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NORTH CAROLINA LAW REVIEW

Volume 100 | Number 5

Article 5

6-1-2022

Is Enhanced Judicial Review the Correct Antidote to Excessive State Preemption?

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Paul A. Diller, *Is Enhanced Judicial Review the Correct Antidote to Excessive State Preemption?*, 100 N.C. L. REV. 1469 (2022).

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IS ENHANCED JUDICIAL REVIEW THE CORRECT ANTIDOTE TO EXCESSIVE STATE PREEMPTION?

PAUL A. DILLER**

In proposing a new system of constitutional home rule, the National League of Cities' Principles of Home Rule for the 21st Century ("Principles") would empower the judiciary to police preemption in a manner akin to older systems of home rule adopted in the late nineteenth century. Because legislatures have abused their power to police local governments under the more modern legislative home rule, the Principles reasons, states should again designate the judiciary as a backup supervisor of the state-local divide. This Article examines the judiciary's potential strengths and weaknesses as a home-rule policeman from an institutional perspective. It surveys the real-world examples of California and Colorado, two states whose judiciaries have played a prominent role in supervising preemption for decades. The Article also assesses how interest-based tier scrutiny, which the Principles proposes as the methodology judges use to review preemption, might mesh with state constitutional jurisprudence. In doing so, the Article considers alternative methods of judicial review—proportionality and reasonableness—that are popular in other constitutional regimes. The Article concludes that reformers should proceed carefully and analyze the state-specific benefits and drawbacks of placing supervisory authority for home rule in state courts.

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INTRODUCTION

The conception of cities in the United States as “creatures” of the state derives from Judge John Dillon’s 1872 treatise, *The Law of Municipal Corporations*, that announced the infamous “Dillon’s Rule” that local governments bemoan to this day.¹ Even in states with “home rule,” the doctrine of state supremacy has eroded city power due to increasingly aggressive preemption by state legislatures. For this reason, the National League of Cities’ (“NLC”) *Principles of Home Rule for the 21st Century* (“*Principles*”) suggests model constitutional language that invites the state judiciary to protect local authority from legislative overreach.² Namely, the *Principles* allows for express preemption of general local regulatory powers “only if necessary to serve a substantial state interest [and] only if narrowly tailored to that interest.”³ With respect to state law that preempts matters of local democratic self-government, the proposal calls for allowing such preemption only if “the state is acting to advance an overriding state concern . . . [and] only if narrowly tailored to that interest.”⁴

1. JOHN F. DILLON, *THE LAW OF MUNICIPAL CORPORATIONS* 78 (2d ed. 1873).

2. The NLC describes itself as “an organization comprised of city, town and village leaders that are focused on improving the quality of life for their current and future constituents.” *See About, NLC*, <https://www.nlc.org/about/> [<https://perma.cc/Q4N6-MYFA>]. Claiming that it has earned “the trust and support of more than 2,000 cities across the nation,” the NLC’s mission “is to strengthen local leadership, influence federal policy and drive innovative solutions.” *Id.* One political scientist has described the NLC as “[a] traditional, bottom-up membership organization [of state municipal associations] with a decentralized federal structure . . . primarily concerned with building cross-city networks” THOMAS K. OGORZALEK, *THE CITIES ON THE HILL* 73 (2018).

3. *See* NAT’L LEAGUE OF CITIES, *PRINCIPLES OF HOME RULE FOR THE 21ST CENTURY* (2020), as reprinted in 100 N.C. L. REV. 1329, 1351–52 (2022) [hereinafter *PRINCIPLES*]. The *Principles* also requires that such preemption take place through a “general law,” which it further defines by reference to Ohio’s case law on the matter. *Id.* at 1369–71.

4. *Id.* at 1352. As with preemption of local regulatory authority, this kind of preemption must also take place through “a general law.” *Id.*

In requiring that preemptive legislation meet a substantive standard—“substantial state interest” or “overriding state concern”—and adopting something like narrow-tailoring scrutiny for judicial home-rule analysis, the *Principles* treads on both old and new ground. Some states—most notably, California and Colorado—have judiciaries that are actively involved in policing the boundaries of the state-local division of power through their interpretation of those states’ constitutional home-rule provisions.⁵ However, in most other states that use something like “legislative” home rule, courts do not regularly weigh in on the legitimacy of state preemption.⁶ Rather, in these states, courts generally take the validity of the state interest at face value. Why else would a sufficient number of state legislators vote for—and a governor sign—a law unless there was a “substantial” or “overriding” state interest of some type?⁷

Of course, the well-known maladies of the legislature’s composition and legislative process—such as gerrymandering, logrolling, and special-interest influence—and the legislature’s occasional lack of subject-matter expertise, inevitably complicate the question of whether the legislature has a “substantial” or “overriding” interest in a particular matter on which it has overridden local preferences. Recognizing these critiques of the legislative process invites a discussion of comparative institutional competence. Which branch(es) and processes of state government would be better at producing or checking legislation that represents a “substantial” or “overriding” state interest, assuming such a thing can be said to exist in any objective way? Inviting the judiciary to review the legislature’s work robustly is necessarily an endorsement of that branch’s capability to answer these questions in a credible way and, indeed, in a manner that is superior to *just* the legislature.⁸

Seeking to address the problem of “hyper” preemption—that is, the unprecedented state preemption of local power in both scope and method of the

5. See *infra* Part III.

6. For a discussion of the meaning of “legislative” home rule, see *infra* Part I.

7. *City of La Grande v. Pub. Emps. Ret. Bd.*, 576 P.2d 1204, 1213–14 (Or. 1978), *aff’d on reh’g*, 586 P.2d 765 (Or. 1978) (“Nor is it generally useful to define a ‘subject’ of legislation and assign it to one or the other level of government. . . . A search for a predominant state or local interest in the ‘subject matter’ of legislation can only substitute for the political process . . . the court’s own political judgment whether the state or the local policy should prevail.”).

8. Of course, preemptive legislation does not involve just the legislature insofar as the governor usually signs legislation (in the absence of a veto override). In approximately twenty states, there is also the possibility of voter initiatives creating legislation that can preempt. See Paul A. Diller, *The Political Process of Preemption*, 54 U. RICH. L. REV. 343, 382 (2020) [hereinafter Diller, *Political Process*]. Moreover, as the reaction to the COVID-19 pandemic has demonstrated clearly, there is also the possibility of state preemption by executive order. See generally Carol S. Weissert, Matthew J. Uttermark, Kenneth R. Mackie & Alexandra Artiles, *Governors in Control: Executive Orders, State-Local Preemption, and the COVID-19 Pandemic*, 51 PUBLIUS 396 (2021) (examining the executive orders by governors made during the first five months of the COVID-19 pandemic). This Article will focus primarily on preemption by the legislature but will occasionally address these other types of preemption as well.

last decade or so—the *Principles* invites the state judiciary to police state-local boundaries yet again.⁹ Indeed, the *Principles* invites judicial supervision more than any home-rule model since the “imperio” reforms of the late nineteenth and early twentieth centuries by expressly importing into state constitutional law the federal model of judicial tier-based scrutiny review of legislative enactments into state constitutional law.¹⁰ Because this would constitute a sea change in the way in which most states approach preemption, it is incumbent upon the proponents of the *Principles* to explain what exactly the judiciary has to offer that the legislature (and other actors in the lawmaking process) do not. This Article attempts to engage in that comparative analysis and, in so doing, proceeds in four parts.

Part I lays out the background of state-local relations, including the gradual drift toward mostly “legislative” home rule by the middle of the twentieth century, and how this evolution of home rule left cities vulnerable to sweeping preemption. Part II assesses the institutional capabilities of the judiciary and why it may, or may not, be better suited to serving as a “check” on preemption than are legislatures. Part III analyzes the history of judicial review of city-state disputes, focusing in particular on California and Colorado, where the judiciary already plays a much larger role in policing preemption than in most other states. Since the *Principles* proposes a form of tier-based scrutiny review for judges to use in assessing preemption, Part IV discusses general criticisms of tier-based scrutiny as a jurisprudential tool, including critiques of previous attempts by state judiciaries to use it in interpreting their constitutions.

I. CITIES (IN MOST STATES) ARE HIGHLY VULNERABLE TO PREEMPTION

The earliest versions of constitutional home rule that emerged in the late 1800s granted substantive lawmaking power to cities, but have often been described as limiting this authority generally to matters of “local” concern. When a city acted within the sphere of “local” concern, its actions were

9. Erin Adele Scharff, *Hyper Preemption: A Reordering of the State-Local Relationship?*, 106 GEO. L.J. 1469, 1494–507 (2018). Another commentator, Bradley Pough, has called this phenomenon “super preemption,” Bradley Pough, *Understanding the Rise of Super Preemption in State Legislatures*, 34 J.L. & POL. 67, 69 (2018), while Professor Richard Briffault calls it the “new preemption,” Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 1997 (2018) [hereinafter Briffault, *Challenge of the New Preemption*]. For more on the phenomenon, irrespective of nomenclature, see Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163 (2018) [hereinafter Schragger, *Attack on American Cities*]; RICHARD BRIFFAULT, NESTOR DAVIDSON, PAUL A. DILLER, OLATUNDE JOHNSON & RICHARD C. SCHRAGGER, AM. CONST. SOC’Y FOR L. & POL’Y, THE TROUBLING TURN IN STATE PREEMPTION: THE ASSAULT ON PROGRESSIVE CITIES AND HOW CITIES CAN RESPOND (2017) [hereinafter ACS ISSUE BRIEF], https://www.acslaw.org/wp-content/uploads/2017/09/ACS_Issue_Brief_-_Preemption_0.pdf [<https://perma.cc/7YLM-5QL3>] (discussing recent examples of preemption and conflicts between states and cities).

10. For a discussion on the meaning of “imperio” home rule, see *infra* Part I.

protected from state interference.¹¹ That is, even if the state legislature wanted to preempt a city ordinance or charter provision that regulated a matter of “local” concern, it was prohibited from doing so, particularly if the state’s home-rule system was enshrined in the state’s constitution.¹² As a result, many early home-rule regimes have been described as establishing separate—and exclusive—jurisdictions whose areas of authority do not overlap, thereby creating little potential for preemption.¹³

This earlier form of home rule is sometimes called “imperio” because it establishes an “imperium in imperio,” or a “government within a government.”¹⁴ This description was never entirely accurate, but imperio home rule was clearly different conceptually, even if not always in application, from the “legislative” versions of home rule that succeeded it.¹⁵ Early home-rule provisions, like Missouri’s 1875 constitutional amendment, at least nominally increased cities’ organic policymaking authority beyond Dillon’s Rule.¹⁶ Under Dillon’s Rule, cities had only a small core of essential powers in addition to those that the state legislature may have delegated; courts were supposed to interpret even the delegated powers narrowly.¹⁷ Under imperio home rule, by contrast, cities had the unquestioned power to run their “local” affairs, but state courts nonetheless were the ultimate arbiters of city power because they had the power to interpret the extent of such “local” powers.¹⁸ Despite imperio seemingly improving on Dillon’s Rule from the perspective of municipal power, advocates of city power

11. See David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2290 (2003).

12. *E.g.*, *Kansas City v. Scarritt*, 29 S.W. 845, 848 (Mo. 1895) (invalidating a state law that “relate[d] solely to matters of internal municipal government” and conflicted with provisions of a city’s charter).

13. *See, e.g.*, *City of New Orleans v. Bd. of Comm’rs*, 640 So. 2d 237, 242 (La. 1994) (stating that, under the old system of home rule, the city acted “without fear of the supervisory authority of the state government” so long as it acted in the “local” realm only).

14. *City of St. Louis v. W. Union Tel. Co.*, 149 U.S. 465, 468 (1893); *City of New Orleans*, 640 So. 2d at 242–43 (reviewing the “imperio” model of home rule); Terrance Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643, 660–61 (1964).

15. Judge David Barron, writing as a Harvard law professor, argued that the early home-rule movement actually confined local power to “a quasi-private sphere” even more effectively than Dillon’s Rule. *See Barron, supra* note 11, at 2291–300.

16. For more on Missouri’s 1875 home-rule amendment, see Henry J. Schmandt, *Municipal Home Rule in Missouri*, 1953 WASH. U. L.Q. 385, 385 (citing MO. CONST. art. IX, §§ 16, 20 (1875)). There is some question as to how well-established Dillon’s Rule was as a matter of state constitutional law across the country by the time of the early home-rule movement. After all, Dillon only wrote the first draft of his treatise three years before Missouri established home rule. *See, e.g.*, Paul A. Diller, *The Partly Fulfilled Promise of Home Rule in Oregon*, 87 OR. L. REV. 939, 943 (2009) [hereinafter Diller, *Partly Fulfilled Promise*] (noting that the Oregon courts did not always follow an approach akin to Dillon’s Rule before the state constitution’s 1906 “home rule” amendment).

17. Dillon’s Rule traces its lineage to Iowa Supreme Court Justice John J. Dillon, who later became a federal appellate court judge. Justice Dillon articulated something like Dillon’s Rule first in *Clark v. City of Des Moines*, 19 Iowa 199, 212 (1865), and then later more clearly in his first treatise on municipal corporations in 1873. DILLON, *supra* note 1, at 173.

