Home Rule Be Damned: Exploring Policy Conflicts between the Statehouse and City Hall

INTRODUCTION

William D. Hicks, *Appalachian State University*
Carol Weissert, *Florida State University*

In a time of increasing political conflict, attention is inevitably focused on Washington and the Trump White House. However, there are other important institutional fights across the country that are equally, if not more, important. These fights engage cities versus state governments over issues including gun control, environmental policies, nondiscrimination policies, and immigration, to name only a few examples. While partisanship plays a role in these conflicts (Republicans hold a majority of state legislatures and governorships and cities are predominantly led by Democrats), also at stake is the strength and vibrancy of federalism and representation of citizens whose views may differ substantially from the rest of the state.

This Politics Spotlight addresses and analyzes these local–state conflicts from an academic perspective. Our goal is to motivate research that engages several crucial questions about the nature of conflicts between city and state governments. How common are these conflicts historically? Which governments typically have the upper hand and why? How important are they in shaping political institutions and the lives of ordinary citizens? What are their causes and causal mechanisms? The contributions to this Spotlight address these questions but also shed light on new avenues for research.

The first three articles provide a general overview of these conflicts, with some useful hypotheses about their sources. Jeffrey Swanson provides an introduction to state government preemption—the basic notion that state laws legally trump local laws. Swanson reminds us that state governments generally have the upper hand in policy disagreements between state and local governments. After all, local governments are creatures of state policy. Jessica Bulman-Pozen further argues that partisan politics fuels state preemption. Importantly, for Bulman-Pozen, interest groups that help write and market legislation for lawmakers increasingly enable state preemption laws. Finally, Vladimir Kogan makes the case that these conflicts are ultimately rooted in electoral politics. Picking fights with the state government, for example, helps mayors get elected and reelected.

The next articles provide historical and legal context to the issue. Lori Riverstone-Newell challenges us to remember that these conflicts are not unique to this time period. Battles between cities and states raged as recently as the 1980s and 90s over tobacco regulations and gun control. Conflicts between statehouses and city halls are a fixture of the American federal system. Jaclyn Bunch writes that home rule charters often provide the legal recourse for localities when in conflict with the state. However, she is pessimistic that they can help a city overcome state preemption, at least easily. Finally, Katherine Levine Einstein and David Glick explore mayors' perceptions of their state governments using surveys. They conclude that mayors often feel restricted by their state governments—particularly when an opposing party controls those governments.

Our final three articles offer specific cases of policy conflicts. Dorothy Daley hones in on climate change policy. Policies aimed at mitigating or adapting to climate change are naturally complex and increasingly polarized, which makes such policies ripe for conflicts between levels of government. Jonathan M. Fisk investigates state and local regulations on gas and oil production. He asks: what sorts of conditions compel local governments to adopt more restrictive environmental protections than the status quo or state policy mandates? Finally, Jami K. Taylor, Donald P. Haider-Markel, and Dan C. Lewis explore tensions between state and local governments regarding LGBT rights. Their article offers a rich account of forces that shape conflicts over LGBT ordinances, such as direct democracy and whether the local government has a mayor or manager system.

In sum, these pieces provide the context for understanding and evaluating current state preemptive actions and the pushback from local officials. The preemption and pushback are understood in part by the politics of elections, the instigation of interest groups, and institutional rules that benefit states over local governments. What is not well known, at least for now, is whether the current state–local divide evident in a number of issues and across many states represents a new trend in governance where the preferences of lower levels of governments are ignored or whether it is simply another manifestation of politics writ small. Either way, the implications on policy and representation are important and worthy of more research.

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INTRASTATE FEDERALISM: RESTRICTING LOCAL AUTONOMY THROUGH COURT PREEMPTIONS

Jeffrey Swanson, *Florida State University*

Local governments exist because of state grants of recognition. This can be in the form of enabling legislation that authorizes specific local action (i.e. *Dillon's Rule*) or home rule. *Dillon's Rule* is a restrictive form of local self-governance, which is why many states have adopted home rule legislation. Home rule legislation can take two forms. The first is *imperio in imperium* (government within a government), which establishes a clear separation of what encompasses state and local affairs. Furthermore, this policy also grants local governments a degree of immunity from state preemption over local affairs. The second form is referred to as the legislative model because local governments are granted similar legislative powers as the state government, unless expressly denied (Dalmat 2005).

Therefore, state governments have multiple options to grant local governments the autonomy to legislate over local matters. This devolution can free up legislative resources to state policy makers. However, devolving legislative control can increase delegation costs as local governments can shirk on their expected duties. Preemptions provide state policy makers with a tool to rein in local governments that have strayed from a preferred policy position. State courts are the most common venue through which local autonomy is challenged. Often, the proceedings are initiated by an affected third-party who challenges the legality of the local ordinance by claiming that it imposes additional costs and regulatory burdens that exceed what state law permits (Diller 2007). The state challenge of local authority offers an interesting venue of research for political scientists, as it furthers our understanding of federalism and state–local relations.

Although state courts employ a variety of preemption tests, all states rely on the federal preemption guidelines as a common framework, which primarily involve two types of preemptions. The first type of preemption is *express preemption*. This involves the state legislature adopting a statute that prohibits any local government from legislating over a specific policy area. A well-known example of this is North Carolina's *Public Facilities Privacy & Security Act* (2016), which preempted local governments from allowing transgender people to use the bathroom of their choice. However, express preemptions are not very common in practice because of the political costs they can entail (Knight and Gullman 2014). The second type of preemption is known as *implied preemption*. This occurs when state courts determine that the state government intended to regulate the policy area to achieve uniformity (i.e., occupy the field) or that the ordinance interferes with state law (i.e., conflict).

However, the extent with which state courts can preempt local policy varies by home rule status. Occupation of the field is less likely to occur because the court must either find that the state government intended to regulate the field of a *legislative* government, or that the policy area is not exclusively a local concern for an *imperio* government. However, this is the least common form of preemption, as courts prefer to not engage in direct policy making (Freilich and Popowitz 2012). Furthermore, conflict preemptions will almost always result in the preemption of a *legislative* government's ordinance, while in the case of *imperio* governments the court must determine whether the matter is of local concern or not (Dalmat 2005). Conflict preemptions are far more likely to occur, usually a product of a local ordinance criminalizing activities that are legal at the state level (Diller 2007).

