlooks.<sup>28</sup> Following the

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doctrine and the political economy of preemption. This Essay, by contrast, focuses on how to reconcile defenses of local authority with continuing normative concerns about localism.

23. See *supra* note 18 (discussing Dillon's Rule). The prevailing pre-home-rule approach embodied in Dillon's Rule arguably displaced an earlier, more localist conception of state-local relations. See, e.g., Carol M. Rose, *The Ancient Constitution vs. the Federalist Empire: Anti-Federalism from the Attack on "Monarchism" to Modern Localism*, 84 NW. U. L. REV. 74, 94-99 (1989) (discussing theories of the inherent sovereignty of local governments); see also David J. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 515-21 (1999) (exploring the consequences of Thomas Cooley's conception of local governments as important political institutions that bring substantive constitutional values to life).
24. Barron, *supra* note 9, at 2288-2322.
25. *Id.* at 2325-28.
26. Cf. 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 266-94 (1998) (discussing dynamics of periodic fundamental constitutional change outside the course of normal lawmaking).
27. The current resurgence of interest in local governments – and cities in particular – is reflected in the popular literature as well. See, e.g., BRUCE KATZ & JEREMY NOWAK, *THE NEW LOCALISM: HOW CITIES CAN THRIVE IN THE AGE OF POPULISM* (2017).
28. See David Schleicher, *Stuck! The Law and Economics of Residential Stability*, 127 YALE L.J. 78, 114-17 (2017) (noting that there have been declines in overall mobility, but also that patterns of mobility have shifted to allow those with means to remain geographically mobile, further

2010 census, many state legislative districts were redistricted in ways that locked in partisan advantages – mostly in states with conservative legislatures – further distancing state legislatures from the median state voter as well as from increasingly progressive cities in many states.<sup>29</sup> There is evidence of a tipping point institutionally with respect to preemption when a single party takes control of both houses of a state legislature as well as the governorship – at that moment, regardless of party, state oversight of local governments becomes much more intrusive.<sup>30</sup> Finally, there are networks of policy entrepreneurs with a generally deregulatory orientation that have increasingly focused on local governments as a locus for advocacy, with some success.<sup>31</sup>

As a result, states in recent years have sought to constrain or remove local authority across a striking range of policy areas and with increasing vehemence.<sup>32</sup> This wave of preemption reflects a mix of deregulatory libertarianism – particularly focused on employment, the environment, and technology – and social conservatives’ concerns about religious liberty and reducing immigration, forming a shared agenda of reducing local power.<sup>33</sup>

A number of high-profile state/local fault lines have emerged from these dynamics. On civil rights, North Carolina preempted Charlotte’s authority to add

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concentrating populations of those unable to move). See generally BILL BISHOP, *THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICA IS TEARING US APART* (2008) (analyzing the reasons for and implications of the United States’ geographic ideological separation).

29. See Richard Briffault et al., *The Troubling Turn in State Preemption: The Assault on Progressive Cities and How Cities Can Respond*, 11 *ADVANCE* 3, 3 (2017); Riverstone-Newell, *supra* note 3, at 406–07. For an analysis of the urban/rural political divide in contemporary state-local relations, see generally Paul A. Diller, *Reorienting Home Rule: Part 1 – The Urban Disadvantage in National and State Lawmaking*, 77 *LA. L. REV.* 287 (2016), and for an in-depth exploration of this dynamic as it has exacerbated the current wave of state/local conflicts, see generally Stahl, *supra* note 4.
30. Swindell et al., *supra* note 4, at 13–15 (analyzing data on state preemption between 2001 and mid-2017 and concluding that roughly three-quarters of preemption occurs when one party has a “trifecta” of both houses of a state legislature and the governorship).
31. See, e.g., Briffault, *supra* note 22, at 2001 (discussing the work of the American Legislative Exchange and its subsidiary the American City Council Exchange in promoting and providing templates for state preemption of local regulation).
32. For other overviews of these rising state/local conflicts, see Briffault, *supra* note 22; Briffault et al., *supra* note 29; Scharff, *supra* note 6; and Schragger, *supra* note 6.
33. Race, moreover, has been a recurring leitmotif in many of the current state/local conflicts, given the alignment of majority-minority cities in states with predominantly white legislatures. See *States Preempting Local Laws Are an Extension of Jim Crow*, PARTNERSHIP FOR WORKING FAMILIES (Aug. 29, 2017), <http://www.forworkingfamilies.org/blog/states-preempting-local-laws-are-extension-jim-crow> [<https://perma.cc/MQ5R-AENT>] (noting, for example, that Birmingham’s population is 73% black while the Alabama Legislature is 75% white; and that Cleveland is 53% black while the Ohio Legislature is 86% white).

LGBT antidiscrimination protection to its local ordinances, leading to turmoil that brought preemption conflicts to the national conversation.<sup>34</sup> Arkansas and Tennessee have similarly preempted local antidiscrimination laws, and so-called “bathroom bills” have become a significant flashpoint in many states.<sup>35</sup> Relatedly, on immigration, at least nine states now have legislation limiting so-called sanctuary cities,<sup>36</sup> with a wave of new legislation still emerging.<sup>37</sup>

Similar issues have arisen in other policy areas. In workplace regulation, at least twenty-five states preempt local minimum wage rules,<sup>38</sup> at least nineteen states preempt local sick-leave policies,<sup>39</sup> and at least twelve states preempt local

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34. See Schragger, *supra* note 6, at 1178 & n.81, 1183, 1223-25.

35. *Id.* at 1165-66, 1228.

36. ALA. CODE § 31-13-5 (LexisNexis 2016); GA. CODE ANN. § 20-3-10 (West, Westlaw through 2018 Legis. Sess.); IND. CODE § 5-2-18.2-3 (2018); IOWA CODE ANN. § 825.4 (West, Westlaw through 2018 Reg. Sess.); MISS. CODE ANN. § 25-1-119 (2018); N.C. GEN. STAT. § 153A-145.5 (2017); S.C. CODE ANN. § 6-1-170 (Westlaw through 2018 Act 266); TENN. CODE ANN. § 4-59-103 (West, Westlaw through 2018 2d Reg. Sess.); TEX. GOV'T CODE ANN. § 752.053 (West, Westlaw through 2017 Reg. & 1st Called Sessions of the 85th Leg.). The term “sanctuary city” has no fixed meaning, but generally refers to local governments that adopt inclusive policies regarding undocumented immigrants. See, e.g., Rose Cuison Villazor, “*Sanctuary Cities*” and *Local Citizenship*, 37 FORDHAM URB. L.J. 573, 576 (2010).

37. Florida’s CS/HB 9, labelled the “Rule of Law Adherence Act,” introduced in 2017, would have been one of the more extreme examples had it passed. The proposed statute would have exposed local governments with “sanctuary-city” policies to fines of \$1,000 to \$5,000 per day and denied them state funding for five years; it would have subjected such local governments to vicarious liability for actions of undocumented immigrants; and it would have provided for the removal from office of local officials who support sanctuary policies. H.R. 9 (Fla. 2018).

38. ALA. CODE § 25-7-45 (LexisNexis 2016); ARIZ. REV. STAT. ANN. § 34-321(b) (Supp. 2017); ARK. CODE ANN. § 11-4-221 (LEXIS through 2018 Fiscal Sess. & 2d Extraordinary Sess.); COLO. REV. STAT. § 8-6-101 (West 2013); FLA. STAT. ANN. § 218.077 (West 2018); GA. CODE ANN. § 34-4-3.1 (2017); IDAHO CODE § 44-1502 (LEXIS through 2018 2d Reg. Sess.); IND. CODE ANN. § 22-2-2-10.5 (LexisNexis 2018); IOWA CODE ANN. §§ 331.304(12), 364.3(12)(a) (West 2018); KAN. STAT. ANN. § 12-16,130 (Supp. 2017); KY. REV. STAT. ANN. § 65.016 (LexisNexis Supp. 2018); LA. STAT. ANN. § 23:642 (Supp. 2017); MICH. COMP. LAWS ANN. § 123.1392 (West, Westlaw through P.A.2018, No. 348 of 2018 Reg. Sess., 99th Mich. Leg.); MISS. CODE ANN. § 17-1-51 (Supp. 2017); N.Y. LAB. LAW § 652 (McKinney, Westlaw through L.2018, chs. 1-321); N.C. GEN. STAT. §§ 95-25.1, 153A-449, 160A-20.1 (2017); OKLA. STAT. ANN. tit. 40, § 160 (West Supp. 2018); OR. REV. STAT. §§ 653.017, 653.025 (2017); 43 PA. STAT. AND CONS. STAT. ANN. § 333.114a (West 2009); 28 R.I. GEN. LAWS § 28-12-25 (West 2017); S.C. CODE ANN. § 6-1-130 (2004); TENN. CODE ANN. §§ 50-2-112 to -113 (LEXIS through 2018 Reg. Sess.); TEX. LAB. CODE ANN. § 62.0515 (West 2015); UTAH CODE ANN. § 34-40-106 (LexisNexis 2015); WIS. STAT. ANN. § 104.001 (West 2018).

39. ALA. CODE § 25-7-41 (LexisNexis 2016); ARK. CODE ANN. § 11-4-222 (LEXIS through 2018 Fiscal Sess. & 2d Extraordinary Sess.); FLA. STAT. ANN. § 218.077 (West 2018); GA. CODE ANN. § 34-4-3.1 (2017); IND. CODE ANN. § 22-2-16-3 (LexisNexis 2018); IOWA CODE ANN. §§ 331.304(12), 364.3(12)(a) (West 2018); KAN. STAT. ANN. § 12-16,130 (Supp. 2017); KY. REV.

regulation of other types of employee benefits.<sup>40</sup> Similarly, with regard to public health, thirty-one states now preempt in some form local regulation of tobacco products,<sup>41</sup> and at least seven states preempt local regulation of e-cigarettes or alternative tobacco products;<sup>42</sup> at least twelve states preempt local nutrition and

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STAT. ANN. § 65.016 (LexisNexis Supp. 2018); LA. STAT. ANN. § 23:642 (Supp. 2017); MICH. COMP. LAWS ANN. §§ 123.1381 to .1396 (West, Westlaw through P.A.2018, No. 348 of 2018 Reg. Sess., 99th Mich. Leg.); MISS. CODE ANN. § 17-1-51 (Supp. 2017); N.J. STAT. ANN. § 34:11D-8 (West, Westlaw through L.2018, c. 125 & J.R. No. 10); N.C. GEN. STAT. §§ 153A-449, 160A-20.1 (2017); OKLA. STAT. ANN. tit. 40, § 160 (West Supp. 2018); OR. REV. STAT. § 653.661 (West, Westlaw through 2018 Reg. Sess. & 2018 Spec. Sess., 79th Legis. Assemb.); 28 R.I. GEN. LAWS § 28-57-8 (West 2017); S.C. CODE ANN. § 41-1-25 (Supp. 2017); TENN. CODE ANN. § 7-51-1802 (Supp. 2018); WIS. STAT. ANN. § 103.10 (West 2018).

40. ALA. CODE § 25-7-41 (LexisNexis 2016); ARK. CODE ANN. § 11-4-221 (LEXIS through 2018 Fiscal Sess. & 2d Extraordinary Sess.); FLA. STAT. ANN. § 218.077 (West 2018); GA. CODE ANN. § 34-4-3.1 (2017); IND. CODE ANN. § 22-2-16-3 (LexisNexis 2018); IOWA CODE ANN. §§ 331.304(12), 364.3(12)(a) (West 2018); KAN. STAT. ANN. § 12-16,130 (Supp. 2017); KY. REV. STAT. ANN. § 65.016 (LexisNexis Supp. 2018); MICH. COMP. LAWS ANN. § 123.1389 (West, Westlaw through P.A.2018, No. 348 of 2018 Reg. Sess.); OHIO REV. CODE ANN. § 4113.85 (LexisNexis Supp. 2018); S.C. CODE ANN. § 41-1-25 (Supp. 2017); TENN. CODE ANN. § 7-51-1802 (Supp. 2018).
41. CAL. HEALTH & SAFETY CODE § 118950 (West 2012); CONN. GEN. STAT. § 19A-342 (2017); DEL. CODE ANN. tit. 11, §§ 1116, 1127 (2015); FLA. STAT. ANN. § 386.209 (West 2014); IDAHO CODE § 39-5713 (2011 & Supp. 2018); IND. CODE ANN. § 16-41-39-1 (LexisNexis 2011); IOWA CODE ANN. § 453A.56 (West 2016); KY. REV. STAT. ANN. § 438.300 (2010); LA. STAT. ANN. § 14:91.8 (2018); MD. CODE ANN., BUS. REG. § 16-202 (LexisNexis 2015); MASS. GEN. LAWS ANN. ch. 64C, § 2 (West 2011); MICH. COMP. LAWS ANN. §§ 205.434, 333.12915, 750.42A (West 2004); MISS. CODE ANN. § 97-32-2 (2014); MONT. CODE ANN. § 16-11-311 (2017); NEV. REV. STAT. ANN. § 202.249(4) (LexisNexis 2013); N.H. REV. STAT. ANN. § 155:66 (West, Westlaw through ch. 379 of the 2018 Reg. Sess.); N.M. STAT. ANN. § 30-49-11 (LexisNexis 2014); N.C. GEN. STAT. §§ 14-313(e), 130A-498 (2017); OKLA. STAT. ANN. tit. 37, § 600.10 (West Supp. 2018); OKLA. STAT. ANN. tit. 63, § 1-1527 (West 2016); OR. REV. STAT. § 167.775 (2017); 35 PA. STAT. AND CONS. STAT. § 637.11 (West 2017); 53 PA. STAT. AND CONS. STAT. § 301 (West 2016); 72 PA. STAT. AND CONS. STAT. § 232-A (West Supp. 2018); S.C. CODE ANN. § 16-17-504 (2015); S.D. CODIFIED LAWS § 34-46-6 (2011); TENN. CODE ANN. § 39-17-1551 (2018); TEX. TAX CODE ANN. §§ 154.101, 155.041 (West 2015); UTAH CODE ANN. § 26-38-6 (LexisNexis 2013); UTAH CODE ANN. § 76-10-105.1(8) (LexisNexis 2017 & Supp. 2018); VA. CODE ANN. § 15.2-2828 (2018); WASH. REV. CODE ANN. §§ 70.155.130, 70.160.011 (West 2011); W. VA. CODE ANN. § 16-9A-5 (LexisNexis 2016); WIS. STAT. ANN. §§ 134.65, .66 (West Supp. 2017); WIS. STAT. ANN. § 139.43 (West 2016); WIS. STAT. ANN. § 254.92 (West 2015); WYO. STAT. ANN. § 14-3-308(b) (2017); *see also State Tobacco Activities Tracking and Evaluation (STATE) System*, CENTERS FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/statesystem/preemption.html> [<https://perma.cc/K4MJ-RYKF>].
42. ARK. CODE ANN. § 26-57-267 (2014 & Supp. 2017); IOWA CODE ANN. § 453A.56 (West 2016); NEV. REV. STAT. ANN. § 202.249(4) (LexisNexis 2013); OKLA. STAT. ANN. tit. 37, § 600.10 (West Supp. 2018); S.C. CODE ANN. § 16-17-504 (2015); S.D. CODIFIED LAWS § 34-46-20 (Supp. 2018); WASH. REV. CODE ANN. § 70.345.210 (West Supp. 2017).