18. Barron, *supra* note 11, at 2325–26; Sandalow, *supra* note 14, at 660.

over time grew increasingly frustrated with state courts because judges often interpreted “local” quite narrowly, thereby curtailing cities’ policymaking authority.¹⁹

It is important to keep imperio home rule’s cautionary example in mind as the *Principles* again proposes enhanced judicial review to protect local rule. The judiciary had a chance once to protect local authority, and it used that power to *limit* local authority.²⁰ To be sure, the *Principles* contains all kinds of safeguards that were not present in earlier imperio home-rule provisions: for example, it abrogates Dillon’s Rule clearly and emphatically;²¹ it creates a presumption against preemption; and it requires that preemption be express only.²² It is difficult to imagine a court manipulating the whole of these provisions, if adopted into a state’s constitution, into antilocal tools. Nonetheless, the history of imperio home rule is one of many examples of constitutional language having unanticipated consequences.²³

In response to the perceived failures of imperio home rule, the American Municipal Association (“AMA”)²⁴ and the National Municipal League (“NML”),²⁵ proposed legislative home-rule models in the 1950s and 1960s that granted either the “police power” or all legislative power to local governments, subject to denial of that power in a particular area by specific act of the state legislature.²⁶ Legislative home rule differed significantly from the imperio approach in that it did not offer cities any realm of regulation to be protected

19. See Sandalow, *supra* note 14, at 685–92.

20. See *id.*

21. See PRINCIPLES, *supra* note 3, at 1364 (noting that proposed language “clearly repudiate[s] Dillon’s Rule as applied to home-rule governments”).

22. *Id.* at 1366 (stating that no implied preemption is allowed).

23. There are all kinds of examples of this phenomenon in constitutional law. Two well-known ones are the Fourteenth Amendment’s equal protection doctrine—originally passed to protect freed slaves from discrimination—then being used to limit affirmative action, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 396 (1978) (Marshall, J., concurring) (“[The Fourteenth Amendment’s] history [does not] lend any support to the conclusion that a university may not remedy the cumulative effects of society’s discrimination by giving consideration to race in an effort to increase the number and percentage of Negro doctors.”), and the First Amendment’s free speech provisions, which have been used to protect corporate donations to political campaigns, see *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 430 (2010) (Stevens, J., dissenting) (“As a matter of original expectations, then, it seems absurd to think that the First Amendment prohibits legislatures from taking into account the corporate identity of a sponsor of electoral advocacy.”).

24. The AMA became known as the National League of Cities in 1964. See PRINCIPLES, *supra* note 3, at 1330.

25. The NML is now known as the National Civic League, although it is unclear when exactly this name change occurred. See *History*, NAT’L CIVIC LEAGUE, <https://www.nationalcivicleague.org/history/> [<https://perma.cc/HE8T-ZEJF>].

26. See JEFFERSON B. FORDHAM, AM. MUN. ASS’N, MODEL CONSTITUTIONAL PROVISIONS FOR MUNICIPAL HOME RULE 13–24 (1953); NAT’L MUN. LEAGUE, MODEL STATE CONSTITUTION § 8.02 (6th ed. 1968); Barron, *supra* note 11, at 2326–27; Sandalow, *supra* note 14, at 685–92.

by the judiciary from state legislative infringement.²⁷ On the other hand, legislative home rule, which has become the majority approach,²⁸ vastly expanded the areas in which municipalities could govern in many states through its wholesale delegation of state power. The courts remained involved in policing the state-local divide primarily through their more limited role in deciding cases of implied preemption.²⁹

As the Preamble to the *Principles* makes clear, the pace, scope, and ferocity of express preemption by state legislatures has accelerated significantly in the last decade.³⁰ Numerous commentators in the last five years have highlighted this dynamic, referring to it, alternatively, as “hyper-,” “super-,” or “the new” preemption.³¹ The preemption has been notable in its breadth. Some preemption has been anticipatory and largely performative in prohibiting any local jurisdiction in the state from enacting a certain kind of law before any city even seriously considered such a move.³² Moreover, the last decade has seen an

27. The NML model slightly enhanced the protection afforded to local governments provided by the AMA model in that the NML model required the state legislature to deny municipal power only by general law. Some states that have adopted the NML model have interpreted it to require *express* denial of a certain local power by the state legislature in order to preempt. *See City of New Orleans v. Bd. of Comm’rs*, 640 So. 2d 237, 243 (La. 1994) (comparing both models). Many states with legislative home rule have, nonetheless, expressly reserved the broad and vaguely defined area of “private law”—which is often interpreted to include contracts, property, torts, and family relations—for the state. *See generally* Paul A. Diller, *The City and the Private Right of Action*, 64 STAN. L. REV. 1109 (2012) [hereinafter Diller, *Private Right of Action*] (examining the definition of “private law” and the different ways in which courts have applied the private law exception to municipal home rule); Gary T. Schwartz, *The Logic of Home Rule and the Private Law Exception*, 20 UCLA L. REV. 671 (1973) (examining similarly how courts have interpreted the private law exception and arguing in favor of the doctrine). Because the area of “private law” is so broad that it might swallow cities’ home-rule authority, many states allow municipal encroachments into this area so long as they are incidental to the exercise of an independent city power. *See City of Atlanta v. McKinney*, 454 S.E.2d 517, 520 (Ga. 1995) (citing GA. CODE ANN. § 36-35-6 (LEXIS through the 2021 Reg. and Spec. Sess. of the Gen. Assemb.)); *New Mexicans for Free Enter. v. City of Santa Fe*, 126 P.3d 1149, 1160–64 (N.M. Ct. App. 2005).

28. *See* Paul A. Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1126–27 (2007) [hereinafter Diller, *Intrastate Preemption*] (observing that however one counts it, legislative home-rule states are in the majority of home-rule jurisdictions).

29. *See* Briffault, *Challenge of the New Preemption*, *supra* note 9, at 1997 (“Traditionally, preemption consisted of a judicial determination of whether a new local law conflicted with preexisting state law.”). *See generally* Diller, *Intrastate Preemption*, *supra* note 28 (discussing the doctrine of intrastate implied preemption and problems therewith).

30. PRINCIPLES, *supra* note 3, at 1366.

31. *See supra* note 9 and accompanying text. Even the popular press picked up on the trend. *See, e.g.*, Emily Badger, *Blue Cities Want To Make Their Own Rules. Red States Won’t Let Them*, N.Y. TIMES (July 6, 2017), <https://www.nytimes.com/2017/07/06/upshot/blue-cities-want-to-make-their-own-rule-red-states-wont-let-them.html?searchResultPosition=1> [http://perma.cc/4T7S-XGVD (dark archive)] (“In the last few years, Republican-controlled state legislatures have intensified the use of what are known as pre-emption laws . . . wall[ing] off whole new realms where local governments aren’t allowed to govern at all.”).

32. Anticipatory preemption was frequent in the early part of the 2010s with respect to food labeling and potential nutrition regulation. *See, e.g.*, Act of Mar. 16, 2018, ch. 17, § 2, 2018 Ariz. Sess. Laws 68, 74–75 (codified at ARIZ. REV. STAT. ANN. § 42-6015 (2018)) (preempting soda taxes *before*

explosion of “punitive” preemption.³³ This form of preemption includes punishments like loss of funds for noncompliant cities, removal from office—and even potential imprisonment—of local officials who support or fail to repeal preempted policies, and the authorization of lawsuits against cities and local officials (sometimes in their personal capacity) who support preempted measures.³⁴

Republican-controlled state legislatures in states with Republican governors (“Red Trifectas”) have been particularly apt to adopt these kinds of policies, and often for “hot-button” issues like immigration, firearm safety, and, more recently, controlling protests, defunding the police, and measures related to the COVID-19 pandemic.³⁵ Indeed, Red Trifectas—with legislative majorities often created or enlarged by gerrymandering—preempting large,

any municipality in Arizona had enacted them); Jeffrey Hess, *Soda Wars Backlash: Mississippi Passes ‘Anti-Bloomberg’ Bill*, NPR (Mar. 12, 2013), <https://www.npr.org/sections/thesalt/2013/03/12/174048623/mississippi-passes-anti-bloomberg-bill> [<https://perma.cc/53JF-CPEL>] (discussing the Mississippi Legislature’s passage of a bill that prohibited something like New York City’s sugar-sweetened-beverage portion-cap rule (often inaccurately referred to as a “soda ban”). See generally Paul A. Diller, *Local Health Agencies, the Bloomberg Soda Rule, and the Ghost of Woodrow Wilson*, 40 FORDHAM URB. L.J. 1859 (2013) [hereinafter Diller, *Local Health Agencies*] (providing more detail on New York City’s proposed “soda ban”).

33. See Briffault, *Challenge of the New Preemption*, *supra* note 9, at 2002–07 (discussing punitive preemption).

34. *Id.*; see also PRINCIPLES, *supra* note 3, at 1375–77 (discussing recent trends of “punitive preemption”); RICHARD BRIFFAULT, LOC. SOLS. SUPPORT CTR., PUNITIVE PREEMPTION: AN UNPRECEDENTED ATTACK ON LOCAL DEMOCRACY 2 (2018), <https://www.abetterbalance.org/wp-content/uploads/2018/10/Punitive-Preemption-White-Paper-FINAL-8.6.18.pdf> [<https://perma.cc/KXW5-ZKGT>] (describing punitive preemption as “especially threatening”); Joshua S. Sellers & Erin A. Scharff, *Preempting Politics: State Power and Local Democracy*, 72 STAN. L. REV. 1361, 1376 (2020) (“Along similar lines, some states have gone so far as to pass punitive preemption laws, which punish jurisdictions or their elected officials for enacting ordinances that conflict with state laws.” (footnote omitted)).

35. See, e.g., Rachel Proctor May, *Punitive Preemption and the First Amendment*, 55 S.D. L. REV. 1, 13–21 (2018) (discussing punitive preemption provisions passed by Republican legislatures in Arizona and Texas). On defunding the police, see Act of June 1, 2021, ch. 197, 2021 Tex. Sess. Law Serv. (West) (codified at TEX. PENAL CODE ANN. § 42.03(c) (West 2021)); Act of June 1, 2021, ch. 199, 2021 Tex. Sess. Law Serv. (West) (codified in scattered sections of TEX. GOV’T CODE ANN., TEX. LOC. GOV’T CODE ANN. & TEX. TAX CODE ANN.); Act of June 1, 2021, ch. 201, 2021 Tex. Sess. Law Serv. (West) (codified at TEX. LOC. GOV’T CODE ANN. § 120 (West 2021)); see also Megan Munce, *Gov. Greg Abbott Signs Slate of Legislation To Increase Criminal Penalties for Protesters, Punish Cities That Reduce Police Budgets*, TEX. TRIB. (June 1, 2021, 3:00 PM), <https://www.texastribune.org/2021/06/01/texas-abbott-defund-police-protest/> [<https://perma.cc/R893-LRJU>]. For Florida’s “anti-riot” law, also known as H.B. 1, see Act of Apr. 20, 2021, ch. 6, Fla. Sess. Law Serv. (West) (codified in scattered sections of FLA. STAT.) (increasing penalties for persons who block roadways or deface public monuments and creating new crime of “mob intimidation”). A federal judge has enjoined enforcement of the part of Florida’s law that broadened the definition of “riot” and increased penalties for rioting. See *Dream Defenders v. DeSantis*, No. 21CV191, 2021 WL 4099437, at *33 (N.D. Fla. Sept. 9, 2021) (enjoining enforcement of FLA. STAT. § 870.01 (2021)). On Republican preemption of local COVID-19 measures, such as shutdown orders and masking requirements, see Weissert et al., *supra* note 8, at 401–02; see also Keith Boeckelman & Jonathan Day, *State Legislation Restricting and Enabling Local Governments in an Era of Preemption*, 53 ST. & LOC. GOV’T REV. 210, 212 (2021).

Democratic-leaning cities from enacting policy priorities has been a focus of much academic research of late, including by some of the authors of the *Principles*.³⁶ But this has hardly been the only statewide dynamic within which preemption emerges. States with Democratic-controlled legislatures and Democratic governors (“Blue Trifectas”) have also preempted local governments in their states. Their geographical targets are often suburbs or smaller, more sparsely populated towns and counties that lean more rightward politically,³⁷ but in some instances Blue Trifectas have also preempted the policy priorities, such as minimum wage and soda taxes, of large and left-leaning cities in their states.³⁸

Mixed governments—that is, states in which more than one political party controls either of one house of the state legislature or the governor’s mansion—too have engaged in aggressive preemption: In 2012, for instance, Kentucky preempted local authority to regulate firearms with potential criminal and civil penalties for local officials who violate this law.³⁹ A Democratic state house member sponsored the law, a Democratic-controlled state house and

36. See Diller, *Political Process*, *supra* note 8, at 364–81 (highlighting this phenomenon in Florida, Michigan, North Carolina, Ohio, and Wisconsin); Schragger, *Attack on American Cities*, *supra* note 9, at 1190–91.

37. *E.g.*, *City of Huntington Beach v. Becerra*, 257 Cal. Rptr. 3d 458, 463 (Ct. App. 2020) (holding that the California Values Act, passed in 2018, which restricted the ability of local law enforcement agencies to aid federal immigration authorities, was constitutional as applied to charter cities because it addressed a matter of “statewide concern”); *see also* California Values Act, ch. 495, 2017 Cal. Stat. 3733 (codified in scattered sections of CAL. GOV’T CODE & CAL. HEALTH & SAFETY CODE).