Growing partisan divides and ideological polarization are likely to make conflict preemptions more likely. Diller (2007) argues that ordinances that are more likely to be preempted are often the product of resentment from ideological groups who feel alienated from their state legislators. There does appear to be some evidence to support this claim. Charles Barrilleaux and I (2016) find that local ordinances are more likely to be preempted by state courts when local and state governments hold opposing ideological views, regardless of home rule status.

In conclusion, a growing source of state–local conflict is coming from affected third-party interests. Interest groups often challenge the legality of an ordinance, arguing that it imposes unnecessary additional regulatory burdens. These contentious ordinances are likely to be the product of citizens lobbying their local governments to adopt their preferred policy positions, which can be at odds with the preferred policies of state policy makers. Therefore, state–local conflict can have serious implications such as the erosion of self-governance and an increase in express preemption statutes concentrating legislative authority into state governments.

Preemptions provide state policy makers with a tool to rein in local governments that have strayed from a preferred policy position.

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STATE–LOCAL PREEMPTION: PARTIES, INTEREST GROUPS, AND OVERLAPPING GOVERNMENT

Jessica Bulman-Pozen, *Columbia Law School*

The early months of Donald Trump's presidency have renewed interest in the states as laboratories of democracy and, with such interest, concerns about federal preemption of state law. Yet states are not only targets of preemption. They also do a good deal of their own preempting, halting the very local experiments that may foster state innovation. Recent years have seen a sharp increase in express preemption of local policy, in particular. After the Charlotte City Council conferred protection from

discrimination on the basis of sexual orientation and gender identity, for example, North Carolina's HB2 preempted local antidiscrimination ordinances. More quietly, states have halted local attempts to raise the minimum wage; provide for paid sick, medical, or family leave; establish public broadband service; ban or tax single-use plastic bags; restrict fracking; regulate firearms and ammunition; require nutritional labeling; and adopt rent controls or inclusionary zoning (DuPuis et al. 2017). Current state preemption efforts focus on sanctuary city policies, which limit local assistance with federal immigration officials, and ordinances aiding bathroom access by transgender individuals.

Why has state preemption of local law become so prevalent? Two related causes—partisan politics and interest group lobbying—also help to explain the consistency of preemption measures across states (Johnson 2016). Because Democratic voters cluster in urban areas, cities are sites of national partisan fights, with state preemption of local ordinances often entailing Republican preemption of Democratic policy making. An increase in single-party state government facilitates such preemption. As the urban–rural divide suggests, however, this is not purely a red state/blue city phenomenon. Even as red Texas preempts blue Austin, blue states also preempt their bluer cities. When New York City adopted a plastic bag ordinance, New York State preempted the measure.

New York's plastic bag fight illustrates a second basis for the uniformity of state preemption measures: the involvement of national interest groups that draft model preemption legislation and shop it to state lawmakers across the country. The American Legislative Exchange Council has pioneered this approach, but a variety of other conservative and business organizations, ranging from the NRA to the American Progressive Bag Alliance similarly peddle preemptive legislation, seizing not only on ideological affinity, but also on state legislators' lack of time and resources (Hertel-Fernandez 2014).

Responding to state preemption requires attending simultaneously to federal, state, and local government and revisiting doctrines premised on the idea that these governments regulate separate rather than overlapping spheres. The federal Constitution has not been understood to bear directly on state preemption: because local governments are creatures of the state, they possess only those powers states confer upon them, and states may amend or retract such powers. At the same time, the principal framework for thinking about local power vis-à-vis the state—the Dillon's Rule/Home Rule distinction—addresses local power to act in the first instance but generally does not speak to preemption. Home Rule reverses the Dillon's Rule default that local governments may exercise only powers expressly conferred by the state legislature and therefore authorizes local governments to legislate absent a retraction of power by the state. Yet in most states even Home Rule does not insulate local governments from preemption.

Federal and state constitutional frameworks that allocate power across levels of government—and, in so doing, determine how much conflict is prohibited and how much is democratic politics at work—might nonetheless be brought to bear on state preemption of local law. For example, many federalism values associated with state power, including fostering experimentation, democratic participation, and diversity, apply to local governments more readily than to states (Briffault 1994). And state preemption has as much significance for local governments' ability to engage in "home rule" as the failure to confer authority *ex ante*. Reasoning about state and federal frameworks in isolation, however, will not sufficiently resolve preemption questions. For instance, state preemption may be subject to federal constitutional challenge for violating individual rights. Congress or federal agencies might also seek to preserve local experiments from state displacement, effectively engaging in federal preemption of state preemption. More generally, as federal, state, and local governments regulate in shared policy spaces, and as partisan and ideological networks span these three levels, addressing preemption will require integrated attention to federal, state, and local power.

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MEANS, MOTIVES, AND OPPORTUNITIES IN THE NEW PREEMPTION WARS

Vladimir Kogan, *Ohio State University*

State legislatures across the country have in recent years acted repeatedly to block, undo, and overrule policies adopted by local governments—particularly big municipalities—on topics including single-use plastic bags (Michigan), minimum wages (Alabama), discrimination in public facilities (North Carolina), and immigration enforcement (Texas). A new political war over state preemption appears to be being waged.

Today's battles bear striking resemblance to city–state dynamics during the middle of the nineteenth century, an era marked by flagrant state interference in local affairs (e.g., Bridges 1984; Erie 1988; Griffith 1974). In the aftermath, many states adopted new constitutions that expressly prohibited state legislatures

from passing "special" legislation targeting individual localities and gave local governments the power of "home rule"—the ability to govern their own internal affairs without first seeking consent from state government. Nevertheless, even these constitutions retained the power for state governments to preempt local laws through general legislation. (Because local governments are mentioned nowhere in the US Constitution, they remain legal creatures of the state and empowered to do only what their state governments or constitutions allow.)