food policies;<sup>43</sup> and at least forty-four states preempt local authority related to firearms.<sup>44</sup> On local environmental protection, at least eight states preempt local regulation of oil and gas drilling and conservation efforts,<sup>45</sup> at least twelve states preempt localities from regulating or placing fees on plastic bags,<sup>46</sup> and at least

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43. ALA. CODE § 20-1-7 (LexisNexis 2015); ARIZ. REV. STAT. ANN. § 42-6015 (Westlaw through 1st Spec. and 2d Reg. Sess. of 53d Leg. (2018)); ARIZ. REV. STAT. ANN. § 44-1380 (2013); CAL. REV. & TAX. CODE §§ 7284.8 to .10; .12 to .16 (West 2018); FLA. STAT. ANN. § 509.032 (West 2007 & Supp. 2018); GA. CODE ANN. § 26-2-373 (2014); KAN. STAT. ANN. § 12-16,137 (Supp. 2017); MICH. COMP. LAWS ANN. §§ 123,711, .713, 289.1107 (West, Westlaw through P.A.2018, No. 348 of 2018 Reg. Sess., 99th Mich. Leg.); MISS. CODE ANN. § 75-29-901 (2016); N.C. GEN. STAT. § 160A-203 (2017); OHIO REV. CODE ANN. § 3717.53 (LexisNexis 2015); UTAH CODE ANN. § 10-8-44.5 (LexisNexis 2015); WIS. STAT. ANN. § 66.0418 (West 2014).
44. N.M. CONST. art. II, § 6; ALA. CODE § 13A-11-61.3 (LexisNexis 2015); ALASKA STAT. § 29.35.145 (2016); ARIZ. REV. STAT. ANN. § 13-3108 (2018); ARK. CODE ANN. § 14-16-504 (2013); ARK. CODE ANN. § 14-54-1411 (1998); CAL. GOV'T CODE §§ 53071, 53071.5 (West 2012); COLO. REV. STAT. ANN. § 18-12-105.6(b) (West 2013); COLO. REV. STAT. ANN. § 29-11.7-103 (West 2017); DEL. CODE ANN. tit. 9, § 330(c) (2011 & Supp. 2016); DEL. CODE ANN. tit. 22, § 111(a) (LEXIS through 81 Del. Laws, ch. 453); FLA. STAT. ANN. § 790.33 (West 2017); GA. CODE ANN. § 16-11-173(b)(1) (2018); IDAHO CODE § 18-3302J (2016); 430 ILL. COMP. STAT. ANN. 65/13.1 (West 2014); IND. CODE ANN. § 35-47-11.1-2 (LexisNexis 2016); IOWA CODE ANN. § 724.28 (West Supp. 2017); KAN. STAT. ANN. § 12-16,124 (Supp. 2017); KY. REV. STAT. ANN. § 65.870 (LexisNexis 2014); LA. STAT. ANN. § 40:1796 (2016); ME. REV. STAT. ANN. tit. 25, § 2011 (Supp. 2017); MD. CODE ANN., CRIM. LAW § 4-209 (LexisNexis 2012); MICH. COMP. LAWS ANN. § 123.1102 (West, Westlaw through P.A.2018, No. 348 of 2018 Reg. Sess., 99th Mich. Leg.); MINN. STAT. ANN. § 471.633 (West 2008); MISS. CODE ANN. § 45-9-51 (2015); MO. ANN. STAT. § 21.750 (West Supp. 2018); MONT. CODE ANN. § 45-8-351 (2015); NEV. REV. STAT. ANN. §§ 244.364, 268.418, 269.222 (LexisNexis Supp. 2016); N.H. REV. STAT. ANN. § 159:26 (Westlaw through ch. 379 of 2018 Reg. Sess.); N.C. GEN. STAT. § 14-409.40 (2017); N.D. CENT. CODE § 62.1-01-03 (Supp. 2017); OHIO REV. CODE ANN. § 9.68 (LexisNexis 2015); OKLA. STAT. ANN. tit. 21, § 1289.24 (West 2015); OR. REV. STAT. § 166.170 (2017); 18 PA. STAT. AND CONS. STAT. § 6120 (West 2015); 11 R.I. GEN. LAWS § 11-47-58 (2002); S.C. CODE ANN. § 23-31-510 (Supp. 2017); S.D. CODIFIED LAWS §§ 7-18A-36, 8-5-13, 9-19-20 (2004); TENN. CODE ANN. § 39-17-1314 (2018); TEX. LOC. GOV'T CODE ANN. § 229.001 (West 2016); UTAH CODE ANN. § 76-10-500 (LexisNexis 2017); VT. STAT. ANN. tit. 24, § 2295 (2016); VA. CODE ANN. § 15.2-915 (2018); WASH. REV. CODE ANN. § 9.41.290 (West 2010); W. VA. CODE ANN. § 8-12-5a (LexisNexis 2017); WIS. STAT. ANN. § 66.0409(2) (West Supp. 2017); WYO. STAT. ANN. § 6-8-401 (2017).
45. COLO. REV. STAT. ANN. § 34-60-105 (West 2017); LA. STAT. ANN. § 30:28F (2017); N.M. STAT. ANN. § 70-2-6 (LexisNexis 2017); N.C. GEN. STAT. § 113-415.1 (2017); OHIO REV. CODE ANN. § 1509.02 (LexisNexis Supp. 2018); OKLA. STAT. ANN. tit. 52, § 137.1 (West Supp. 2018); TEX. NAT. RES. CODE ANN. § 81.0523 (West Supp. 2017); W. VA. CODE ANN. § 22-6-2 (LexisNexis 2014).
46. ARIZ. REV. STAT. ANN. §§ 9-500.38, 11-269.16 (Supp. 2017); DEL. CODE ANN. tit. 7, § 6099A (LEXIS through 81 Del. Laws, ch. 453); FLA. STAT. ANN. § 403.7033 (West 2015); IDAHO CODE § 67-2340 (2014 & Supp. 2018); IND. CODE ANN. § 36-1-3-8.6 (LexisNexis Supp. 2018); IOWA CODE ANN. § 331.301(6)(c) (West Supp. 2017); MICH. COMP. LAWS ANN. § 445.592 (West, Westlaw through P.A.2018, No. 348 of 2018 Reg. Sess., 99th Mich. Leg.); MINN. STAT. ANN.

forty-two states preempt local pesticide regulation.<sup>47</sup> Finally, with respect to technology and innovation, twenty-one states preempt local authority over some form of municipal communications provision (telephone, TV, or internet),<sup>48</sup> and at least forty-two states preempt aspects of local authority over the sharing economy.<sup>49</sup>

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§ 471.9998 (West Supp. 2018); MISS. CODE ANN. § 17-1-73 (LEXIS through 2018 Reg. Sess.); MO. ANN. STAT. § 260.283 (West 2016); TEX. HEALTH & SAFETY CODE ANN. § 361.0961 (West 2016); WIS. STAT. ANN. § 66.0419 (West Supp. 2017).

47. ALA. CODE § 2-27-5.1 (LexisNexis 1999); ARIZ. REV. STAT. ANN. § 3-3602 (Supp. 2017); ARK. CODE ANN. § 20-20-266 (2014); CAL. FOOD & AGRIC. CODE § 11501.1 (West 2001); COLO. REV. STAT. ANN. §§ 35-10-112(3), -112.5 (West Supp. 2017); CONN. GEN. STAT. § 22A-54 (2017); DEL. CODE ANN. tit. 3, § 1203 (2001 & Supp. 2016); FLA. STAT. ANN. § 482.242 (West 2015); GA. CODE ANN. § 2-7-113.1 (Supp. 2017); IDAHO CODE § 22-3426 (2009); 415 ILL. COMP. STAT. ANN. 60/3 (West 2014); IND. CODE ANN. § 15-16-5-71 (LexisNexis 2017); IOWA CODE ANN. § 206.34 (West 2012); KAN. STAT. ANN. § 2-2480 (2001); KY. REV. STAT. ANN. § 217B.270 (LexisNexis 2015); LA. STAT. ANN. § 3:3224 (2011); MASS. GEN. LAWS ch. 132B, § 1 (West 2015); MICH. COMP. LAWS ANN. § 324.8328 (West 1999); MINN. STAT. ANN. § 18B.02 (West 2010); MISS. CODE ANN. § 69-23-9 (2012); MO. ANN. STAT. § 281.005 (West 2015); MONT. CODE ANN. § 80-8-120 (2017); NEB. REV. STAT. § 2-2625 (2012); N.H. REV. STAT. ANN. § 430:49 (LexisNexis 2012); N.M. STAT. ANN. § 76-4-9.1 (LexisNexis 2004); N.Y. ENVTL. CONSERV. LAW § 33-0303(1) (McKinney 2008); N.C. GEN. STAT. § 143-435 (2017); N.D. CENT. CODE § 4.1-34-06 (Supp. 2017); OHIO REV. CODE ANN. § 921.02 (LexisNexis 2013); OKLA. STAT. tit. 2, § 3-84 (West Supp. 2018); OR. REV. STAT. § 634.057 (2017); 3 PA. STAT AND CONS. STAT. ANN. § 111.57 (West 2008); 23 R.I. GEN. LAWS § 23-25-9 (2008); S.C. CODE ANN. § 46-13-30 (2017); S.D. CODIFIED LAWS § 39-1-17 (Supp. 2018); TENN. CODE ANN. § 43-8-114 (2007); TEX. AGRIC. CODE ANN. § 76.003 (West 2004); VA. CODE ANN. § 3.2-3907 (2016); WASH. REV. CODE ANN. § 17.21.010 (West 2006); W. VA. CODE ANN. § 19-16A-2 (LexisNexis 2007); WIS. STAT. ANN. § 94.701 (West Supp. 2017); WYO. STAT. ANN. § 35-7-352 (2017).
48. ALA. CODE §§ 11-50B-1 to -12 (LexisNexis 2008); ARK. CODE ANN. § 23-17-409, 23-18-804 (2015); COLO. REV. STAT. ANN. §§ 29-27-201 to -202 (West 2017); FLA. STAT. ANN. § 350.81 (West 2018); FLA. STAT. ANN. § 166.047 (West 2000); LA. STAT. ANN. §§ 45:844.49 to .50 (2007); MICH. COMP. LAWS ANN. § 484.2252 (West 2008); MINN. STAT. ANN. § 237.19 (West 2010); MO. ANN. STAT. § 392.410(7) (West 2010); MONT. CODE ANN. § 2-17-603 (2017); NEB. REV. STAT. § 86-594 (2014); NEV. REV. STAT. ANN. § 710.147 (LexisNexis 2014); NEV. REV. STAT. ANN. § 268.086 (LexisNexis 2011); N.C. GEN. STAT. § 160A-340.1 (2017); 66 PA. STAT. AND CONS. STAT ANN. § 3014(h) (West Supp. 2018); S.C. CODE ANN. § 58-9-2620 (2015); TENN. CODE ANN. § 7-52-601, 7-59-316 (2015); TEX. UTIL. CODE § 54.202 (West 2015); UTAH CODE ANN. §§ 10-18-201 to -204 (LexisNexis 2015); VA. CODE ANN. § 15.2-2160 (2018); VA. CODE ANN. § 56-265.4:4 (Supp. 2018); VA. CODE ANN. § 56-484.7:1 (2012); WASH. REV. CODE ANN. § 54.16.330 (West Supp. 2017); WIS. STAT. ANN. § 66.0422 (West 2014); WYO. STAT. ANN. § 37-15-413 (2017).
49. ALASKA STAT. § 29.35.148 (LEXIS through 2018 SLA, all legis.); ARIZ. REV. STAT. ANN. §§ 9-500.39, 11-269.17 (Supp. 2017); ARIZ. REV. STAT. ANN. § 28-142 (2012); ARK. CODE ANN. § 23-13-720 (2015); CAL. PUB. UTIL. CODE § 5445.2 (West Supp. 2018); COLO. REV. STAT. ANN. § 40-10.1-603 (West 2016); DEL. CODE ANN. tit. 2, § 1922 (Supp. 2016); FLA. STAT. ANN. §§ 509.032(7)(b), 627.748(15) (West Supp. 2018); GA. CODE ANN. § 40-1-191 (2018); HAW. REV. STAT. ANN. § 431:10C-701 to -705 (LexisNexis Supp. 2017); IDAHO CODE § 67-6539

As broadly as these preemptive laws sweep, states are also becoming more targeted and punitive in asserting oversight of local governments, no longer content simply to check or withdraw local authority.<sup>50</sup> An Arizona statute, for example, now conditions state revenue-share funding on local governments affirmatively repealing preempted local laws and requires local governments to post an almost confiscatory bond to challenge the contested preemption.<sup>51</sup>

