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### Do Local Governments Really Have Too Much Power? Understanding the National League of Cities' Principles of Home Rule for the 21st Century

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DO LOCAL GOVERNMENTS REALLY HAVE TOO MUCH POWER? UNDERSTANDING THE NATIONAL LEAGUE OF CITIES' *PRINCIPLES OF HOME RULE FOR THE 21ST CENTURY*

NESTOR M. DAVIDSON\*\* & RICHARD C. SCHRAGGER\*\*\*

*This Article explains and defends the National League of Cities' Principles of Home Rule for the 21st Century, which the authors participated in drafting. The Principles project both articulates a vision of state-local relations appropriate to an urban age and, as with previous efforts stretching back to the Progressive Era, includes a model constitutional home rule article designed to serve as the foundation for state-level constitutional law reform. This Article explains the origins of the Principles, outlines the major components of its model constitutional provision, and defends the model against a set of criticisms common to this and past home-rule reform efforts. Necessitated by the increasingly hostile relationship between cities and their states, the Principles would reset the state-local relationship to better align local legal authority with the actual role that local governments play in contemporary governance. Currently, cities do not have sufficient authority to address the basic problems of urban governance, and the global pandemic has illustrated the widening gap between cities and their states over even the most basic public health and safety issues. Cities are seeking to address these and other constituent concerns but are regularly stymied by state law that is often aggressively deployed to punish local officials and limit their democratic responsiveness. A reformed home rule is an essential aspect of the states' "internal federalism" and is crucial to addressing the challenges of twenty-first century governance.*

INTRODUCTION .....1386  
I. THE STRUCTURAL PROBLEM OF LOCAL AUTHORITY AND THE NLC'S STRUCTURAL RESPONSE .....1390

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1386	<i>NORTH CAROLINA LAW REVIEW</i>	[Vol. 100]
	A. <i>Weaknesses of the Current Legal Regime</i> .....	1391
	B. <i>A New Partnership Model of Local Authority</i> .....	1396
II.	POLICY AND THE <i>PRINCIPLES</i> .....	1400
	A. <i>Housing Affordability</i> .....	1401
	B. <i>Corporate Subsidies, Pension Crises, Local Elections, and Police Misconduct</i> .....	1406
	1. Corporate Subsidies and the Pension Crisis .....	1406
	2. Local Elections .....	1409
	3. Police Reform.....	1411
III.	IDEOLOGY AND HOME RULE .....	1413
	CONCLUSION .....	1418

## INTRODUCTION

In 2020, the National League of Cities (“NLC”) published the *Principles of Home Rule for the 21st Century* (“*Principles*”),<sup>1</sup> a groundbreaking new vision of local-government legal authority to match the increasingly central role that cities play in our contemporary system of governance. The *Principles* project, however, is not meant to be an abstract rumination on home rule. As with previous efforts by predecessors to the NLC and similar models stretching back to the Progressive Era, the *Principles* includes a model constitutional home rule article designed to serve as the foundation for genuine state-level law reform.<sup>2</sup>

Those past efforts were met with resistance, as undoubtedly will this present one. State officials do not readily choose to give up power, especially if they contemplate it being potentially wielded by political opponents. Devolving authority to cities, which the *Principles* seeks to do, has long been unpopular with central governments because it means those governments and their elected officials exercise less power.

In each era of reform, a set of standard criticisms of city power has emerged; these criticisms tend to combine hostility to cities with a skepticism of the exercise of local democratic authority based on an assumption that local governments are poorly managed, corrupt, or otherwise inferior to some (usually idealized) state government.<sup>3</sup> In recent years, state politicians have stated these criticisms in somewhat crude, political terms—suggesting, for example, that the exercise of city power is a threat to American values.<sup>4</sup>

1. NAT’L LEAGUE OF CITIES, *PRINCIPLES OF HOME RULE FOR THE 21ST CENTURY* (2020), as reprinted in 100 N.C. L. REV. 1329 (2022) [hereinafter *PRINCIPLES*].

2. See *id.* at 1330–43, 1350–53 (describing the background of the *Principles* and including the model constitutional home rule article).

3. See *infra* Part III.

4. Consider Texas Governor Greg Abbott’s statement: “As you leave Austin and start heading north, you start feeling different . . . . Once you cross the Travis County line, it starts

This Article is a response to a slightly more academic—though still somewhat overwrought—critique recently authored by Professor David Schleicher.<sup>5</sup> Schleicher hits all the high notes of the committed anti-localist. He argues that NLC’s model would lead to a colorful parade of horrors, exacerbating exclusionary zoning, reifying local political process failure, unleashing fiscal irresponsibility, and solidifying the fragmentation of regional governance.<sup>6</sup> Contrary to the careful recalibration of state and local authority embodied in the model constitutional article at the heart of the *Principles*,<sup>7</sup> Schleicher sees constraints on state oversight in zero-sum terms, empowering local governments with no corresponding responsibility imposed on the exercise of that power, as though existing state oversight has been meaningfully exercised in any real way.<sup>8</sup>

We think those criticisms are badly overstated and misunderstand both the current distribution of power between states and local governments and what the *Principles* would require going forward. In this Article we take an opportunity to respond to some of those criticisms after describing the *Principles* and the project’s theoretical and practical foundations. We should say at the outset that we assisted in drafting the *Principles*, working alongside six other experienced scholars of state and local government law.<sup>9</sup> We urge you to read them. We are quite confident that these proposals are in the mainstream of

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smelling different. And you know what that fragrance is? Freedom. It’s the smell of freedom that does not exist in Austin, Texas.” Jonathan Tilove, *Gov. Abbott: Austin Stinks and So Does ‘Sanctuary Sally,’ STATESMAN*, <https://www.statesman.com/news/state--regional-govt--politics/shorter-gov-abbott-austin-stinks-and-does-sanctuary-sally/goq6JEihda4PzADg2lOMgO/> [<https://perma.cc/BK2J-LM9R>] (June 6, 2017, 11:25 AM). Donald Trump has made similar claims on his now-suspended Twitter account. Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 14, 2017, 7:22 PM), <https://www.thetrumparchive.com/?searchbox=%22%5C%22burning+and+crime-infested%5C%22> [<https://perma.cc/W6PF-DNH6>] (referring to “burning and crime infested inner-cities”). These views reflect an abiding historical anti-urbanism. Cf. Paul Krugman, *The Durable Myth of Urban Hellholes*, N.Y. TIMES (July 12, 2021), <https://www.nytimes.com/2021/07/12/opinion/covid-big-cities.html> [<https://perma.cc/A9C9-ULL4> (dark archive)] (“The rise of a knowledge economy has led to a growing concentration of jobs and wealth in large, highly educated metropolitan areas, leaving much of small-town and rural America stranded. And this loss of opportunity has ended up being reflected in social disintegration, just as the disappearance of jobs did in many inner cities half a century ago.”). See generally STEVEN CONN, *AMERICANS AGAINST THE CITY: ANTI-URBANISM IN THE TWENTIETH CENTURY* (2014) (discussing anti-urbanism in America).

5. See generally 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 (2020) (reviewing and critiquing the *Principles*).

6. See *id.* at 898–921.

7. See PRINCIPLES, *supra* note 1, at 1348–50 (“[T]he model provisions below primarily set forth a structure to balance state and local authority . . .”); see also *id.* at 1353–84 (providing commentary to the *Principles*’ model state home rule constitutional article).

8. See Schleicher, *supra* note 5, at 898–921.

9. Professors Richard Briffault, Paul Diller, Sarah Fox, Laurie Reynolds, Erin Adele Scharff, and Rick Su.

reform efforts, even if they elicit opposition from those who are and will likely remain skeptics of the exercise of city authority.

In this moment—when cities are the dominant economic, political, and social actors in their regions, states, and nations<sup>10</sup>—that skepticism is antiquated and outdated. Indeed, any fair-minded evaluation of the nature of local legal authority today would have to conclude that the balance between state and local power simply does not reflect the role that local governments play in contemporary governance. The *Principles*' model constitutional home rule article provides a basis for resetting the state-local relationship to create a new equilibrium in places where local responsibility is not matched by local authority.

Part of that rebalancing—an important part—responds to the rise of sweeping, targeted, and increasingly punitive preemption. The preemption explosion has been extensively documented;<sup>11</sup> it is reminiscent of the era of “ripper” bills, when states stripped local governments of their offices and responsibilities, ensuring that they would be governed by the state legislature.<sup>12</sup> But as dysfunctions in governance revealed by the current pandemic sadly underscore, there is a second, equally important imperative for reform: while local governments form a critical frontline of governance on many issues that were once primarily considered state or federal, they lack legal authority to match that responsibility in too many places.<sup>13</sup> Any sweeping rejection of localism does a disservice to a serious effort to respond to significant and growing pathologies in the current structure of state and local government law.

Contemporary state overreach and local powerlessness have serious negative consequences. States are capriciously blocking policy experimentation

10. See generally RAN HIRSCHL, CITY, STATE: CONSTITUTIONALISM AND THE MEGACITY (2020) (discussing the prevalence of cities in the twenty-first century).

11. See, e.g., Joshua S. Sellers & Erin A. Scharff, *Preempting Politics: State Power and Local Democracy*, 72 STAN. L. REV. 1361 (2020) (examining structural preemption); Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995 (2018) [hereinafter Briffault, *New Preemption*] (examining the rise of new, aggressive preemption); Erin Adele Scharff, *Hyper Preemption: A Reordering of the State-Local Relationship?*, 106 GEO. L.J. 1469 (2018) [hereinafter Scharff, *Hyper Preemption*] (describing the various forms of hyper preemption); Kenneth A. Stahl, *Preemption, Federalism, and Local Democracy*, 44 FORDHAM URB. L.J. 133 (2017) (observing that preemption has reached “epidemic proportions”); Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163 (2018) [hereinafter Schragger, *Attack on American Cities*] (illustrating the explosion of preemption). See generally RICHARD BRIFFAULT, NESTOR M. DAVIDSON & LAURIE REYNOLDS, THE NEW PREEMPTION READER: LEGISLATION, CASES, AND COMMENTARY ON THE LEADING CHALLENGE IN TODAY’S STATE AND LOCAL GOVERNMENT LAW (2019) [hereinafter BRIFFAULT ET AL., THE NEW PREEMPTION READER] (collecting materials on the new preemption).

12. See Richard Briffault, *Voting Rights, Home Rule, and Metropolitan Governance: The Secession of Staten Island as a Case Study in the Dilemmas of Local Self-Determination*, 92 COLUM. L. REV. 775, 805–06 (1992) [hereinafter Briffault, *Voting Rights*] (recounting the nineteenth-century history of “ripper bills” through which states gave themselves power over specific elements of local governance).

13. See *infra* Part I.

and undermining the ability of local governments to solve a range of problems, notably including the COVID-19 public health emergency.<sup>14</sup> Doing so in turn weakens local capacity, sapping the practical potential of local democracy. The right model—again, as the recent pandemic has made eminently clear—is partnership, not just between local governments and states, but across local, state, and federal governments. Without a clear legal basis for local authority, however, that cooperative model is much harder to achieve, especially in a polarized political environment in which states can import the most arbitrary decision-making to what should be a cautious exercise of displacing local democracy.

The *Principles* seeks to reinforce that legal authority and to reinvigorate home rule doctrines that have long existed nominally but have in practice gone underenforced or ignored. The *Principles*, however, has an additional purpose. One would assume from reading Professor Schleicher’s critique that local governments are to blame for most of the intractable problems of twenty-first century governance, including inequality, abusive policing, affordable housing, corruption, and democratic failure.<sup>15</sup> But, of course, what we well know is that state and national policy-making is as (or more) dysfunctional and increasingly so. Any simplistic and sweeping critique of local democracy as inherently flawed—dominated by homevoters, subject to capture, perennially parochial, as the standard tropes play out—has to answer the fundamental “as-opposed-to-what” question. This is a question that modern anti-localists so rarely even try to answer.