38. *See, e.g.*, Diller, *Political Process*, *supra* note 8, at 363 n.100 (describing the Rhode Island General Assembly’s preemption of Providence’s effort to increase its minimum wage in 2014); *see also* Peter Makhoul, *Laboring for Democracy: On the Minimum Wage in Rhode Island*, COLL HILL INDEP. (Apr. 3, 2015), <https://www.theindy.org/585> [<https://perma.cc/3WP6-4FX8>] (discussing the National Restaurant Association’s influence on the Rhode Island legislature’s preemption of Providence’s proposed minimum wage ordinance); Keep Groceries Affordable Act, ch. 61, 2018 Cal. Stat. 1843 (codified at CAL. REV. & TAX. CODE § 7284.12 (West 2021)) (forbidding local taxes on “groceries,” including soda and sugar-sweetened drinks, through 2030). In Oregon, the legislature preempted local authority to tax soda and other groceries less than a year after voters defeated a similar measure at the polls. Diller, *Political Process*, *supra* note 8, at 398–99 (discussing Oregon’s failed Measure 103 in 2018). In 2021, a superior court judge struck down the penalty provision of California’s soda tax preemption. *See Cultiva La Salud v. State*, No. 34-2020-8003458 (Cal. Super. Ct. Oct. 1, 2021) (striking down a provision of the Keep Groceries Affordable Act which would have deprived cities that passed soda taxes of all sales-and-use-tax revenue as “financial coercion” that violated the California Constitution’s Home Rule Provision).

39. KY. REV. STAT. ANN. § 65.870 (West 2018) (creating a private right of action against a local official who violated the state firearms preemption and also making it criminal “official misconduct” for a local official to violate the law); *see id.* § 65.870(2)–(3), (6); *see also id.* § 522.020 (first degree official misconduct); *id.* § 522.030 (second degree official misconduct).

Republican-controlled state senate passed it, and a Democratic governor signed the bill into law.⁴⁰

As noted above, the COVID-19 pandemic, which was cited by governors of all states in declaring statewide emergencies in March 2020, has been the source of numerous clashes between states and their cities and counties.⁴¹ In many of these clashes, the preemptive action of the state often emanated not from the legislature passing laws, but from the governor or some other executive official, like the chief of the state's public health agency, who was usually appointed by the governor.⁴² State COVID-19 policy in most states, therefore, has been driven by the state's chief executive, who is not always of the same party as the majority party in both houses of the state legislature.⁴³ Nonetheless, the "red" governor-"blue" city divide played out in a number of states in this context, such as Florida, Georgia, and Texas. In those states, governors unilaterally preempted the powers of local entities to adopt measures like capacity limits, social distancing, and mask and vaccine mandates.⁴⁴ The reverse was also true, of course: many Democratic governors mandated strict virus-related measures despite fierce resistance from local officials, many of whom were Republican or—if technically nonpartisan—represented areas with Republican-leaning sympathies.⁴⁵

40. See May, *supra* note 35, at 19–20; F Riehl, *Kentucky Governor Signs Three NRA-Backed Bills into Law*, AMMOLAND (Apr. 12, 2012), <https://www.ammoland.com/2012/04/kentucky-governor-signs-three-nra-backed-bills-into-law/#axzz7Lq8lleVz> [<https://perma.cc/ESB9-PPBF>].

41. See Weissert et al., *supra* note 8, at 401–02; see also David Gartner, *Pandemic Preemption: Limits on Local Control over Public Health*, 13 N.E. U. L. REV. 733, 735–39 (2021); Bruce D. McDonald III, Christopher B. Goodman & Megan E. Hatch, *Tensions in State-Local Intergovernmental Response to Emergencies: The Case of COVID-19*, 52 ST. & LOC. GOV'T REV. 186, 186 (2020).

42. See, e.g., McDonald et al., *supra* note 41, at 190.

43. For instance, while many consider Kentucky a "red" state because it has voted Republican consistently in the last six presidential elections, it has had a Democratic governor since 2019. So, with respect to Covid policy, Kentucky has more often resembled other "blue states," at least in terms of the executive orders Governor Andy Beshear has issued. See Sarah Ladd, *These Capacity Rules for Restaurants, Bars, and Venues Ease Ahead of Memorial Day*, LOUISVILLE COURIER J. (May 12, 2021), <https://www.courier-journal.com/story/news/local/2021/05/12/kentucky-covid-19-restrictions-mandates-and-rules-to-follow/5035706001/> [<https://perma.cc/75BK-43JP>] (referring to Beshear's mask mandate, capacity, and price-gouging rules); Brian Planalp, *Will Kentucky Join Other States in Lifting Pandemic Orders? Not Likely*, FOX19 NOW (Mar. 2, 2021), <https://www.fox19.com/2021/03/02/live-gov-beshear-updates-vaccine-rollout-covid-response-kentucky/> [<https://perma.cc/9CXV-4Q9K>] (comparing Kentucky's response to the responses of other states).

44. E.g., Ga. Exec. Order No. 07.15.20.01 (encouraging the wearing of masks but not requiring them and prohibiting localities from imposing mandates more stringent than the governor's order); see also Complaint at 4–5, *Kemp v. Bottoms*, No. 2020CV338387 (Ga. Super. Ct. July 16, 2020).

45. See, e.g., Trip Gabriel, *G.O.P. Defiance of Pennsylvania's Lockdown Has 2020 Implications*, N.Y. TIMES, <https://www.nytimes.com/2020/05/14/us/politics/pennsylvania-tom-wolf-coronavirus.html> [<https://perma.cc/SD9U-ADRB> (dark archive)] (Sept. 21, 2020) (stating that officials in Republican-led counties resisted Democratic Pennsylvania Governor Tom Wolf's lockdown orders); Molly Beck & Patrick Marley, *Local Health Officials Are Tossing Their Coronavirus Orders Citing Shaky Legal Grounds Following Supreme Court Ruling*, MILWAUKEE J.-SENTINEL (May 15, 2020),

As with other issues, the conflicts over COVID-19 policies have not always been clear-cut disputes between “red” and “blue.” There have been plenty of intramural conflicts on both sides, with some Democratic mayors feuding with Democratic governors over the pace and scope of reopening (such as Mayor Bill de Blasio of New York City and Governor Andrew Cuomo of New York⁴⁶), and Republican mayors and county executives having similar disagreements with Republican governors, such as in Ohio.⁴⁷

COVID-19 thus emerged as a new battle in a long-running war between states and cities. While often involving a new mechanism of preemption—the executive order—this battle occurred within the larger framework of legislative home rule that leaves cities highly vulnerable to state override. To help shield cities from what they see as excessive and abusive preemption, the *Principles* calls on the judiciary to serve as a check on the other state branches. This Article will now examine the relative strengths and weaknesses the judiciary would bring to performing this role.

II. THE JUDICIARY’S INSTITUTIONAL STRENGTHS AND WEAKNESSES WITH RESPECT TO PREEMPTION

States’ aggressive narrowing of the scope of home-rule authority through preemption is much of the impetus behind the *Principles*.⁴⁸ Other scholarship has delved more deeply into the reasons for this increasingly aggressive legislative behavior, identifying as causes intentional partisan gerrymandering as well as the outsized influence of certain national and state interest groups amplified by a relatively unrestrained campaign finance system.⁴⁹ These are primarily institutional concerns: in other words, legislatures as currently

<https://www.jsonline.com/story/news/politics/2020/05/15/local-health-officials-tossing-their-coronavirus-orders-citing-shaky-legal-grounds-following-supreme/5202462002/> [<https://perma.cc/TX8W-YLFP>] (stating that cities and counties in Wisconsin stopped complying with COVID-19 restrictions that Democratic Governor Tony Evers had imposed after the Wisconsin Supreme Court ruled they exceeded Evers’s authority).

46. Jesse McKinley, Luis Ferré-Sadurní, Dana Rubinstein & Joseph Goldstein, *How a Feud Between Cuomo and de Blasio Led to a Chaotic Virus Crackdown*, N.Y. TIMES (Oct. 12, 2020), <https://www.nytimes.com/2020/10/12/nyregion/cuomo-coronavirus-orthodox-shutdown.html> [<http://perma.cc/C46E-L8S9> (dark archive)] (describing de Blasio and Cuomo’s continuing disagreements over COVID-19 restrictions).

47. Scott Wartman, *DeWine Facing GOP Mutiny in Rural Ohio Over Coronavirus*, COLUMBUS DISPATCH (June 30, 2020, 4:40 AM), <https://www.dispatch.com/story/news/politics/elections/2020/06/30/dewine-facing-gop-mutiny-in-rural-ohio-over-coronavirus/112736050/> [<https://perma.cc/FY5M-M4RV>] (noting that several Republican-led counties “told the Republican governor he ‘overstepped his bounds’ with the restrictions to prevent the spread of COVID-19”).

48. PRINCIPLES, *supra* note 3, at 1339 (“States, however, are increasingly violating the spirit of th[eir] oversight authority [over local governments].”).

49. See Diller, *Political Process*, *supra* note 8, at 358–64 (discussing gerrymandering as a phenomenon behind preemption); ALEX HERTEL-FERNANDEZ, STATE CAPTURE 238–41 (2019) (discussing the American Legislative Exchange Council’s advocacy of preemption).

constituted are not functioning in a manner that comports with a preferred conception of the state-local division of power.

If institutional problems are responsible for legislatures' preemptive overreach, one must also apply an institutional lens in assessing how well the *Principles* would work in using the judiciary as a bulwark against preemption. In thirty-eight states, voters elect the state's highest court judges in some way, shape, or form.⁵⁰ Why would elected judges be any *more* immune to whatever forces have pushed state legislatures to abuse preemption? This part critically assesses some of the potential explanations. In doing so, I rely to some extent on observations I have made in earlier work, in which I argued that the judiciary had a legitimate role to play in deciding questions of implied preemption.⁵¹

A. *Relative Geographic Impartiality*

In contrast to the legislature, the judiciary may be better positioned to enforce a norm of geographic impartiality, under which cities' potentially offensive ordinances are treated with some semblance of equality. This is because in most states, the governor, who is elected statewide, appoints judges, at least initially, or justices run for office statewide. Hence, the forces of districting that lead legislatures to represent a geographic slice of the electorate do not apply equally in the judicial context in most states. In a minority of states, geography might play a more direct role in high court judges' selection. In South Carolina and Virginia, the legislature appoints justices to the high court.⁵² In these states, therefore, the same forces that influence the legislature's composition overall might trickle down to the courts, although the effect would be indirect.⁵³

In the eight states that use judicial districts for their high court elections, the forces at work are countervailing and complicated. Five of these states—Illinois, Kentucky, Louisiana, Mississippi, and Oklahoma—elect their high court judges directly by district.⁵⁴ In the three other states—Maryland,

50. See *Judicial Selection: Significant Figures*, BRENNAN CTR. FOR JUST. (Oct. 4, 2021), <https://www.brennancenter.org/our-work/research-reports/judicial-selection-significant-figures> [[http://perma.cc/NYS7-2Y9H](https://perma.cc/NYS7-2Y9H)] [hereinafter *Significant Figures*].

51. See Diller, *Intrastate Preemption*, *supra* note 28, at 1159–68.

52. See Douglas Keith & Laila Robbins, *Legislative Appointments for Judges: Lessons from South Carolina, Virginia, and Rhode Island*, BRENNAN CTR. FOR JUST. (Sept. 29, 2017), <https://www.brennancenter.org/our-work/research-reports/legislative-appointments-judges-lessons-south-carolina-virginia-and-rhode> [<https://perma.cc/AQ48-KT4L>]. Before 1994, Rhode Island used a similar method but “scandals led to the abandonment of that system in 1994.” *Id.*

53. See *id.* (finding all kinds of problems with Virginia's and South Carolina's judicial appointment systems).

54. See KY. CONST. § 110(4); ILL. CONST. art. VI, § 2 (dividing the state into five judicial districts for supreme and appellate court judges); LA. CONST. art. 5, § 4 (dividing the state into “at least six supreme court districts” with at least one judge elected from each); MISS. CONST. §§ 145, 145-A, 145-B (establishing districts for the election of supreme court judges); OKLA. CONST. art. VII, § 3.

Nebraska, and South Dakota—the governor initially selects high court justices,⁵⁵ and justices later face a retention election within a particular geographical district.⁵⁶ In all eight states, the relevant judicial districts are much larger than state legislative districts.⁵⁷ The comparatively large size of these judicial districts is likely to diminish a justice’s allegiance to any particular geographic area. On the other hand, the U.S. Supreme Court has indicated—without squarely addressing the issue—that one-person, one-vote does not apply to judicial elections.⁵⁸ Hence, states may draw their judicial districts in a manner that strays from equal apportionment. Maryland, for instance, establishes the districts for its court of appeals (its high court) in its constitution; the districts do not change with census data.⁵⁹ Its districts vary immensely in population size, with some more than double the size of others.⁶⁰ Judicial districts that are exempt from one-person, one-vote, therefore, may open up the door to a state’s high court skewing in a particular geographical direction.⁶¹

In addition to states’ selection mechanisms, it is also worth considering where justices of a state’s highest court reside. In Oregon, for instance, the judges of the supreme court—even if selected on a statewide basis—generally live in Portland, Salem, or Eugene, all within a 110-mile stretch of the state’s populous Willamette Valley; on the intermediate court of appeals, with thirteen judges, only one hails from east of the Cascades.⁶² In states in which the capitol

55. See MD. CONST. art. IV, § 5A(b); NEB. CONST. art. V, § 21(1); S.D. CONST. art. V, § 7.

56. In Maryland, for instance, the retention election is a mere year after gubernatorial appointment for an additional ten years on the bench. See MD. CONST. art. IV, § 5A(d), (e).