Moreover, states for the first time have begun enacting penalties against individual local officials in the event of policy conflicts. Oklahoma began this trend

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(Supp. 2018); IDAHO CODE § 49-3715 (2016); 625 ILL. COMP. STAT. ANN. 57/32 (West 2016); IND. CODE ANN. § 36-9-2-4 (LexisNexis 2015); IOWA CODE ANN. § 321N.11 (West 2017); KAN. STAT. ANN. § 8-2720 (Supp. 2017); KY. REV. STAT. ANN. § 281.630 to .6301 (LexisNexis Supp. 2018); ME. REV. STAT. ANN. tit. 29-A, § 1677 (2018); MD. CODE ANN., PUB. UTIL. § 10-406 (LexisNexis Supp. 2017); MASS. GEN. LAWS ANN. ch. 159A 1/2, § 10 (West Supp. 2018); MICH. COMP. LAWS ANN. § 257.2115 (West, Westlaw through P.A.2018, No. 348 of 2018 Reg. Sess., 99th Mich. Leg.); MISS. CODE ANN. § 77-8-37 (2018); MO. ANN. STAT. § 387.430 (West Supp. 2018); MONT. CODE ANN. § 69-12-342 (2017); NEV. REV. STAT. ANN. § 706A.310 (LexisNexis Supp. 2016); N.H. REV. STAT. ANN. § 376-A:17 (LexisNexis Supp. 2016); N.J. STAT. ANN. § 39:5H-26 (Supp. 2018); N.M. STAT. ANN. § 65-7-18 (LexisNexis 2017); N.Y. GEN. MUN. LAW § 182 (McKinney, Westlaw through L.2018, chs. 1-321); N.Y. MULT. DWELL. LAW § 4(8) (McKinney, Westlaw through L.2018, chs. 1-321); N.C. GEN. STAT. § 20-280.10 (2017); N.D. CENT. CODE § 39-34-06 (Supp. 2017); OHIO REV. CODE ANN. § 4925.09 (LexisNexis 2017); OKLA. STAT. tit. 47, § 1030 (West Supp. 2018); 66 PA. STAT. AND CONS. STAT. ANN. § 2603 (West Supp. 2018); 39 R.I. GEN. LAWS § 39-14.2-18 (Supp. 2017); S.C. CODE ANN. § 58-23-1710 (Supp. 2017); TENN. CODE ANN. § 65-15-302 (2015); TEX. OCC. CODE ANN. § 2402.003 (West Supp. 2018); UTAH CODE ANN. § 13-51-109 (LexisNexis Supp. 2018); UTAH CODE ANN. § 10-8-85.4 (LexisNexis Supp. 2017); UTAH CODE ANN. § 17-50-338 (LexisNexis 2017); VA. CODE ANN. § 46.2-2099.46 (2017); WASH. REV. CODE ANN. § 48.177.010 (West Supp. 2017); W. VA. CODE ANN. § 17-29-19 (LexisNexis 2017); WIS. STAT. ANN. §§ 66.1014, 440.465 (West Supp. 2017); WYO. STAT. ANN. § 31-20-111 (2017).

50. For discussions of “punitive,” “hyper,” or “nuclear” preemption—scholars have yet to settle on consistent vocabulary—see Briffault, *supra* note 22; Scharff, *supra* note 6; and Schragger, *supra* note 6.
51. ARIZ. REV. STAT. ANN. § 41-194.01 (Supp. 2017). Adopted in 2016, it empowers individual legislators to request that the Arizona Attorney General investigate local laws for potential conflicts with state law. *Id.* § 41-194.01(A). If the Attorney General concludes that a local ordinance conflicts with state law, then the local government must resolve the violation within thirty days or face a loss of state shared revenue. *Id.* § 41-194.01(B). If the Attorney General concludes that a local ordinance *may* be preempted, then the statute directs the Attorney General to file a special action to resolve the issue, but local governments can only contest the determination by posting a bond in an amount equal to the prior six-months’ worth of state shared revenue. *Id.* § 41-194.01(B)(2). The Arizona Supreme Court recently upheld portions of the statute, although the court also expressed concerns about some of the statute’s more punitive aspects, particularly the bond provision, which in the case at issue would have required the city of Tucson to post a bond to cover over fifty-five million dollars in revenue, the cost of which would have exceeded the city’s entire available reserves. *See State ex rel. Brnovich v. City of Tucson*, 399 P.3d 663, 671-72 (Ariz. 2017).

in 2003 by creating personal civil liability for officials who vote for laws that conflict with the state's firearm preemption statute.<sup>52</sup> Florida followed suit in 2011, enacting a range of sanctions on individual officials for "knowing and willful violations" of the state's firearm preemption statute, including civil fines of up to five thousand dollars, barring officials from using public funds for legal defense or reimbursement of fines, and providing that violation of the statute constitutes cause for termination of employment or removal from office by the governor.<sup>53</sup> Since then, more states have opened up local officials to fines, removal, and civil litigation.<sup>54</sup> Perhaps most remarkably, Kentucky, for firearms, and Texas, in its antisansanuary legislation, have now opened local officials to potential *criminal* liability in preemption conflicts.<sup>55</sup>

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52. OKLA. STAT. tit. 21, § 1289.24(D) (2018) ("When a person's rights pursuant to the protection of the preemption provisions of this section have been violated, the person shall have the right to bring a civil action against the persons, municipality, and political subdivision jointly and severally for injunctive relief or monetary damages or both.").
53. FLA. STAT. ANN. § 790.33(3)(c)-(e) (West 2017). *But see* *Marcus v. Scott*, No. 2012-CA-001260, 2014 WL 3797314 (Fla. Cir. Ct. June 2, 2014) (holding § 790.33(3)(e) unconstitutional). The Florida law also gives affected individuals and groups a private right of action against local governments for declaratory and injunctive relief, as well as actual damages of up to \$100,000 and attorneys' fees. FLA. STAT. ANN. § 790.33(3)(f) (West 2017). In the wake of the Parkland school shooting, which took place in Broward County, Florida, local governments and individual officials recently filed three additional lawsuits challenging the punitive aspects of Florida's firearm preemption law. *Broward County v. State*, No. 2018-CA-000882 (Fla. Cir. Ct. filed Apr. 30, 2018); *City of Weston v. Scott*, No. 2018-CA-000699 (Fla. Cir. Ct. filed Apr. 2, 2018); *Daley v. State*, No. CACE 18-008664 (Fla. Cir. Ct. filed Apr. 2, 2018) (joint motion to consolidate filed July 2, 2018); *see also* Lisa J. Huriash, *10 More Cities Join Gun Lawsuit Against Florida*, SUNSENTINEL (May 16, 2018, 6:30 PM), <http://www.sun-sentinel.com/news/florida/fl-reg-more-cities-join-gun-lawsuit-20180516-story.html> [<https://perma.cc/4BG5-C2AR>] (discussing a proposed Parkland lawsuit brought by more than ten Florida cities "against the state, seeking the power to regulate firearms"); Katie Zezima, *Fla. Officials Who Try to Strengthen Gun Laws Can Be Personally Fined, Kicked Out of Office*, WASH. POST (Apr. 26, 2018) [https://www.washingtonpost.com/national/fla-officials-who-try-to-strengthen-gun-laws-can-be-personally-fined-kicked-out-of-office/2018/04/25/ada1fe28-4825-11e8-9072-f6d4bc32f223\\_story.html](https://www.washingtonpost.com/national/fla-officials-who-try-to-strengthen-gun-laws-can-be-personally-fined-kicked-out-of-office/2018/04/25/ada1fe28-4825-11e8-9072-f6d4bc32f223_story.html) [<https://perma.cc/6SY8-UK4Y>] (discussing the post-Parkland litigation).
54. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3108(I)-(K) (2017) (allowing private litigants to pursue personal sanctions against local officials in firearm preemption conflicts; allowing termination from office and civil penalties of \$50,000; and providing a private right of action against local governments to recover damages of up to \$100,000 as well as attorneys' fees and costs); MISS. CODE ANN. § 45-9-53(5)(a), (c) (2015) (establishing a private right of action for declaratory and injunctive relief and holding any "elected county or municipal official under whose jurisdiction the violation occurred" civilly liable for up to \$1,000, plus attorneys' fees and costs that may not be paid, or defended against, through public funds).
55. In 2012, Kentucky amended its firearm preemption statute both to create a private right of action, KY. REV. STAT. ANN. § 65.870(4) (LexisNexis 2014), and to impose a criminal penalty

This new landscape of preemption has prompted a vigorous response from cities and other local governments, as well as from their officials and advocates who have seen hard-fought local policy gains fall. Despite the nominally limited formal authority that local governments possess to challenge state oversight, a number of legal tools have been deployed in recent preemption battles.<sup>56</sup> The resulting cases have yielded mixed results in challenging preemption, but more success than traditional narratives of local legal powerlessness would augur.

In many current state/local conflicts, cities are asserting versions of direct claims under home rule and related doctrines. The most notable examples are state constitutional bans on “special” or “local” legislation or similar requirements of generality designed, in part, to protect local governments from targeted and arbitrary interference.<sup>57</sup> Cleveland, for example, has challenged Ohio’s preemption of the city’s “Fannie Lewis Law,” an ordinance requiring the hiring of city residents on public construction contracts.<sup>58</sup> The Ohio Court of Appeals, ruling in favor of the city, found that the relevant state enactment was not a “general law” that would validly preempt the ordinance, because the state enactment was not part of a comprehensive, statewide enactment, and instead only aimed to limit local power.<sup>59</sup>

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on officials: “A violation of this section by a public servant shall be a violation of either KRS § 522.020 [official misconduct in the first degree] or § 522.030 [official misconduct in the second degree], depending on the circumstances of the violation,” *id.* § 65.870(6). The prevailing party in such a civil suit is entitled to attorneys’ fees and costs, as well as expert witness fees. *Id.* § 65.870(4).

In 2017, Texas similarly included a provision in its anti-sanctuary-cities legislation that subjects local law enforcement officials to criminal penalties if they fail to comply with immigration detainer requests. *See* S. 4, 85th Leg. § 5.02 (Tex. 2017) (adding a new Class A misdemeanor offense in § 39.07 of the Texas Penal Code); *see also infra* note 66 and accompanying text (discussing the litigation over this bill).

56. *See* Briffault, *supra* note 22, at 2008-17; *see also* Schragger, *supra* note 6, at 1216-26 (describing general legal defenses for city power in the face of state attempts at centralization).
57. Special legislation bans provide that state legislatures can exercise their plenary authority in general terms, but cannot target the exercise of that power on local governments—or private individuals and entities—in ways that impermissibly single out the object of legislation. *See* Anthony Schutz, *State Constitutional Restrictions on Special Legislation as Structural Restraints*, 40 J. LEGIS. 39, 46 (2014). Traditionally, most courts have been deferential and have treated these bans as versions of equal protection claims, *see id.* at 53-56, but the recent wave of preemption litigation is showing glimmers of renewed strength in the doctrine as states are being much more targeted in their oversight.
58. *City of Cleveland v. State*, 90 N.E.3d 979, 981-82 (Ohio Ct. App. 2017).
59. *Id.* at 988-89. In some states, specific local governments enjoy additional constitutional protection against being singled out, and that protection has also arisen in current preemption conflicts. *See Fla. Retail Fed’n, Inc. v. City of Coral Gables*, No. 2016-018370-CA-01, slip op. at 1 (Fla. Cir. Ct. Mar. 8, 2017) (finding an attempt by Florida to preempt a local ban on

Similarly, some recent cases involve once-obscure state legislative procedural requirements, such as constitutional “single-subject” mandates, to strike down preemptive legislation appended to entirely unrelated bills.<sup>60</sup> In the St. Louis minimum wage litigation, for example, the Missouri Supreme Court found it unconstitutional for the state to have appended a preemption provision to a bill otherwise—and entirely unrelatedly—directed “to the establishment, proper governance, and operation of community improvement districts.”<sup>61</sup> Similarly, an Ohio court recently struck down provisions of a state statute that would have preempted several areas of local workplace regulation—provisions appended to a bill originally focused on regulating the sale of puppies.<sup>62</sup>

Current state/local conflicts also implicate federal constitutional doctrines and statutes, both in terms of structural provisions and individual rights. The challenge over Alabama’s preemption of Birmingham’s minimum wage, for example, involves claims under the Thirteenth Amendment, the Fourteenth Amendment (for intentional discrimination and on equal protection political-process grounds<sup>63</sup>), Fifteenth Amendment, and a claim under section 2 of the Federal Voting Rights Act<sup>64</sup>—all of which were unsuccessful before the Northern District of Alabama, with dismissal confirmed by the Eleventh Circuit, with the notable exception of the plaintiff’s intentional discrimination equal protection claim.<sup>65</sup> And the challenge by the small border community of El Cenizo and other local governments to Texas’s anti-sanctuary-city law raised First and Fourteenth Amendment concerns. In addition, being required to comply with federal detainer requests under the statute triggered Fourth Amendment concerns.<sup>66</sup>

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Styrofoam violated the Florida constitution’s protection against legislation singling out municipalities in Miami-Dade County).