Moreover, the policy failures that excite opposition to local control are not actually “local”; indeed, they are rightfully placed at the states’ doorsteps.<sup>16</sup> One might assume from the extreme political attacks on American cities<sup>17</sup> that local governments are currently fully empowered, doing terrible damage with absolutely no oversight. But, in actuality, a regime of nearly unfettered *state* power is what currently exists in most states. All states permit fairly aggressive preemption of local laws, and all states allow for extensive regulation in almost all pertinent policy areas.<sup>18</sup> The states have had every opportunity to address

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14. See Kim Haddow, Derek Carr, Benjamin D. Winig & Sabrina Adler, *Preemption, Public Health, and Equity in the Time of COVID-19*, in ASSESSING LEGAL RESPONSES TO COVID-19, at 71, 72–73 (2020) (reviewing a range of state policies preemptive of local public health measures during the early part of the pandemic); David Gartner, *Pandemic Preemption: Limits on Local Control over Public Health*, 13 NE. U. L. REV. 733, 747–63 (2021) (surveying examples from Nebraska, Iowa, Georgia, and Florida).

15. See Schleicher, *supra* note 5.

16. See *infra* Part II (discussing housing affordability, pension crises, and other policy flashpoints).

17. See *supra* note 4 and accompanying text; see also *infra* Part III (discussing ideological resistance to home rule).

18. See *infra* Part I.

the problems of twenty-first century governance in the United States but have mostly failed to do so.

Why? Because state power has never effectively addressed—or meaningfully attempted to address—the core concerns of urban policy in the United States, including urban decline, racial segregation, entrenched poverty, and the adequate and fair provision of education, health care, housing, and public safety.<sup>19</sup> States have long had very limited capacity, let alone will, to address the frontline needs of local governments and their residents. And real local democracy—the actual exercise of municipal power—has never really been tried in the United States.

Part I of this Article describes the background and impetus for the drafting of the *Principles* and then describes the NLC's new model. It observes how the *Principles* is in fact a relatively mild response to an otherwise significant crisis in state-local relations in many U.S. states. Part II considers a number of policy areas that critics of home rule argue are failures of local administration. We dispute that contention, arguing that state policy is mainly responsible for undermining effective responses to the continuing challenges of twenty-first century urban governance. Part III considers the ideological blinders that lead reformers to resist a workable devolution when there is abundant evidence that state domination is not working. The challenges of modern urban governance continue to go unaddressed not because cities exercise too much power but because they do not exercise enough.

#### I. THE STRUCTURAL PROBLEM OF LOCAL AUTHORITY AND THE NLC'S STRUCTURAL RESPONSE

Local-government authority and home rule have been focal points of contestation and reform since the Founding Era, and the NLC's *Principles* is only the most recent of a long line of efforts to balance the state and local legal relationship to reflect the structure of contemporary governance.<sup>20</sup> To understand why a new model of state-local legal relations is necessary today, we start by describing the structural concerns that provided the impetus for reform underlying the *Principles* project. We then turn to the responses to these

19. Cf. Robert A. Dahl, *The City in the Future of Democracy*, 61 AM. POL. SCI. REV. 953, 964 (1967) (“Our cities are not merely non-cities, they are anti-cities—mean, ugly, gross, banal, inconvenient, hazardous, formless, incoherent, unfit for human living, deserts from which a family flees to the greener hinterlands as soon as job and income permit, yet deserts growing so rapidly outward that the open green space to which the family escapes soon shrinks to an oasis and then it too turns to a desert.”); see also JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 4 (1961) (describing midcentury urban renewal as “not the rebuilding of cities,” but “the sacking of cities”).

20. See, e.g., David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2257 (2003) (arguing that home rule has been wrongly equated with local legal autonomy and that late-nineteenth-century urban reformers from the first home-rule movement did not seek local legal autonomy).

concerns that are embodied in the NLC's model constitutional home rule article, outlining the reform proposal and explaining its primary provisions.

A. *Weaknesses of the Current Legal Regime*

The *Principles* begins with the proposition that the structure of state-and-local-government law is significantly misaligned with the critical governance role that cities, counties, and even smaller local governments play today.<sup>21</sup> The contemporary global economy has increasingly come to center on metropolitan areas and the local governments that most immediately manage them. As the *Principles* notes,<sup>22</sup> in 2010, urban metropolitan areas in the United States housed nearly eighty-one percent of our nation's populace, a trend that is growing more pronounced every decade, as highlighted by the 2020 Census.<sup>23</sup> And as the U.S. Conference of Mayors has documented, on the eve of the current public health crisis, cities produced over ninety-one percent of our GDP.<sup>24</sup> Our most productive metro areas dwarf the economic output of most states—in 2018, New York City's \$1.85 trillion gross metropolitan product exceeded that of the entire State of Texas (not to mention entire countries like Russia and Canada), while the Los Angeles metro area topped the State of Florida's gross state product.<sup>25</sup> Indeed, U.S. metro areas represent a dozen of the world's fifty highest-producing economies.<sup>26</sup>

The centrality of local governance to our contemporary demographics and economy is matched by the growing role that cities and other local governments are playing in policy innovation. The reality is that across an array of pressing concerns—public health, of course, but also labor and employment, environment protection and the climate crisis, emerging technology, and many others—local governments have become a significant locus for pragmatic, evidence-based policy-making at a time when the states, let alone the federal government, too often seem to have abandoned that project.<sup>27</sup>

However, local governments are being called to play these vital roles against the headwinds of increasing state interference—in particular the rising

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21. See PRINCIPLES, *supra* note 1, at 1336–41.

22. See *id.* at 15.

23. See Press Release, U.S. Census Bureau, 2020 Census Statistics Highlight Local Population Changes and Nation's Racial and Ethnic Diversity (Aug. 12, 2021), <https://www.census.gov/newsroom/press-releases/2021/population-changes-nations-diversity.html> [<https://perma.cc/GQ53-R5UM>] (reporting that metropolitan areas grew by nine percent between 2010 and 2020 and now house eighty-six percent of the population).

24. U.S. CONF. OF MAYORS, U.S. METRO ECONOMIES: ANNUAL REPORT AND FORECAST 1 (2019), <https://www.usmayors.org/wp-content/uploads/2019/09/mer-2019-09.pdf> [<https://perma.cc/74EQ-WJZZ>].

25. *Id.*

26. *Id.*

27. See, e.g., Briffault, *New Preemption*, *supra* note 11, at 1999–2001; Schragger, *Attack on American Cities*, *supra* note 11, at 1169.



abuse of state-law preemption. In large swaths of the country, the warping of this traditional tool of governance is a driving force in state politics.<sup>28</sup> Preemption, as a growing body of literature underscores,<sup>29</sup> has become sweeping in scope, covering almost every area of local policy. At the same time, state legislatures are also enacting statutes targeting specific exercises of local authority.

As preemption has become increasingly partisan, most troubling is a new punitive turn that has significantly raised the stakes in state-local conflicts: states now threaten to eliminate local funding if local governments challenge preemption, and states have likewise found novel ways to expose local governments to civil liability in preemption conflicts.<sup>30</sup> Moreover, concluding that merely preempting local authority is not sufficient to resolve differences, states have begun targeting local officials who disagree with the boundaries of state limitations, opening up individual officeholders to loss of pay—witness Florida’s docking the pay of school board officials for issuing masking policies in local schools amidst a resurgence of the pandemic for a recent example—removal, civil penalties, and even criminal liability.<sup>31</sup>

Given both affirmative and defensive arguments for bolstering local legal authority, in what ways is contemporary home rule structurally inadequate? Some states, of course, still do not have home rule despite nearly a century and a half of reform stretching back to Missouri’s constitutional amendment of 1875.<sup>32</sup> But even states that have well-recognized home rule often have ambiguities and gaps in the initiative function of home rule.<sup>33</sup> Courts at times have grappled with whether seemingly straightforward state constitutional delegations of the power to act could be as broad as their framers intended, creating unnecessary uncertainty for local officials.<sup>34</sup>

28. See generally Lori Riverstone-Newell, *The Rise of State Preemption Laws in Response to Local Policy Innovation*, 47 PUBLIUS 403 (2017) (tracking patterns within the trend of increasing state preemption of local policies).

29. See, e.g., Briffault, *New Preemption*, *supra* note 11, at 1999–2008 (surveying the breadth and depth of the new preemption); Schragger, *Attack on American Cities*, *supra* note 11, at 1169–83 (same); Scharff, *Hyper Preemption*, *supra* note 11, at 1494–507 (same).

30. See BRIFFAULT ET AL., *THE NEW PREEMPTION READER*, *supra* note 11, at 11–16 (describing novel aspects of new preemption compared to the traditional exercise of state oversight of local governance).

31. *Id.* at 13–14.

32. See Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1126–27 (2007) [hereinafter Diller, *Intrastate Preemption*] (surveying the landscape of states without home rule); see also Barron, *supra* note 20, at 2289–90 (discussing Missouri and the origins of home-rule reform).

33. RICHARD BRIFFAULT, LAURIE REYNOLDS, NESTOR M. DAVIDSON, ERIN ADELE SCHARFF & RICK SU, *CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW* 390–482 (9th ed. 2022) [hereinafter BRIFFAULT ET AL., *STATE AND LOCAL GOVERNMENT LAW*].

34. See, e.g., *Ill. Rest. Ass’n v. City of Chicago*, 492 F. Supp. 2d 891, 892, 894 (N.D. Ill. 2007), *vacated as moot*, No. 06 C 7014, 2008 WL 8915042 (N.D. Ill. Aug. 7, 2008) (reviewing a challenge to a

At the same time, local fiscal authority has been significantly undermined by state limitations while local governments have had increasing needs for fiscal capacity. Home rule has been interpreted in some states to be particularly limited in the context of local revenue, and the rise of state constitutional tax-and-expenditure limitations, such as California's Prop 13<sup>35</sup> and Colorado's Taxpayer Bill of Rights,<sup>36</sup> has left many local governments in a particularly challenging bind as states continue to call on them to provide so many critical services.<sup>37</sup>

And the emergence of the punitive turn in preemption highlights ways in which the mechanisms of local democracy are fodder for state interference, even on matters much more prosaic than the potential personal liability of local officials. Local governance choices around everything from elections to the allowable forms and structures of local governing bodies to procedures over legislation, budgeting, and administration—not to mention a variety of other issues, such as freedom of information, open meetings, conflict of interest, and ethics—are regularly made at the state level.

One might reasonably question the majoritarianism of local democratic processes; local politics are not free of the pathologies that afflict state and national political processes. But many of these cases are easy. The state is not stepping in to protect city residents or prevent damaging spillover effects when the state prevents a majority-minority city from removing Confederate statues in city-owned parks.<sup>38</sup> State officials are not fixing a political-process defect when they threaten to withhold funds from a city that seeks to reduce its own police budget and shift those monies to social services.<sup>39</sup> The state is not solving a political-process problem when it denies local authority to institute an indoor masking requirement.<sup>40</sup> In all these instances, and in many others, state officials

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Chicago ordinance that banned the sale of foie gras to determine whether the ordinance addressed a "local problem," despite the broad sweep of the city's state constitutional grant of home rule power).

35. CAL. CONST. art. XIII A (capping property taxes).

36. COLO. CONST. art. 10, § 20 (requiring voter approval for tax changes, among other limitations on revenue authority).

37. See Erin Adele Scharff, *Powerful Cities?: Limits on Municipal Taxing Authority and What To Do About Them*, 91 N.Y.U. L. REV. 292, 296–97 (2016) [hereinafter Scharff, *Powerful Cities*].

38. See Richard C. Schragger, *Of Crosses and Confederate Monuments: A Theory of Unconstitutional Government Speech*, 63 ARIZ. L. REV. 45, 81–89, 97–101 (2021) (recounting recent conflicts over Confederate monuments and preemption).