57. In Kentucky, for instance, the state is divided into seven districts for the purposes of supreme court (and court of appeals) elections. See KY. CONST. § 110(4) (“There shall be one Justice from each Supreme Court district.”); *Map of Supreme Court and Court of Appeals Districts*, KY. CT. JUST., https://kycourts.gov/Courts/Documents/SC_COA_districtsmap.pdf [<http://perma.cc/RD23-WFFP>]. The Kentucky Legislature, on the other hand, consists of a Senate with 38 members and a House of Representatives with 100 members. See KY. CONST. § 33 (enumerating the number of legislators and districts).

58. See *Wells v. Edwards*, 409 U.S. 1095, 1095 (1973), *aff’d* 347 F. Supp. 453 (M.D. La. 1972) (affirming summarily a district court ruling which held that the Fourteenth Amendment Equal Protection Clause’s one-person, one-vote principle did not apply to the districts used to elect Louisiana supreme court justices).

59. MD. CONST. art. IV, § 14.

60. Per 2020 census data, Maryland’s First Appellate Judicial Circuit (which includes Caroline, Cecil, Dorchester, Kent, Queen Anne’s, Somerset, Talbot, Wicomico, and Worcester counties) has a population of approximately 458,000. See *id.*; *Quick Facts: Maryland*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/MD> [<https://perma.cc/E7ZF-XHNM>] [hereinafter *Quick Facts*]. Its Second Appellate Judicial District, which includes Baltimore and Harford counties, has a population of approximately 1,115,000, which is 2.43 times that of the first. See MD. CONST. art. IV, § 14; *Quick Facts, supra*.

61. Some states, such as Kentucky, authorize (but do not require) the legislature to redistrict the judicial districts over time as population shifts. See KY. CONST. § 110(4).

62. See Steve Powers, *The Honorable Roger DeHoog: Oregon Court of Appeals Judge*, MULTNOMAH LAW., June 2016, at 1, 11 (noting that Roger DeHoog was the first lawyer on the court of appeals from east of the Cascades since Walt Edmonds). Judge DeHoog was subsequently appointed to the Oregon

is relatively isolated, justices may move there to serve their terms. In theory, these dynamics could lead to some bias toward the judges' "home" region or city, whether the capital or other areas (like Portland and Eugene) within commuting distance of the capital, although I am unaware of any empirical studies probing this hypothesis. Moreover, it is possible that with the rise of remote hearings during the COVID-19 pandemic, state judiciaries may become more amenable to judges working remotely, which could facilitate a more geographically diverse judiciary within states.

As discussed below, judges do not generally think of themselves as "representatives" in the way elected officials do.⁶³ Legislators usually maintain home-district offices that cater to services of constituents who live only within their districts.⁶⁴ Judges, by contrast, at least traditionally, perceive themselves as beholden to the law, not any particular constituency, and maintain only their chambers at the court rather than district offices. Any geographic influence, therefore, is likely subtler than in the legislative environment, but it may vary to some degree by state depending on the institutional design forces discussed here.

B. *Tempered Political Insulation*

One of the most familiar arguments for judicial intervention, particularly at the federal level, is that courts and judges, as compared to legislative and executive branch officials, are more insulated from political pressures.⁶⁵ In hoping that judges can better decide questions of state-local power, the *Principles* bets on judges' insulation to some of the political pressures that have driven legislators to support excessive preemption. Section II.A just discussed how judges may be more removed from the political pressures that are connected to geography. However, there are other political pressures that influence state actors even if they are elected statewide and represent a statewide constituency. State officials often need to raise money and garner endorsements from interest groups—businesses, unions, "special interest" organizations, etc.—in order to

Supreme Court. See Press Release, State of Oregon Newsroom, Governor Kate Brown Announces Appointments to the Oregon Supreme Court and Oregon Court of Appeals (Jan. 19, 2022), <https://www.oregon.gov/newsroom/pages/newsdetail.aspx?newsid=64779> [<https://perma.cc/UB67-2H5P>].

63. See Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1363 (2006) ("[E]ven where judges are elected, the business of the courts is not normally conducted, as the business of the legislature is, in accordance with an ethos of representation . . .").

64. See Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 41 (1991) ("Each representative has an incentive to support legislation favoring her district.").

65. See, e.g., RONALD DWORKIN, *LAW'S EMPIRE* 375 (1986); LAWRENCE G. SAGER, *JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE* 74 (2004).

get elected and wield power effectively once in office.⁶⁶ These dynamics inevitably influence preemption battles, even within the judiciary.

Because the judges of the highest court of thirty-eight states are elected in some way,⁶⁷ they are arguably less politically insulated than their counterparts at the federal level who enjoy life tenure.⁶⁸ Nonetheless, in many of these states, judges are still likely to be subject to less political influence than legislators. In sixteen of the thirty-nine states with judicial elections, for instance, high court judges face only uncontested retention elections after their initial appointment.⁶⁹ In fourteen of the thirty-nine states with judicial elections, the races are officially nonpartisan,⁷⁰ although it is unclear how much this factor alone reduces the influence of politics on the judiciary.⁷¹ More significantly, in most of the thirty-nine states that have judicial elections, judges are elected or reelected to terms substantially longer than those of the average legislator, ranging from six to fifteen years.⁷² The relative infrequency with which state high court judges face voters presumably increases their political insulation.⁷³

66. See *Interest Groups*, USHISTORY.ORG, <https://www.ushistory.org/gov/5c.asp> [<https://perma.cc/Y5H8-6CFX>].

67. See *supra* note 50 and accompanying text. Some states, such as New York, elect lower-court judges but not the justices of the high and appellate courts. See *Judicial Selection in the State of New York*, FUND FOR MOD. CTS., <https://moderncourts.org/programs-advocacy/judicial-selection/judicial-selection-in-the-courts-of-new-york/> [<https://perma.cc/3BU9-799W>] [hereinafter *Judicial Selection in New York*]; see also Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 725–26 (1995) (discussing how judges are appointed or elected by each state). Although these lower court judges may be as susceptible to political pressures as any other elected official, they are nonetheless compelled to apply the precedent of the state's less politically pressured high court.

68. In the twelve states without judicial elections for the high court, judges are perhaps as insulated from political pressures as their federal counterparts. Some of these twelve states use some version of nonelective reappointment, while others employ lifetime terms or mandatory retirement ages. See *Significant Figures*, *supra* note 50 (discussing the wide array of judicial selection, retention, and mandatory retirement systems across the states); see also Croley, *supra* note 67, at 725–26 (reviewing wide array of judicial selection mechanisms across the states).

69. *Significant Figures*, *supra* note 50. In thirty-eight states, only the high court justices are elected, whereas in thirty-nine states, judges of *any* court are elected. *Id.* The difference maker is New York, which elects its trial court judges but not intermediate and final appeals court judges. *Judicial Selection in New York*, *supra* note 67.

70. *Significant Figures*, *supra* note 50.

71. “[D]espite a great deal of skepticism . . . about whether nonpartisan [judicial] elections differ materially from partisan elections,” Professors Michael S. Kang and Joanna M. Shepherd found that the distinction makes a difference with respect to the influence of campaign donations on judicial decisions. *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, 86 N.Y.U. L. REV. 69, 129 (2011).

72. See *State Supreme Courts*, BALLOTPEDIA, https://ballotpedia.org/State_supreme_courts [<https://perma.cc/9ZP4-2AN8>].

73. See JED HANDELSMAN SHUGERMAN, *THE PEOPLE’S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA* 153–54 (2012) (arguing that, historically, longer terms were understood as better insulating high court judges from party politics and special-interest influence than shorter terms).

On the other hand, judicial elections—particularly contested ones as opposed to mere retention elections—are still elections and thus involve campaigning and all of its accoutrements, good and bad.⁷⁴ Candidates need campaign committees to finance their campaign; they need to raise money from donors; and they seek endorsements from interest groups and often political parties even if they are technically nonpartisan candidates.⁷⁵ The political pressures of campaigning have led to various incidents seen as damaging the integrity of the judiciary, particularly where it appears that donors to campaigns are trying to buy outcomes in a particular case or set of cases.⁷⁶ Some reformers have seized on these incidents as grounds for ending judicial elections or, at the least, reforming them significantly.⁷⁷

Insofar as decisions regarding the state-local divide implicate the issues favored or opposed by influential interest groups (and assuming such interest groups attempt to gain favor with judges through campaign donations and endorsements),⁷⁸ there may be good reason to doubt whether the judiciary will be significantly more politically insulated than the legislature. Particularly in those states in which supreme court elections are bruising, big-money affairs, skepticism about the judiciary's ability to be "neutral" seems quite warranted. In such states, one might suspect that a four (of seven) justice majority whose campaigns have been financed heavily by a particular industry might be hard-pressed to rule against such an industry in a state-local dispute.⁷⁹ On the other

74. See, e.g., MELINDA GANN HALL, *ATTACKING JUDGES: HOW CAMPAIGN ADVERTISING INFLUENCES STATE SUPREME COURT ELECTIONS* 65–94 (2015) (reviewing studies of campaign messaging and advertising in judicial elections as well as data on campaigns in the 2000s).

75. See Charles Gardner Geyh, *Judicial Selection and the Search for Middle Ground*, 67 DEPAUL L. REV. 333, 338 (2018) (discussing how campaign contributions to and independent expenditures on behalf of judicial campaigns "exacerbate[] underlying legitimacy problems"). See generally Anthony Champagne, *Interest Groups and Judicial Elections*, 34 LOY. L.A. L. REV. 1391 (2001) (detailing the relationship between interest groups and those seeking judicial office).

76. See, e.g., *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 874 (2009) (holding that a West Virginia Supreme Court justice violated the Due Process Clause of the Fourteenth Amendment by failing to recuse himself from a case involving a corporate party whose chief executive officer had created an independent expenditure organization to benefit the justice's campaign and donated over \$3 million to it). Indeed, *Caperton* was a case of life imitating art insofar as it resembled the facts of a John Grisham novel, *The Appeal*, published one year earlier. See Richard Gillespie, *Buying a Judicial Seat for Appeal: Caperton v. A.T. Massey Coal Co., Inc., Is Right out of a John Grisham Novel*, 30 J. NAT'L ASS'N ADMIN. L. JUDICIARY 309 *passim* (2010).

77. E.g., ALICIA BANNON, BRENNAN CTR. FOR JUST., *RETHINKING JUDICIAL SELECTION IN STATE COURTS* 9 (2016), https://www.brennancenter.org/sites/default/files/2019-08/Report_Rethinking_Judicial_Selection_State_Courts.pdf [<https://perma.cc/DNJ5-HKX5>] (discussing *Caperton* specifically).

78. See Champagne, *supra* note 75, at 1392.

79. The empirical data on the effects of campaign contributions on judicial decisions is mixed. Compare Kang & Shepherd, *supra* note 71, at 107 (finding that campaign contributions influence judicial decisions, but "almost exclusively" where judges are selected through partisan races), with HALL, *supra* note 74, at 176 (finding that aggressive judicial election advertising campaigns have little effect on voter behavior).

hand, state judges face reelection less frequently and in a different manner than legislators and therefore might be just a bit more resistant to electoral pressures. Just how “political” a state’s judiciary may be is a matter of degree and is state-specific, and the assessment of a particular state’s judiciary may affect one’s confidence in that branch’s ability to enforce the *Principles* impartially.

C. *The Shaming Power of Precedent, or the Aspirational Norm of Judicial Neutrality*

Regardless of manner of selection or election of a state’s high court judges, stare decisis, at least in theory, inevitably imposes a degree of consistency and uniformity on the courts’ decisions in the preemption realm. This may be among the best arguments in favor of involving the judiciary in state-local disputes and the best rebuttal to the concerns about political influence raised above. Some might call this dynamic the “shaming power of precedent”—that is, precedent can shame judges into deciding a case in a way that contradicts their policy preferences; at the least, it requires them to explain a departure. The power of precedent over judicial decision-making is inextricably linked to the long-running debate about whether judges should and are capable of deciding cases through “neutral principles” regardless of the outcome of the case.⁸⁰

When departing from a past decision on state-local distribution of power, legislators can be as unprincipled as the electorate will allow. Judges, on the other hand, are at least exposed within the legal community by their hypocrisy. Indeed, evidence shows that judges care deeply about the respect of their audiences, including the legal profession.⁸¹ The existence of a professional and even scholarly community scrutinizing a state court’s judicial decisions may assist in enforcing whatever discipline precedent provides. In this respect, courts in small states or states without law schools—or without law schools whose faculty pay any attention to their state supreme courts—may skate by more easily.