60. For background on these procedural constraints, see generally Martha J. Dragich, *State Constitutional Restrictions on Legislative Procedure: Rethinking the Analysis of Original Purpose, Single Subject, and Clear Title Challenges*, 38 HARV. J. ON LEGIS. 103 (2001).
61. *Coop. Home Care, Inc. v. City of St. Louis*, 514 S.W.3d 571, 580 (Mo. 2017) (finding a violation of MO. CONST. art. III, § 23).
62. *City of Bexley v. State*, 92 N.E.3d 397, 404-06 (Ohio Ct. C.P. 2017) (interpreting OHIO CONST. art. II, § 15(D)).
63. See *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 467 (1982). *But see* *Schuetz v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. by Any Means Necessary (BAMN)*, 134 S. Ct. 1623 (2014) (raising questions about the continuing viability of this strand of equal protection doctrine).
64. 52 U.S.C. § 10301 (2018).
65. See generally *Lewis v. Governor of Ala.*, 896 F.3d 1282 (11th Cir. 2018) (dismissing all constitutional claims save for the equal protection claim alleging intentional discrimination).
66. These claims received a generally favorable audience at the district court level, but the Fifth Circuit was much more skeptical. It found merit in this array of facial challenges essentially

Whether these cases involve questions of state constitutional authority and process, home rule, or individual rights, they all engage in a renewed jurisprudence of local power.<sup>67</sup> In resolving these claims, courts are defining the scope of local power and the nature of the state-local legal relationship, at times directly and at other times obliquely. Regardless, the legal construction of localism is ever present—and, hence, the dilemma of localism is unavoidable as the jurisprudence develops.<sup>68</sup>

The bulk of these conflicts have played out against the backdrop of the rise of cities that are increasingly progressive, in states with conservative state legislatures or unified conservative control of state political branches.<sup>69</sup> Preemption, of course, also occurs in progressive states with relatively conservative local governments. Indeed, that has traditionally been the valence of state/local conflicts over issues such as affordable and fair housing, with states such as New Jersey and Massachusetts having long taken significant steps to cabin local exclusionary policies.<sup>70</sup> More recently, California and Illinois constrained the ability of local governments to cooperate with federal immigration officials.<sup>71</sup> Preemption can

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only in First Amendment concerns. See *City of El Cenizo v. Texas*, 264 F. Supp. 3d 744 (W.D. Tex. 2017) (order granting preliminary injunction), *injunction aff'd in part and vacated in part*, 890 F.3d 164 (5th Cir. 2018) (holding that plaintiffs had not made a showing that they are likely to succeed on the merits of any of their constitutional arguments except their First Amendment claim).

67. Cf. Lynn A. Baker & Daniel B. Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, 86 DENV. U. L. REV. 1337, 1338 (2009) (“Defining the scope of this local sovereignty, and thereby shaping the constitutional relationship between state and local governments, is a task that has largely fallen to the state courts.”).
68. Contemporary state/local conflicts are primarily about the “immunity” function of localism, which is to say the legal authority that protects local governments from state overrides. BRIFFAULT & REYNOLDS, *supra* note 18, at 377-97. That is not to say that the “initiative” function—defining when local governments can act in the first place, *id.* at 351-77—is entirely absent from current city/state tensions. See, e.g., *Coop. Home Care, Inc. v. City of St. Louis*, 514 S.W.3d 571, 586-87 (Mo. 2017) (rejecting the argument that regulating wages is beyond the power of localities in Missouri). But cities and other local governments seem generally to be acting within the scope of their initiative authority in these conflicts.
69. See *Riverstone-Newell*, *supra* note 3, at 406.
70. See J. Peter Byrne, *Are Suburbs Unconstitutional?*, 85 GEO. L.J. 2265 (1997) (book review); Paul K. Stockman, Note, *Anti-Snob Zoning in Massachusetts: Assessing One Attempt at Opening the Suburbs to Affordable Housing*, 78 VA. L. REV. 535 (1992).
71. See Julia Esparza, *Illinois Is Officially a ‘Sanctuary State’ for Immigrants*, CHI. TRIB. (Aug. 28, 2017, 5:28 PM), <http://www.chicagotribune.com/hoy/ct-hoy-illinois-is-officially-a-sanctuary-state-for-immigrants-20170828-story.html> [https://perma.cc/J43B-VBHT]; Katy Steinmetz, *California Just Became a ‘Sanctuary State.’ Here’s What That Means*, TIME (Oct. 5, 2017), <http://time.com/4960233/california-sanctuary-state-donald-trump> [https://perma

be a bipartisan issue,<sup>72</sup> but that only throws into sharper relief the consequences of arguments for local empowerment in a polarized climate.

In short, in the past five or six years, a significant and rising wave of state intervention in local political and policy ordering has given rise to a corresponding wave of litigation seeking to vindicate the authority of local governments and the individual rights of officials and citizens caught in the partisan crossfire. These dynamics, coupled with the renewed political salience of preemption, are bringing questions of the legal dimensions of localism to the fore across the country in fundamental ways. The nature of localism and how the legal system structures the state-local relationship are front and center once again.

## II. REVISITING THE DILEMMA OF LOCALISM

As the new preemption laws and their localist counterarguments clash, a longstanding concern<sup>73</sup> – not unique to state-local dynamics<sup>74</sup> – has resurfaced. Decentralization and devolution are often laudable in theory, but can be troubling in fact. That reality has always been a challenge, but recent political and cultural polarization, coupled with patterns of mobility that accentuate geographic aspects of that polarization,<sup>75</sup> have sharply exacerbated the progressive city/conservative state overlay on the dilemma. Before turning to this Essay's approach, this Part first surveys the terms of the debate and reviews themes in the responses offered to date.

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.cc/XD88-VX7G]; Priscella Vega, *Huntington Beach Prepares to Sue State to Challenge 'Sanctuary' Immigration Laws*, L.A. TIMES (Apr. 3, 2018, 8:20 AM), <http://www.latimes.com/socal/daily-pilot/news/tn-dpt-me-hb-sanctuary-city-20180403-story.html> [https://perma.cc/6SND-HZYY].

72. See, e.g., Rachel Dovey, *Dem and GOP Mayors Agree: States Must Stop Preempting Local Laws*, NEXTCITY (Jan. 24, 2018), <https://nextcity.org/daily/entry/dem-gop-mayors-agree-states-must-stop-preempting-local-laws> [https://perma.cc/XS9B-RMK9].

73. See Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346 (1990).

74. See *supra* note 11 and accompanying text. The dilemma of localism in the current era of polarization echoes similar debates about so-called fair-weather federalism and partisan skewing (across the political spectrum) of perspectives on the executive-legislative balance in separation of powers. See, e.g., Ilya Somin, *No More Fair-Weather Federalism*, NAT'L REV. (Aug. 18, 2017, 8:00 AM), <https://www.nationalreview.com/2017/08/limit-federal-power-left-right-can-agree> [https://perma.cc/YDF2-2H3U].

75. See *supra* text accompanying notes 28-31.

A. *The Case for Local Empowerment and the Challenge of Parochialism*

The primary structural and normative arguments in favor of and against devolution and decentralization within the states are well rehearsed in the literature. But given the new salience these arguments have taken on in the current environment, it is worth pausing to reflect on their contemporary valence.

On the one hand, the case for the legal empowerment of cities, counties, towns, and other local governments in our federal system has long progressed along lines that mix the advantages of small scale with the positive valence of decentralization.<sup>76</sup> Local governments, the argument goes, serve as critical sites for democratic participation and local political engagement.<sup>77</sup> Local participation reinforces bedrock public values as people learn to cooperate to solve problems that face much more significant collective-action challenges at larger scales. As a result, local governments have a distinctive capacity to reflect community needs in polities that foster local voice.<sup>78</sup>

Moreover, localities have a particularly important role to play in a distributed, competitive approach to policy experimentalism.<sup>79</sup> If fifty states allow policy innovation and evaluation, then so much the better to empower ninety thousand local governments to be entrepreneurial problem solvers. These localities are especially well positioned to experiment because they may be armed with much greater sensitivity to local variation and the immediate accountability that comes from having to reckon with policy failure. And, for many commentators,

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76. The general case for localism is often a mix of empirical propositions and normative preferences. See Roderick M. Hills, Jr., *Romancing the Town: Why We (Still) Need a Democratic Defense of City Power*, 113 HARV. L. REV. 2009, 2022-23 (2000) (reviewing GERALD E. FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS (1999)).

77. The democratic-participation argument is often associated with Alexis de Tocqueville's paean to towns as schools for democracy, ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Harvey C. Mansfield & Delba Winthrop eds. & trans., Univ. of Chicago Press 2000) (1835), but the focus on local democracy and the normative value of participation has a much broader lineage, see, e.g., Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980) (advocating participationist ideals in local governance).

78. See, e.g., GERALD E. FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS (1999); Hills, *supra* note 76; see also Daniel Farbman, *Reconstructing Local Government*, 70 VAND. L. REV. 413 (2017) (offering a comparative historical examination of northern U.S. "communitarian" localism with southern "proprietary" localism). For a thoughtful critique of community-based accounts of localism, see generally Richard C. Schragger, *The Limits of Localism*, 100 MICH. L. REV. 371 (2001).

79. See, e.g., Paul A. Diller, *Why Do Cities Innovate in Public Health? Implications of Scale and Structure*, 91 WASH. U. L. REV. 1219 (2014). On the general case for devolution and policy experimentalism, see Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998).

local governments play a critical role—more so than the states alone—in vindicating American federalism’s general concern with checking concentrated governmental power by dispersing authority vertically.<sup>80</sup> Local governments can be sites of contestation and expression, a role they play particularly well in times of national polarization.<sup>81</sup>

On the other hand, as Richard Briffault forcefully argued nearly thirty years ago, the normative and pragmatic case for local subsidiarity carries within it the seeds of its own destruction.<sup>82</sup> Calling to mind Karl Llewellyn’s description of the internal contradictions inherent in the canons of statutory construction,<sup>83</sup> scholars can, and regularly do, pair most normative and pragmatic arguments in favor of local-government empowerment with corresponding deep concerns.<sup>84</sup>

For example, for all of localism’s Tocquevillian promise, there can be a decided lack of democratic engagement at the local level.<sup>85</sup> Local actions also often have significant practical and distributional implications for those not able to

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80. See, e.g., Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745 (2005); Heather K. Gerken, *The Supreme Court, 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4 (2010) [hereinafter Gerken, *Federalism*].

81. Cf. Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1259 (2009) (exploring ways in which states and local governments can “tweak, challenge, and even dissent from federal law”).

82. Briffault, *supra* note 9; Briffault, *supra* note 73; see also Briffault, *supra* note 11.

83. See Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 399 (1950).

84. There is a general case to be made for centralization in some contexts, based on the advantages of uniformity for certain regulatory regimes and the need for a baseline of rights that should be set statewide (or, ideally, nationally), below which local governments cannot go (even if they can be more rights protective). It is appropriate to recognize that subsidiarity must be evaluated against these countervailing concerns, even while maintaining that there are many issues best resolved at the level of government closest to those governed. That said, the discussion in this Section focuses on a particular set of concerns about the harms that can flow from localism.

85. See, e.g., Zoltan L. Hajnal & Paul G. Lewis, *Municipal Institutions and Voter Turnout in Local Elections*, 38 URB. AFF. REV. 645, 660 (2003) (discussing relatively low turnout in local elections); see also David Schleicher, *Federalism and State Democracy*, 95 TEX. L. REV. 763 (2017) [hereinafter Schleicher, *State Democracy*] (exploring structural barriers to state and local electoral participation); David Schleicher, *Why Is There No Partisan Competition in City Council Elections?: The Role of Election Law*, 23 J.L. & POL. 419 (2007) (explaining the legal-structural barriers to partisan contestation of local legislative elections and the consequences for local governance).

participate in – or who are otherwise disadvantaged by – any particular local political process.<sup>86</sup> Commentators have repeatedly raised alarms about the resulting tendency of some local governments to foster exclusion.<sup>87</sup> And local policies often generate externalities and spillover effects not fully accounted for by local governments, especially in the fragmented metropolitan areas that define the context in which so many of those governments operate.<sup>88</sup> Together, these strands of the critique of localism coalesce into an overriding concern with a particularly toxic vein of local parochialism that hardens a range of socioeconomic and racial inequalities. As Briffault aptly summarized the critique, “[l]ocalism reflects territorial economic and social inequalities and reinforces them with political power.”<sup>89</sup>

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86. Political-process failures at the local level can be understood in two dimensions. First, there is the concern that because of the scale of local governance, outsiders to the local polity can be systematically unrepresented in local decisions that affect their interests. See Briffault, *supra* note 73, at 382. Second, for some commentators, the pathologies of local political processes mean that residents face distinctive threats to their rights from their own local governments. See, e.g., CLINT BOLICK, *LEVIATHAN: THE GROWTH OF LOCAL GOVERNMENT AND THE EROSION OF LIBERTY* (2004); see also Clayton Gillette, *In Partial Praise of Dillon’s Rule, or, Can Public Choice Theory Justify Local Government Law?*, 67 CHI.-KENT L. REV. 959, 960 (1991) (arguing that formal local legal powerlessness – embodied in the restrictive approach of Dillon’s Rule – “can best be understood and justified as a judicial check on local tendencies to cater to special interests at the expense of other groups within [a] locality”). But see Richard Briffault, *Home Rule, Majority Rule, and Dillon’s Rule*, 67 CHI.-KENT L. REV. 1011 (1991) (offering counterpoints to Gillette’s public-choice-capture perspective on localism).
87. See, e.g., Briffault, *supra* note 73; Schragger, *supra* note 78. On the racial dimensions of local exclusion, see, for example, Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985 (2000); Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841 (1994); and David D. Troutt, *Localism and Segregation*, 16 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 323 (2007). Concerns with the exclusionary risks of local governance are no longer limited to polemics against suburban home voters, however, with even our largest, most diverse cities raising alarms from scholars concerned about inclusion and equity in local governance. See Wendell Pritchett & Shitong Qiao, *Exclusionary Megacities*, 91 S. CAL. L. REV. 467 (2018).
88. Some local-government scholars prefer a frame for the pathologies of localism that foregrounds negative externalities and public-choice perspectives on political-process failure as critical concerns. See *infra* text accompanying notes 104-105. On some level, those frames recapitulate concerns about parochialism through an alternative conceptual vocabulary, but to the extent that an overriding focus on the spillover effects of local decision-making, or on rational-actor simplifications of local official incentives, decenters other normative concerns implicated in the discourse of localism, a richer account is necessary.
89. Briffault, *supra* note 9, at 1. Rick Hills likewise succinctly notes that those who value local government seemingly have to choose between the values that local governments can advance, such as direct political participation, “and the social inequality and parochialism that local governments also seem to promote.” Hills, *supra* note 76, at 2011-12.