39. See, e.g., Karl Eppers, *Tallahassee and 8 Other Cities File Lawsuit Challenging HB 1 'Anti-Riot' Bill*, TALLAHASSEE DEMOCRAT (Nov. 16, 2021, 5:03 PM), <https://www.tallahassee.com/story/news/2021/11/16/tallahassee-8-other-cities-suing-state-over-hb-1-anti-riot-bill/8636987002/> [<https://perma.cc/PY9J-P4N9> (dark archive)] (discussing a recently filed lawsuit against a Florida statute that provides for removal of local budget authority if cities seek to reduce police funding).

40. See generally Haddow et al., *supra* note 14 (surveying numerous instances of states preempting local public health authority during the pandemic); Gartner, *supra* note 14 (same).

are not solving but *creating* political pathologies; in all these cases, they are acting in a decidedly “counter-majoritarian” fashion.<sup>41</sup>

Finally, whether the issue is general policy-making, local fiscal capacity, or the mechanics of local democracy, contemporary home rule generally vindicates the power of the states in conflicts with local governments. This is true regardless of the strength or merits of the state concern at issue—the “immunity” function of home rule.<sup>42</sup> Two models have generally taken hold over the course of the development of home rule. The first is the so-called imperio approach of protecting “local” or “municipal” matters as to both initiative and immunity, however contested those terms have been in practice.<sup>43</sup> The second is reflected in the American Municipal Association’s (“AMA”) 1953 *Model Constitutional Provisions for Municipal Home Rule*,<sup>44</sup> which broadened the scope of imperio’s initiative authority while removing what little local immunity the earlier model had conferred.<sup>45</sup> In neither approach, however, is state preemption meaningfully constrained, although of course one can find examples of local governments prevailing at the margins.<sup>46</sup>

While there has certainly not been enough empirical work done on the consequences of state limitations on local power,<sup>47</sup> it would be wrong to dismiss

41. Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1741–43 (2021) [hereinafter Seifter, *Countermajoritarian Legislatures*]; see also Paul A. Diller, *The Political Process of Preemption*, 54 U. RICH. L. REV. 343, 355–81 (2020) [hereinafter Diller, *Political Process*] (surveying the variety of ways, such as political geography and gerrymandering, in which contemporary states stray from majoritarianism and the consequences of this democratic failure for state preemption).

42. See BRIFFAULT ET AL., STATE AND LOCAL GOVERNMENT LAW, *supra* note 33, at 377–97. The immunity function of home rule involves legal protection for local governments against state preemption. PRINCIPLES, *supra* note 1, at 1334.

43. PRINCIPLES, *supra* note 1, at 1334. “Imperio” home rule—from the Latin phrase *imperium in imperio*—a government within a government—generally refers to systems in which local governments have both the authority to make policy in the first instance and, at least in theory, supremacy over contrary state law in matters of local or municipal concern. *Id.*

44. JEFFERSON B. FORDHAM, AM. MUN. ASS’N, MODEL CONSTITUTIONAL PROVISIONS FOR MUNICIPAL HOME RULE (1953).

45. See *id.* The basic structure, and purpose, of the AMA Model was to eliminate uncertainty over what constituted “local” or “municipal” matters that formed the basis for local authority in earlier imperio models; in exchange for broadening the power of local governments to act in the first instance, however, the AMA Model empowered states to preempt or structure local power with few constraints. For this reason, the model is sometimes described as “legislative” home rule for the way it resides the power to resolve the allocation of state-local power in the state legislature. See Diller, *Intrastate Preemption*, *supra* note 32, at 1125–26.

46. See, e.g., *State Bldg. & Constr. Trades Council v. City of Vista*, 279 P.3d 1022, 1024 (Cal. 2012) (holding that the state’s wage law is “a municipal affair” that is governed by a city’s local ordinances rather than statewide legislation).

47. Interdisciplinary literature is emerging on the consequences of the abuse of state preemption that underscores, for example, the significantly negative health outcomes that arise in states that tend to abuse their preemption authority. See, e.g., Jennifer L. Pomeranz & Mark Pertschuk, *State Preemption: A Significant and Quiet Threat to Public Health in the United States*, 107 AM. J. PUB. HEALTH 900, 900–02 (2017).

the reality that the contemporary structure of home rule chills the ability of local governments to respond to the challenges they undeniably face. This is true for local-government policy innovation but also for the ability of local governments to fulfill another critical promise of decentralization—namely adopting policies that actually prove effective.

The hollowing out of local fiscal capacity, moreover, has distressingly familiar consequences. This is strikingly evident in the post-industrial Midwest, where cities like Flint, Michigan, underscore the harms that flow—in Flint’s case, literally—when local governments do not have the resources to meet even the most basic needs of their residents.<sup>48</sup> But state misstructuring of local finance has created capacity challenges in many other parts of the country,<sup>49</sup> and the fallout from the current pandemic is likely to exacerbate this hollowing out significantly.

Contemporary local powerlessness also carries distributional consequences. Opponents of local power regularly express concerns about equity; in particular, they worry that local control will allow certain jurisdictions to use their land use authority to exclude lower-income and minority populations<sup>50</sup>—a point we will address further below. But the current structure of local power in much of the country already reinforces racial, gender, and socioeconomic disparities. Mayors and other local officials trying to equalize disparate pay, bolster affordable housing, or broaden civil rights protection have been stymied in state after state.<sup>51</sup> It is notable that state minimum wage preemption laws were adopted in Georgia, Alabama, Ohio, Louisiana, Tennessee, and Missouri in *direct response* to minimum wage efforts in majority-minority cities: Atlanta, Birmingham, Cleveland, New Orleans, Memphis, and St. Louis.<sup>52</sup> Preemption is a leading civil rights issue for these and other cities,

48. See Toni M. Massaro & Ellen Elizabeth Brooks, *Flint of Outrage*, 93 NOTRE DAME L. REV. 155, 159–72 (2017) (recounting the Flint water crisis and its aftermath).

49. See Scharff, *Powerful Cities*, *supra* note 37, at 312–21.

50. See, e.g., Schleicher, *supra* note 5, at 899–910.

51. See, e.g., Briffault, *New Preemption*, *supra* note 11, at 1999–2008 (discussing new preemption efforts); Schragger, *Attack on American Cities*, *supra* note 11, at 1169–83 (same); Scharff, *Hyper Preemption*, *supra* note 11, at 1494–507 (same).

52. See *Georgia Among 21 States Stuck at \$7.25 Minimum Wage*, ATLANTA DAILY WORLD (July 28, 2017), <http://atlantadailyworld.com/2017/07/28/georgia-among-21-state-stuck-at-7-25-minimum-wage> [<https://perma.cc/F33K-TMWL>] (Atlanta); Zachary Roth, *Birmingham Raises Minimum Wage and Alabama Takes It Away*, NBC NEWS (Feb. 26, 2016, 4:37 PM), <https://www.nbcnews.com/news/nbcblk/birmingham-raises-minimum-wage-alabama-takes-it-away-n526806> [<https://perma.cc/PC86-95DM>] (Birmingham); Jeremy Pelzer, *Gov. John Kasich Signs Bill Blocking Cleveland’s \$15 Minimum Wage Proposal*, CLEVELAND.COM (Jan. 11, 2019, 5:49 PM), [https://www.cleveland.com/open/2016/12/gov\\_john\\_kasich\\_signs\\_bill\\_blo.html](https://www.cleveland.com/open/2016/12/gov_john_kasich_signs_bill_blo.html) [<https://perma.cc/3YN3-LSPP>] (Cleveland); Amelia Morrison Hipps, *Ban on Local ‘Living Wage’ Regs Bound for House Floor*, TNREPORT (Mar. 7, 2013), <http://tnreport.com/2013/03/07/ban-on-local-living-wage-regulations-clears-house-committee-tenne> ssee-legislature/ [<https://perma.cc/XH9X-LWNP>] (Memphis); Michael Isaac Stein, *Report: State Preemption Laws Disproportionately Hurt Women, People of Color*, LENS (May 8, 2019), <http://thelensnola>

all of which would arguably prefer self-rule rather than a principle of broad state powers that *might* theoretically be used to constrain exclusionary zoning in the suburbs—something that is unlikely to occur in any of the states that have for so long targeted majority-minority cities.

B. *A New Partnership Model of Local Authority*

How, then, does the NLC's model constitutional home rule article respond to these structural concerns? The model draws largely from existing aspects of home rule across the country in a novel synthesis that seeks to put local governments in a position that almost none play now—full partnership in state and local governance.<sup>53</sup>

The model article is divided into five operative sections with commentary that explains each provision in detail for any future reform efforts within the states and for courts considering the often murky application of home-rule provisions. The first section articulates the core principle that state constitutional law should recognize the right of the people to local self-government.<sup>54</sup> Although that is implicit in state constitutional recognition of home rule, the model is explicit so as to leave no doubt about its intended scope. In debates about the state and local balance of power, state sovereignty and the supposedly plenary authority of state government are often invoked as trumps, and the model article would make clear that every level of government derives its legitimacy from the consent of the governed. Nothing in contemporary constitutional law bars the people of a state from exercising the authority to delegate power in whatever vertical fashion they decide, and the model article renders the choice to protect local democracy transparent.<sup>55</sup>

The second section in the model article would bolster the basic terms of local initiative authority, creating a new baseline for Dillon's Rule states, expanding local initiative for imperio states, and clarifying local authority in

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org/2019/05/08/report-state-preemption-laws-disproportionately-hurt-women-people-of-color/ [https://perma.cc/GGS9-7HT2] (New Orleans); David A. Graham, *How St. Louis Workers Won and Then Lost a Minimum-Wage Hike*, ATLANTIC (Aug. 29, 2017), <https://www.theatlantic.com/business/archive/2017/08/st-louis-minimum-wage-preemption/538182/> [http://perma.cc/H54T-UTM8 (dark archive)] (St. Louis). See generally LAURA HUIZAR & YANNET LATHROP, *Fighting Wage Preemption: How Workers Have Lost Billions in Wages and How We Can Restore Local Democracy* (July 2019), <http://s27147.pcdn.co/wp-content/upload/Fighting-Wage-Preemption-Report-7-19.pdf> [http://perma.cc/452L-HEPR] (showing how preemption of local minimum wage laws “has become a powerful anti-worker and anti-democratic policy”).

53. See PRINCIPLES, *supra* note 1, at 1341. With one exception, around state fiscal support for local governance, see *id.* at 1380–82, the model article draws on elements of home rule currently present in some form in the states. See *id.* at 1350–84 (including the model article with commentary).

54. *Id.* at 1347.

55. See Richard Briffault, *Our Localism: Part I—the Structure of Local Government Law*, 90 COLUM. L. REV. 1, 6–18 (1990) (reviewing the formal structure of local government law in the United States).

states that have adopted the 1953 AMA Model's approach.<sup>56</sup> The section begins with the default proposition, similar to the AMA's, that local governments should have the authority to act on the entire range of policy matters they face.<sup>57</sup> The section also emphasizes the critical need to be clear about the breadth of local initiative authority around fiscal matters, such as raising and spending funds, as well as around making choices about how to provide local public goods, given the centrality of those issues to local capacity to govern.<sup>58</sup>

The third section in the NLC Model would create a presumption against state preemption, rebalancing the state-local relationship in the face of currently weak immunity.<sup>59</sup> Some state constitutions proffer procedural approaches to protect local authority from arbitrary or unreasonable state interference, requiring state legislative supermajorities, for example, or successive reenactment to preempt.<sup>60</sup> These kinds of procedural protections could provide a positive foundation for balancing state and local interests on the theory that, because courts are ill-equipped to evaluate the underlying substance of preemption conflicts, raising state procedural hurdles at least provides some check on ill-conceived state interference. In practice, however, courts have mostly ceded oversight over state legislative process, making these protections relatively easy for states to evade.<sup>61</sup>

The NLC Model takes a different approach. As a threshold matter, it requires that preemption be express,<sup>62</sup> as is the case in Illinois and other states.<sup>63</sup> This constraint on state oversight responds to the fact that implied-preemption challenges to local governance often require judicial feats of supposition: Did the legislature intend to displace local policy when it enacted a state regulatory regime? Can a political system tolerate some measure of inconsistency between state and local choices? On what metric? There is simply too much obscurity in

56. See PRINCIPLES, *supra* note 1, at 1348. Dillon's Rule is the doctrine that local governments derive their authority only from explicit grants of their states and that such grants are to be construed narrowly. *Id.* at 1333 n.6; DALE KRANE, PLATON N. RIGOS & MELVIN B. HILL JR., HOME RULE IN AMERICA: A FIFTY-STATE HANDBOOK 9–10 (2001).