In sum, the institutional forces that affect a judiciary’s makeup, independence, and ability to police state-local disputes in a principled and relatively neutral manner will vary by state depending on the features of its judicial selection system and other aspects of its legal and political culture.

80. See generally Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959) (arguing for adherence to “neutral principles”).

81. See LAWRENCE BAUM, *JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR* 18 (2006).

III. JUDICIAL EXPERIENCE AND TOOLS IN ENFORCING THE STATE-LOCAL DIVIDE

Asking how the judiciary would police preemption is not a completely hypothetical question. Rather, as this part discusses, at least two states never abandoned imperio home rule entirely despite legislative home rule's ascendance over the last several decades. Notably, California and Colorado have both offered some shield-like protection for local authority in their constitutions.⁸² Some other states that have a different or less protective version of a shield against preemption include Minnesota, New York, and Ohio.⁸³ These states might also be illuminative, but they are less forthrightly protective of local autonomy, so this part will focus only on California and Colorado in terms of analyzing how courts have performed recently at protecting cities from preemption.

In discussing the recent history of judicial home-rule decisions in California and Colorado, this part also notes how tier-based scrutiny crept into California's home-rule jurisprudence almost by accident, while the Colorado courts have avoided using that methodology. Because the *Principles* wholeheartedly embraces California's importation of federal tier-based scrutiny as the means for scrutinizing preemptive measures, this part then engages with some of the larger concerns with and criticism of tier-based scrutiny, both at the federal and state levels.

A. *How's It Going? Lessons from California and Colorado*

The two states that have retained some version of imperio home rule most significantly into the early twenty-first century are California and Colorado. California first adopted steps toward home rule as part of its 1879 constitution, but in 1896 it put in place what remain some of the most significant, judicially protected barriers to state preemption in the nation.⁸⁴ Specifically, the 1896 amendments, as clarified in 1914, preserve "municipal affairs" as an area that

82. I discuss each of these states' home-rule systems in detail below. See *infra* Section III.A.

83. See MINN. CONST. art. XII, §§ 1–2 (prohibiting special laws related to local governments unless agreed to by the local government(s) affected); N.Y. CONST. art. IX, § 2(b)(2) (providing that any special law passed by the legislature that "act[s] in relation to the property, affairs or government" of a local government remains "subject to the bill of rights of local governments"); OHIO CONST. art. XVIII, § 3 (allowing for preemption of local authority by the legislature but only through "general law"); see also PRINCIPLES, *supra* note 3, at 1369–71 (discussing how Ohio's "general law" requirement helps protect local autonomy).

84. See John C. Peppin, *Municipal Home Rule in California: I*, 30 CALIF. L. REV. 1, 34–41 (1941) (discussing the background for California's adoption of the 1879 constitution); John C. Peppin, *Municipal Home Rule in California: II*, 30 CALIF. L. REV. 272, 273 (1942) [hereinafter Peppin, *Home Rule II*] (discussing the 1896 and 1914 amendments).

the state may not preempt.⁸⁵ This language remains part of the California Constitution and has been the subject of numerous California judicial decisions.

In Colorado, the state's voters approved amendments in 1902 and 1912 that established certain spheres that are protected from state interference.⁸⁶ As a mid-twentieth-century commentator stated, Colorado home rule can be "[v]iewed as a *negative* doctrine limiting state legislative interference with local affairs of a particular municipality, or with particular local matters of concern to all cities"⁸⁷ Colorado's constitution expressly states that in home-rule cities, the municipal "charter and the ordinances made pursuant thereto in [local and municipal] matters shall supersede within the territorial limits and other jurisdiction of said city or town any law of the state in conflict therewith."⁸⁸ Like the California Constitution, this provision of the Colorado Constitution has been interpreted numerous times by the state's judiciary in the more-than-century since its adoption.

1. California

The California courts have long protected home rule through judicial decisions, though the extent of protection has ebbed and flowed with changing court membership and issues of the day. In the last decade or so, key battles over the state-local divide have concerned local elections, land use, and municipal employment and benefits. The methodology of the California courts in these contexts provides a useful guide as to how the *Principles* might work in application.

The key language in the California Constitution is found in Article XI, Section 5(a):

It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations *in respect to municipal affairs*, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws. City charters adopted pursuant to this Constitution shall supersede any existing charter, and *with respect to municipal affairs* shall supersede all laws inconsistent therewith.⁸⁹

As the discussion below demonstrates, the courts have found this constitutional language to provide the most protection for localities in the realm of local personnel matters. This record may presage how the *Principles*, which specifically grants the highest protection from preemption to local "power to

85. See Peppin, *Home Rule II*, *supra* note 84, at 273.

86. Howard C. Klemme, *The Powers of Home Rule Cities in Colorado*, 36 U. COLO. L. REV. 321, 321–22 (1964).

87. *Id.* at 322.

88. COLO. CONST. art. XX, § 6.

89. CAL. CONST. art. XI, § 5(a) (emphases added).

determine the terms and conditions of . . . [municipal] employees,” may work in application if adopted in toto.⁹⁰

In interpreting this provision, the California Supreme Court purports to use an “analytical framework” that derives from a 1991 decision.⁹¹ First, the court determines “whether the city ordinance at issue regulates an activity that can be characterized as a ‘municipal affair.’”⁹² Second, the court decides whether the case presents an “actual conflict” between local and state law.⁹³ Finally, the court determines whether the law is “reasonably related to . . . resolution of that [statewide] concern” and “‘narrowly tailored’ to avoid unnecessary interference in local governance.”⁹⁴ It is the third part of this analysis that bears the most resemblance to federal tier-based scrutiny review, and partly inspired the NLC proposal.⁹⁵

Before assessing how the California courts have applied this test, including its tiered-scrutiny third part, it is helpful to trace the history of their importation of federal jurisprudence. As Professor Tara Grove points out, the U.S. Supreme Court’s tiers of scrutiny are of “relatively recent vintage.”⁹⁶ It was not “until the early to mid-twentieth century” that the Court began to develop these tiers, and it was even later that they rigidified into the widely known rules applicable today.⁹⁷ The California Constitution’s provision on home rule, however, traces back to the late nineteenth century. So how did a federal jurisprudential method that developed around 1950 get incorporated into the California courts’ interpretation of their constitutional home-rule provision from decades earlier?

The 1991 California Supreme Court decision, *California Federal Savings & Loan Ass’n v. City of Los Angeles*,⁹⁸ appears to be the first time that the court invoked federal tiers of scrutiny in a home-rule decision. Before that decision, a Westlaw search reveals no California cases containing the terms “tailored” and “home rule” or “municipal.” In *California Federal Savings & Loan*, the court laid out what sounded like a new test for weighing potentially preemptive state legislation against the impacted local ordinances: “In the event of a true conflict

90. PRINCIPLES, *supra* note 3, at 1352.

91. This oft-cited case is *Cal. Fed. Sav. & Loan Ass’n v. City of Los Angeles*, 812 P.2d 916 (Cal. 1991). *See also* *State Bldg. & Constr. Trades Council of Cal. v. City of Vista*, 279 P.3d 1022, 1027 (Cal. 2012).

92. *City of Vista*, 279 P.3d at 1027 (citing *Cal. Fed. Sav. & Loan*, 812 P.2d at 924–25).

93. *Id.*

94. *Id.*

95. PRINCIPLES, *supra* note 3, at 1367 (citing “narrow tailoring requirement” from a California case, *Johnson v. Bradley*, 841 P.2d 990 (Cal. 1992)).

96. Tara Leigh Grove, *Tiers of Scrutiny in a Hierarchical Judiciary*, 14 GEO. J.L. & PUB. POL’Y 475, 475 (2016).

97. *See* Richard Fallon, *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1284 (2007) (“Before 1960, what we would now call strict judicial scrutiny . . . did not exist.”).

98. 812 P.2d 916 (Cal. 1991).

between a state statute *reasonably tailored* to the resolution of a subject of statewide concern and a charter city tax measure, the latter ceases to be a ‘municipal affair’ to the extent of the conflict and must yield.”⁹⁹ Despite articulating the test this way, the court then went on to conclude that the state law in question, despite needing only to be “reasonably tailored” to the resolution of the statewide issue it addressed, was actually “narrowly tailored” to that end.¹⁰⁰ By passing a test stricter than the one applicable to it, the state law passed with flying colors!

Despite initially articulating and applying its tier-based scrutiny test this way, over the next several years the test metamorphosed further. A key decision along this doctrinal path came a year later in *Johnson v. Bradley*.¹⁰¹ In *Johnson*, the court transformed the test for state preemption from “reasonably” tailored to “narrowly” tailored. It did this by altering a quotation from *California Federal Savings & Loan*: “If, however, the court is persuaded that the subject of the state statute is one of statewide concern and that the state statute is reasonably related [and ‘narrowly tailored’] to its resolution,” then the legislature may preempt.¹⁰² So within one year, “reasonably tailored” became “narrowly tailored,” which presumably is a significant increase in the level of scrutiny applied. More recent cases from the intermediate appellate court say that a potentially preemptive statute must be “reasonably related” to a statewide goal but “narrowly tailored” to avoid “unnecessary” infringement on “municipal affairs.”¹⁰³

Even as the California Supreme Court ratcheted up the level of scrutiny, it has never required that the state interest in the potentially preemptive legislation be any more than “reasonably related” to “resolution of the issue of statewide concern” addressed by the legislation.¹⁰⁴ Having said that, the courts have made clear that this part of the test does not offer carte blanche to any state law. Rather, a court must “identif[y] a convincing basis for legislative action originating in extramunicipal concerns, one justifying legislative suppression based on sensible, pragmatic considerations.”¹⁰⁵ Also, the state must show that “under the historical circumstances presented, the state has a more substantial interest in the subject than the charter city.”¹⁰⁶ The latter sounds a bit like a “substantial state interest,” or perhaps like the balancing that comes under the narrow tailoring test. Indeed, requiring the state to show a “more substantial interest in the subject” would be just a straightforward balancing of

99. *Id.* at 918 (emphasis added).

100. *Id.* at 930.

101. 841 P.2d 990 (1992).

102. *Id.* at 996 (alteration in original).

103. *Jauregui v. City of Palmdale*, 172 Cal. Rptr. 3d 333, 342 (Ct. App. 2014) (citing *Cal. Fed. Sav. & Loan Ass’n*, 812 P.2d at 925).

104. *See id.*

105. *Id.* at 344.

106. *Id.*

the two relevant “interests,” akin to the old imperio approach of adjudging a matter “statewide” or “local.” But in the very same opinion, the California Supreme Court said that it aimed to avoid “compartmentalization” of areas of governmental activity “as either a municipal affair or one of statewide concern.”¹⁰⁷

With the exception of the Los Angeles public campaign financing scheme at issue in *Johnson*, the California courts have almost uniformly upheld state legislation as “narrowly tailored” in terms of their imposition on local government. The appellate cases upholding state laws preempting local ordinances span a wide array of subjects, including immigration, land use, pay and procedural protections for municipal employees, local firearm regulation, and appeals processes for building code citations.¹⁰⁸

In the area of municipal employees and contractors, however, much like local elections in *Johnson*, the California Supreme Court has shown a special solicitude for local control.¹⁰⁹ In *State Building & Construction Trades Council v. City of Vista*,¹¹⁰ despite the state legislature’s finding of numerous statewide interests as reasons for a municipal contractor prevailing wage statute, the court rejected the idea that the legislation furthered a statewide concern as a matter of law.¹¹¹ The court cited the narrow nature of the statute (as opposed to a general minimum wage, for instance) as well as the fact that it infringed upon local “autonomy [regarding] the expenditure of public funds,” which the court viewed as “at the heart of what it means to be an independent governmental

107. *Id.*

108. *See City of Huntington Beach v. Becerra*, 257 Cal. Rptr. 3d 458, 463 (Ct. App. 2020) (holding that the California Values Act, which restricted the ability of local law enforcement agencies to inquire into immigration status, place individuals on an immigration hold, and use personnel or resources to participate in certain immigration enforcement activities, “addressed matters of statewide concern—including public safety, health, effective policing, and protection of constitutional rights,” was “reasonably related to resolution of those statewide concerns,” and was “narrowly tailored” to addressing those matters); *Lippman v. City of Oakland*, 229 Cal. Rptr. 3d 206, 217 (Ct. App. 2017) (holding that state law requirements for resolution of appeals affecting property owners did not impermissibly infringe on the city’s home-rule powers because the appellate process therein was “narrowly tailored to ensure uniform application of state law”); *Marquez v. City of Long Beach*, 244 Cal. Rptr. 3d 57, 76 (Ct. App. 2019) (holding that the statewide minimum wage as applied to a charter city’s employees addressed a matter of statewide concern and was “appropriately tailored” to address statewide concern in the health and welfare of workers); *see also Fiscal v. City & County of San Francisco*, 70 Cal. Rptr. 3d 324 (Ct. App. 2008) (upholding statewide preemption of local firearm regulation, but without employing a “narrow tailoring” analysis); *Morgado v. City & County of San Francisco*, 220 Cal. Rptr. 3d 497 (Ct. App. 2017) (upholding state Public Safety Officers Procedural Bill of Rights against a city attempt to terminate a police officer).