Although states have exercised their preemption authority for much of the previous 150 years, what makes today's preemption wars unusual is both the national salience of the issues at stake and the clear ideological dimension that underpins many of these conflicts. Although blue states see preemption controversies from time to time—in California, for example, over state laws requiring local governments to pay prevailing wages on public works projects—many recent battles have involved conservative state legislatures trying to roll back liberal policies adopted at the local level. Understanding these dynamics requires paying attention to the means, motives, and opportunities of both elected officials and strategic policy entrepreneurs.

Today, as was the case in the latter half of the nineteenth century, big cities are demographically distinct and politically isolated from the rest of their states (Chen and Rodden 2013; Wasserman 2017). Although historically Democratic, major cities—generally younger, diverse, and more cosmopolitan—have become increasingly blue, with growing partisan polarization and sorting remaking American political geography. Just as malapportionment prevented big cities from making their due influence felt at the state level in the 1800s and early 1900s, gerrymandering limits local influence in state policy making today. The 2010 Tea Party wave that brought historical Republican gains at the state level put the party in the driver's seat of the decennial redistricting process, helping consolidate Republican control of state government and protect it from potential erosion even as national partisan tides receded in subsequent years (Daley 2016). One way to do so was to pack big-city Democratic voters in just a few safe Democratic super-majority districts.

Control over state government gives Republicans the means and opportunity to meddle in local affairs, but the fiscal constraints they face also provide the motive. In the wake of the Great Recession, states faced massive budget shortfalls—complicated further by balanced-budget requirements in most states. Although state finances have recovered somewhat, many remain in deficit and major oil-producing states have faced additional pain due to the sharp decline of international oil prices. During times of fiscal scarcity—when passing major tax cuts or increasing spending is politically difficult (e.g., Klarner, Phillips, and Muckler 2012)—state politicians can more easily build their political reputations by exploiting symbolic issues. (A prominent Ohio Republican official recently told my class that tight budgets necessarily mean more abortion restrictions and pro-gun laws, since legislators have little else to do.) Local efforts to protect sexual minorities and avoid cooperation with federal immigration authorities are thus perfect targets for conservative state legislators looking for credit-claiming and position-taking opportunities that can attract attention.

Local efforts to protect sexual minorities and avoid cooperation with federal immigration authorities are thus perfect targets for conservative state legislators looking for credit-claiming and position-taking opportunities that can attract attention.

Democrats governing most big American cities receive similar tangible political benefits from conflicts with their Republican legislatures. With Democratic ranks greatly diminished at the state level, much of the party's future talent is holding local offices. Picking fights with state government over high-profile issues is a great way for big-city mayors to attract national notoriety, especially from among party activists and mega-donors whose support will be necessary for successful statewide or national campaigns (e.g., Oklobdzija 2017).

The final set of critical actors is interest groups such as labor unions and other left-leaning policy entrepreneurs. Shut out of power for much of the last decade at the state level, and with the polarization paralyzing national policy making during the same period, activists have increasingly turned to local governments to pursue their policy objectives, such as increasing the minimum wage (e.g., Constantelos 2010). A series of local successes, they hope, can build momentum for broader victories—in the same way that city-specific tobacco bans helped set the stage for subsequent statewide legislation (Shipan and Volden 2008). (Similarly, conservative groups have responded by lobbying state legislatures for preemption, using the need for "uniformity" as justification to prevent leftward policy shifts at the local level.)

Although they might not admit so publicly, both Democrats and Republicans earn tangible political dividends from prominent state-local conflict. For this reason, we can expect the battles to rage on for the foreseeable future.

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STATE PREEMPTION AS SCALPEL AND SWORD

Lori Riverstone-Newell, *Illinois State University*

The realm of local authority and responsibility relative to higher governments has never been clear, despite ongoing attempts to make it so. Whether one desires greater centralization or decentralization, there is a general recognition that "local decisions are best made by locals" and that the lowest level of government that can perform a function adequately is the one that should probably do the job (Hooghe and Marks 2009, 232). Perhaps the strongest effort to free local governments from state interference has been the widespread adoption of home rule. The home rule movement began in the late nineteenth century and spread throughout the twentieth century, resulting in grants of limited to broad local authority for at least some localities in nearly every state. Once granted, however, home rule status is hardly definitive; states continue to intervene in local affairs at will, and the courts typically default to the plenary power of the states on questions of state or local overreach, even in cases where the states have instructed their courts to favor localities.

In any case, local authority is never complete. State leaders have a variety of tools available to them to guide and direct local behavior, preemption laws being among them. Without question, many state preemption laws are necessary to create and correct conditions of equity, economic opportunity, and an appropriate business environment, among others. However, as discussed in this symposium, states have recently begun to preempt local laws and regulations broadly, called "maximum preemption" by some. These preemption laws are often reactionary, passed to prevent or undo a wide range of local legislation, pursued at the behest of pressure groups that face some financial or ideological cost due to local legislation. Thus, the resulting erosion of local authority and autonomy corresponds with a tightening of partnerships between special interests and the legislators who work together to achieve their own goals.

Today's preemption trend shares similarities with the preemption activity of the 1980s and 1990s, which targeted local tobacco and firearm regulation. In 1999, the Centers for Disease Control (CDC) reported a rise in state preemption of local regulation of tobacco-related activities over the period 1982–1998. After decades of scientific evidence affirming the negative effects of tobacco use and little regulation at the state level, hundreds of local governments moved to regulate the industry. These localities targeted specific aspects of tobacco sales and use, including minors' access to tobacco, indoor smoking, industry marketing efforts, and assessment of excise taxes. R.J. Reynolds, Phillip Morris, and other tobacco companies fought back. But rather than taking on localities one-by-one, they focused their energies on state lawmakers, pressuring for state preemption of local tobacco-related regulation (e.g., Monardi and Glantz 1996a; 1996b). According to the CDC, by 1999, 31 states had passed either "narrow" and "broad" preemption laws. Narrow preemption laws might, for example, ban local regulation of free tobacco samples, while broad preemption would ban all local tobacco-related legislation outright.