57. See PRINCIPLES, *supra* note 1, at 1354–55.

58. *Id.* The section would also shore up the authority of local governments to act jointly with other local governments without prior authorization from the state to foster interlocal cooperation. And to the extent that issues related to home rule will inevitably lead to litigation, the section also explicitly rejects the Dillon's Rule restrictive interpretive canon. See *id.*

59. *Id.* at 1347–48.

60. See, e.g., ILL. CONST. art. VII, § 6(g); N.Y. CONST. art. IX, § 2(b)(1).

61. See, e.g., *Wambat Realty Corp. v. State*, 362 N.E.2d 581, 584–85 (N.Y. 1977) (allowing the state legislature to override the New York Constitution's successive session requirement where “the subject matter in need of legislative attention was of sufficient importance to the State”).

62. See PRINCIPLES, *supra* note 1, at 1366 (“[T]he state may only rely on express forms of preemption to restrict the power of home rule governments—implied preemption may not be used.”).

63. See, e.g., ILL. CONST. art. VII, § 6(g)–(h); see also PRINCIPLES, *supra* note 1, at 1366 n.110 (discussing statutory regimes in Florida and Maine that require express preemption).

various approaches to “field,” “conflict,” or other kinds of implied preemption, while requirements that state intent be explicit seem workable.

Beyond rejecting implied preemption, this section would require that state preemption serve a substantial state interest, be narrowly tailored to that interest, and be enacted by “general law.”<sup>64</sup> The first two of these elements reflect the concept of proportionality so familiar in other areas of law—that ends must be justified as well as means, and that even legitimate state interests should displace local authority only to the extent necessary to advance those interests. Under this substantiality standard, states do bear a burden of justification—*ipse dixit* would be insufficient to prevail over local governance—and something more than lack of uniformity would have to be involved, given that the essential nature of devolution values regulatory diversity. The provision would place a burden on the states to articulate relevant state interests and demonstrate that they are sufficiently significant to warrant displacing local democracy. To be sure, that empowers courts to adjudicate questions about the significance of relevant state interests. But courts do so regularly now in state-local conflicts, only under a standard that presumes as a default matter the inherent superiority of state-level interests.<sup>65</sup>

As to the “general law” requirement, a widespread concept in contemporary state-local relations, the NLC model adapts the approach taken by the Supreme Court of Ohio in *Canton v. State*.<sup>66</sup> According to the *Canton* court, the “general law” standard requires that state preemption be part of a comprehensive legislative enactment, apply uniformly statewide, and further a state regulatory interest rather than simply remove the authority that a constitution grants to local governments.<sup>67</sup>

64. See PRINCIPLES, *supra* note 1, at 1366–67.

65. See Lynn A. Baker & Daniel B. Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, 86 DENV. U. L. REV. 1337, 1138–39, 1349–55 (2009) (noting that most jurisdictions provide no “immunity” function for home rule and in the jurisdictions that do, courts seek to delineate statewide interests, which prevail, in contrast to some realm of local interests).

66. 766 N.E.2d 963 (Ohio 2002); see PRINCIPLES, *supra* note 1, at 1370.

67. *Canton*, 766 N.E.2d at 968 (“[T]o constitute a general law for purposes of home-rule analysis, a statute must (1) be part of a statewide and comprehensive legislative enactment, (2) apply to all parts of the state alike and operate uniformly throughout the state, (3) set forth police, sanitary, or similar regulations, rather than purport only to grant or limit legislative power of a municipal corporation to set forth police, sanitary, or similar regulations, and (4) prescribe a rule of conduct upon citizens generally.”).

In his critique, Professor Schleicher challenges the invocation of this standard because the policy at issue in *Canton* involved local regulation of manufactured homes. Schleicher, *supra* note 5, at 892 n.49. However, one of the reasons the *Canton* court was dubious about the state statutory regime at issue—a critical aspect of the court’s finding of nonuniformity—was that it had a carve-out to allow parts of the state with active deed restrictions or homeowners associations to block manufactured homes, effectively barring older cities from regulating issues like housing quality, but empowering suburbs to be exclusionary. See *Canton*, 766 N.E.2d at 969.

Professor Schleicher also argues that invoking this standard undermines the ability of states to declare areas of policy free from regulation, at the state and local level. Schleicher, *supra* note 5, at

The fourth section of the model article focuses on protecting and reinforcing the mechanics of local democracy, which it recognizes as the core of the core of home rule.<sup>68</sup> It would not bar state intervention on issues such as districting or local personnel but would require that states bear an even higher burden of justification for overriding these largely internal local processes.<sup>69</sup> And it would constitutionally bar the worst excesses of punitive preemption, providing local governments and local government officials the same immunity from suit for governmental functions that the state itself enjoys.<sup>70</sup>

Finally, the fifth section of the model would mandate state fiscal support for local governance.<sup>71</sup> One part of the section adapts existing prohibitions on unfunded state mandates.<sup>72</sup> But building on the concept of state constitutional mandates of adequacy for education, the section would place a burden on states to take affirmative steps to make sure that local governments have a minimal baseline of resources they need to meet the critical governance responsibilities they carry.<sup>73</sup> For example, state constitutional educational provisions have hardly been a panacea for the shortcomings of public schools, but litigation over the obligation has prodded some states to take the resource challenges and the inequity of this particular aspect of delegated local governance more seriously.<sup>74</sup>

It is important, then, to be clear about what the NLC's model constitutional article would and would *not* do. It would provide a baseline of authority in state constitutional law for local governments to tackle the full range of problems they face and structure their own governance. And it would rebalance the state-local relationship by recognizing that states have obligations to, as well as power over, local governments. The model article, however, would not cut off or eliminate state authority, like an imperio approach on steroids. The model's presumption against state preemption is just that—a presumption. It would require states to make conscious choices about displacing local democracy and have good reasons for doing so rather than simply nakedly asserting supervening power, but that is the least we can ask of the states. If California—which has relatively strong home rule for its charter cities, all things

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892 n.49. The Ohio general laws standard, however, merely recognizes that singling out local authority—denying a local choice to act—standing alone undermines the delegation of initiative authority in the Ohio Constitution. A state may choose not to regulate at the state level and may choose to regulate in a way that requires uniformity; but to choose neither to act nor to allow local initiative belies the nature of home rule.

68. See PRINCIPLES, *supra* note 1, at 1348.

69. *Id.* at 1374–75.

70. *Id.* at 1376.

71. *Id.* at 1380.

72. *Id.* at 1382–84.

73. *Id.*; cf. Michelle Wilde Anderson, *The New Minimal Cities*, 123 YALE L.J. 1118, 1195–97 (2014) (discussing dynamics of essential local spending and minimum standards for urban life).

74. See BRIFFAULT ET AL., STATE AND LOCAL GOVERNMENT LAW, *supra* note 33, at 596–635 (surveying state education finance litigation).



considered—cannot justify a state interest in solving its housing crisis, there would clearly be something wrong with the state’s approach. Even then, the NLC framework would still recognize that localism has an important role to play in statewide regimes that are responding to significant exigencies. What the model article would no longer allow, however, is states to override local governance simply because state lawmakers take a different policy view.

## II. POLICY AND THE *PRINCIPLES*

What are the policy implications of the *Principles*’ proposed rebalancing of state-local power? Historically, conflicts over the appropriate vertical division of government authority—whether state-local or state-federal—have tended to occur against the backdrop of specific events (e.g., the Great Depression<sup>75</sup>) or in the shadow of particular policy conflicts (e.g., COVID-19 health regulations).<sup>76</sup> It is very difficult to separate policy preferences from the more abstract issue of the appropriate distribution of power. The NLC’s home-rule provisions are transsubstantive; the model rules are meant to provide courts with rules of decision for allocating authority over a varied range of policy areas. Nevertheless, one might want to know how a particular policy area might be resolved under the rules. In this part, we consider a few such areas, using Professor Schleicher’s critique as a point of departure. He identifies five core problems that he thinks the NLC’s model home-rule provisions will exacerbate: housing affordability, abusive corporate subsidies, the pension crisis, local electoral failure, and police brutality.<sup>77</sup>

These are important issues, and to have a reasonable debate about how any particular vertical allocation of authority might or might not foster solving them is not to ignore their seriousness. But are these problems (or *any* of the difficult policy challenges of modern urban governance) actually “local” in nature? Under the existing structure of authority, states already have the full power to address all these issues. Ever since the U.S. Supreme Court decided *Hunter v. Pittsburgh*<sup>78</sup> in 1907, cities have had no federal constitutional right to resist state law, and as noted, the home rule grants they enjoy in state constitutional law provide very limited immunity.<sup>79</sup> States could have addressed all these supposed locally caused ills long ago if they took them at all seriously. Only state constitutional bans on “special legislation”<sup>80</sup>—which have come to be barely

75. See, e.g., 3 G. EDWARD WHITE, *LAW IN AMERICAN HISTORY: 1930–2000*, at 155–211 (2019) (discussing the rise of federal power in response to the Great Depression).

76. See, e.g., Nathan Newman, *The Withering Away of the States Can’t Happen Soon Enough*, *NATION* (Nov. 19, 2021), <https://www.thenation.com/article/politics/federal-states-rights/> [<https://perma.cc/W4GA-2ZUX>] (arguing that states have failed to address the COVID-19 pandemic).

77. See Schleicher, *supra* note 5, at 898–919.

78. 207 U.S. 161.

79. *Id.* at 178.

80. See, e.g., NEB. CONST. art. III, § 18.

enforced<sup>81</sup>—and some other fairly minor restrictions on state authority stand in the way of legislative action. Other than those thin limits, most state legislatures can preempt local law basically at will.

So, who is to blame for the policy failures in these disparate areas? Why have the states not already stepped in to fix them? And why would one resist city power if the current regime is failing, and in many respects exacerbating, these problems? We address these questions in turn for each of the policy areas Schleicher identifies.

#### A. *Housing Affordability*

Consider first the housing affordability crisis. A central concern of critics of home rule, already mentioned above, is that increased local authority will stand in the way of greatly needed state efforts to reform local land use laws, in particular local exclusionary zoning regulations.<sup>82</sup> The YIMBY (yes-in-my-backyard) movement that has gained traction in expensive metropolitan areas, especially in California, seems particularly skeptical of local power.<sup>83</sup> Schleicher reads the entire *Principles* project through this lens, as have others who understand local power as inextricably tied to NIMBY (not-in-my-backyard) land use attitudes. For Schleicher, all local power is suspect because the zoning power—which has traditionally been exercised by local governments—can be used by some local governments to limit construction and thus raise the cost of housing both locally and regionally.<sup>84</sup> Racial and socioeconomic segregation is one result. For these critics, localism and NIMBYism are one-and-the-same.<sup>85</sup>

81. See Evan C. Zoldan, *The Equal Protection Component of Legislative Generality*, 51 U. RICH. L. REV. 489, 497 n.34 (2017) (“[S]tate special legislation has persisted despite these state constitutional provisions because they tend to be weakly enforced and are riddled with exceptions.”).

82. See, e.g., Anika Singh Lemar, *The Role of States in Liberalizing Land Use Regulations*, 97 N.C. L. REV. 293, 345–48 (2019) (arguing that pro-development groups will be more successful at the state level); Kenneth A. Stahl, “Yes in My Backyard”: Can a New Pro-Housing Movement Overcome the Power of NIMBYs?, 41 ZONING & PLAN. L. REP. 1, 8 (2018) (suggesting YIMBYs focus reform efforts at the state level).