Any argument for local empowerment, then, must account for the dark side of local parochialism. This challenge takes on a particular valence for advocates who are focused on the potential for cities and other local governments to advance equity, inclusion, redistribution, and social justice, especially as national politics become increasingly paralyzed and many states abandon those goals.<sup>90</sup> Any legal tool to vindicate the progressive potential of local governance can be used by local governments to undermine the very values underlying that potential. For those who care about progressive values, the double-edged sword gleams most brightly.<sup>91</sup>

This puts front and center whether there are workable and consistent structural principles to frame an approach to localism sensitive to this dilemma. In other words, is the argument for local legal empowerment only about reinforcing local democracy and advancing the other normative and instrumental values of decentralization? Or is there an overriding normative constraint on subsidiarity? Is it possible to ask what localism is *for*?

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A separate vein of concern focuses on the argument that cities, counties, suburbs, and towns, in their own particular ways, lack competence and are subject to particular risks of corruption and capture. *See, e.g.*, Frug, *supra* note 77. This was once a critical source of concern, with the critique from capacity captured by John Stuart Mill's argument that local officials, compared to those found at higher levels of government, are of a "lower average of capacities" as well as "almost certain to be of a much lower grade of intelligence and knowledge . . ." JOHN STUART MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 279, 281 (London, Parker, Son & Bourn, West Strand 1861). Similarly, local governments have long been indelibly linked to the city boss and efforts to combat municipal corruption. *See, e.g.*, LINCOLN STEFFENS, *New York: Good Government to the Test*, in *THE SHAME OF THE CITIES* 279, 281-82 (1904); LINCOLN STEFFENS, *Philadelphia: Corrupt and Contented*, in *THE SHAME OF THE CITIES*, *supra*, at 193, 195-97. These generalizations no doubt still resonate for some commentators. But it would be hard to say that capacity and corruption—for all of the reality of ongoing challenges on both fronts—are at the heart of current normative debates about the legal identity of local governments. Thoughtful scholars more generally decry the structural forces—economic, social, and legal—that have undermined the ability of some local governments to respond to the challenges they face. *See, e.g.*, Michelle Wilde Anderson, *The New Minimal Cities*, 123 *YALE L.J.* 1118 (2014) (exploring the contemporary landscape of fiscally distressed cities).

90. Advocates for local empowerment focused on different objectives may be no less concerned with questions of exclusion and local parochialism, but in the current environment, the dilemma that localism poses is sharpest for progressive advocates.

91. For some advocates, there is an approach under which questions of consistency across conflicts and underlying structural principles generally do not matter, and the task is the traditional advocate's one—prevailing in given cases, even if that requires taking the opposite position on a given allocation-of-authority issue in another case. Advocates for particular policy outcomes can certainly feel comfortable with that position, but it is unsatisfying for advocates (let alone scholars) who approach the question from the perspective of structure.

### B. A Typology of Extant Approaches

A number of scholars have posited approaches for resolving the dilemma of localism. This Section outlines a basic typology of positions that range from strongly localist, to default state-centric, to approaches that calibrate what is attractive and what is troubling about local empowerment through various functional and formal lenses. Much can be learned from these attempts to navigate the challenge, but none are entirely satisfying.<sup>92</sup>

#### 1. Ecumenical Localism

As some scholars have tried to tackle the challenge of subsidiarity in the face of the risk of local parochialism, others have forged ahead with arguments for a kind of all-in localism. For them, the case for local empowerment is strong enough to minimize any challenges that arise from parochialism. In a series of articles, for example, Heather Gerken has contended that for those concerned with equity and the position of minorities in contemporary American society, the potential for obtaining power at the local level should outweigh concerns that recalcitrant localities will warp localism for regressive ends.<sup>93</sup> As a result, Gerken asserts, even for those most dubious of the record of “states’ rights” and other assertions of devolution as a screen to mask racial animus, there is much more to be gained from localism—in terms of integration and genuine democratic minority rule—than can be lost by relying solely on higher levels of government, which, of course, remain available to protect individual rights.<sup>94</sup>

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92. A number of scholars have sought to rethink localism altogether. See, e.g., Jerry Frug, *Decentering Decentralization*, 60 U. CHI. L. REV. 253 (1993) (defending decentralization through critical conceptions of subjectivity and the self that are instantiated in local governance); Schragger, *supra* note 78, at 375 (arguing for “a shift from a discourse of localism, which takes territorially defined communities as a given, to a discourse of alternative localisms, which understands communities as products of contested political norms, arising simultaneously with the borders that define them”). There is great value in better clarifying the dilemma of localism and providing conceptually challenging perspectives on how fundamentally to restructure local governance and community. However, advancing advocacy in practical terms around these theories is challenging, and the urgency of crafting workable approaches to thread the localist needle benefits from this wisdom, even as it requires proceeding in more prosaic jurisprudential and institutional terms.

93. See Heather K. Gerken, *A New Progressive Federalism*, DEMOCRACY, Spring 2012, at 37, 37-38 [hereinafter Gerken, *Progressive Federalism*]; Gerken, *Federalism*, *supra* note 80, at 7-8.

94. Gerken, *Progressive Federalism*, *supra* note 93, at 46-47 (“The federalism that haunts our history looks quite different from the form of local power that prevails now. Federalism of old involved states’ rights, a trump card to protect instances of local oppression. Today’s federalism involves a muscular national government that makes policy in virtually every area that

It would be hard to deny the appeal of this account and similar thoughtful arguments for relatively full-stop devolution.<sup>95</sup> These accounts have the virtue of consistency and an Occam's Razor-like neutral principle that is certainly normatively clear.<sup>96</sup> But embracing this approach does require minimizing the real, structural, ineluctable problem of parochialism. This should not lightly be done if some other path is available to calibrate the benefits of democratic decentralization against the harm at moments when local empowerment turns dark.

## 2. *Skeptical Localism*

Contrary to ecumenical localists, some scholars have advocated for the primacy of state oversight. Briffault, for example, argued in a landmark pair of articles that in practice localism has essentially been warped by the empowerment of exclusionary suburbs, with significant consequences in terms of spatial socio-economic and racial stratification.<sup>97</sup> As a result, he concluded that we need to rely on the states to police recalcitrant localities more actively.<sup>98</sup>

There is much to commend in Briffault's call for states to exercise more thoughtful oversight. The challenge, however, is that whatever optimism about the states one might have expressed in 1990 when Briffault first made this argument seems no longer warranted in many states.<sup>99</sup> States have suffered from in-

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was once relegated to state and local governments. The states' rights trump card has all but disappeared, which means that the national government can protect racial minorities and dissenters when it needs to while allowing local forms of power to flourish.").

95. See, e.g., Hills, *supra* note 76.

96. It bears noting that Gerken's progressive case for subsidiarity proceeds against the backdrop of a federal and state constitutional system that tends to valorize centralization in most direct conflicts, whether in the context of federalism or localism. The so-called federalism revolution and generations of home-rule reform notwithstanding, courts are still most comfortable vindicating the power of the federal government against the states under the Supremacy Clause and the power of the states against local governments under a variety of arguably more constitutionally suspect grounds. See, e.g., Briffault, *supra* note 9, at 96; Allison H. Eid, *Preemption and the Federalism Five*, 37 RUTGERS L.J. 1, 18-20 (2005).

97. See Briffault, *supra* note 9; Briffault, *supra* note 73.

98. See Briffault, *supra* note 9, at 6 ("New legal doctrines and governmental structures are needed to encourage state governments to take a state-wide perspective on local problems, to strengthen the states' role in overseeing local power and overriding parochial actions and to increase state accountability for local functions and for ameliorating interlocal wealth differences.").

99. The democratic failures of many states, particularly in relation to their local governments, have been well documented, see Diller, *supra* note 29, at 290; Schragger, *supra* note 6, to which we can add the significant problems arising from contemporary state gerrymandering, see Paul

creasingly sophisticated partisan gerrymandering, and local governments—cities in particular—already suffer from a range of structural inequities in state political systems.<sup>100</sup> As a result, too many legislatures simply no longer reflect the voters of their states in general, and state political systems structurally marginalize their urban residents in particular. These states have become unreliable arbiters of the normal and legitimate oversight functions they have traditionally undertaken in less polarized times.<sup>101</sup>

### 3. *Functionalist and Formalist Localism*

Many approaches to localism are instrumental. Some rely primarily on functionalist arguments to discern the appropriate balance between state and local authority. Others look primarily to formal sources of law, without directly addressing underlying concerns in what seemingly neutral formalism might yield.

One leading functionalist account emphasizes the implications of the Tiebout mobility model in addressing the boundaries of localism. In its broadest understanding (although not the one that its namesake Charles Tiebout appears to have had in mind<sup>102</sup>), the model suggests that residential and other forms of mobility will serve as a sufficient check on the excesses of local government.<sup>103</sup>

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Diller, *The Political Process of Preemption* (Sept. 2018) (unpublished manuscript) (on file with author) (exploring connections between contemporary patterns of state legislative gerrymandering as well as other political-process failures and the legitimacy of preemption of local government authority). Moreover, David Schleicher has argued that state legislative races are increasingly second-order elections in which voters are unaware of state legislators' stances on distinctly state or local issues. Schleicher, *State Democracy*, *supra* note 85, at 772-76. That is not unique to states—Schleicher's argument pertains to some local governments as well, *id.* at 776—but it does underscore particular democratic challenges at the state level, dynamics that arguably give more scope to interest groups to capture state-level legislation.

Interestingly, perhaps reflecting the change in the times, Briffault himself has shifted since *Our Localism* to embrace a more devolutionary position, notwithstanding the strength of his earlier critique. See Briffault, *supra* note 22, at 2017-25.

100. See Diller, *supra* note 29, at 326.

101. This arguably returns states to the position they played during the era that gave rise to the first wave of home-rule reform, with state “ripper” bills selectively removing authority from local governments. See 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).

102. William A. Fischel, *Footloose at Fifty: An Introduction to the Tiebout Anniversary Essays*, in *THE TIEBOUT MODEL AT FIFTY: ESSAYS IN PUBLIC ECONOMICS IN HONOR OF WALLACE OATES* 8, 15 (William A. Fischel ed., 2006).

103. See ILYA SOMIN, *DEMOCRACY AND POLITICAL IGNORANCE: WHY SMALLER GOVERNMENT IS SMARTER* 137-54 (2013) (making the case for mobility as a political accountability tool).

Other functionalist accounts focus on measurable externalities as the guiding principle to discern when localism should be displaced. Absent negative spillovers, the argument goes, states should allow local governments policy freedom.<sup>104</sup> And public-choice narratives that focus on political-process failure seek to surface the skewed incentives of local officials.<sup>105</sup>

Courts often resolve complex questions of state/local allocation of power into a mix of formalist and functionalist attempts to discern realms of “local” or “statewide” interests. In doing so, they largely draw on ambiguous constitutional and statutory text. For example, the basic inquiry in many home-rule states is the formalist exercise of “defining and drawing lines between ‘local affairs’ and ‘matters of statewide concern.’”<sup>106</sup> The work of courts in these cases involves state constitutional and statutory interpretation, and the materials courts apply often themselves reflect a great deal of uncertainty.<sup>107</sup> Courts ultimately struggle through in a kind of constitutional common-law way.<sup>108</sup>

Approaches grounded in formal sources or in the functionalism of “local” or “municipal” versus “statewide interests” have some distinct advantages, not the least of which is a great deal of tradition as well as attention to the pragmatic consequences of local empowerment. But relying on what might appear to be value-neutral formalism or functionalism in state/local conflicts can obscure the

104. See, e.g., Clayton P. Gillette, *The Exercise of Trumps by Decentralized Governments*, 83 VA. L. REV. 1347, 1390-1407 (1997) (discussing dynamics in the allocation of authority that might internalize the externalities of local decentralized governments).

105. See, e.g., Gillette, *supra* note 86, at 961.

106. Baker & Rodriguez, *supra* note 67, at 1339 (citing, for example, *Johnson v. Bradley*, 841 P.2d 990, 996 (Cal. 1992); and *Town of Telluride v. San Miguel Valley Corp.*, 185 P.3d 161 (Colo. 2008)).

107. See *id.* at 1344 (“The nature of the project is necessarily ad hoc: The courts are asked to evaluate specific exercises of municipal power against the background of language . . . that is notoriously ambiguous.”).

108. See *id.* at 1349-65 (delineating practical categories in the judicial construction of local authority). As Frank Michelman put it:

[A] great deal of the law to which courts appeal as delineating local-government authority is actually so open, so little constrained or determined by constitutional or statutory texts, so little referable to any discoverable legislative intent—is rather so much and so obviously a product of doctrinal formulations evolved by judges in the course of case-by-case adjudication, from sources and inspirations quite beyond written texts or suppositious historical intentions—that whole masses can fairly be said to compose a floating “general law” of local government hardly less open to spontaneous judicial economizing, or less inviting to the rationalizing ambitions of a theorist, than is the corpus of private-law doctrine.

Frank I. Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145, 146 (1977).

normative judgments inherent in many of the most contentious of these conflicts.<sup>109</sup> As this Essay elaborates below, normativity is inevitable in questions of the vertical allocation of power. That fact should be acknowledged in resolving state/local conflicts, even if it is by no means the only relevant consideration.<sup>110</sup>

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It is possible to draw some broad lessons from past attempts to grapple with the dilemma of localism. Approaches that make absolute claims in the direction of centralization or decentralization are flawed, and we must recognize that all such approaches should be qualified in some fashion. Context matters: what might be innocuous in a diverse city might be pernicious in a racially and socio-economically homogeneous suburb. Further, judicial engagement in questions of localism is unavoidable—conflicts over local authority and the scope of state oversight are going to end up in litigation because allocations of power are inherently contested. Finally, if we ever could, we can no longer rely on state-level political processes to get the allocation right.

For those particularly concerned about equity and inclusion, past attempts to wrestle with the dilemma of localism have wisdom to offer, but they are worth revisiting against the backdrop of the current alignment of conflicts. What would it look like to craft a more direct attempt to provide operable structural principles that courts and other legal actors could use to distinguish between valid and invalid exercises of local authority, even when the alignment of conflicts shifts? It is to that possibility that we now turn.