Noting the efficiency and efficacy of the tobacco industry's strategy (although about two-thirds of state tobacco preemption laws have since been successfully challenged in the courts), the NRA pursued state preemption of local gun regulation throughout the 1990s. Local regulation of firearms and ammunition included conceal carry restrictions, dealer regulations, and quantity limits on ammunition purchases, among others. The NRA successfully sought relief from state legislators: "43 states now have some form of maximum preemption preventing localities from passing additional gun regulations on top of state law" (Rappoport 2016). Following the push for tobacco and firearms preemption in the 1980s and 1990s, interest-driven state preemption efforts slowed, perhaps due to a favorable reception at the national level, picking up again in the 2010s as control over state legislatures shifted in favor of the Republican party: "Every year since 2011 has seen more preemption activity than the last…" (Riverstone-Newell 2017, 406).

Four points can be derived from the 1980s–1990s and current preemption trends. First, these movements support claims made elsewhere regarding an ongoing erosion of local autonomy (e.g., Bowman and Kearney 2011; Nicholson-Crotty and Theobald 2011; Einstein and Glick 2017). These and other scholars have noted the ways in which states have undermined local authority in recent years, from taking back or withholding promised funding, to shifting responsibilities and blame to localities, to passing various restrictive laws (e.g., Bowman and Kearney 2014). The use of broad preemption appears to be another tool employed by states in this effort.

Second, broad preemption laws further degrade state and local relations, which have been strained by state intrusion and neglect for some time (e.g., Shannon 1987; Berman 2003; Krane, Ebdon, and Bartle 2004; Bowman and Kearney 2011). Regarding the recent trend in state preemption specifically, local leaders are frustrated with state interference and baffled that conservative leaders are undermining local choices when decentralization has long been a rallying cry among conservatives (Riverstone-Newell 2017). Ohio Republican state senator Keith Faber corrects this misperception: "[W]hen we talk about local control, we mean state control" (Wilson 2017).

Third, a related point: the tone of state rhetoric around these two periods of state preemption is harsh and projects a lack of regard that state leaders have for their cities, especially large cities, as well as the growing disdain that local leaders have for their states (Ward 2017).

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Fourth, the role of industry and interest group influence on state preemption policies is clear, as are the effects of this influence on local autonomy. State leaders, in their attempt to remove obstacles for industry groups or to create a social environment more pleasing to their constituents (who often do not live in the affected areas, due to the spatial distribution of Republicans and Democrats), may be overlooking the costs associated with lost local control. While regulatory uniformity is often desirable, it is not always necessary to create a workable business environment. State laws that allow for local choice in the sale of alcohol is just one example. Such uniformity also has a chilling effect on local policy innovation. Additionally, community standards have long driven morality policy decisions, which have contributed greatly to America's social and economic stability.

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GIVE AND TAKE: THE CASE OF HOME RULE INFRINGEMENTS IN THE UNITED STATES

Jaclyn Bunch, *University of South Alabama*

Home rule is a state constitutional provision or legislative action that provides a locality with greater measures of self-governance (Richardson 2011). States grant home rule to give flexibility and discretion to local units of governments (Bunch 2014). However, a recent surge in state level infringements have challenged the home rule provisions, creating a struggle between state predominance and local discretion.

In the wake of these power struggles, citizens question whether states have the ability to withdraw granted powers. Largely, localities exist at the pleasure of the state and have no constitutional protection, but these local units gain some semblance of power when granted home rule. Home rule provisions are crafted in such a way that states both allow and retain the power of local government through overriding powers (Briffault 2015). In a situation of conflict, a state statute will prevail over the ordinance (Knight and Gullman 2017). Thus, the rule is largely "co-exist but not conflict."

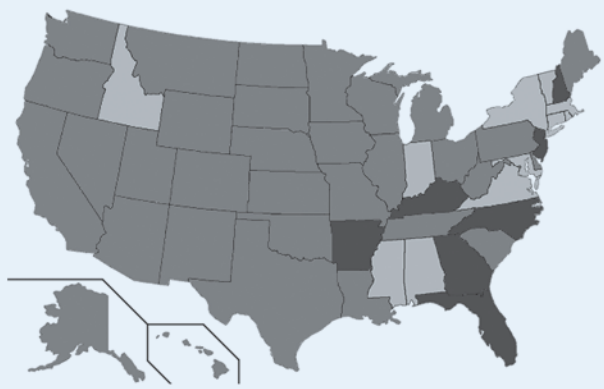
Home rule gives local governments the ability to enact local legislation as long as it does not interfere with state government (Russell 2016). This is especially true when the home rule powers originate from a state constitutional provision rather than state legislation, which is subject to more rapid change. In these cases a change to the powers of a locality would often have to be made via constitutional amendment rather than statute. As can be seen in figure 1, 40 states in the United States provide for home rule either constitutionally or through state legislation (Russell 2016).

One bill that exemplified the tension was Florida's House Bill 17. While Florida has allocated power via home rule to municipalities, HB 17 demonstrated the capacity to withdrawal that power. HB 17 would have required municipalities and local government to have any regulations concerning business, profession, or occupation to be authorized by general law, rather than local ordinance as is permitted under home rule. The potential statute would have intervened with the local units, allowing the state to supersede local regulation in an entire policy area—in this case ordinances pertaining to business. The bill was considered to be "far-reaching" and termed by Florida House Speaker Corcoran to be "runaway regulation" (Bousquet 2017).

While state predominance is not a new concept, and HB 17 ultimately died in committee, the bill was of particular concern because it applies predominance to an entire field of possible ordinances rather than ordinances that contradict with state law. HB 17 is not the first example of the power struggle localities face. Analogous to the implications of HB 17, Longmont, Colorado

Figure 1

State-by-State Home Rule Granting Status



Note: From darkest gradient to lightest denotes home rule designated by statute, constitutional provision, to none.

faced a similar struggle concerning a ban on hydraulic fracturing. Concerned with the safety hazards posed to their residents, Longmont banned fracking by ordinance. However, the ban was later preempted by the state law, permitting the fracturing to take place. In a nearly identical situation, Munroe Falls, Ohio used zoning regulation to prevent an energy company from drilling. Operating within their zone of power, Munroe believed it could restrict the action. However, Ohio's state statute gives the state full discretion regarding oil and gas drilling overruling the municipality's ban. This struggle can also be found in other policy domains such as in the field of public health.[1]

In recent years, nine states have had local ordinances invalidated concerning indoor smoking. The battle was easily lost for non-home rule designated localities as it was determined that the local ordinances could be invalidated for lack of authority. Some localities (both granted home rule and not) argued that smoking zones were in relation to public health, a category that local authority was granted. These battles were lost as the local authority did not explicitly include smoking regulation.