83. The YIMBY movement seeks to foster development to respond to the challenges of constrained supply on housing affordability and related challenges. See Alana Semuels, *From ‘Not in My Backyard’ to ‘Yes in My Backyard,’* ATLANTIC (July 5, 2017), <https://www.theatlantic.com/business/archive/2017/07/yimby-groups-pro-development/532437> [<https://perma.cc/9XB8-F7BY> (dark archive)] (profiling the movement); Erin McCormick, *Rise of the YIMBYs: The Angry Millennials with a Radical Housing Solution*, GUARDIAN (Oct. 2, 2017, 2:15 PM), <https://www.theguardian.com/cities/2017/oct/02/rise-of-the-yimbys-angry-millennials-radical-housing-solution> [<https://perma.cc/A8GD-VVLU>] (describing the San Francisco Bay Area as “[t]he birthplace of the YIMBY movement”).

84. See Schleicher, *supra* note 5, at 899–910.

85. For an extended response to this critique, see Richard Schragger, *The Perils of Land Use Deregulation*, 170 U. PA. L. REV. 125 (2021) [hereinafter Schragger, *Perils of Land Use Deregulation*].

These criticisms of local land use authority are not new. We both have written (repeatedly) about the deleterious effects of exclusionary zoning.<sup>86</sup> So have other members of the *Principles*' drafting team.<sup>87</sup> Richard Briffault, in particular, has written a now-classic article that focuses on the ways in which suburbs use exclusionary zoning and other tactics to undermine regional equity and urban health.<sup>88</sup>

And yet there are some very good reasons for not allowing exclusionary zoning to be the tail that wags the dog of home rule. First, as already noted, for at least seventy-five years states have done virtually nothing about exclusionary zoning, though they have always had the power to do so and even though reformers have been touting the benefits of regional land use for almost as long.<sup>89</sup> Why the sudden trust in state political processes? In New Jersey, the state supreme court struck down exclusionary zoning in 1975,<sup>90</sup> but the state legislature's lackluster efforts to create a fair and equitable housing regime over the next fifty years have mostly failed.<sup>91</sup> Other states that have adopted statewide land use regimes have also generally failed to ameliorate state and local housing affordability challenges.<sup>92</sup> For instance, Connecticut recently adopted a much-lauded statewide land use law, but, predictably, that law does little to change the underlying incentives that lead local governments to adopt exclusionary zoning.<sup>93</sup> The new law also does little to offend the suburban voters

86. See, e.g., Nestor M. Davidson, *The Dilemma of Localism in an Era of Polarization*, 128 YALE L.J. 954, 976–77 (2019) [hereinafter Davidson, *Dilemma*]; Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959, 1023–31 (2007); Richard Schragger, *Consuming Government*, 101 MICH. L. REV. 1824, 1839–42 (2003); Richard Schragger, *The Limits of Localism*, 100 MICH. L. REV. 371, 420–24 (2001).

87. See, e.g., Laurie Reynolds, *Local Governments and Regional Governance*, 39 URB. LAW. 483, 528 (2007).

88. Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 366–67, 438 (1990).

89. See *supra* notes 83–84 and accompanying text; Reynolds, *supra* note 87, at 484–86.

90. *S. Burlington Cnty. NAACP v. Township of Mount Laurel*, 336 A.2d 713, 734 (N.J. 1975).

91. See DOUGLAS S. MASSEY, LEN ALBRIGHT, REBECCA CASCIANO, ELIZABETH DERICKSON & DAVID N. KINSEY, *CLIMBING MOUNT LAUREL: THE STRUGGLE FOR AFFORDABLE HOUSING AND SOCIAL MOBILITY IN AN AMERICAN SUBURB* 184–86 (2013); Joseph Marsico, *A Forty-Year Failure: Why the New Jersey Supreme Court Should Take Control of Mount Laurel Enforcement*, 41 SETON HALL LEGIS. J. 149, 159–64 (2017).

92. See John R. Nolon, *Golden and Its Emanations: The Surprising Origins of Smart Growth*, 35 URB. LAW. 15, 67 (2003) (noting that “New Jersey’s aggressive, state-mandated fair share housing policy has been emulated timidly in just a few states” and that in most states neither regionalism nor reform movements have succeeded in controlling local planning outcomes); Jessie Agatstein, *The Suburbs’ Fair Share: How California’s Housing Element Law (and Facebook) Can Set a Housing Productions Floor*, 44 REAL EST. L.J. 219, 219–20 (2015) (describing how fair share programs have only been “implemented in a half-dozen states around the country”).

93. See Act of June 10, 2021, Pub. Act 21-29, 2021 Conn. Legis. Serv. (West) (codified in scattered sections of CONN. GEN. STAT.).

that dominate the Connecticut legislature.<sup>94</sup> An early review of California's recently adopted S.B. 9, which purports to abolish single-family zoning across the state, also indicates it will have a limited impact.<sup>95</sup>

Decentralization is not the cause of the coastal housing crisis; centralizing land use authority will do little if state and national politicians are responsive to the same set of voters. Suburban voters are resistant to multifamily housing, no doubt,<sup>96</sup> and this is regrettable. But why limit the power of those cities that want to adopt affordable housing requirements with the hope that states will come to the rescue? Past and more recent history shows that to be highly unlikely.<sup>97</sup> And yet the specter of exclusionary zoning continues to haunt home rule.

Second, while the housing crisis is undoubtedly real and important—especially in certain popular coastal cities—other cities face the problem of too much housing, not too little.<sup>98</sup> Cities with declining populations are less concerned about suburban exclusionary zoning and more concerned with their revenue-raising ability under conditions of perennial fiscal stress.<sup>99</sup> Many of us would agree that suburban selfishness and “opportunity hoarding”<sup>100</sup> is a problem, but “the suburbs” themselves are now much more diverse, both economically and fiscally.<sup>101</sup> Many formerly “exclusionary” suburbs are facing social and economic difficulties that have nothing to do with exclusionary land use policies.<sup>102</sup>

Urban and suburban decline has occurred against a backdrop of state intergovernmental policy. State law generally dictates how local government

94. See Cate Hewitt, *Few See 'Win,' as House Approves Less Far-Reaching Housing Law*, CONN. EXAM'R (May 21, 2021), <https://ctexaminer.com/2021/05/21/few-see-win-as-house-approves-less-far-reaching-housing-law> [<https://perma.cc/CJ4U-2S5X>] (noting lukewarm reactions to the reform package).

95. See Henry Grabar, *You Can Kill Single-Family Zoning, but You Can't Kill the Suburbs*, SLATE (Sept. 17, 2021, 5:38 PM), <https://slate.com/business/2021/09/california-sb9-single-family-zoning-duplexes-newsom-housing.html> [<https://perma.cc/9PLU-Z25K>] (citing studies indicating that S.B. 9 will have limited effect); Act of Sept. 16, 2021, ch. 162, 2021 Cal. Legis. Serv. (West) (codified at CAL. GOV'T CODE §§ 66452.6, 65852.21, 66411.7).

96. Cf. *S. Burlington Cnty. NAACP v. Township of Mount Laurel*, 336 A.2d 713, 734 (N.J. 1975) (describing and invalidating suburban fiscal zoning, which limits multifamily housing construction).

97. For more discussion of this point, see Schragger, *Perils of Land Use Deregulation*, *supra* note 85, at 153–60.

98. For more discussion on shrinking cities, see Anderson, *supra* note 73, at 1138–39.

99. See *id.*

100. CHARLES TILLY, *DURABLE INEQUALITY* 147–69 (1998); see also J. Peter Byrne, *Are the Suburbs Unconstitutional?*, 85 GEO. L.J. 2265, 2268–69 (1997).

101. See Richard Florida, *The New Suburban Crisis*, BLOOMBERG (May 2, 2017, 10:05 AM), <https://www.bloomberg.com/news/articles/2017-05-02/inside-the-new-suburban-crisis> [<https://perma.cc/8AZ6-96G8>] (reporting on shrinking inner-ring suburbs and growing cities and suburban peripheries).

102. ALAN EHRENHALT, *THE GREAT INVERSION AND THE FUTURE OF THE AMERICAN CITY* 109–12 (2012).

services are financed. The structure of that fiscal system is one of the chief reasons that local governments deploy exclusionary zoning. States have created a system by which local governments are dependent on the property tax to fund basic services, including, most importantly, schools. State law dictates how jurisdictional boundaries are drawn and what kinds of taxable resources are available to which communities. State law limits local governments' revenue sources as well as the taxability of services and land, enforces debt and spending limitations that often hamstring local governments, and imposes unfunded mandates.<sup>103</sup> States could adopt revenue sharing, but they do not. These state policies have led to the “fiscalization” of land use<sup>104</sup>—the effort by locals to use what powers they have over zoning to control their fiscal fates.

And that is before we consider state laws that prevent local governments from adopting inclusionary housing policies or make it difficult for them to build affordable housing themselves.<sup>105</sup> Those state laws are currently on the books<sup>106</sup> and do more to restrict local housing opportunities than a home rule principle that *might* bar the currently *theoretical* statewide deregulatory zoning laws that some YIMBY advocates seem to believe are just around the corner. Indeed, we should be very clear that the use of “*might*” here is purposeful: nothing in the *Principles* prevents the state from overriding local land use laws if the state can meet its burden of proving that the state is advancing a substantial state interest. A statewide housing crisis would certainly meet that standard.

Third, cities are responding to the new YIMBY politics. It is difficult to understand the claim that cities cannot be trusted to respond to the housing crisis when housing is such a pivotal political issue in places like San Francisco, Los Angeles, and New York<sup>107</sup>—not to mention in places like Charlottesville and Richmond.<sup>108</sup> The argument assumes that local citizens and their elected

103. Richard C. Schragger, *Democracy and Debt*, 121 YALE L.J. 860, 860 (2012) [hereinafter Schragger, *Democracy and Debt*]; David A. Super, *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544, 2549 & n.21 (2005); Richard Briffault, *Foreword: The Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, 34 RUTGERS L.J. 907, 911–12 (2003).

104. Jonathan Schwartz, *Prisoners of Proposition 13: Sales Taxes, Property Taxes, and the Fiscalization of Municipal Land Use Decisions*, 71 S. CAL. L. REV. 183, 201–04 (1997).

105. See, e.g., Act of April 19, 2021, ch. 249, 2021 Mont. Laws 736 (codified at MONT. CODE ANN. §§ 7-2-4203, 76-2-203, -302 (2022)); Nora Shelly, *Bill To Ban Inclusionary Zoning Heard by Montana Senate Committee*, BOZEMAN DAILY CHRON. (Mar. 12, 2021), [https://www.bozemandailychronicle.com/news/city/bill-to-ban-inclusionary-zoning-heard-by-montana-senate-committee/article\\_9cf6ed36-c428-58cd-bd0d-871e3c01d4c2.html](https://www.bozemandailychronicle.com/news/city/bill-to-ban-inclusionary-zoning-heard-by-montana-senate-committee/article_9cf6ed36-c428-58cd-bd0d-871e3c01d4c2.html) [https://perma.cc/7C2G-VZXC].

106. *State Preemption of Local Equitable Housing Policies*, LOC. SOLS. SUPPORT CTR., <https://www.supportdemocracy.org/equitablehousing/> [https://perma.cc/NSR2-8GDP].

107. For a discussion of San Francisco in particular, see, for example, CONOR DOUGHERTY, *GOLDEN GATES: FIGHTING FOR HOUSING IN AMERICA* (2020) (describing pro-housing coalitions in San Francisco).

108. See, e.g., Sarah King, *The Housing Gap*, RICHMOND MAG. (May 21, 2019, 5:03 PM), [https://richmondmagazine.com/news/news/housing\\_1/](https://richmondmagazine.com/news/news/housing_1/) [https://perma.cc/D9C3-NCSM]; CJ Paschall,

officials will rarely or never permit increased development or density and that only enlightened statewide coalitions will be able to force changes on recalcitrant cities and suburbs.