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109. This is not to ignore the proposition that functional conceptions of localism reflect normative values as well. See Amnon Lehari, *Zoning and Market Externalities*, 44 *FORDHAM URB. L.J.* 361, 400–01 (2017). Legal concerns with externalities, for example, draw on analogous ideas from economics that have a normative dimension, even if some strands in the economics literature would seem to deny that. See Carl J. Dahlman, *The Problem of Externality*, 22 *J.L. & ECON.* 141, 155 (1979). The point here is that when legal institutions invoke seemingly value-neutral frames such as spillovers, they often do so without reflection of distributional and similar consequences.

110. There are also accounts that try to calibrate devolution to the local-government level against the benefits of centralization, or to bracket off specific policies that may be troubling at the local level through more targeted lenses. Thus, for example, in arguing for reclaiming home rule, David Barron seemed to carve out local parochialism largely focused on specific policy domains, noting that “inclusionary zoning powers need not entail concomitant recognition of a local right to exclude low-income housing.” Barron, *supra* note 9, at 2364. It is clarifying to be reminded of the trade-offs involved in subsidiarity and to have the most contentious of exclusionary practices called out, but that recognition does not fully answer the jurisprudential question of how and on what basis to find the right calibration.

### III. CENTERING THE NORMATIVE IN LOCALISM

The need to reconcile the attractive and troubling aspects of localism is newly resurgent, but a solution continues to elude courts and scholars. While there is no simple way to resolve the dilemma, normative considerations undergirding the vertical allocation of power in the states should be more directly confronted, allowing evaluation of the valence of local power in light of the normative commitments states have made. There are risks, to be sure, in elevating the normative dimension of localism: the values at stake can be indeterminate, and there is reason to be cautious about further enmeshing courts in what in many instances are essentially policy battles between disparate levels of government with misaligned views. But given that the nature of the state-local relationship is being navigated now in active conflicts that demand resolution, the alternative is even less attractive—a set of attenuated proxy battles that obscure the real stakes at issue.<sup>111</sup>

This Part, accordingly, first lays out the argument for centering normative considerations in discerning the outer margins of localism. It then argues for looking to state constitutional law as a source for those considerations, both in terms of individual-rights provisions and in the concept that delegation to local governments carries obligations to consider the broader general welfare of the state. It also elaborates what this approach might look like in practice. The Part then concludes by evaluating and responding to some important objections.

#### A. *Elevating Normativity in the Structure of State/Local Conflicts*

##### 1. *The Value in Elevating Normative Considerations to Discern the Boundaries of Local Authority*

If ecumenical localism obscures the fundamental dilemma, if state legislatures are too often unreliable arbiters of the proper allocation of authority, and if traditional functional and formal tools are ultimately unavailing, then an approach that more directly addresses the challenge must be found. This Section describes the advantages of explicitly elevating normative considerations in discerning the outer boundaries of local autonomy.

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111. Much of the discussion in this Essay necessarily focuses on the judiciary, but there are other actors involved in defining the legal nature of local identity, such as state legislators, administrators, and local officials. Local legal identity is also shaped by private citizens, who are so often involved in the politics and practice of localism, as well as in the process of constitutional change, which is much more malleable at the state than at the federal level. See Bruce E. Cain & Roger G. Noll, *Malleable Constitutions: Reflections on State Constitutional Reform*, 87 TEX. L. REV. 1517, 1521-25 (2009).

In recent years, private-law scholars have recognized that normative considerations are *internal* to areas of law – such as property, torts, contracts, and remedies – in which concerns about equity, individual autonomy, self-authorship, and other values have traditionally been seen as engrafted onto prepolitical or instrumental understandings of the law. As Hanoch Dagan has argued, one branch of private-law theory views the values that govern the law’s approach to interpersonal relations as autonomous – external to those relations.<sup>112</sup> An opposing view understands private law in more instrumental terms, viewing law’s approach to interpersonal relations as simply one more regulatory tool for the state, with no normative content.<sup>113</sup> Dagan counters with the argument that intrinsic to private law are “features that constrain the types of rules it can legitimately promulgate,”<sup>114</sup> features that reflect social context and meaning, and thus inherently involve what Dagan calls collective values. This is ultimately a justificatory exercise grounded in the nature of reciprocal rights and obligations – that is, in the logic of private law.

Private law is an imperfect analogy for resolving questions of governmental authority, but the broad point is that there are structures within seemingly autonomous bodies of law that reflect collective understandings of social relations.<sup>115</sup> That insight can be applied to the discourse of localism. The idea that legal actors should justify allocations of authority on grounds other than pure formal command, such as the text of a given state’s constitution, surfaces occasionally in case law that acknowledges competing values in structural conflicts.<sup>116</sup> But the need to discern normative principles in state/local conflicts – to define a general realm of appropriate local power, with state oversight justified at the normatively troubling margins – should be more explicit. These principles should be understood *not* as external to localism, but, as with individual reciprocity in private law, as arising from the state-local relationship itself.

Recognizing the potential for vertical structural questions to be resolved by reference to underlying, value-reflecting norms would have several benefits. It would focus the terms of advocacy for local authority, rendering the nature of the conflicts more transparent. Over the long run, a more normatively inflected

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112. HANOCH DAGAN, RECONSTRUCTING AMERICAN LEGAL REALISM & RETHINKING PRIVATE LAW THEORY 106 (2013) (“Private law, in this view, is a realm with its own inner intelligibility, isolated from the social, economic, cultural, and political realms.”).

113. *Id.* (“Private law is, in this view, indistinguishable from other regulatory regimes, either in the type of aims it can promote or in the means it can legitimately use in order to achieve them.”).

114. *Id.* at 107.

115. There is a broad literature on the normative dimensions of private law. See, e.g., Stephen A. Smith, *The Normativity of Private Law*, 31 OXFORD J. LEGAL STUD. 215 (2011). That literature need not be rehearsed here.

116. See, e.g., *State v. Hutchinson*, 624 P.2d 1116, 1118-21 (Utah 1981).

advocacy could refine the terms of decisions about localism. That, in turn, can reinforce the positive attributes of localism – including democratic participation, satisfaction of local preferences, and experimentation and innovation – while providing a vocabulary for grappling with marginal cases where state oversight is most justified in light of local parochialism.

The real questions then become whether there are defensible sources to turn to in delineating the contours of those normative principles in conflicts over the boundaries of local power and what normative content those sources might plausibly yield. One could argue that state law has already made whatever normative choices about vertical allocation of power are necessary and that courts should simply reflect that positive law. But so many areas of state-local jurisprudence involve constitutional provisions sufficiently indeterminate to invite interpretation, even if that interpretation is nominally grounded in constitutional text and design.<sup>117</sup>

This interpretive space leaves room for broader normative considerations, although those considerations should not, in turn, be unanchored. They should, first and foremost, be defensible from within the positive law and doctrinal sources available for constructing local legal identity. There is undeniable value in thinking creatively about the possibility of deeper structural reform, or even in rethinking the nature of local governance. But the conflicts facing courts underscore the need to probe what the existing legal system might realistically implement.

## 2. *Sources of Normative Content – Of the Interplay of Individual Rights and General Welfare*

Two strands of state constitutional jurisprudence, in combination, hold promise as appropriate sources of normative commitment in calibrating the margins of localism. These strands are the individual-rights provisions of state constitutions and the general-welfare constraint operative when the state delegates its plenary power to a geographically bounded local government. To be clear, this is not to argue that current localism doctrine necessarily reflects these two sources of normative-structural content, although it is possible to catch glimmers – however rare – in the case law.<sup>118</sup> Rather, it is to argue that these sources might fruitfully be drawn on to refine the jurisprudence in more explicitly normative terms.

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<sup>117</sup>. See Baker & Rodriguez, *supra* note 67, at 1338-39.

<sup>118</sup>. See *infra* Section III.A.3.

As to the first strand, the individual-rights provisions of state constitutions can provide insight into the normative commitments of a given state.<sup>119</sup> States are not indifferent to values such as equality and equity, even if in the context of the jurisprudence of individual claims against the state those principles are often thinly realized.<sup>120</sup> The same can be said for state constitutional commitments to education,<sup>121</sup> employment rights,<sup>122</sup> social welfare,<sup>123</sup> and environmental protection,<sup>124</sup> at least in some states.<sup>125</sup> These provisions mean that the *state* as a whole has made certain discernable normative commitments—embodied in the terms of the individual rights that the state has chosen to valorize—that can be reflected in state/local conflicts.<sup>126</sup>

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119. Cf. Daniel J. Elazar, *Foreword: The Moral Compass of State Constitutionalism*, 30 RUTGERS L.J. 849, 864–65 (1999) (discussing the extraction of moral dimensions from state constitutions).
120. See generally Shaman, *supra* note 16 (describing the wide scope of protection some states have interpreted as inhering in their constitutional equality provisions).
121. See, e.g., Scott R. Bauries, *State Constitutions and Individual Rights: Conceptual Convergence in School Finance Litigation*, 18 GEO. MASON L. REV. 301 (2011).
122. See C. Scott Pryor, *Who Bears the Burden? The Place for Participation of Municipal Residents in Chapter 9*, 37 CAMPBELL L. REV. 161, 169 (2015) (noting that “many state constitutions contain a variety of labor rights, such as ‘the right to an eight-hour day, a minimum wage, and protection from blacklisting practices and private armies,’” as well as “labor-oriented positive state constitutional rights [that] include laborer’s liens, weakening of employer defenses to liability for workplace injuries, and, of course, workers’-compensation systems” (quoting EMILY ZACKIN, *LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA’S POSITIVE RIGHTS* 108 (2013))).
123. See, e.g., Elizabeth Pascal, *Welfare Rights in State Constitutions*, 39 RUTGERS L.J. 863, 869 (2008).
124. See, e.g., Barton H. Thompson, Jr., *Environmental Policy and State Constitutions: The Potential Role of Substantive Guidance*, 27 RUTGERS L.J. 863 (1996).
125. See, e.g., N.Y. CONST. art. XI, § 1 (education); *id.* art. XVII, § 1 (social welfare); *id.* art. XIV, § 1 (environmental protection). For an insightful history of the development of state constitutional rights in the areas of education, employment, and environmental protection, see EMILY ZACKIN, *LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA’S POSITIVE RIGHTS* 67–197 (2013).
126. Scholars have debated—and continue to debate—the extent to which states have saliently distinctive legal identities. Compare, e.g., Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1110–11 (2014) (collecting scholarship that “reject[s] the notion of state identity altogether, at least for the majority of states”), with Elazar, *supra* note 119, at 861 (canvassing arguments that states represent individually distinctive societies, with an independent moral valence to their constitutional tradition). This is a debate that need not be resolved here. For present purposes, it is sufficient to acknowledge, as Robert Schapiro has argued, that state constitutions represent at least “the collection of those particular values that various electoral supermajorities have seen fit to enshrine . . . .” Robert A. Schapiro, *Identity and Interpretation in State Constitutional Law*, 84 VA. L. REV. 389, 393 (1998).

These normative commitments will by necessity vary by state,<sup>127</sup> which reinforces the value of working within each state's particular constitutional tradition. That said, nearly every state has some form of equality norm enshrined in its constitution,<sup>128</sup> and other important related values are relatively widely reflected across state constitutional law as well.<sup>129</sup> State courts should not be limited to express individual constitutional rights—or even state law—to find constitutional meaning in localism. But, again, those provisions are appropriate proxies for the values of a state precisely because they have been enshrined in state constitutions.

In the current jurisprudence, there is already some interplay between individual rights and questions of vertical structure.<sup>130</sup> This interplay creates a spectrum that ranges from conflicts that at least nominally involve pure questions of structure—such as classic home-rule or Dillon's Rule cases over local initiative or immunity—to cases that are directly about individual rights—such as the constitutional claims raised by individual officials facing potential sanctions in the

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127. See generally G. ALAN TARR, *UNDERSTANDING STATE CONSTITUTIONS* (1998).

128. There is a rich history of the development of state constitutional provisions, for example, that variously provide for equal protection or ban special privileges and immunities. See Shaman, *supra* note 16, at 1029–56 (surveying state approaches). One variation, for example, found in nine state constitutions, is provisions that state all laws ought to be instituted for the benefit of the whole, rather than for the enjoyment of a specific subgroup of citizens. See, e.g., IOWA CONST. art. I, § 6 (“All laws of a general nature shall have a uniform operation; the General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens.”); see also MASS. CONST. pt. 1, art. VI; N.H. CONST. pt. 1, art. 10; N.D. CONST. art. I, § 22; R.I. CONST. art. I, § 2; UTAH CONST. art. I, § 24; VT. CONST. ch. I, art. 7; VA. CONST. art. I, § 3; WYO. CONST. art. 1, § 34. Many state supreme courts have taken a so-called lockstep approach to state equality guarantees, declining to vary from federal equal protection doctrine, although that appears to be shifting. Shaman, *supra* note 16, at 1031 (noting “a significant trend toward state independence from the federal conception of equality”); see also JEFFREY S. SUTTON, *51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW* (2018) (discussing state constitutional protection for individual rights and the role of state court judges in forging an independent state constitutional jurisprudence). But see Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 757 n.73 (2011) (cataloguing state variation from federal equal protection but chiding states for not taking up the slack left by federal retrenchment). Regardless of whether a state chooses to mirror federal equal protection in its individual-rights jurisprudence or strike an independent view, state constitutional equality guarantees remain available as a reflection of a state-level normative principle to inform the boundaries of local authority in state/local conflicts.

129. See TARR, *supra* note 127, at 11–13.

130. Cf. Daryl J. Levinson, *Rights and Votes*, 121 YALE L.J. 1286, 1293 (2012) (exploring rights and representation as means to protect vulnerable groups).