PARTISANSHIP AND PREEMPTION: MAYORS ON LOCAL AUTONOMY

Katherine Levine Einstein, *Boston University*

David Glick, *Boston University*

In the wake of Donald Trump's victory in the 2016 presidential election, mayors of left-leaning cities banded together to pursue progressive policies and organize opposition against many of Trump's proposed initiatives (Goodman 2016). Indeed, urban residents are increasingly Democratic (Badger, Bui, and Pearce 2016), and their politics are reflected in their representatives: 67% of mayors of cities with populations over 170,000 are Democrats (Gerber and Hopkins 2011).[1] While liberals are increasingly looking to cities as sources of political and policy activism, they may be constrained from implementing these initiatives by more conservative state governments. Along with garnering unified control of federal institutions, Republicans have enjoyed striking success in state-level contests. They currently have unified control over 32 state legislatures as well as 33 governorships.

As has been observed, local power can be superseded regardless of home rule status—indicating that state predominance should not be a question of whether a state can take power, but a question of how.

Can home rule serve as a protectorate from state intrusion? The answer is both yes and no. Home rule, especially as granted by constitutional provision, gives a locality power over certain policy domains and if a state wants to reclaim power it must first show conflict between state and local ordinances. This is not the case for localities lacking home rule, where the fight to retain local power is shorter and largely in favor of the state. As has been observed, local power can be superseded regardless of home rule status—indicating that state predominance should not be a question of whether a state can take power, but a question of how. This is an important distinction as localities invested with powers of autonomy constitutionally have more formalized and long-lasting rights than those granted power via statute or devoid of home rule entirely.

This dominance matters for local autonomy. Municipal governments largely derive their powers from their states. In recent years, multiple journalistic and academic accounts have highlighted states using their authority to limit local governments' ability to pass progressive legislation. These preemptive state laws target a wide array of local policies affecting minimum wage increases, plastic bag bans, e-cigarette restrictions, and even regulations on gifts in McDonald's Happy Meals (Graham 2017; Schragger 2016).

Most of the evidence on state and local conflict stems from case studies. We surveyed mayors of medium and large cities to more systematically evaluate local governments' experiences with state government across the United States (Einstein and Glick forthcoming). Among other topics, in summer 2015, we asked 89 mayors questions about financial support and regulation from state and federal government.[2]

We find that mayors are generally concerned about their state governments. Fifty one percent of mayors said that laws and regulations from their state governments restrict their autonomy more than the average city. Only 22% said this about the federal government. These regulatory concerns are especially stark in Republican states. Almost 70% of mayors in Republican states rated their policy autonomy as low or very low, compared with just over half of mayors in Democratic states.

Part of this hostility towards Republican state governments is explained by a partisan mismatch between local and state officials. Nearly 80% of Democratic mayors in Republican states rated their local autonomy as being worse than that of an average city. In contrast, just over 30% of their counterparts in Democratic states felt the same. These results hold when we control for local poverty levels and population size. As one big city Democratic mayor in a conservative state put it, "They've declared war on local governments in [state redacted], the state legislature has."

NOTE

1. A further discussion regarding the different forms of preemption and their varied sources can be found elsewhere in this Politics Spotlight.

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We find more limited evidence of a general conservative push against local autonomy. Our statistical models find that mayors in more conservative states generally rate their autonomy from their state government as lower, all else equal. While directionally consistent, however, the relationship is statistically imprecise, leading us to treat these results more cautiously.

Given the policy importance of these state–local conflicts, we hope that our article can serve as a starting point for future scholarship. In particular, researchers might begin to systematically measure when states engage in preemption and in which policy areas. In concert with our survey, these policy data would help us better understand the *efficacy* of these preemption laws. Are they a way to effectively impinge on local government autonomy, or are they at times used by state leaders as ideological signals?

Left-leaning cities in over half of American states face substantial institutional obstacles. The recent election of Donald Trump means that mayors may face additional challenges from the federal government. Moreover, the worsening urban–rural divide that helped fuel Trump's election may create further challenges for local governments in many places where they are already struggling with regulatory obstacles.

NOTES

1. This political swing impacts a substantial portion of Americans: almost two-thirds of Americans live in incorporated places (Cohen 2015).
2. Full question wording is available in Einstein and Glick (forthcoming).

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CLIMATE CHANGE AND STATE AND LOCAL GOVERNMENTS: MULTIPLE DIMENSIONS OF INTERGOVERNMENTAL CONFLICT

Dorothy M. Daley, *University of Kansas*

Climate change creates a range of governance challenges for communities across the United States. While there is scientific consensus that climate change is happening and that greenhouse gas (GHG) emissions from coal-fired power plants, automobiles, and other human activities are a significant factor accelerating this change, there is no political consensus about how to respond. Climate policy can focus on mitigation—reducing GHG emissions, adaptation—improving a community's ability to respond to the negative consequences of climate change, or both. In the United States, state and local governments have been leading the way to reduce GHG emissions. More than 30 states have developed Climate Action Plans. At the local level, thousands of governments have committed to reducing GHG emissions. Some cities have joined the US Conference of Mayors' Climate Protection Agreement, committing themselves to GHG emission reductions, while others have become ICLEI members, an organization that works specifically with local governments to reduce GHG emissions and foster sustainability.

Current research suggests that even if subnational climate initiatives substantially reduce GHG emissions, many of the negative consequences of climate change are likely to still occur. Sea level rise, flooding, extreme weather events including heat waves, droughts, and damaging storms are all likely to become more frequent and severe as climate change progresses, regardless of mitigation efforts (National Research Council 2010; 2011; National Academies of Sciences, Engineering and Medicine 2017). The impacts from climate change will challenge most, if not all, local governments' ability to provide municipal public services—emergency response, public works, including environmental infrastructure like water and wastewater systems, and transportation infrastructure. It will also increase pressure to consider climate resilience during land use planning. Given this, some local governments are beginning to invest in climate adaptation planning. This can fall under the umbrella of creating climate resilient communities, or it may be adding climate change considerations into hazard mitigation planning. While some state and local governments have been at the forefront of climate mitigation and adaption efforts, others have not.