There is no reason, however, to believe that local coalitions to expand housing opportunities cannot be constructed at the municipal level or that pro-housing constituencies will somehow be systematically ignored. Indeed, a large body of literature argues that developer interests are well represented in mature cities as well as in developing suburban and rural municipalities,<sup>109</sup> even if some suburban municipalities are decidedly antigrowth and will effectively remain so. If housing advocates can win at the local level, taking away locals' power to shape land use is exactly the *opposite* of what one should do, especially in light of the history of state inaction and the power of NIMBY forces in state politics.

This leads to a final observation. When one thinks about the pros and cons of home rule, the kind of place one imagines exercising it matters a lot. Exclusionary suburbs have been the focus of metropolitan reform efforts for at least half a century. That effort is not wrong, but it is far from the whole picture. Those kinds of places may—and likely will—succeed in excluding regardless of state law, as the New Jersey experience proves. But by building one's concept of local power around that archetype, which increasingly fails to represent the reality of suburban socioeconomics and demographics,<sup>110</sup> we limit the exercise of power in the very places that have traditionally been injured by suburban exclusion: cities and inner-ring suburbs, many of which are actively seeking solutions to housing affordability and displacement challenges. Restricting local power in this, as in other areas, will hurt the very places that YIMBY advocates want to help.

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*Report: Charlottesville Affordable Housing Crisis Disproportionately Affects Black People*, NBC, <https://www.nbc29.com/2020/03/13/report-charlottesville-affordable-housing-crisis-disproportionately-affects-black-people/> [<https://perma.cc/VR47-FS73> (staff-uploaded archive)] (Mar. 13, 2020, 11:18 AM); Benjamin Schneider, *The American Housing Crisis Might Be Our Next Big Political Issue*, BLOOMBERG (May 16, 2018, 5:12 PM), <https://www.citylab.com/equity/2018/05/is-housing-americas-next-big-political-issue/560378/> [<https://perma.cc/84VG-HLGQ>].

109. See JOHN R. LOGAN & HARVEY L. MOLOTCH, *URBAN FORTUNES: THE POLITICAL ECONOMY OF PLACE* (1987); Andrew E.G. Jonas & David Wilson, *The City as a Growth Machine: Critical Reflections Two Decades Later*, in *THE URBAN GROWTH MACHINE: CRITICAL PERSPECTIVES, TWO DECADES LATER* 3, 3 (Andrew E.G. Jonas & David Wilson eds., 1999); H.V. SAVITCH & PAUL KANTOR, *CITIES IN THE INTERNATIONAL MARKETPLACE: THE POLITICAL ECONOMY OF URBAN DEVELOPMENT IN NORTH AMERICA AND WESTERN EUROPE* 348 (2002); Harvey Molotch, *The City as a Growth Machine: Toward a Political Economy of Place*, 82 *AM. J. SOCIO.* 309, 309–10 (1976).

110. Over the past two decades, poverty in the United States has become an increasingly suburban phenomenon, with over three million more people living in poverty in the suburbs than in traditional central cities as of 2015. See Elizabeth Kneebone, *The Changing Geography of US Poverty*, BROOKINGS INST. (Feb. 15, 2017), <https://www.brookings.edu/testimonies/the-changing-geography-of-us-poverty/> [<https://perma.cc/8JTH-6HRY>].

B. *Corporate Subsidies, Pension Crises, Local Elections, and Police Misconduct*

Similar arguments hold for the other policy areas identified by Schleicher<sup>111</sup> that appear to be “local” but are in fact driven mainly by state law and politics. Home rule has little to do with the abuse of corporate subsidies, the pension crisis, local electoral entrenchment, or police misconduct. States already dominate in these areas or would likely govern no differently than locals—or do much worse. In these policy arenas, the centralization/decentralization debate is mostly beside the point.

Indeed, it bears repeating that, as with housing affordability, these other policy challenges persist despite the states’ current plenary authority over cities. Moreover, these challenges are not new; similar ones served as an excuse to limit local power in the late nineteenth century as well. Blaming cities for these types of failures while not readily providing a solution has been something of a tradition over the last century. It is much easier to limit local authority than it is to actually address the difficult substantive issues that afflict both states and local governments. Here we consider corporate subsidies and the pension crisis, local elections, and police misconduct in turn.

1. Corporate Subsidies and the Pension Crisis

First, consider corporate subsidies and the pension crisis. Both involve the comparative fiscal probity of state and local governments. To critics, cities have always been too ready to provide subsidies for corporations, whether railroads, automobile manufacturers, or Amazon.<sup>112</sup> So too, for critics, cities have often been overly generous with their public pensions. John Dillon, the nineteenth-century jurist who articulated the rule of strict construction limiting local government powers,<sup>113</sup> notably centered his constitutional theory on the proposition that cities could not be trusted to exercise fiscal restraint.<sup>114</sup> Dillon’s Rule—the doctrine that cities derive their authority only from explicit grants by their states<sup>115</sup>—still bears his name. Dillon’s worry that cities will be

111. See Schleicher, *supra* note 5, at 883.

112. See Schragger, *Democracy and Debt*, *supra* note 103, at 866–67; Reid Wilson, *States, Cities Rethink Tax Incentives After Amazon HQ2 Backlash*, HILL (Feb. 17, 2020, 2:15 PM), <https://thehill.com/homenews/state-watch/483127-states-cities-rethink-tax-incentives-after-amazon-hq2-backlash> [http://perma.cc/4YDR-WE3H].

113. See *City of Clinton v. Cedar Rapids & Mo. River R.R. Co.*, 24 Iowa 455, 475 (1868); JOHN F. DILLON, *TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS* 101–02 (1872).

114. DILLON, *supra* note 113, at 21–26; RICHARD SCHRAGGER, *CITY POWER: URBAN GOVERNANCE IN A GLOBAL AGE* 61–65 (2016) [hereinafter SCHRAGGER, *CITY POWER*]; Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1117–18 (1980).

115. See DILLON, *supra* note 113, at 21–26.

profligate spenders unless constrained has been and continues to be commonplace.<sup>116</sup>

Of course, as Dillon well knew, it was not only cities that overextended themselves. Numerous states in the nineteenth century defaulted after committing to bond issues to finance railroad and other infrastructure investments.<sup>117</sup> More recently, the federal programs that fell under the rubric of “urban renewal” in the mid-twentieth century were only possible because of the availability of state and federal funds. Urban renewal funds often subsidized downtown commercial redevelopment at the expense of local low-income minority communities, who were regularly displaced.<sup>118</sup> But it is important to remember that without federal support, locals would not have been able to afford subsidizing redevelopment at such a scale. Similarly, state monies underwrote the exercise of eminent domain in the famous *Kelo v. New London*<sup>119</sup> takings case, which involved tax breaks and other incentives to induce Pfizer to relocate to New London.<sup>120</sup> And one need only look at the Amazon HQ2 bids to realize that most giveaways in that competition were not out of purely local dollars. Virginia voted to give \$750 million to the project in Arlington.<sup>121</sup> New York was slated to give nearly \$3 billion in state funding to its Amazon bid.<sup>122</sup>

If cities were left alone, they might still engage in useless races-to-the-bottom in the hunt for mobile capital, but certainly not on the scale or to the degree that states currently do. Cities would have to internalize the costs of their bids to their own taxpayers, which might be quite difficult when the costs and benefits of the project are concentrated.

Moreover, city constituents seem more attentive than state officials to the trade-offs of having a good “business climate.” Corporate interests seem to have

116. Cf. SCHRAGGER, CITY POWER, *supra* note 114, at 61–65 (describing the policy concerns that led to Dillon’s Rule).

117. See ERIC H. MONKKONEN, THE LOCAL STATE: PUBLIC MONEY AND AMERICAN CITIES 25–26 (1995). Monkkonen reports that there were approximately 941 municipal bond defaults between 1854 and 1929, with a peak of 111 in 1898. Bond defaults rose by orders of magnitude during the Great Depression, peaking in 1935 with 3,251 defaults. See *id.*

118. See Wendell E. Pritchett, *The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL’Y REV. 1, 13–21 (2003) (describing how the national rhetoric around “urban blight” facilitated urban renewal and the use of eminent domain by national planning organizations).

119. 545 U.S. 469 (2005).

120. *Id.* at 473.

121. Robert McCartney, *Virginia House Approves \$750 Million in Amazon Subsidies After 9 Minutes of Debate*, WASH. POST (Jan. 28, 2019), [https://www.washingtonpost.com/local/virginia-politics/virginia-house-approves-750-million-in-amazon-subsidies-after-9-minutes-of-debate/2019/01/28/ac1a40ac-2334-11e9-90cd-dedb0c92dc\\_story.html](https://www.washingtonpost.com/local/virginia-politics/virginia-house-approves-750-million-in-amazon-subsidies-after-9-minutes-of-debate/2019/01/28/ac1a40ac-2334-11e9-90cd-dedb0c92dc_story.html) [<https://perma.cc/W5TD-VEYP> (dark archive)].

122. Emily Badger, *In the End, Amazon Didn’t Win Its Own Subsidy Game*, N.Y. TIMES (Feb. 14, 2019), <https://nyti.ms/2UZs1si> [<https://perma.cc/766A-CWU7> (dark archive)].



significant sway in state capitols these days.<sup>123</sup> Industries from across the spectrum, from telecommunications to oil and gas to firearms, have effectively lobbied state legislatures for preemptive legislation and have successfully fended off local regulation time and time again.<sup>124</sup> Cities are more likely to adopt minimum wage requirements and reject giveaways to corporate capital (as locals did in New York City, thereby prompting Amazon to abandon that aspect of its HQ2 plans).<sup>125</sup> Locals are not the ones we should be most worried about when it comes to corporate subsidies.

As for the pension crisis, there too, states are no better off than cities,<sup>126</sup> and perhaps for the same reasons. A previously large municipal workforce is now getting old, while the local tax base is smaller and not as capable of supporting retirees in the way that was once taken for granted. Some pensions are quite generous, but some that have been described as overly generous are not. Detroit is in the latter category.<sup>127</sup> Its pension problems are serious, to be sure. But what is the cause? In 1950, the city housed close to 1.8 million people and was at the height of its powers.<sup>128</sup> It has since lost more than half of its population to deindustrialization, suburbanization, and migration to other states.<sup>129</sup> The city may have made bad deals, but the fiscal crisis in Detroit is largely a function of global economic restructuring and demographic change, not bad governance.<sup>130</sup> Those macroeconomic factors swamp any decisions made by either local or state leaders.

In any case, *state* law often entrenches pension commitments to municipal employees (police and firefighters are a common example); those commitments must be honored by local governments.<sup>131</sup> For those interested in preserving

123. See ALEXANDER HERTEL-FERNANDEZ, *STATE CAPTURE: HOW CONSERVATIVE ACTIVISTS, BIG BUSINESSES, AND WEALTHY DONORS RESHAPE THE AMERICAN STATES—AND THE NATION* 13–14 (2019) (describing strategies corporations employ to ensure their priorities end up as state law).

124. Schragger, *Attack on American Cities*, *supra* note 11, at 1170–74.

125. J. David Goldman, *Amazon Pulls Out of Planned New York Headquarters*, N.Y. TIMES (Feb. 14, 2019), <https://nyti.ms/2UYaeSh> [<https://perma.cc/GCP7-YMDG> (dark archive)].

126. See, e.g., Patrick Mulholland, *Pension Crisis: US Seeks To Save Flawed State Benefits System*, FIN. TIMES (Feb. 1, 2020), <https://www.ft.com/content/758b6709-1d05-4feb-8206-e902f52f6696> [<https://perma.cc/8LZ5-DJTS> (dark archive)] (discussing Illinois's underfunded pension system that has left firefighters concerned about their ability to retire).