*El Cenizo* sanctuary-cities case.<sup>131</sup> In between are cases that involve the overlap, which is to say rights-inflected structural questions and structure-inflected rights cases. A good example can be found in the Birmingham minimum wage dispute, which is being contested on equal protection grounds, powerfully raising the interplay between local-government power, preemption, and race.<sup>132</sup>

Across the entire spectrum, to echo Briffault's insights in *Our Localism*, normative considerations—if not the actual contents of the individual rights at issue—influence structural doctrines, and structural principles bleed into rights cases. Individual rights can serve as a good approximation of areas where the normative dimension of localism should be most prominent in structural conflicts. Making localism more explicitly normative, and in particular drawing on the normative content of state constitutional rights, would thus allow courts to foreground issues, such as race and inequality, that are obscured by functional approaches or are relegated to second-order considerations by strong devolutionary accounts of localism. It would provide courts a means of addressing questions of racial subordination and economic inequality.

This is not to argue that federal constitutional and statutory rights are an inappropriate source of normative content for localism.<sup>133</sup> Federal rights have an important role to play in checking state excesses and can inform the state-local dialogue, as David Barron and Rich Schragger have each argued.<sup>134</sup> Yet where

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131. See *supra* text accompanying note 66 (noting that in the challenge to Texas's sanctuary-city law, individual officials raised due process, First Amendment, and Fourth Amendment claims).

132. See *Lewis v. Governor of Ala.*, 896 F.3d 1282, 1296–97 (11th Cir. 2018) (reversing the dismissal of a claim that Alabama's preemption of Birmingham's minimum wage ordinance violated the Equal Protection Clause of the Fourteenth Amendment, and noting that “[t]oday, racism is no longer pledged from the portico of the capitol or exclaimed from the floor of the constitutional convention; it hides, abashed, cloaked beneath ostensibly neutral laws and legitimate bases, steering government power toward no less invidious ends”).

133. Some advocates have argued that the solution to the dilemma of localism in light of concerns about equity and inclusion is to rely on federal equal protection as the primary doctrinal source to challenge state intrusion. See, e.g., Thomas Silverstein, *Combating State Preemption Without Falling into the Local Control Trap*, POVERTY & RACE RES. ACTION COUNCIL (Oct.–Dec. 2017), <http://prrac.org/newsletters/octnovdec2017.pdf> [<https://perma.cc/XK6W-LFUY>]. Antidiscrimination law does, indeed, have much to commend it, but many important localist conflicts in the current environment will simply not be addressed by that body of law. State courts are going to continue to confront core questions of state constitutional allocation of authority for which federal equal protection can be relevant, but will likely not provide the ultimate ground of decision.

134. See Barron, *supra* note 23, at 493 (arguing that in a series of equal protection cases, including *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982); *Papasan v. Allain*, 478 U.S. 265 (1986); and *Romer v. Evans*, 517 U.S. 620 (1996), the Supreme Court “enforced public constitutional values by striking down state attempts to control the political discretion of towns

Barron and Schragger invoke localism as a means of vindicating individual federal rights, this Essay's argument focuses on the inverse: where individual rights more generally can help delineate the boundaries of appropriate localism in light of the risk of parochialism.<sup>135</sup> And the argument for specifically privileging *state* individual-rights provisions in delineating the outer boundaries of local power is in part pragmatic—state law is the canvas on which state courts and state legislatures paint—but it is also conceptual in the sense that rights and structural norms from within a given state's legal culture have the potential to advance interpretive fidelity when courts are confronted with competing state constitutional texts and norms.

However, in an era when individual-rights claims are increasingly limited—and in which there is a relative paucity of economic and social rights (although less so at the state than at the federal level)—there remain some areas of potentially troubling local discretion that cannot be addressed by rights cases alone. As much as the substance of individual rights can serve as a guide to a state's normative commitments, courts can take an additional logical step to help translate the values underlying those commitments—values that are not immediately associated with the balance of state and local authority—into the jurisprudential terms of localism.

That leads to the second source of constitutional meaning to inform the outer bounds of localism. That source would involve incorporating a geographic view of “general welfare” in recognition that there are normative considerations inherently implicated in the broader context of the delegation of state authority to a local government. As with normative arguments that flow from the logic of private law, invoking this understanding of general welfare provides a structural principle to bring values such as equity and inclusion to bear in the doctrine.<sup>136</sup>

States, as a formal matter, are generally understood to possess plenary police power, subject only to articulated (federal and state) constitutional limitations and the constraints that come with federal supremacy.<sup>137</sup> In practice, however,

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and cities”); Richard C. Schragger, *Cities as Constitutional Actors: The Case of Same-Sex Marriage*, 21 J.L. & POL. 147, 167-68 (2005) (drawing on equal protection jurisprudence to argue for the constitutional space for cities to vindicate substantive constitutional rights in the context of same-sex marriage, in the era prior to *United States v. Windsor*, 135 S. Ct. 2675 (2013), and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015)).

135. Moreover, for fundamental questions of how courts should resolve disputes over the scope of local authority and autonomy, state constitutions—even if they parallel in some respects their federal counterpart—can offer a closer reflection of a state's normative commitments.

136. See *supra* Section III.A.1.

137. See BRIFFAULT & REYNOLDS, *supra* note 18, at 54-55. This contrasts with the concept of the federal government as one of limited and enumerated powers, although in practice there are

state constitutional law recognizes that that plenary authority must advance the actual, general welfare of the people of the state. This constraint applies to all state action but can be understood to have a particular spatial component when the state delegates (through home rule or by statute) a portion of its plenary power to a geographically bounded locality<sup>138</sup>: the exercise of that delegated power must reflect consequences that affect the state as a whole.<sup>139</sup>

This spatially inflected understanding of general welfare thus supplies an operative principle to translate normative commitments into the structural terms of state/local conflicts.<sup>140</sup> Externalities are usually thought of in pragmatic, material terms—the paradigmatic trash dump on the edge of a town that leaches

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relatively few constraints on federal authority and relatively robust limitations on state plenary authority, despite the theory.

138. Or, to put this in the terms of democratic accountability, when the people of a state subdelegate some of the authority that they have given to their state back down to specific local communities.
139. General welfare is a formulation that often derives from due process and equal protection doctrine, or from the nature of the police power, and the idea of generality in the formulation is not often conceived in spatial terms. Some courts in the localism context, however, have done so. As discussed below, *see infra* text accompanying notes 145-153, a prominent example can be found in *Southern Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713 (N.J. 1975), but other instances of linking general welfare to the spatial terms of localism occasionally emerge in the jurisprudence. *See, e.g.*, *Associated Home Builders of Greater Eastbay, Inc. v. City of Livermore*, 557 P.2d 473, 485-89 (Cal. 1976); *id.* at 487 (“When we inquire whether an ordinance reasonably relates to the public welfare, inquiry should begin by asking whose welfare must the ordinance serve. In past cases, when discussing ordinances without significant effect beyond the municipal boundaries, we have been content to assume that the ordinance need only reasonably relate to the welfare of the enacting municipality and its residents. But municipalities are not isolated islands remote from the needs and problems of the area in which they are located; thus an ordinance, superficially reasonable from the limited viewpoint of the municipality, may be disclosed as unreasonable when viewed from a larger perspective.”); *cf.* *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 390 (1926) (alluding, in the course of upholding a local government’s zoning code, to “cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way”).
140. Another variation on the concept of a geographically inflected general welfare can be found in a recent decision that upheld a City of Cleveland law requiring a portion of jobs in publicly funded projects to be staffed by local residents against an Ohio preemptive statute. The court found, among other things, that the state constitutional provision invoked by the Ohio legislature to preempt Cleveland’s local-hire law was not a valid source of authority because the Ohio constitution required any state regulation of labor conditions under the provision to advance the general welfare, which the trial court concluded was absent when the state barred the city’s authority. *See City of Cleveland v. State*, 90 N.E.3d 979, 988-89 (Ohio Ct. App. 2017). Setting aside the merits of local-hire policies, the resonance of this vein in the jurisprudence is that it emphasizes the need for the exercise of state authority to reflect the *general* in the concept of general welfare.

into the neighboring town's water—and are also often invoked in assessing political-process failure, couched in terms of either capture or insufficient attention to those not represented in a local polity.<sup>141</sup> Yet there can be a normative dimension to the geography of general welfare. Much of what cities and other local governments do is contained within their boundaries—contained, that is, not just in the sense of physical and regulatory spillovers, but also in terms of the policy valence of the choices that local governments make. When local governments exercise their authority as a means of racial, economic, or similar exclusion, their parochialism has an inherently normative dimension. That exercise can offend the values of the state as a whole and can therefore in turn justify state intervention. Explicitly considering the general welfare of the state in evaluating the boundaries of local power provides a mechanism for limiting the most pernicious externalities that can be produced by local parochialism at the margins.<sup>142</sup>

Calibrating the normative outer boundaries of localism by focusing on the *overlap* between these two sources of constitutional meaning, a variation on what Kerry Abrams and Brandon Garrett have called intersectional rights,<sup>143</sup> carries several advantages. Together, individual-rights provisions and a spatial understanding of general welfare can, for example, cabin what might otherwise be an overly expansive judicial role in resolving state/local conflicts. This conjunction

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141. See *supra* note 86.

142. Recognizing that a spatial version of “general” in the idea of general welfare can be a structural filter for the outer boundaries of local authority—that courts and other legal actors can explicitly ask what deeper obligations local governments must attend to that transcend their boundaries—does not undermine the basic case for subsidiarity. Quite the opposite. In a frame premised on the proposition that policy issues should, as a starting point, be addressed at the level of governance closest to those governed, explicitly attending to the broader normative implications of local authority can supply outer boundaries, even while preserving a strong central core of localism.

143. See Kerry Abrams & Brandon L. Garrett, *Cumulative Constitutional Rights*, 97 B.U. L. REV. 1309, 1330 (2017) (noting that “many constitutional cases involve multiple constitutional claims that gain meaning when heard together and amplify the cognizable harm”); see also Michael Coenen, *Combining Constitutional Clauses*, 164 U. PA. L. REV. 1067, 1077–91 (2016) (exploring judicial approaches to the interplay between federal constitutional provisions, both within and across rights and structure). What in some contexts are called “hybrid rights”—from cases such as *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and *Employment Division v. Smith*, 494 U.S. 872 (1990)—have been criticized for illogic and incoherence. See, e.g., Jonathan B. Hensley, Comment, *Approaches to the Hybrid-Rights Doctrine in Free Exercise Cases*, 68 TENN. L. REV. 119, 120 (2000) (labeling the hybrid-rights doctrine “logically flawed and ultimately untenable”). This Essay, however, invokes the interplay between structure (embodied in the normative dimensions of the concept of general welfare) and individual rights, not to amplify overlapping constitutional harms but to cabin and make more coherent judicial resolution of fraught questions of the vertical allocation of power.

provides a way of targeting what could otherwise be a free-floating judicial exercise, and grounds the exercise in clearly identifiable legal sources.

Bringing together these two streams of jurisprudence would also have the advantage of incorporating the normative concerns underlying the individual-rights provisions of state constitutional law into the fabric of state authority, while at the same time avoiding the necessity of individual litigation to vindicate those rights. It is appropriate—indeed critical—to resort to rights-based litigation to correct egregious cases, but the values reflected in the rights that states supply can also inform the scope of state-local dynamics.<sup>144</sup>

### 3. *The Jurisprudential Model in Practice*

Are there any precedents for what this theory might look like in practice? One example, familiar to scholars of local governance, property law, and fair housing, can be found in a certain reading of a doctrine named for the town in southern New Jersey from which it sprang: *Mount Laurel*.<sup>145</sup> In the mid-1970s, the New Jersey Supreme Court stared down ongoing segregation fostered by exclusionary zoning and other local practices in the state, with the city of Mount Laurel as the paradigmatic battleground. Mount Laurel had functionally zoned out all but high-cost, single-family detached housing, which put living in the community out of financial reach for low- and moderate-income people.<sup>146</sup> Plaintiffs—people concerned about conditions in Mount Laurel as well as those barred from living in the community<sup>147</sup>—challenged the township and prevailed. The New Jersey Supreme Court held that local governments in the state

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144. Focusing the inquiry on the intersection between rights and a spatial conception of general welfare can also provide a theoretical underpinning for the argument that the appropriate approach to substantive constitutional rights provisions is for higher-level governments to set a floor, above which local governments can craft policy. This makes sense as a formal matter, given that state and federal constitutional rights apply to local governments no less than to state governments, but it extends this institutional arrangement to the structure of the state-local relationship.

145. *S. Burlington Cty. NAACP v. Township of Mount Laurel (Mount Laurel I)*, 336 A.2d 713 (N.J. 1975).

146. *See id.* at 719-24.

147. As the court described the plaintiffs, they were “minority group poor (black and Hispanic)” people comprised of “present residents of the township residing in dilapidated or substandard housing; . . . former residents who were forced to move elsewhere because of the absence of suitable housing; [and] nonresidents living in central city substandard housing in the region who desire to secure decent housing and accompanying advantages within their means elsewhere,” as well as “three organizations representing the housing and other interests of racial minorities.” *Id.* at 717 & n.3.

had a state constitutional obligation to account for their fair share of regional housing needs.<sup>148</sup>

In reaching its conclusion, the court relied on the intersection between the general-welfare constraint on delegation of authority under the New Jersey Constitution and the fundamental importance of housing. As the court put it, “any police power enactment . . . must promote public health, safety, morals or the general welfare,” adding that the “last term seems broad enough to encompass the others.”<sup>149</sup> As to whose general welfare was at stake, the court continued, “local authority is acting only as a delegate of [the state’s] power and . . . when regulation does have a substantial external impact, the welfare of the state’s citizens beyond the borders of the particular municipality . . . must be recognized and served.”<sup>150</sup>

Looking to the concept of general welfare alone was not sufficient to delineate the limits on local authority; rather, the court needed an underlying normative concern to give content to the relevant terms of the broader welfare at issue. The court accordingly invoked the importance of housing in New Jersey law.<sup>151</sup> As the court put it:

There cannot be the slightest doubt that shelter, along with food, are the most basic human needs. “The question of whether a citizenry has adequate and sufficient housing is certainly one of the prime considerations in assessing the general health and welfare of that body.” . . . It is plain beyond dispute that proper provision for adequate housing of all categories of people is certainly an absolute essential in promotion of the general welfare required in all local land use regulation. Further the universal and constant need for such housing is so important and of such broad public interest that the general welfare which . . . municipalities . . . must consider extends beyond their boundaries and cannot be parochially confined to the claimed good of the particular municipality.<sup>152</sup>

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148. *Id.* at 731–32. The original *Mount Laurel* decision was limited to “developing municipalities,” *id.* at 734, but the New Jersey Supreme Court later expanded the reach of the doctrine and changed its remedial scope in *South Burlington County NAACP v. Township of Mount Laurel (Mount Laurel II)*, 456 A.2d 390 (N.J. 1983).