In a federalist system, variation in subnational responses to problems is not uncommon. Differential state and local responses to climate change reflect some level of conflict and divergent policy preferences between state and local governments. Disagreements about the nature of the problem and appropriate responses are a fairly common source of intergovernmental strife when addressing technically complex problems that operate on large spatial scales and over long time-horizons. However, climate change is unique in that the causes and consequences of this challenge cut across substantial and diverse sectors such as agriculture, transportation, energy, health, housing, and land use planning, to name a few. Additionally, climate change is unfolding at a time when there is growing political polarization in the country.

At the state level, several governors and legislatures are staunchly opposed to any government action on climate change. But recent research on public opinion and climate change suggests important subnational variation. Within "red" states, there are communities that believe climate change is a problem and support public action to address it (Howe et al. 2015). Local governments may be more responsive to public opinion; localities could integrate climate initiatives into their transportation and land use planning, water management, waste management, and for publicly owned utilities, energy management. For some localities, any action addressing climate change will clash with state policy priorities and may risk triggering state preemption. While state governments seem more willing to use preemption when localities diverge from state policy preferences, state preemption with respect to local climate policy is still uncommon.

More frequent sources of state and local conflict revolve around the fiscal costs of climate change. While localities may

have some jurisdiction over many of the causes and consequences of climate change, many lack the financial, technical, and managerial capacity to act. Red states hostile to climate change may limit fiscal resources to discourage local action. Alternatively, localities in blue states where state climate policy exists may view state requirements as an unfunded mandate. For example the State Water Resources Board in California plans to integrate climate change comprehensively into its drinking water and water quality decision making. These changes will be felt at the local level where the majority of drinking water and water quality services are provided.

Both types of fiscal conflicts—state limits on resources or state imposition of local costs—could provide opportunities for creative financing, such as using a special district as a way to support climate policy, or it could encourage localities to lobbying alternative resources to accomplish policy goals at the local level (Goldstein and You 2017). The complexity of climate change and the dynamic relationship between state and local governments offer research opportunities to test theories of federalism and better understand the factors that shape intergovernmental policy conflict and cooperation.

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BOOM AND BUST FEDERALISM: INTERGOVERNMENTAL POLITICS DURING THE SHALE RENAISSANCE

Jonathan M. Fisk, *Auburn University*

The politics and policies governing the oil and gas renaissance (and subsequent slowdown) are largely intergovernmental. While, "fracking" is often treated as a singular issue, it is best understood as embedded within a multi-stage extraction process and one that has multiple decisions points along the way. These include site identification, permit acquisition, facility construction, fracking and drilling (vertically and/or horizontally), waste management, and well closure. These junctures set the stage for intergovernmental debates about the industry's economic and environmental footprint, the adequacy of state legal frameworks, and the proper scope of local regulatory control.

The answers and outcomes to the fracking debate are essential to larger conversations about national security, economic prosperity, environmental protection, local democracy, and quality of life. They are also personal for the millions of Americans who either live or have lived within one mile of an extraction site (Gold and McGinty 2013). Oil and gas supporters highlight that industry directly employs thousands and indirectly supports many more in well paying jobs. Through domestic production, they add the United States avoids importing natural resources from unstable geopolitical regions. Finally, producers send millions in taxes, fees, royalties, and lease payments to state budgets, local governments, and leaseholders and have saved consumers millions of dollars at the pump. Environmentalists and other skeptics, however, point to industry's large environmental footprint as justification for greater oversight. They argue that production deteriorates air quality, harms water quality, strains municipal infrastructure, and fundamentally alters impacted neighborhoods. Environmentalists have also described state regulators as reluctant to balance energy production with environmental protection or local needs (Davis 2012). The resulting dynamics have sandwiched many local governments between the economic promises of development and the potential harms to their environment. As a result, while many cities and towns have embraced the fracking boom, a smaller number have defied state policy.

Unpacking Local Defiance

Local defiance is not the norm when it comes to oil and gas management. However, when it does occur, it tends to be highly salient. In four states, defiance led to state Supreme Court cases and in others it has contributed to legislative changes. It also commands media attention and has captured growing scholarly attention (see Davis 2014; Arnold, Long, and Gottlieb 2016; Fisk 2016; Fisk 2017). Two patterns are apparent. The first is that local defiance is risky. States have the ability to reshape local authority to manage oil and gas production. In Texas and Oklahoma, for example, state lawmakers passed "ban the ban" legislation. Additionally, state Supreme Courts in Colorado and Ohio (Pennsylvania and New York have upheld local zoning authority relative to oil and gas) have struck down local oil and gas ordinances. The second is that a variety of factors shapes defiance efforts. One possible way to organize them is by grouping them into three different categories: site-level characteristics, local political conditions, and the availability of alternative political pathways. These somewhat arbitrary groups quite often blend together and influence the allocation of oil and gas' costs and benefits.

Physical Characteristics

Davis (2014) looked to intergovernmental conflicts brewing in Colorado, Pennsylvania, and Texas. This important work noted the real and perceived allocation of localized costs and benefits. In short, Davis suggested that the shale play's subsurface geology shaped its surface impacts including the volume of water needed by operators, the requisite equipment and therefore truck traffic required on site, the presence and/or absence of specific chemicals, and its location within the community. Davis' work also suggested that focusing events are associated with local resistance. In ongoing work, Fisk, Mahazda, and Park (2017) observed that residents who lived closer to a near well blowout in Denton, Texas and leaking waste pit in Longmont, Colorado were more likely to support local fracking bans (i.e., defiance as opposed to residents who were located further away (see also Davis 2014; 2012).