127. See Melanie Hicken, *Just How Generous Are Detroit's Pensions?*, CNN MONEY (July 23, 2013, 7:04 AM), <https://money.cnn.com/2013/07/23/retirement/detroit-pensions/index.html> [<https://perma.cc/UP79-YNPN>] (explaining that Detroit's pensions “pale in comparison” to other cities).

128. William Sander & William Testa, *Why Chicago Is Not Detroit*, FED. RSRV. BANK CHI.: MIDWEST ECON. BLOG (May 2, 2016), [https://www.chicagofed.org/publications/blogs/midwest-economy/2016/why\\_chicago\\_is\\_not\\_detroit](https://www.chicagofed.org/publications/blogs/midwest-economy/2016/why_chicago_is_not_detroit) [<https://perma.cc/6LL8-RYE9>].

129. *Id.*; see SCHRAGGER, *CITY POWER*, *supra* note 114, at 238–46 (discussing the reasons for Detroit's decline).

130. See SCHRAGGER, *CITY POWER*, *supra* note 114, at 240.

131. See Terrance O'Reilly, *A Public Pensions Bailout: Economics and Law*, 48 U. MICH. J.L. REFORM 183, 195–99 (2014) (detailing the legal status of public employee pension benefits).

local fiscal probity, one would think that a preemption standard preventing these kinds of state fiscal mandates would be welcome. The *Principles* in fact embodies that very idea.

## 2. Local Elections

The pathologies of local elections also worry critics of local power. Schleicher, for example, argues that local political processes are dominated by influential interest groups including, most powerfully, homeowners.<sup>132</sup> Because local elections are low turnout affairs that favor whiter and richer constituencies, the argument goes, giving local governments authority to adopt their own electoral processes is illegitimate. The concern with local political pathologies is not unreasonable, but again, the question when thinking about home rule is: Compared to what? The claim must be that local political processes are somehow worse than state processes.

But this claim is puzzling in light of the obvious deficiencies of state and federal elections—dominated as they are by big money donors and also disproportionately favoring whiter and richer voters.<sup>133</sup> So, too, state democratic processes are easily captured by corporate interests and by parties seeking to entrench their own dominance. If one is worried about democratic integrity, then one should be focused on *state* electoral policy. The epidemic of voter suppression is not a local one. States are at the vanguard of restricting the franchise and limiting participation in various ways.<sup>134</sup> Indeed, many of the states that have been most aggressive in preempting local governments have the least representative legislatures.<sup>135</sup>

The reality is that local elected office is more accessible than state or federal office. The cost to run for school board or city council is typically less

132. Schleicher, *supra* note 5, at 911. See generally WILLIAM A. FISCHER, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* 39 (2001) (arguing that zoning is crucial to motivating homebuyers to “vote with their feet” because it advances capitalization).

133. Richard Briffault, *Corporations, Corruption, and Complexity: Campaign Finance After Citizens United*, 20 CORNELL J.L. & PUB. POL’Y 643, 646–50 (2011); Maggie Koerth, *How Money Affects Elections*, FIVETHIRTYEIGHT (Sept. 10, 2018, 5:56 AM), <https://fivethirtyeight.com/features/money-and-elections-a-complicated-love-story/> [<https://perma.cc/UN98-9EEW>].

134. See *Block the Vote: How Politicians Are Trying To Block Voters from the Ballot Box*, ACLU, <https://www.aclu.org/news/civil-liberties/block-the-vote-voter-suppression-in-2020/> [<http://perma.cc/GD8W-7XAP>] (Aug. 18, 2021) (cataloguing state use of voter ID laws, voter registration restrictions, voter roll purges, and felony disenfranchisement laws). Many of the states that have been breaking preemption norms have the least representative legislatures. See Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 836–37 (2015); see also Diller, *Political Process*, *supra* note 41, at 362.

135. See Seifter, *Counter-majoritarian Legislatures*, *supra* note 41, at 1791–94; Diller, *Political Process*, *supra* note 41, at 362; Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 836–37 (2015).

than \$1,000 and even in large districts does not normally exceed \$25,000.<sup>136</sup> To run for Congress, one would need, on average, more than \$1,000,000.<sup>137</sup> Moreover, the fact of low voter turnout is not a reason to deny local power. The causation might in fact be exactly backwards. Why vote when the city can exercise little authority over the things that matter to it? Participation in local elections would likely increase if locals could exercise greater powers. Consider again majority-minority cities. Home rule enhances the power of traditionally disenfranchised groups in those cities. State officials know this, which is why they are systematically undermining home rule in those states with large minority urban populations.<sup>138</sup>

Electoral reform is a relatively easy case for deferring to local control. Electoral politics at the state and national levels are dominated by a narrow donor class, and states have been notoriously quick to upend local democratic institutions. They used “ripper” bills in the nineteenth and early twentieth centuries to reverse local electoral outcomes that they did not like. These “rippers” literally eliminated local offices or removed local officials in part because state political machines were using municipal offices to reward their own political supporters.<sup>139</sup> Today, those forms of state intervention are seen as wildly inappropriate.

Nevertheless, states still have the power to seize cities and sideline their elected officials in cases of fiscal crisis. Perhaps unsurprisingly, most of those cities that have been placed into state receivership are predominantly Black and poor.<sup>140</sup> Some states are also adopting preemptive laws that permit the removal of local elected officials when those officials disagree with state policy or that

136. Sarah Reckhow, Jeffrey R. Henig, Rebecca Jacobsen & Jamie Alter Litt, “*Outsiders with Deep Pockets*”: *The Nationalization of Local School Board Elections*, 53 URB. AFFS. REV. 783, 784 (2017) (“Studies of school board campaigns suggest that candidates typically spend less than \$1000; candidates in large districts often spend more, although 90% of candidates in large districts reported spending less than \$25,000.” (citation omitted)).

137. FED. ELECTION COMM’N, CONGRESSIONAL CANDIDATE DATA SUMMARY TABLES tbl.4 (2019), [http://www.fec.gov/resources/campaign-finance-statistics/2018/tables/congressional/ConCand\\_4\\_2018\\_24m.pdf](http://www.fec.gov/resources/campaign-finance-statistics/2018/tables/congressional/ConCand_4_2018_24m.pdf) [<https://perma.cc/5EYH-K5EZ>] (including calculations for the “24-Month Median Receipts of Senate and House Candidates from January 1, 2017 through December 31, 2018”).

138. Kriston Capps, *The Cities That Are Fighting Back Against State Intervention*, BLOOMBERG (Oct. 3, 2016, 1:22 PM), <https://www.bloomberg.com/news/articles/2016-10-03/cities-struggle-to-resist-state-preemption-laws> [<https://perma.cc/4KM4-4K5B>]; see, e.g., *Lewis v. Governor of Ala.*, 896 F.3d 1282, 1283 (11th Cir. 2018) (holding that an equal protection challenge to a legislative preemption of a city’s minimum wage law stated a claim), *on reh’g en banc*, 944 F.3d 1287, 1288 (2019) (dismissing for lack of standing).

139. Briffault, *Voting Rights*, *supra* note 12, at 805–06; Lyle Kossis, Note, *Examining the Conflict Between Municipal Receivership and Local Autonomy*, 98 VA. L. REV. 1109, 1125–26 (2012).

140. Kossis, *supra* note 139, at 1115–20, 1134–37; Schragger, *Democracy and Debt*, *supra* note 103, at 879 n.80, 881; Julie Bosman & Monica Davey, *Anger in Michigan over Appointing Emergency Managers*, N.Y. TIMES (Jan. 22, 2016), <https://www.nytimes.com/2016/01/23/us/anger-in-michigan-over-appointing-emergency-managers.html?smid=url-share> [<http://perma.cc/2RT2-QAGY> (dark archive)].

impose personal liability on those same officials.<sup>141</sup> These laws constitute the modern version of ripper bills. State law also denies cities the ability to adopt ranked-choice voting, to encourage same-day registration, to extend the franchise to nonresidents or to residents under eighteen, or to adopt campaign finance laws.<sup>142</sup> These efforts represent the undermining of democratic government, not its enhancement.

### 3. Police Reform

The final example we consider is police reform. Enhanced home rule, it could be argued, will prevent states from reforming recalcitrant and abusive local police departments. But here again, a comparative perspective is required. Why are states better equipped to address the problem of racially discriminatory and abusive policing? State police are no more immune to the problem of racialized policing than local police. State oversight of local police through training and other programs is already commonplace; no one is suggesting that these administrative mechanisms be jettisoned. Again, it is not at all clear what policing abuse has to do with home rule. The NLC provisions do not say anything about the violation of constitutional or civil rights;<sup>143</sup> whatever preemption presumptions one adopts, the state and federal constitutions must apply and are arguably a clearer lens through which to address police abuses.

More importantly, the claim that a stronger preemption standard would exacerbate our national policing failures is odd in light of the role that the states have played in creating the carceral state. Overcriminalization has been an almost exclusively state affair.<sup>144</sup> State legislatures are responsible for adopting the punitive and racially charged laws that have led to overincarceration. States fund the elaborate penal system—the prosecutors, judges, guards, and parole officers—that enforces those laws. States fund the prisons used to house their huge incarcerated populations.<sup>145</sup> That prison-industrial complex is zealously backed by unions that exercise much of their power in the state legislature.<sup>146</sup> And state laws are responsible for suspending driver's licenses for unpaid fines

141. PRINCIPLES, *supra* note 1, at 1368; Briffault, *New Preemption*, *supra* note 11, at 2002–04.

142. See Joshua Douglas, *The Right To Vote Under Local Law*, 85 GEO. WASH. L. REV. 1039, 1052–69 (2017); David M. Faherty, *The Post-Crawford Rise in Voter ID Laws: A Solution Still in Search of a Problem*, 66 ME. L. REV. 269, 286–87 (2013).

143. See generally PRINCIPLES, *supra* note 1 (detailing the list of provisions and principles that may constitute a model constitutional home rule).

144. Erika Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 710–12 (2005); see also JOHN PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM* 1–20 (2017).

145. See Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 12–19 (2019) (describing the prison industrial complex).

146. For a discussion on the prison-industrial complex, see JOSHUA PAGE, *THE TOUGHEST BEAT: POLITICS, PUNISHMENT, AND THE PRISON OFFICERS UNION IN CALIFORNIA* (2011).

and fees and for disenfranchising former offenders.<sup>147</sup> As with corporate subsidy abuse, if local governments had to internalize the costs of incarceration, they would undoubtedly make different choices.

To be sure, local police departments can and do engage in racial profiling and abusive stop-and-frisk practices.<sup>148</sup> There is nothing in the *Principles* that prevents these practices from being outlawed by the state, and yet it is notable that states seem in no rush to do so. In Virginia, for years state law prevented local police civilian review boards from exercising any power at all.<sup>149</sup> And when Nashville instituted a community oversight board in 2019 that had the authority to investigate police misconduct, the Tennessee legislature responded by stripping citizen boards of their authority to issue subpoenas.<sup>150</sup>

Certainly, there have also been prominent examples of local governments relying heavily on the fines and fees imposed for local traffic and municipal code violations. Ferguson, Missouri, is the best-known case: a Department of Justice inquiry found that Ferguson relied heavily on revenue from municipal code violations to fund city government, pressured the police department to issue as many citations as possible, and incarcerated people who could not afford to pay the fines and fees imposed without a determination of their ability to pay.<sup>151</sup> Excessive fines and fees can be a significant problem, but here too, nothing in the *Principles* prevents the state from imposing limitations on the use of those kinds of measures.

Moreover—and again this needs to be emphasized—the fiscalization of criminal justice, like the fiscalization of land use, is a feature of a state-created

147. See Meghan Keneally, *'It's Not America': 11 Million Go Without a License Because of Unpaid Fines*, ABC NEWS (Oct. 25, 2019, 5:11 AM), <https://abcnews.go.com/US/vicious-cycle-11-million-live-drivers-license-unpaid/story?id=66504966> [<https://perma.cc/6P9D-YHCG>]; Priya Sarathy Jones & Jonathan Ben-Menachem, *FINES & FEES JUST. CTR., Free To Drive* (Apr. 30, 2020, 4:36 PM), <https://www.freetodrive.org/maps/#page-content> [<https://perma.cc/22UA-D9MN>] (noting the presence of such laws in forty-two states and the District of Columbia).