149. *Mount Laurel I*, 336 A.2d at 725 (noting that the authority to delegate is constrained by state-level conceptions of equal protection and due process that yield a requirement that such delegation be exercised for the general welfare).

150. *Id.* at 726.

151. *Id.* at 727.

152. *Id.* (citations omitted).

Housing was not, to be sure, a clearly established individual constitutional right, but the *Mount Laurel* court found the interest advanced by state support of housing clearly implicated in the spatial concept of general welfare at issue in the zoning controversy before it. The court thus brought to the surface both the regional (spatial) and normative dimensions of Mount Laurel's exclusion, and *Mount Laurel's* constitutional theory relied on the intersection of those considerations.

The controversy that *Mount Laurel* sparked continues to reverberate more than forty years later, fostering a fraught judicial relationship with the state and with local governments in New Jersey.<sup>153</sup> Despite well-founded critiques that *Mount Laurel* stretches the boundaries of the judicial role too far,<sup>154</sup> it is possible to read the constitutional theory underlying the case in more modest and pragmatic terms. Instead of an institutional justification for affirmative judicial intervention in local ordering—as the case gave rise to a large judicial bureaucracy necessary to enforce its terms in the face of local recalcitrance—the doctrine can be read as allowing courts to distinguish between more or less normatively valid grounds for the assertion of local autonomy in state/local conflicts.<sup>155</sup>

Applied to the current wave of state/local conflicts, the framework developed above would surface underlying normative tensions across areas as diverse as workplace regulation, antidiscrimination, environmental protection, public health, broadband, and many others in the current social and political reckoning.<sup>156</sup> Take controversies over sanctuary cities. As noted, a number of states have passed or are considering legislation that would bar local governments from a range of policies that states understand to constitute “sanctuary.”<sup>157</sup> At the same time, some states have declared their support for such policies and have legislatively constrained the ability of their local governments to assist federal

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153. See generally DOUGLAS S. MASSEY ET AL., *CLIMBING MOUNT LAUREL: THE STRUGGLE FOR AFFORDABLE HOUSING AND SOCIAL MOBILITY IN AN AMERICAN SUBURB* (2013).

154. See *infra* Section III.B.

155. It bears acknowledging that there are a variety of procedural and doctrinal questions that the framework might implicate, from standing, choice of forum, comity, or any of the myriad of technical questions that arise in any particular case involving the balance of state and local authority. It is beyond the scope of this Essay to elaborate on those many variations, but the core insights should generally pertain, even if they might be instantiated in different ways in different cases.

156. On the other hand, most states have a version of a state constitutional right to bear arms, which advocates in favor of restricting local variation in firearm safety regulation might invoke. See generally Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191 (2006) (charting the provisions across forty-four states and their variation from the Second Amendment).

157. See *supra* text accompanying notes 36-37.

law enforcement with deportation and related policies.<sup>158</sup> There are, then, two competing normative visions of the boundaries of local authority at issue in conflicts over state oversight. On the one hand, local governments are choosing to prioritize values of inclusion, the benefits of economic development that come through immigration, and the judgment that working with immigrant communities advances law enforcement by building trust and encouraging the reporting of crime. On the other, local governments are choosing—again, in the face of potential state preemption—to pursue policies, albeit reflecting the current federal approach, that are grounded in a very different moral vision.

A normative lens on these conflicts would allow advocates to make the case that local exclusionary immigration policies, whether they formally violate federal or state equal protection clauses, run counter to equity norms reflected in state equality law and run counter to the broader general-welfare obligations of those local governments by singling out and targeting disfavored minorities subordinated in the political process. This would, in turn, provide grounds to make substantive distinctions between inclusive and exclusionary policies in the resolution of clashing structural imperatives between a local government and the state. Courts might still choose to vindicate contrary state interests in the case of inclusionary local action and to reject state interests in the case of contrary exclusionary local policies—and these are by no means simple decisions—but at least the terms of the debate would be clearer.

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That, in short, is the core argument that there are defensible signposts that might offer some promise for constructing a coherent, textually grounded, implementable conception of the outer boundaries of localism. This approach provides sufficient justification for vindicating Cleveland's moves to advance economic fairness, but not Vista's resistance to prevailing wages; El Cenizo's welcome of immigrants, but not Hazelton's hostility. In other words, an explicitly normative approach promises to help answer the dilemma of localism.

### *B. Objections from Indeterminacy and Judicial Role*

Before concluding, there are some reasonable objections that are worth acknowledging and evaluating. This Section addresses two particularly forceful arguments: first, that the norms at issue are too contested; and second, that courts are institutionally ill-suited to the task of discerning manageable normative

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158. See *supra* text accompanying note 71. California's SB 54, for example, prevents local law enforcement from undertaking immigration enforcement with some exceptions, and from detaining individuals for deportation without a judicial warrant, among other things. 2017 Cal. Stat. ch. 495, at 95.

boundaries in this context. These concerns suggest the need for caution in advancing a more normatively inflected approach to resolving structural localist conflicts. But they do not mean that ultimately the game is not worth the candle.

The first concern is that the particular constitutional norms this Essay identifies are deeply contingent and at the same time conveniently congruent with a certain set of specified outcomes. Is this just policy preference in the guise of structural constitutional law? Relatedly, as a pragmatic matter, what basis is there for trusting that courts will appropriately reflect the values at issue? Indeed, any attempt to embody normative values in the structure of localism could as easily turn into antilocal libertarian or property-rights exercises as it could provide a means for advancing local equity and inclusion.<sup>159</sup>

These are natural critiques of any attempt to articulate a normative lens for discerning a positive or a negative valence of localism. However, the arguments for an inclusive or equity-sensitive account of localism—looking at state-based constitutional rights as well as taking seriously the idea that the general welfare has an inherent logic in the context of devolution as a doctrinal matter—can be made convincingly. It is true that arguing for devolution in normative terms may leave the jurisprudence open to other values, such as free speech, religious liberty, or due process, that can rise to the surface. But a general libertarian case that local governments are distinctly threatening in their regulatory role and should be constrained on that basis seems weaker than normative arguments about exclusion and equity, even as specific threats to individual constitutional rights can be salient at the local level. Regardless, a debate that included those considerations would still have advantages over one that glossed over the possibility of a normative valence to localism.

It is, indeed, possible to invert the concern over local governments as particularly threatening to individual liberty and also separately address a concern with the overreliance on rights.<sup>160</sup> If local governments are going to advance, rather than offend, the values reflected in the individual-rights provisions of state constitutions (and perhaps even the Federal Constitution), then courts should vindicate that role by protecting that aspect of local legal authority, even if the courts

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159. Cf. Barron, *supra* note 9, at 2364 (noting the indeterminacy of judicial interpretation of home rule and expressing concern that courts will be insufficiently sensitive to the normative valence of localism).

160. There is a political-process risk in overly relying on rights and even milder forms of “rights talk” in localism, given that this shifts power toward the judiciary. In the current environment, however, especially given the partisan nature of many state/local conflicts, resort to litigation seems inevitable, and it is preferable for courts to be transparent about the exercise.

do not vindicate converse normative values.<sup>161</sup> Ultimately, the framework this Essay proposes would allow advocates to argue about what is really at stake in many state/local conflicts: not just abstract concerns with devolving and decentralizing power, but more immediately how the exercise of that local power intersects with equity, inclusion, environmental protection, and the like—even if the case would have to be made in any given instance. That does not mean that these values will always prevail, but at least these would be the terms on which marginal cases could be addressed within a general case for local empowerment.

A closely related concern focuses on judicial role and capacity. Can courts take on the task of calibrating localism as this Essay argues? Should they? As noted, the experience of New Jersey in the aftermath of *Mount Laurel*—where the judicial system essentially gave up trying to enforce the doctrine and ceded implementation to a state agency—suggests caution before urging any expansion of judicial oversight in state/local conflicts.<sup>162</sup> This line of reasoning could also draw on conceptions of democratic theory and separation of powers to posit that judicial resolution of vertical allocation-of-powers questions should be left to the political branches, even when state/local conflicts generally involve two polities. And there is certainly reason to be skeptical that, to the extent that city/state conflicts in the current environment reflect partisan polarization, state courts are necessarily going to be immune from those currents, especially given that many states have elected judiciaries.<sup>163</sup>

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161. There is a pragmatic political dimension to this concern as well. Given the polarization that has generated the current wave of state/local conflicts in so many states, many state supreme courts likely reflect the politics of the state legislatures that are currently seeking to constrain local power. See Paul Brace et al., *Measuring the Preferences of State Supreme Court Judges*, 62 J. POL. 387, 393-94 (2000) (discussing the relationship between state supreme court justices' partisan affiliation and the ideology of the state at the time in which they were elected or appointed). For that reason, any advocacy that seeks to acknowledge a normative valence to localism may have to be advanced with awareness of the limits of potential receptivity, which advocates are perfectly capable of discerning. That said, for a variety of structural and timing reasons, there are some states where the current polarization of the state legislature is not reflected in a similarly polarized state supreme court. *Id.* (noting that “the relative consistency of a justice’s preferences with either citizens or the elite should be dependent upon the method of judicial selection operating in that state”).

162. Indeed, home rule as a structural matter has long evinced the difficulty of a relatively centralized judiciary mediating state-local relations. A part of the thrust of the second wave of home-rule reform was a desire to move questions of local authority out of the courts and into the state legislatures. See Barron, *supra* note 9, at 2325-28.

163. Cf. Claire S. H. Lim, *Preferences and Incentives of Appointed and Elected Public Officials: Evidence from State Trial Court Judges*, 103 AM. ECON. REV. 1360, 1361 (2013) (noting the correlation between the preferences of constituents and sentencing outcomes at the trial level).

Concern over judicial role and competence is important, but not without response. A more modest approach to the judicial role would recognize that inherent in most state/local conflicts is the necessity of resolving otherwise open-ended questions about what normative conceptions of localism should prevail. Vertical (state/local), horizontal (interlocal), and internal (local government-individual) legal conflicts are unavoidable and it is possible to limit the question in such cases to how best to construct a jurisprudence built around individual challenges, rather than how courts—as in *Mount Laurel*—might reconstruct institutions more fundamentally.<sup>164</sup>

The reality is that as the state-local relationship becomes more confrontational, courts cannot avoid the responsibility of adjudicating foundational questions of the allocation of power. Whether courts do so through formalist or functionalist proxies, or through practical presumptions in favor of state power—which is how most of these cases are currently decided, at least nominally—they risk obscuring the real stakes at issue. And trusting democratic processes to resolve the conflict, as attractive as that sounds, fails to appreciate the pathologies of the current landscape of state-local relations.

It would be hard to deny that state supreme courts can reflect the politics of their state, but it would prove too much to regard the judiciary as inherently incapable of separating the partisan valence of given aspects of state/local conflicts from the underlying merits. Admittedly, a framework grounded in the value of interpretive fidelity in state constitutional law necessarily holds out hope that courts are not entirely political and that at least some state judicial systems will be receptive, even if that hope may be misplaced in many cases. Moreover, the process of judicial selection and the constituencies to which courts answer may not match the polarization of a given state, especially in states that are relatively evenly divided on a partisan basis but that have especially skewed state legislatures.<sup>165</sup>

Even if it might be challenging for courts to change their approach, there are broader reasons to do so. This Essay has focused on jurisprudence, but an approach to localism that adds consideration of the normative valence of questions of structure interacts with other audiences and other institutions. It remains, and will remain, the fact that state legislatures are the primary legal institution setting the terms of formal local legal power. At the moment, too many state legislatures are approaching their responsibility through the lens of partisan politics,

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164. Paul Diller has argued that courts have institutional advantages over state legislatures in resolving state/local conflicts, such as geographic impartiality, relative political insulation, and comparatively greater immediacy in ability to respond to conflicts. See Diller, *supra* note 18, at 1157–68.

165. See Barron, *supra* note 9, at 2364.

with insufficient respect for local democracy. In the long run, with careful advocacy, this polarization might soften. The same can be said for state executive officials and state administrative agencies, all of which are part of the state-local interplay, even if they do not set the primary terms of the legal landscape.

Ultimately, questions of state/local power are as much political as they are legal, and any jurisprudence of localism will have to interact with popular perceptions of the appropriate balance. This is because of electoral outcomes, and because constitutional change is much more flexible at the state level than it is at the federal level. Repeatedly throughout the modern history of home rule, and in some cases quite recently, states have undertaken important constitutional changes to protect their localities. Those constitutional changes have been honored as much in the breach as in the spirit in which they were intended, but change can happen.

### CONCLUSION

Over a half century ago, in a widely regarded early exegesis of home rule, Terrance Sandalow asked “whether it is desirable, by a broad grant of power to municipalities, to permit local majorities to press hard against fundamental values.”<sup>166</sup> That question—and the broader dilemma of localism it reflects—is all the more urgent at a moment marked by rising social and political polarization and by the corresponding governance responsibility that cities and other local governments are embracing in the shadow of that polarization.

This Essay has accordingly sought to limn a new approach to the legal structure of local empowerment, particularly for those who value deeply the promise of local governance but remain concerned about the challenge of local parochialism. The argument privileges local autonomy as a core principle, but simultaneously grounds a search for the outer margins of local power in concerns for equity and inclusion drawn from a combination of individual rights and the concept of a broader general welfare inherent in state delegation to geographically bounded local governments. Hard questions can certainly be raised about the feasibility of our imperfect legal institutions succeeding at the task of implementing this approach with sensitivity and nuance. But as states seek to redefine the nature of local governance, it is more critical than ever that we grapple with getting the balance right.

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166. Terrance Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643, 713 (1964).