109. *See, e.g., State Bldg. & Constr. Trades Council of Cal. v. City of Vista*, 279 P.3d 1022, 1034 (Cal. 2012).

110. 279 P.3d 1022.

111. *Id.* at 1034.

entity.”¹¹² Because no statewide concern was presented, the majority easily found that this law failed the test articulated in *California Federal Savings & Loan*.

In one of two dissents, Justice Werdegar understandably faulted the majority for relying on a Depression-era case that “interpreted a different law long ago eclipsed by more modern economic ideas.”¹¹³ Justice Werdegar also faulted the majority for “significantly undervalu[ing] the statewide economic concerns the law addresses”¹¹⁴ Indeed, Justice Werdegar thought that the issue of whether the law promoted a “statewide concern” was “not a close question.”¹¹⁵ Namely, Werdegar brought up the statewide benefit of municipalities paying prevailing wages and the effect of such a requirement on apprenticeship programs.¹¹⁶ Justice Liu also offered a piercing dissent in which he criticized the majority’s approach as a return to the rigid “compartmentalization” of statewide and municipal affairs.¹¹⁷

Clearly, whether the prevailing wage rates for city contractors is a matter of “statewide concern”—or, in the language of the *Principles*, an “overriding state interest”—is a question lacking an easy answer. *City of Vista* certainly offers reason to wonder why judges are better able to answer this question than the legislature.¹¹⁸ Hence, California’s example demonstrates that the judiciary’s heightened involvement in home-rule questions may, at times, offer some additional protection from preemption to cities, but a system of tier-based scrutiny is also likely to be unpredictable and leave much discretion in the courts.

2. Colorado

The other prominent state that uses a form of home rule in which the judiciary plays a robust role in protecting certain areas of local decision-making from state preemption is Colorado, whose home-rule provision dates back to the early twentieth century.¹¹⁹ Like California, Colorado identifies certain areas

112. *Id.* (“[W]e conclude that no statewide concern has been presented justifying the state’s regulation of wages that charter cities require their contractors to pay to workers hired to construct locally funded public works.”).

113. *Id.* at 1035 (Werdegar, J., dissenting).

114. *Id.*

115. *Id.* at 1038.

116. *Id.* at 1040.

117. *See id.* at 1048 (Liu, J., dissenting).

118. It is worth noting that the prevailing wage statute struck down in *City of Vista* might separately qualify as an unconstitutional “unfunded mandate” under the *Principles*. *See* PRINCIPLES, *supra* note 3, at 1353 (prohibiting states from requiring cities “to provide additional services or undertake new activities without providing an additional appropriation that fully funds the newly mandated service or activity”).

119. For a good summary of the history of municipal home rule in Colorado, see Howard C. Klemme, *The Powers of Home Rule Cities in Colorado*, 36 U. COLO. L. REV. 321 (1964).

that qualify as “local and municipal matters” for the purpose of home-rule analysis, including the terms and tenure of municipal employees and local elections.¹²⁰ These provisions give municipal litigants and others solid textual ammunition to attack state legislation that invades these areas, if not others.

Unlike California, the Colorado courts do not purport to balance state and local interests for matters of “local concern.” Local legislation in areas exclusively of “local concern” trumps preemptive state legislation outright.¹²¹ The key inquiry, therefore, happens before analysis of the conflict, at the categorization stage. At that stage, Colorado courts determine whether an issue is a matter of “local,” “statewide,” or “mixed” concern.¹²² In the case of the latter two, state legislation triumphs in the case of a conflict with local action.¹²³

To determine which “compartment” a particular matter falls into, the Colorado courts employ an analysis that relies on at least four factors: “(1) the need for statewide uniformity of regulation; (2) the extraterritorial impact of local regulation; (3) whether the matter has traditionally been regulated at the state or local level; and (4) whether the Colorado Constitution specifically commits the matter to state or local regulation.”¹²⁴ On a few isolated occasions, federal scrutiny-like language has seeped into Colorado jurisprudence. However, for the most part, Colorado’s judiciary applies the four-part test in its own way. Rather than examine whether the state’s interest is “compelling” or “substantial,” the courts have used the term “sufficiently dominant,” but usually only in the context of analyzing implied preemption—i.e., determining whether the enacted legislation evinces an intent to occupy the field, for instance.¹²⁵

So, to the extent that Colorado courts balance statewide versus local interests, they do so in their application of the first two factors: the need for statewide uniformity and the extraterritorial impact of local action. Interestingly, on these factors, the *Principles* cautions that “[i]t is not enough for

120. See COLO CONST. art XX, § 6(a)–(h) (including language on municipal employees, police and municipal courts, municipal elections, municipal bonds, park and water district consolidation, assessment and levy of taxes and special assessments, and assessment and collection of fines).

121. *City of Longmont v. Colo. Oil & Gas Ass’n*, 369 P.3d 573, 579 (Colo. 2016) (“[I]n matters of local concern, a home-rule ordinance supersedes a conflicting state statute.”); *City & County of Denver v. Qwest Corp.*, 18 P.3d 748, 754 (Colo. 2001) (en banc) (noting that a home-rule municipality “has plenary authority to regulate matters of local concern”).

122. See *Colo. Oil & Gas Ass’n*, 369 P.3d at 579.

123. *Id.* (“[W]hen a home-rule ordinance conflicts with state law in a matter of either statewide or mixed state and local concern, the state law supersedes that conflicting ordinance.”); *Voss v. Lundvall Bros., Inc.*, 830 P.2d 1061, 1066 (Colo. 1992) (en banc) (“[I]n a matter of purely statewide concern a state statute or regulation supersedes a conflicting ordinance of a home-rule city.”).

124. *Webb v. City of Black Hawk*, 295 P.3d 480, 486 (Colo. 2013).

125. *E.g.*, *Colo. Min. Ass’n v. Bd. of Cnty. Comm’rs of Summit Cnty.*, 199 P.3d 718, 724 (Colo. 2009) (“Sufficient dominancy is one of several grounds for implied state preemption of a local ordinance.”).

a state simply to decry the lack of uniformity, as local variation is inherent to any regime of home rule.”¹²⁶ The *Principles* further urges “courts [to] evaluate skeptically claims that statewide uniformity is necessary in any given context,” and also assert that “[t]he claim that a given local law has external effects should . . . be evaluated skeptically.”¹²⁷ Indeed, the *Principles* remains neutral when citing one case that upheld state preemption by implication and another case that concluded the preemption was express.¹²⁸ For preemption to succeed on factors like Colorado’s first and second, the *Principles* makes clear that the regional or statewide effects of the local policy must be both “demonstrable and substantial.”¹²⁹

There is some similarity in form and substance between Colorado’s approach and that of the *Principles*, even if the similar inquiries occur at different stages of the process. In practice, Colorado courts have sustained preemptive laws that address matters of natural resource extraction, while displaying a mixed record in other land use and zoning cases. For instance, in a prominent recent case, *City of Longmont v. Colorado Oil & Gas Ass’n*,¹³⁰ the Colorado Supreme Court considered whether a city’s ban on hydraulic fracturing—also known as fracking—could be trumped by the state’s Oil and Gas Conservation Act.¹³¹ The court ruled that the local ban affected a matter of mixed statewide and local concern.¹³² In assessing the need for statewide uniformity of regulation, the court relied on an earlier precedent, which recognized that subterranean pools of oil and gas often transcend municipal boundaries.¹³³ In its analysis of the second factor—the extraterritorial impact—the court cited the potential increased cost of producing oil and gas, if limited to those parts of a pool outside the city, and the effect that such a limitation would have on royalties.¹³⁴ So far, so good, even under the *Principles*. But then the court went on to cite the potential “ripple effect” of other cities adopting an ordinance like Longmont’s and cited a case that warned of a “patchwork of local . . . rules.”¹³⁵

126. PRINCIPLES, *supra* note 3, at 1345.

127. *Id.* at 1368.

128. *Id.* (first citing *City of Northglenn v. Ibarra*, 62 P.3d 151 (Colo. 2003) (en banc) (finding that a city ordinance prohibiting unrelated sex offenders from living together in single-family homes in the city was impliedly preempted by state laws that govern the foster care system); then citing *Webb v. City of Black Hawk*, 295 P.3d 480 (Colo. 2013) (finding that a city ordinance banning bicycles on virtually all of its streets conflicted, and was expressly preempted by, a state statute requiring that cities allow bikes on streets unless they provided an alternative bike path nearby)).

129. *Id.*

130. 369 P.3d 573 (Colo. 2016).

131. *Id.* at 577.

132. *Id.* at 581.

133. *Id.* at 580 (citing *Voss v. Lundvall Bros.*, 830 P.2d 1061 (Colo. 1992) (en banc)).

134. *Id.* at 581.

135. *Id.* (citing *Webb v. City of Black Hawk*, 295 P.3d 480, 491 (Colo. 2013)).

The *Principles*, by contrast, specifically cautions against accepting the patchwork argument, although it does not rule it out entirely.¹³⁶

On matters of land use and zoning, the Colorado courts have a mixed record. The Colorado Supreme Court has upheld a statewide ban on rent control as applied to a town's inclusionary zoning ordinance,¹³⁷ citing the state's "significant interests in maintaining the quality and quantity of affordable housing in the state."¹³⁸ Such language would presumably bode well for statewide zoning reforms designed to promote affordable housing similar to those now being introduced or considered in several states.¹³⁹ On the other hand, the court in the same opinion also noted that "state residents have an expectation of consistency throughout the state" regarding "[l]andlord-tenant relations."¹⁴⁰ This kind of logic is redolent of the "private law exception" to home-rule authority that the *Principles* readily rejects.¹⁴¹

The Colorado Supreme Court also upheld statewide telecommunications easements as against conflicting local programs¹⁴² and separately struck down restrictions on sex offender residency that cities have defended as zoning ordinances.¹⁴³ In the latter, while applying the four-part test for determining whether a matter is of "statewide," "local," or "mixed" concern, the court found the state's interest in housing foster children "sufficiently dominant" to override the local regulation because it was a matter of implied preemption.¹⁴⁴ For the most part, therefore, in Colorado, the state can usually find a way to justify its

136. PRINCIPLES, *supra* note 3, at 1368 ("Because a diversity of regulatory approaches is one of the benefits of local self-government, courts should evaluate skeptically claims that statewide uniformity is necessary in any given context.")

137. *Town of Telluride v. Lot Thirty-Four Venture, LLC*, 3 P.3d 30, 32 (Colo. 2000) (en banc).

138. *Id.* at 38.

139. *See, e.g.*, Act of Aug. 8, 2019, ch. 639, 2019 Or. Laws 2011 (codified as amended in scattered sections of OR. REV. STAT.); Act of Aug. 8, 2019, ch. 640, 2019 Or. Laws 2018 (codified as amended in scattered sections of OR. REV. STAT.); Act of June 10, 2021, Pub. Act No. 21-29, 2021 Conn. Legis. Serv. 1, 8-12 (West); *see also* Christopher S. Elmendorf, *Beyond the Double Veto: Housing Plans as Preemptive Intergovernmental Compacts*, 71 HASTINGS L.J. 79, 83, 114-16 (2019) (analyzing California's preemptive intergovernmental compact to plan for more housing and allow greater density in existing residential zones).

140. *See Town of Telluride*, 3 P.3d at 38.

141. *See* PRINCIPLES, *supra* note 3, at 1355 ("This provision pointedly does not include a 'private law exception' to local power . . .") (citing, inter alia, Diller, *Private Right of Action*, *supra* note 27, at 1109).

142. *City & County of Denver v. Qwest Corp.*, 18 P.3d 748, 751 (Colo. 2001) (en banc).

143. *City of Northglenn v. Ibarra*, 62 P.3d 151, 153 (Colo. 2003) (en banc). *But see* *Ryals v. City of Englewood*, 364 P.3d 900, 903 (Colo. 2016) (answering a certified question from a federal appellate court and finding no conflict between state law and a local ordinance that effectively banned sex offenders from ninety-nine percent of a city).

144. *City of Northglenn*, 62 P.3d at 163; *see also* *Voss v. Lundvall Bros.*, 830 P.2d 1061, 1068 (Colo. 1992) (en banc) (concluding that the state's interest in oil and gas is "sufficiently dominant to override" a local ban on drilling).

preemption of local authority as involving a matter of at least “mixed” statewide and local concern.

In at least one other land-use case, however, the locality has won. The Colorado Supreme Court upheld Telluride’s use of extraterritorial eminent domain; it did so not because it found a distinct “local” as opposed to “statewide” or “mixed,” interest but because the state constitution specifically committed this power to home-rule cities.¹⁴⁵ Indeed, the Colorado Supreme Court’s focus on the constitutional text provides the key, perhaps, to the other cases in which Colorado municipalities have prevailed in conflicts with state laws attempting to preempt local laws.

In the municipal employment context, for instance, the Colorado Supreme Court held that the state could not require certain training of Denver sheriff’s deputies.¹⁴⁶ Much of the majority’s reasoning focused on the state constitution’s textual commitment of employment matters to home-rule cities.¹⁴⁷ The dissent, by contrast, would have given more credit to the extraterritorial interests presented by law enforcement.¹⁴⁸ Combined, these cases demonstrate the importance of textual commitment of a specific area to local regulation in Colorado home-rule jurisprudence.