Political and Economic Conditions

Other research addresses political differences among localities. Fisk (2016), for example, observed that cities with a greater number of green jobs in their county and higher median home values were more likely to pass policies that challenged their state. Similarly, Walsh, Bird, and Heintzelman (2015) found that New York communities with wealthier and more educated citizens were also more likely to restrict or ban fracking. In survey work by Loh and Osland (2016), a sample of planning officials attributed conflicted intergovernmental relationships to breakdowns in communication and trust. Finally, policy entrepreneurs have also contributed to conflicted state–local relationships (Arnold, Long, and Gottlieb 2016). Flower Mound, Texas typifies the relationship between political and economic conditions and more restrictive oil and gas policies. In the 2010s, Flower Mound's average home was valued at approximately $250,000. Those homes, however, which were located near a gas well, reported a loss of value ranging from 3% to 14%. In response, city leaders enacted a large setback policy that prevented most development from taking place in the city (Integra Realty Resources 2010).

State Institutional and Legal Context

Often in the backdrop of defiance efforts are variations in state laws that either facilitate or impede local involvement. Oil and gas researchers have documented that states often enable local governments to issue use permits, to enter into road use maintenance agreements, and to participate in state–level rulemaking processes. In other instances, states have engaged in deliberate capacity building processes, such as the state–local task force in Colorado and the legislative study committee addressing severance tax issues in Ohio. When these state policy-making venues have failed or been seen by activists as ineffective, anti-fracking groups have turned to local ballot options to shape public policies, such as citizen supported bans/restrictions in the cities of Fort Collins and Longmont, Colorado and Denton, Texas (Fisk 2017; Fisk, Mahafza, and Park 2017).

Conclusions and Future Directions

Conflicts, tensions, and the games of political brinkmanship are common to the American intergovernmental system (Riverstone-Newell 2012). The twenty-first century oil and gas boom follows in that long tradition. Yet, it adds the dimension of generating billions of dollars for state and local economies while also causing real dangers and disruptions to nearby populations (Davis 2014). As communities wrestle with living with oil and gas facilities, additional challenges have emerged. How are communities addressing the recent bust in prices and subsequent loss in revenues? How and why are local governments balancing the need to safely transport oil and gas with residential quality of life and safety? Are local governments regulating or restricting frack sand operations? What intergovernmental tensions are present on tribal lands? Finally, why are some communities banning wastewater injection wells while others are not?

When these state policy-making venues have failed or been seen by activists as ineffective, anti-fracking groups have turned to local ballot options to shape public policies, such as citizen supported bans/restrictions in the cities of Fort Collins and Longmont, Colorado and Denton, Texas (Fisk 2017; Fisk, Mahafza, and Park 2017).

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TENSIONS OVER GAY AND TRANSGENDER RIGHTS BETWEEN LOCALITIES AND STATES

Jami K. Taylor, *University of Toledo*

Donald P. Haider-Markel, *University of Kansas*

Daniel C. Lewis, *Siena College*

In 2016, the Democratic leaning city council in Charlotte, North Carolina passed an LGBT inclusive nondiscrimination ordinance

that included public accommodations protections for transgender people. This policy change followed another high-profile fight over a similar ordinance in Houston that was repealed by popular referendum. Despite most large US cities having such policies, Charlotte's ordinance was controversial because of the public's varying attitudes about gay, and particularly transgender, rights (Lewis et al. 2017). Perceiving electoral advantages in upcoming gubernatorial, Senate and presidential races, the Republican dominated General Assembly responded with House Bill 2 (HB2). HB2 required that people use restrooms in public buildings according to their birth certificate. It also preempted localities from passing nondiscrimination ordinances that are more expansive than state law and it blocked local regulation of wages. North Carolina Republicans were surprised by the business community's negative reaction to HB2 and by the boycotts from the NBA, ACC, and NCAA. HB2 ended up being a strategic backfire because prominent supporters of the law, Governor Pat McCrory and Attorney General Candidate Sen. Buck Newton, lost their elections. Yet, the controversy over HB2 should not be surprising. Morality policies, such as LGBT rights, involve sharp clashes over fundamental values, or first principles (Mooney and Lee 1995), where compromise is difficult and local subcultures and economic considerations shape policy outcomes (Sharp 2005).

Research on local LGBT rights laws employs an "urbanism/social diversity model" to examine the forces that spur cities to adopt such policies (Wald, Button, and Rienzo 1996). Cities with higher education levels, greater diversity, and more people engaged in management, business, science, and arts occupations increase the likelihood of passage of LGBT employment nondiscrimination laws (Taylor et al. 2014). In addition, form of government might be important as organized minority interests appear to be more influential in unreformed city governments compared to those with council-manager systems (Taylor et al. 2014). The reformed systems may be less responsive to minority concerns (e.g., Lineberry and Fowler 1967) and tend to engage in less symbolic policy making (Carr 2015).

Further, the ability of localities to pass this type of policy is contingent on the level of home rule authority in state law (Gossett 1999). However, where home rule powers enable localities to pass these laws, conservatively dominated state governments, with strong encouragement from conservative activists, might preempt them from doing so (Riverstone-Newell 2017). For instance, after the repeal of HB2, North Carolina preempted localities and public universities from regulating public restroom access and set a moratorium on the passage of local nondiscrimination ordinances until 2020. Similarly, Tennessee passed a preemption law in 2011 that blocked localities from enacting nondiscrimination policies that exceed those of the state (which are not LGBT inclusive). Local ordinances might also be thwarted if they are in conflict with state law. In 2017, the Arkansas Supreme Court struck down Fayetteville's LGBT inclusive nondiscrimination ordinance that conflicted with the state's recently enacted uniformity policy. In addition, some states ban localities from making ordinances affecting private law (Diller 2012). Indeed, prior to the repeal agreement on HB2, it was not clear that Charlotte had authority to pass its policy.

Yet, localities in states with strong home rule powers do sometimes engage in compensatory policy making on these issues when there is state inaction (Sharp 2005). This is important given a lack of state responsiveness to public opinion on LGBT rights issues (Lax and Phillips 2009). For example, many localities in Ohio, Pennsylvania, and Michigan passed LGBT nondiscrimination policies when their state legislatures failed to act. Such local policies might diffuse upwards to the state level (Shipan and Volden 2006). For instance, Minneapolis (1975) and St. Paul (1990) passed local transgender inclusive policies before Minnesota did (1993). However, if states pass inclusive nondiscrimination laws, localities in the state are less likely to pass similar ordinances given the lack of need. This explains why there are comparatively few local LGBT-rights laws in California (see figure 2).

Even if localities pass LGBT inclusive nondiscrimination ordinances, these protections often face opposition through popular referendums. Where they exist, these direct democracy institutions can empower majorities, often at the expense of minority groups (Haider-Markel, Querze, and Lindaman 2007; Lewis 2013). Indeed, since Anita Bryant's 1977 campaign to repeal a sexual orientation inclusive ordinance in Dade County, Florida, direct democracy has been the bane of the gay rights movement. In recent years, at least 12 cities that have enacted gender identity protections faced a popular veto attempt through the referendum process. In six of these cases, the referendum vote overturned the ordinance. Direct democracy institutions may also be used to enact nondiscrimination ordinances. However, most of these efforts, such as the 2012 attempt in Anchorage, Alaska, fail. As a small and relatively marginalized minority group, LGBT-rights advocates face an uphill battle in securing protections through a strictly majoritarian process. Given the recent trend of transgender backlash, we anticipate that LGBT rights will continue to be an important battlefield in the war between cities and states. ■

Figure 2

American Cities that Prohibit Employment Discrimination Based on Gender Identity, 2017

Note: Compiled by the authors from news sources and the Human Rights Campaign.

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SYMPOSIUM CONTRIBUTORS

Jessica Bulman-Pozen *is professor of law at Columbia Law School. She teaches and writes about administrative law, antidiscrimination law, constitutional law, and federalism. She may be reached at jbulma@law.columbia.edu.*

Jaclyn Bunch *is assistant professor of political science and public administration at the University of South Alabama. Her research interests primarily fall within the fields of American politics and public policy. She has specific interests in state and local relations, federalism, hierarchical dilemmas, political media, and motivation and reasoning. Correspondences should be directed to Jbunch@southalabama.edu.*

Dorothy M. Daley *is professor at the University of Kansas with a joint appointment in the School of Public Affairs & Administration and the Environmental Studies Program. Daley's research focuses on environmental and public health policy. Her current research evaluates the environmental impacts of subnational climate policy in the United States. Her research has appeared in a range of journals including the* Journal of Public Administration Research and Theory *and the* Journal of Epidemiology & Community Health. *She can be contacted at daley@ku.edu.*

Katherine Levine Einstein *is assistant professor of political science at Boston University. Her research interests include local politics and policy, racial and ethnic politics, and American public policy. She may be reached at kleinst@bu.edu.*

Jonathan M. Fisk *is assistant professor in the Department of Political Science at Auburn University. His research interests include oil and gas policy, water management, and intergovernmental relations. He is the author of* The Fracking Debate: Intergovernmental Politics of the Oil and Gas Renaissance. *He may be reached at jmf0055@auburn.edu.*

David Glick *is assistant professor of political science at Boston University. His research interests include political institutions, especially courts, public opinion about institutions, policy diffusion, law, and local politics. He may be reached at dmglick@bu.edu.*

William D. Hicks *is assistant professor of political science at Appalachian State University. His primary field of study is American Politics, with a specific focus on direct democracy, legislative processes, legislative behavior, and representation in the American states. His research interests also include political science research methods broadly, and applied quantitative methods for clustered and longitudinal data specifically. He may be reached at hickswd@appstate.edu.*

Vladimir Kogan *is assistant professor at the Ohio State University's Department of Political Science. His research focuses on state and local government, and his recent work has been published in the* American Journal of Political Science, Journal of Politics, Journal of Policy Analysis and Management, *and* Journal of Public Administration Research and Theory. *He is also coauthor of* Paradise Plundered: Fiscal Crisis and Governance Failures in San Diego *(Stanford University Press, 2011), which won the best book award from the Urban Politics Section of the American Political Science Association.* He may be reached at *is kogan.18@osu.edu.*

Lori Riverstone-Newell *is associate professor of political science at Illinois State University. Her primary research focus is on the interaction of governments in the US intergovernmental system, specifically, the tools and strategies used by state and local governments to accomplish their goals and defend their interests in America's highly competitive political system. She may be reached at lrivers@ilstu.edu.*

Jeffrey Swanson *is a 4th year graduate student in political science at Florida State University with research interests in public policy, specifically social and fiscal policy. In his current research, he works to understand why government ideology is often associated with better outcomes for citizens. He may be reached at jjs05h@my.fsu.edu*

Jami K. Taylor *(jami.taylor@utoledo.edu) is associate professor of political science and public administration at the University of Toledo.* **Donald P. Haider-Markel** *(dhmarkel@ku.edu) is professor of political science at the University of Kansas.* **Daniel C. Lewis** *(dlewis@siena.edu) is associate professor of political science at Siena College. With Andrew R. Flores, Patrick R. Miller and Barry L. Tadlock, they published a series of articles appearing in* Public Opinion Quarterly, Political Research Quarterly, Political Psychology, and Politics, Groups, and Identities *that examined public attitudes about transgender people and their rights. They are also authors of the forthcoming book,* The Remarkable Rise of Transgender Rights.

Carol Weissert *is LeRoy Collins Eminent Scholar and Chair of Civic Education and Political Science at Florida State University. She studies federalism, state politics, and health policy. In 2010, Carol served at president of the Southern Political Science Association. She may be reached at cweissert@fsu.edu.*

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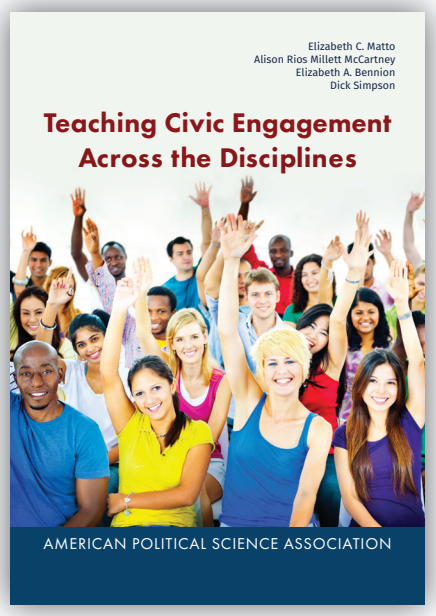

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