Colorado’s example is a reminder that any state considering the *Principles* should, for instance, be particularly careful about the language in Section D.2, which, among other things, recognizes a home-rule government’s “power to determine the terms and conditions of its employees.”¹⁴⁹ As applied to the Denver sheriff’s deputy case, the state’s interest in mandatory training, assuming that it was considered a “term” or “condition” of employment, would need to pass the higher of the *Principles*’ two scrutiny tests: “narrowly tailored” to “advance an overriding state concern.” It is difficult to see how the Colorado law would have survived that test, but there will, of course, inevitably be much discretion in applying it.

145. *Town of Telluride v. San Miguel Valley Corp.*, 185 P.3d 161, 167 (Colo. 2008) (en banc) (“Article XX [of Colorado’s constitution] expressly authorizes home rule municipalities to condemn properties outside of their territorial boundaries, necessarily implicating interests which are not ‘purely’ local. Where the constitution specifically authorizes a municipal action which potentially implicates statewide concerns, the municipality’s exercise of that prerogative is not outside the bounds of its authority.”).

146. *Fraternal Ord. of Police, Colo. Lodge # 27 v. City & County of Denver*, 926 P.2d 582, 584–85 (Colo. 1996) (en banc).

147. *Id.* at 591–92 (“[T]he jurisdiction, term of office, duties and *qualifications* of all . . . officers [of the city and county of Denver] shall be such as in the charter may be provided . . .” (quoting COLO. CONST. art. XX, § 2)).

148. *Id.* at 596 (Lohr, J., concurring in part and dissenting in part) (“Denver deputy sheriffs . . . have substantial ‘extraterritorial impact’ in performing their duties as peace officers in Denver, the State capital and center of commerce.”).

149. PRINCIPLES, *supra* note 3, at 1352.

Indeed, the commentary to Section D of the *Principles* notes that the presumption against preemption “is likely to be especially strong [in the municipal employment context] because the decisions concerning local government structure and organization are particularly unlikely to have extralocal consequences.”¹⁵⁰ In his partial dissent in *Fraternal Order of Police, Colorado Lodge # 27 v. City & County of Denver*,¹⁵¹ however, Justice Lohr emphasized Colorado’s “significant interest in setting minimum training and qualification standards applicable to peace officers who serve as Denver deputy sheriffs” due to the potential extralocal consequences of their behavior and duties.¹⁵² Justice Lohr may have used the term “overriding” if that were the standard called for under the applicable analysis, as in the *Principles*. Even if “overriding,” under the *Principles*, the state would still bear the burden of showing that the legislation is “narrowly tailored” to advance the state’s “overriding concern.”

In sum, California and Colorado provide examples of what some courts are currently doing in policing the state-local divide. While the *Principles* differs in the ways explored above, it may well entrench a system that protects local autonomy over employees and contractors. Such protection might limit the state’s authority to regulate prevailing wages and require minimum training standards for public safety officers throughout the state, but they could also work in reverse and protect higher local contractor wages and heightened training and supervision requirements.¹⁵³ The commentary to the *Principles* anticipates that adoption of the model language would require courts to strike a delicate balance in this area.¹⁵⁴ Since the *Principles* proposes the use of tier-based scrutiny as the means for striking this balance, the next part of this Article homes in on the potential pitfalls of courts using that method for evaluating action by the political branches.

150. *Id.* at 1373.

151. 926 P.2d 582 (Colo. 1996) (en banc).

152. *Id.* at 595–96 (Lohr, J., concurring in part and dissenting in part).

153. See NESTOR DAVIDSON, RICK SU & MARISSA ROY, LOC. SOLS. SUPPORT CTR., PREEMPTING POLICE REFORM: A ROADBLOCK TO SOCIAL JUSTICE 5 (2021), <https://static1.squarespace.com/static/5ce4377caeb1ce00013a02fd/t/6176eb48b158eb2ed44100e4/1635183433487/PreemptingPoliceReform-October2021.pdf> [<https://perma.cc/92JF-YSZT>] (“State laws have insulated police departments from local accountability for decades . . .”).

154. PRINCIPLES, *supra* note 3, at 1378 (noting that “local control of the . . . municipal workforce is not absolute” and that “[s]tates may . . . want to require local governments to meet reasonable, generally applicable . . . equity[] or labor standards, although costly state mandates should generally be accompanied by state aid”).

IV. TIER-BASED SCRUTINY REVIEW IN THE FEDERAL AND STATE COURTS: ALTERNATIVES AND CRITICISM

Home rule is not the only area of state constitutional law into which federal scrutiny-based, tier-level analysis has crept for assessing challenges to governmental action. Numerous state courts now rely on this form of analysis for interpreting all sorts of state constitutional provisions, including those that protect freedom of expression or require equal or uniform treatment of persons or entities by the law.¹⁵⁵ Some state courts even use scrutiny tiers and a tailoring analysis to analyze state constitutional provisions that have no cognate in federal constitutional law, such as provisions that protect the “right to a remedy”—that is, relief in civil court when suing for a tort.¹⁵⁶ This part explores concerns about tier-based scrutiny as a jurisprudential tool as such, as well as more specific concerns about importing it into state constitutional law.

A. *Tier-Based Scrutiny Review in the Federal Courts*

Scholars have offered myriad critiques of federal tier-based scrutiny jurisprudence,¹⁵⁷ often deriding it for being “overly rigid” and “mechanical.”¹⁵⁸ So much of tier-based scrutiny review depends on the level of scrutiny to be applied, with that determination essentially preordaining the outcome of a legal challenge.¹⁵⁹ Other criticisms fall into two camps: scrutiny-based review is either too lax in upholding legislation under the guise of “rational basis” review,¹⁶⁰ or

155. See, e.g., *Connerly v. State Pers. Bd.*, 112 Cal. Rptr. 2d 5, 19 (Ct. App. 2001) (“Although our state constitutional guarantee [of equal protection] is independent of the federal guarantee, in the context of this case it is, with one exception, applied in a manner identical with the federal guarantee.”); *Coleman v. City of Mesa*, 265 P.3d 422, 432 (Ariz. Ct. App. 2011) (using federal terms of art to analyze free speech protection simultaneously under Article 2, Section 6, of the Arizona Constitution and the First Amendment to the U.S. Constitution).

156. See David Schuman, *The Right to a Remedy*, 65 TEMP. L. REV. 1197, 1204 (1992) (noting that one “typology” among state courts uses “federal ‘level of scrutiny’ terminology to describe different treatments of the remedy guarantee” (citing Janice Sue Wang, *State Constitutional Remedies Provisions and Article I, Section 10 of the Washington State Constitution: The Possibility of Greater Protection of Established Tort Causes of Action and Remedies*, 64 WASH. L. REV. 203, 208–11 (1989))).

157. Tara Leigh Grove, *Tiers of Scrutiny in a Hierarchical Judiciary*, 14 GEO. J.L. & PUB. POL’Y 475, 487 (2016) (“[S]cholars have severely criticized the tiers of scrutiny established by the [U.S.] Supreme Court.” (first citing Randy E. Barnett, *Scrutiny Land*, 106 MICH. L. REV. 1479, 1484 (2008); then citing Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 484, 491–92 (2004))).

158. *Id.* at 487.

159. *Id.* at 485–86 (“As Kathleen Sullivan has pointed out, [t]he key move in litigation under a two-tier system is steering the case onto the preferred track. The genius of this tracking device is that outcomes can be determined at the threshold without the need for messy balancing.” (quoting Kathleen Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 296 (1992))).

160. This criticism often comes from economic conservatives; Randy Barnett, for instance, is a key proponent of such views. See RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 339, 345–48 (2014) [hereinafter BARNETT, *RESTORING THE LOST*

it is too harsh because it strikes down too much of whatever falls into “strict scrutiny.”¹⁶¹ In assessing the *Principles*, it is the second of these two critiques that would be most relevant, since the proposal expressly and newly empowers judges to invalidate state legislation.

The criticism of scrutiny-based review as too judge-empowering and harsh has spanned the ideological gamut. In the 1960s and 1970s, some of the most prominent criticism came from the right end of the ideological spectrum, as the U.S. Supreme Court used heightened scrutiny to strike down limitations on contraception, abortion, legal distinctions between the genders, and government regulation of free speech and association.¹⁶² As the Court increasingly used strict scrutiny to invalidate, inter alia, affirmative action and other race-based programs with an ameliorative purpose,¹⁶³ campaign finance regulations,¹⁶⁴ and government regulation of commercial “speech” to protect public health and consumers¹⁶⁵ criticism of scrutiny-based review increasingly emanated from the left.¹⁶⁶

Critics of scrutiny-based review have generally looked more favorably on other methods of judicial review—either from the Supreme Court’s past or from other nations—that they consider more flexible and profitable. The two most

CONSTITUTION]; Randy E. Barnett, *Keynote Remarks: Judicial Engagement Through the Lens of Lee Optical*, 19 GEO. MASON L. REV. 845, 859–60 (2012).

161. See, e.g., Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3178 (2015) [hereinafter Jackson, *Age of Proportionality*] (“A standard focused not only on the nature of the classification but also on the relative nature of the harm complained of and its relationship to the particular government interests at stake would allow courts the flexibility to hold legislatures accountable without invalidating most legislation.”).

162. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (striking down a state law prohibiting the sale or use of contraceptives); *Roe v. Wade*, 410 U.S. 113, 166 (1973) (striking down a Texas state law prohibiting abortion at any stage of pregnancy); *Craig v. Boren*, 429 U.S. 190, 197 (1976) (adopting a heightened-scrutiny standard for analyzing legal distinctions between genders); Fallon, *supra* note 97, at 1292–93 (discussing the Warren Court’s use of strict scrutiny). For criticism of the Warren Court’s use of strict scrutiny to protect “fundamental” rights, see generally PHILIP B. KURLAND, *POLITICS, THE CONSTITUTION, AND THE WARREN COURT* (1970).

163. See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 320 (1978) (holding that a university’s special admissions program based on race violated the Equal Protection Clause of the Fourteenth Amendment); see also *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 551–52 (1989) (Marshall, J., dissenting) (criticizing the application of strict scrutiny to “race-conscious remedial measures”).

164. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 143 (1976) (holding that limitations on campaign expenditures by a candidate are unconstitutional).

165. See, e.g., *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976) (holding that the First Amendment protects commercial speech).

166. For overall criticism of the Supreme Court’s rightward shift in individual rights, see MARY ANNE FRANKS, *THE CULT OF THE CONSTITUTION: OUR DEADLY DEVOTION TO GUNS AND FREE SPEECH* (2019); JEFFERSON DECKER, *THE OTHER RIGHTS REVOLUTION: CONSERVATIVE LAWYERS AND THE REMAKING OF AMERICAN GOVERNMENT* (2016); AMANDA HOLLIS-BRUSKY, *IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION* (2015).

commonly invoked alternatives to scrutiny tiers are reasonableness, often said to be the Supreme Court's method for assessing rights-based claims before the advent of the current system, and proportionality-based review, associated with the constitutional courts of foreign nations like Canada and Germany.¹⁶⁷ Under the first approach, the Supreme Court of the nineteenth and early twentieth centuries asked whether legislation was "reasonable"; the fulfillment of this criterion was necessary for a piece of legislation to be a valid exercise of the state's police power.¹⁶⁸ Perhaps unsurprisingly, "reasonableness" as a jurisprudential method was highly unpredictable; its demands could be understood more or less stringently by different judges, even in the same case.¹⁶⁹ Some scholars, however, have suggested reviving something like a reasonableness standard of review. Like Professor Randy Barnett, some think it better protects liberty—including economic liberty—than current review models,¹⁷⁰ while others prefer a unified review mechanism like reasonableness to the "simplistic" rigidity of tier-based scrutiny review.¹⁷¹

In contrast to reasonableness review, proportionality review assesses the constitutionality of a challenged governmental action more contextually. Under proportionality review, which the Supreme Court has used only in a couple of discrete contexts, larger harms imposed by the government should be justified by weightier reasons.¹⁷² Proportionality review is quite popular in other legal systems, with the United States often seen as an "outlier" in not using the methodology to the same degree.¹⁷³ Different countries' judiciaries administer it differently; Canada, Germany, and Israel, for instance, include in their analyses a question of whether the intrusion on the challenger's rights can be justified by the benefits of achieving an important public goal.¹⁷⁴

167. On proportionality, see, for example, Jamal Greene, *Rights as Trumps*, 132 HARV. L. REV. 28, 34 (2018); Jackson, *Age of Proportionality*, *supra* note 161; on reasonableness, see, for example, Jeffrey D. Jackson, *Putting Rationality Back into the Rational Basis Test: Saving Substantive Due Process and Redeeming the Promise of the Ninth Amendment*, 45 U. RICH. L. REV. 491, 493 (2011) (advocating for "the adoption of a strengthened rational basis test that would allow courts to scrutinize the actual purpose behind legislation and demand that the legislation actually be reasonably related to its valid legislative purpose").

168. *E.g.*, *Lochner v. New York*, 198 U.S. 45, 56 (1905) (asserting that courts must determine if an exercise of the police power is "fair, reasonable, and appropriate").

169. Fallon, *supra* note 97, at 1286–87.

170. See BARNETT, *RESTORING THE LOST CONSTITUTION*, *supra* note 160, at 160–61; see also Steven G. Calabresi, *The Originalist and Normative Case Against Judicial Activism: A Reply to Professor Randy Barnett*, 103 MICH. L. REV. 1081, 1093 (2005) (reviewing BARNETT, *RESTORING THE LOST CONSTITUTION*, *supra* note 160) ("Barnett seems to think the Fourteenth Amendment is a large blank check to judges to sit in judgment on the reasonableness of state laws.").

171. *See, e.g.*, Goldberg, *supra* note 157, at 581–82.

172. Jackson, *Age of Proportionality*, *supra* note 161, at 3098 (discussing the Supreme Court's use of proportionality review in the context of the Eighth Amendment's ban on cruel and unusual punishment as well as in reviewing the assessment of punitive damages under the Fourteenth Amendment).

173. *Id.* at 3096.

174. *Id.* at 3098–101 (discussing the concept of "proportionality as such").

Advocates of proportionality in the United States have argued that this form of “balancing” better protects rights and provides a “relatively systematic, transparent, and trans-substantive doctrinal structure.”¹⁷⁵ Professor Jamal Greene, for instance, looking to other countries’ examples, has praised proportionality as a “structured approach to limitations on rights” that provides “a transsubstantive analytic frame, a kind of intermediate scrutiny for all.”¹⁷⁶ It “invites parties with a diverse set of commitments to remain invested in the constitutional system rather than alienated from it” in part because “they might win tomorrow,” if they did not win today, “on different facts.”¹⁷⁷

By explicitly adopting the tier-based scrutiny system as opposed to something like proportionality or reasonableness review, the *Principles* potentially invites judges to strike down all manner of preemptive statutes that violate the “rights” of local governments.¹⁷⁸ This is clearly not the intent of the proposal. The commentary makes clear that preemption ought to be allowed in certain instances.¹⁷⁹ But the text’s inherent vagueness, coupled with the use of tier-based scrutiny, could lead some judges, who largely take their cues on applying tier-based scrutiny from the federal judiciary, to invalidate much preemptive legislation. The fans of proportionality, on the other hand, would likely suggest that the methodology is preferable for resolving questions that fall within the zone of “epistemic uncertainty”—that is, where it is far from clear whether there is truly a “statewide” interest at stake and how “overriding” or “substantial” it is.¹⁸⁰ Proponents of reasonableness might prefer its flexibility to the *Principles*’ tier-based scrutiny for preemption, even while recognizing that as a standard it might be unpredictable.

One intriguing but limited possibility for resolving some state-local disputes under the *Principles* comes from one of its authors, Professor Nestor Davidson. Davidson has argued that in deciding state-local disputes, courts should look for “normative guidance” to the “[s]tate constitutional individual-rights provisions [that] address[] equality and equity in many states, as well as employment, education, social welfare, and the environment.”¹⁸¹ Davidson cites

175. Jud Mathews & Alec Stone Sweet, *All Things in Proportion? American Rights Review and the Problem of Balancing*, 60 EMORY L.J. 797, 797 (2011).

176. See Greene, *supra* note 167, at 58.

177. See *id.* at 84.

178. Indeed, one of the *Principles*’ most vocal critics, and a participant in this symposium, has found this fault. See David Schleicher, *Constitutional Law for NIMBYs: A Review of ‘Principles of Home Rule for the 21st Century’ by The National League of Cities*, 81 OHIO ST. L.J. 883, 905 (2020) (noting that the *Principles* would give “judges . . . tons of new tools to strike down” state limitations on local zoning authority by requiring narrow tailoring and substantial justification).

179. See PRINCIPLES, *supra* note 3, at 1345.

180. Jackson, *Age of Proportionality*, *supra* note 161, at 3145 (quoting ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 399–401, 411–18 (Julian Rivers trans., 2010)).

181. Nestor M. Davidson, *The Dilemma of Localism in an Era of Polarization*, 128 YALE L.J. 954, 954 (2019).

New Jersey's famous case, *Southern Burlington County NAACP v. Township of Mount Laurel*,¹⁸² case as a paradigmatic example, in that it relied on the state's "general welfare" clause to limit local zoning authority that had excluded lower-income residents.¹⁸³

Davidson's proposal might work better within a proportionality or reasonableness framework rather than the rigid scrutiny framework. In assessing the validity of state preemption of a local fracking regulation, for instance, a court would weigh environmental protection (if that commitment is expressed in the state constitution, as it is in several states) against the state's interest in promoting economic growth and energy resource capabilities to environmental protection.¹⁸⁴ In such a situation, proportionality allows for more focus on what a local government that seeks to ban fracking is trying to achieve than does tier-based scrutiny in weighing such a ban against a state law preempting such bans.¹⁸⁵ Reasonableness, while uncertain, also may allow for more flexibility than a tier-based scrutiny regime.

B. *Tier-Based Scrutiny in State Courts and Resistance Thereto*

In addition to the ample criticism of tier-based scrutiny as a methodological tool, practiced by courts in whichever jurisdiction, prominent voices in the state constitutional law community have criticized state courts' use of tiers of scrutiny as copycat jurisprudence ill-suited to the state court system. Oregon Supreme Court Justice—and former University of Oregon law professor—Hans Linde, who argued strenuously for the independent meaning of state constitutions,¹⁸⁶ believed that the tiers of scrutiny used by the federal courts did not adapt well to state constitutional jurisprudence.¹⁸⁷ Among the many downsides of scrutiny-based review, for Linde, at least in the individual rights context, was that it "centralize[s] decision-making in Washington, in the Supreme Court of the United States."¹⁸⁸ Linde challenged the legal

182. 336 A.2d 713 (N.J. 1975).

183. Davidson, *supra* note 181, at 993–94 (citing *S. Burlington Cnty. NAACP*, 336 A.2d 713).

184. *Robinson Township v. Commonwealth*, 83 A.3d 901, 999–1000 (Pa. 2013) (invalidating state law preempting local fracking regulation based on the state constitution's Environmental Rights Amendment); see also Jeffrey Omar Usman, *Good Enough for Government Work: The Interpretation of Positive Constitutional Rights in State Constitutions*, 73 ALB. L. REV. 1459, 1475 (2010) ("At least thirteen state constitutions . . . impos[e] a duty upon the state to safeguard the environment.").

185. Alternatively, a judiciary could consider a state's normative commitments in adjudging the reasonableness of state preemptive legislation.

186. See, e.g., Hans A. Linde, *The State and Federal Courts in Governance: Vive la Différence*, 46 WM. & MARY L. REV. 1273, 1273 (2005).

187. Hans A. Linde, *Who Must Know What, When, and How? The Systemic Incoherence of "Interest Scrutiny,"* in PUBLIC VALUES IN CONSTITUTIONAL LAW 219, 239 (Stephen E. Gottlieb ed., 1993). See generally Hans A. Linde, *The Shell Game of "Interest" Scrutiny: Who Must Know What, When, and How?*, 55 ALB. L. REV. 725 (1992) [hereinafter Linde, *Shell Game*] (arguing that the "interest" scrutiny regime employed by federal courts undermines states' rights).

188. Linde, *Shell Game*, *supra* note 187, at 733.

professoriate to “look beyond the Supreme Court,” an institution that he believed was too often law professors’ “single focus” and “only source of doctrine.”¹⁸⁹

Although coming from the perspective that tier-based scrutiny review was ill-suited to state constitutional law, many of Linde’s critiques apply more generally to the methodology as well. These include:

1. People individually and collectively have interests, whereas states, as legal or governmental entities, hardly ever do; rather, they “pursue objectives, purposes, and policies.”¹⁹⁰
2. “The word ‘compelling’ denotes compulsion,” but little in the Constitution compels the state to do anything.¹⁹¹
3. The formula “demands a series of discrete, highly debatable steps” in the lawmaking process—identifying and assigning a value to the government’s purpose, determining how the chosen means will work in practice, and ascertaining whether an alternative means will serve well enough at less cost to the opposing value—that might be desirable if possible, but are not currently prescribed by any constitution.¹⁹²
4. There are numerous difficulties in requiring judges to discern legislators’ purpose in enacting statutes.¹⁹³

To be fair, Linde’s third criticism might be less apposite insofar as the *Principles* would arguably prescribe such steps in the lawmaking process, but that then begs the question of whether such an imposition is realistic or desirable. Preemptive legislation is often part of larger legislative packages in which local autonomy is traded away as a bargaining chip toward policy objectives supported by some of the local officials whose governments are losing power in the deal.¹⁹⁴ Applying Linde’s third criticism to the preemptive prong of such an overall package illustrates a potential impracticality of the *Principles*’ approach.

Although he may have expressed frustration with the prevailing legal landscape, Linde was hardly shouting into the void. Some state courts have quite forthrightly parted course from a mechanical grafting of federal scrutiny-based analysis onto their own state constitutional provisions. In Washington,

189. *Id.* at 736–37.

190. *Id.* at 726.

191. *Id.* To be sure, unlike the Federal Constitution, state constitutions impose affirmative—one might say “compulsory”—obligations on states, such as providing public education. *See generally* Usman, *supra* note 184 (reviewing such provisions). On the distinction between positive and negative rights, and an argument that almost all rights in the Federal Constitution are negative, see Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857 (2001).

192. Linde, *Shell Game*, *supra* note 187, at 727.

193. *Id.*

194. Diller, *Political Process*, *supra* note 8, at 400–01 (discussing preemption that results from a legislative bargain).

for instance, the state supreme court has made clear in interpreting its Equal Rights Amendment that “the ERA absolutely prohibits discrimination on the basis of sex and is not subject to even the narrow exceptions permitted under traditional ‘strict scrutiny.’”¹⁹⁵ In other states, however, courts have “corrected” temporary departures from the federal jurisprudential framework.¹⁹⁶ In sum, the criticism of tier-based scrutiny in general and the disagreements regarding importing federal jurisprudence into state constitutional law interpretation suggest that states should proceed cautiously—and evaluate carefully alternative methods and constitutional text—in considering Sections C.2 and D.5 of the *Principles*.¹⁹⁷

CONCLUSION

The problems with excessive preemption very much mirror problems with state democracy generally—and, indeed, democracy generally—within the United States at this present, tenuous moment.¹⁹⁸ The rollout of the *Principles*, therefore, is fortuitously timed to be part of larger discussions of fixing state democracy generally. Given the connection between preemption and gerrymandering, it is useful to connect home-rule reform to reform of how states draw state legislative districts. Pursuing such reforms to reduce the polarities of the partisan splits in legislatures, often exacerbated by gerrymandering, can help create a legislative process in which cities have a fairer shot at getting their priorities heard. Respecting local boundaries in districting (which can, ironically, exacerbate urban areas’ disadvantage in the legislature overall) might nonetheless lead to more unified delegations in the statehouse, allowing cities—at least big cities—to better pursue their priorities.¹⁹⁹ This may be particularly effective in states where cities themselves are “purple,” like Phoenix and Orlando; perhaps it could promote a sense of representing the city rather than representing a party.²⁰⁰

Another issue to focus on in strengthening state democracy is campaign finance reform, which, of course, is currently on “life support” as a policy choice

195. Sw. Wash. Chapter, Nat’l Elec. Contractors Ass’n v. Pierce County, 667 P.2d 1092, 1102 (Wash. 1983) (“The ERA mandates equality in the strongest of terms and absolutely prohibits the sacrifice of equality for any state interest, no matter how compelling, though separate equality may be permissible in some very limited circumstances . . .”).

196. *E.g.*, Cmty. Res. for Just., Inc. v. City of Manchester, 917 A.2d 707, 721 (N.H. 2007) (overruling *Carson v. Maurer*, 424 A.2d 825 (N.H. 1980), in part, “to make our [intermediate scrutiny] test [under the state constitution] more consistent with the federal test”).

197. See PRINCIPLES, *supra* note 3, at 1347–48.

198. See Michael J. Klarman, *Foreword: The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1 *passim* (2020).

199. See Paul A. Diller, *Toward Fairer Representation in State Legislatures*, 33 STAN. L. & POL’Y REV. 135, 159 (2022) (discussing the relationship between political geography and the partisan composition of state legislatures).

200. See JONATHAN A. RODDEN, WHY CITIES LOSE 114–15 (2019).

due to the ideological predilections of the current Supreme Court. Insofar as cities are good lobbyists, but lack that additional tool of campaign contributions that other interest groups wield (with ferocity), limits on political donations from individuals, businesses, and labor unions and even candidate spending overall could help level the playing field between interest groups and cities.

Enhanced judicial review of preemption is one option for empowering local democracy, but so is systematic reform of state democracy. No one would argue that *all* preemption is bad; the question in many ways is about how it is produced. Does it result from a process in which cities had a chance to be heard? Does it come out of a legislature that fairly represents the statewide voting public? Do some interest groups have an outsize role due to campaign contributions? These are all questions reformers should be asking as they consider ushering in a new era of home rule. Answers may vary by state, due to types and populations of cities, as well as underlying political geography, but these are important questions to ask and attempt to answer, and to think about carefully before inviting the judiciary back in to policing the state-local divide.