148. See, e.g., *Floyd v. City of New York*, 959 F. Supp. 2d 540, 561–62 (S.D.N.Y. 2013) (holding New York City's "stop and frisk" policies unconstitutional).

149. See Geremia Di Maro, *Police Civilian Review Board Looks To Expand Its Powers as It Begins To Develop Working Bylaws*, CAVALIER DAILY (Sept. 16, 2018), <https://www.cavalierdaily.com/article/2018/09/police-civilian-review-board-looks-to-expand-its-powers-as-it-begins-to-develop-working-bylaws> [<https://perma.cc/X924-J9MY>]; Charlotte Rene Woods & Elliott Robinson, *Charlottesville Civilian Review Board Finds Its Footing*, CHARLOTTESVILLE TOMORROW (June 28, 2019, 12:01 AM), <https://www.cvilletomorrow.org/articles/charlottesville-civilian-review-board-finds-its-footing/> [<https://perma.cc/YG7W-9MCD>].

150. Act of May 8, 2019, ch. 320, 2019 Tenn. Code Ann. Adv. Legis. Serv. (LexisNexis) (codified at TENN. CODE ANN. § 38-8-312(b)(1) (2022)).

151. CIV. RTS. DIV., U.S. DEP'T OF JUST., *INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 2–4, 9–15* (2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf) [<https://perma.cc/E5PL-V6GS>]; Joseph Shapiro, *In Ferguson, Court Fines and Fees Fuel Anger*, NPR (Aug. 25, 2014, 5:56 PM), <https://www.npr.org/2014/08/25/343143937/in-ferguson-court-fines-and-fees-fuel-anger> [<https://perma.cc/27A5-SPWF>].

system that provides little assistance to economically struggling municipalities. Fines and fees are ways that local governments fund their services. Local governments will use the limited tools they have to raise revenue when they are otherwise restricted by state law, as cities are under many state statutes and constitutions.

The *Principles* seeks to address this problem of fiscalization directly, which is again *state created*. It has been too easy for states to engage in what scholars have called “scalar dumping”: pushing social welfare responsibilities down onto vulnerable local governments while not funding those responsibilities.<sup>152</sup> States are as complicit or more in the fiscalization of local policy in the area of criminal justice, as they are in so many others. Taking power away from local governments is not going to solve that central problem.

### III. IDEOLOGY AND HOME RULE

It is not surprising that readers will view the *Principles* through their own policy preoccupations. They may wonder what the implications of those rules are for their current cause célèbre. We are a little surprised, however, when critics treat their lists of favored policy outcomes as if they are conclusive of the wrongs of local power when there are ample policy concerns that point in the other direction. Proponents of state land use reform have their list of favored policy reforms. But so do advocates across the policy spectrum. The criteria for picking one or the other set of reforms is not at all clear.

The hostility to localism everywhere across the board thus suggests that something more is at work other than a commitment to the best policy outcome all things considered. Consider the proliferation of punitive preemption in the states, much of which has targeted local regulatory efforts.<sup>153</sup> The NLC has engaged in extensive study of the phenomenon and has found that local governments are being strangled by state law across literally dozens of policy areas.<sup>154</sup> States are preempting local policies that address fracking, global warming and environmental poisoning, public health, and paid sick leave.<sup>155</sup> States prevent cities from regulating ride-sharing, adopting congestion pricing, enforcing a minimum wage, or providing broadband services.<sup>156</sup> States have eliminated the possibility for cities to regulate tobacco and firearms, to adopt

152. See Yunji Kim & Mildred E. Warner, *Shrinking Local Autonomy: Corporate Coalitions and the Subnational State*, 11 CAMBRIDGE J. REGIONS ECON. & SOC'Y 427, 433 (2018).

153. See, e.g., Richard Briffault, Nestor Davidson, Paul A. Diller, Olatunde Johnson & Richard C. Schragger, *The Troubling Turn in State Preemption: The Assault on Progressive Cities and How Cities Can Respond*, 11 ADVANCE 3, 3–4 (2017); Briffault, *New Preemption*, *supra* note 11, at 1999; Davidson, *Dilemma*, *supra* note 86, at 958; Schragger, *Attack on American Cities*, *supra* note 11, at 1169; Scharff, *Hyper Preemption*, *supra* note 11, at 1469.

154. See PRINCIPLES, *supra* note 1, at 1337–39.

155. See Schragger, *Attack on American Cities*, *supra* note 11, at 1169, 1171, 1173–74, 1182, 1199–200.

156. *Id.* at 1172, 1174, 1187.

LGBTQ antidiscrimination laws, or to legislate consumer protection policies.<sup>157</sup> States drastically limit local revenue raising capacity while also imposing onerous unfunded mandates.<sup>158</sup>

Should we adopt a state-local regime that allows states to preempt all local land use regulations because housing is so important, even if that principle also permits states to preempt all local minimum wage laws, plastic bag bans, and antidiscrimination laws? Critics of the local land use power do not give us a reason to trade off one set of local policies for another. They do not perform any weighing of the costs and benefits of the policies that would be permitted under home rule against the policies that would be barred. If one is a consequentialist, one would need to know whether these policies will better advance social welfare in the aggregate. And how would one know without a great deal of analysis?

What we do know, under current conditions of uncertainty, is that state supremacy, which characterizes our present regime, has not effectively addressed the problems that we all agree require attention. If that is the case, why stick with the present regime?

That conclusion seems decisive, though it does not entirely end the inquiry. One could take a “do no harm” approach and argue that a more robust home rule regime with a more rigorous preemption standard will exacerbate those problems. But that conclusion is unsupported. It first requires one to discount all the policies that cities would have adopted had those policies not been overridden by their states. And second, it depends on a comparative claim, one that pits the supposed deficiencies of local political processes against the supposed benefits of state political processes.

That inquiry is ongoing. There is ample literature extolling the benefits of federalism, devolution, decentralization, and subsidiarity—terms that all mean slightly different things but tend to point in a similar direction. In the field of local government law, advocates of increasing local power have two main (though somewhat incompatible) orientations. There are those who champion local government from a civic-republican (and anticorporate) perspective, celebrating the virtues of smaller-scale, participatory democracy.<sup>159</sup> And there are those who champion local government from a law-and-economics perspective, extolling the virtues of interjurisdictional competition and the benefits of the local provision of public goods.<sup>160</sup> The former approach emphasizes democratic accountability; the latter perspective emphasizes

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157. *See id.* at 1171, 1177, 1224.

158. *Id.* at 1169.

159. *See* Frug, *supra* note 114, at 1065–66, 1071–73.

160. *See* Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 416 (1956); *see also* Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 282–83 (1998).

efficiency. The NLC model provisions are not explicitly committed to either perspective, though both provide theoretical support.

That said, the primary justification for the revised NLC provisions is the hope to finally accomplish what the long history of home-rule reform in the United States has not. The NLC provisions are built on a preexisting edifice of Progressive Era reform (that included home rule and bans on special legislation)—all of which have been efforts over time to insulate cities from oftentimes pathological state politics.<sup>161</sup>

Moreover, as noted, the NLC model constitutional article is based on a problem-solving theory of intergovernmental relations. That theory goes something like this: In a complex urban society, municipal government has the means, capacity, and need to govern in the first instance through municipal law. That is because local officials are no less capable of making important policy judgments than are state officials and it is both inefficient and undemocratic for cities to have to seek permission from the state to act. While the state obviously also has interests and expertise and should act when necessary to do so, it should not displace local law simply because state officials have a different policy preference. Instead, state officials should give reasons supported by evidence for why it is necessary to displace local law. This standard enhances responsiveness and accountability. It also ensures a reasonable division of authority between state and local and limits unjustified intrusions into local decision-making.

At the heart of this pragmatic division of labor is a conception of local self-government as being more attractive than government from afar. If local governments are seriously deficient, either because they are systematically less accountable or have less expertise, then a presumption against preemption might not make sense. There is, however, no reason to think that cities are more deficient than states or the federal government, and there is some reason to think that they are much less. Indeed, the federal and state governments' response to the COVID-19 pandemic throughout much of the crisis illustrates the significant harms that accompany incompetence and corruption at the top, even if federal support for the development of vaccines is a reminder of the kind of issue that bears centralization. And while governors often showed leadership during the pandemic, too many acted precipitously and contrary to the interests of their urban residents when preempting local social distancing orders, masking requirements, and other basic public health measures.<sup>162</sup> As for state legislatures,

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161. SCHRAGGER, CITY POWER, *supra* note 114, at 56–77.

162. See, e.g., Daniel E. Slotnik, Adeel Hassan & Bryan Pietsch, *Texas Governor Will Bar Local Governments from Requiring Masks.*, N.Y. TIMES, <https://www.nytimes.com/2021/05/18/world/texas-governor-local-mask-mandates.html> [<https://perma.cc/5LYP-62RR> (dark archive)] (Aug. 14, 2021). For a summary of state preemptive health regulations, see *Preemption of Public Health Authority*, LOC. SOL. SUPPORT CTR. (June 25, 2021), <https://www.supportdemocracy.org/issuespecific-preemption->



the evidence that state political pathologies are pervasive is extensive.<sup>163</sup> State legislatures are gerrymandered and unrepresentative, they are often captured by special interests, and they are regularly hostile to their cities.<sup>164</sup>

In light of these failures of centralization, one has to wonder what is driving the hostility to cities, especially when critics provide no real comparative analysis of state and local democracy. Many years ago, Professor Joan Williams observed that conflicts over city status and authority mainly serve as placeholders for ideological conflicts and interests having nothing to do with the city *qua* city.<sup>165</sup> Local power is vulnerable, she noted, to the extent it can be deployed or denigrated to pursue other aims.<sup>166</sup>

An example is the YIMBY objection to the *Principles*' enhanced home rule. As previously noted, an increasingly vocal constituency, mainly in high-demand coastal cities, want local governments to stop regulating the housing market on the assumption that the "free market" will correct the supply bottleneck that has contributed to coastal regional housing crises.<sup>167</sup> This emphasis on deregulation is notable. For most YIMBYs, it actually does not matter which level of government is regulating housing. State exclusionary policies are no more legitimate than local ones, and federal laws that prevent construction are as bad as any others. YIMBYs are not seeking out some workable intergovernmental system under conditions of political disagreement. At this historical moment, local government appears to be more of a threat to a preferred policy outcome. Presumably when states become a threat, the YIMBY perception of the advisability of local power will change. In this way, YIMBY arguments against local power are derivative, serving particular goals having nothing to do with intergovernmental relations.

This conclusion perhaps should come as no surprise, insofar as it tracks the intellectual history of state-municipal relations. As we have already noted, intergovernmental reforms across the late-nineteenth and twentieth centuries

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guides/preemption-of-public-health-authority [<https://perma.cc/FE3P-XLVV>]. For a suggestive study that considers the relationship between city autonomy and pandemic responsiveness in the fourteenth century, see Han Wang & Andrés Rodríguez-Pose, *Local Institutions and Pandemics: City Autonomy and the Black Death*, 136 APPLIED GEOGRAPHY, Nov. 2021, at 1 (finding that mortality rates from the plague were lower in cities with higher levels of political autonomy).

163. See Richard C. Schragger, *Federalism, Metropolitanism, and the Problem of States*, 105 VA. L. REV. 1537, 1594–95 (2019); Seifter, *Countermajoritarian Legislatures*, *supra* note 41, at 1762–76; Miriam Seifter, *Judging Power Plays in the American States*, 97 TEX. L. REV. 1217, 1217 (2019); see also Diller, *Political Process*, *supra* note 41, at 363–64. See generally HERTEL-FERNANDEZ, *supra* note 123 (describing how conservatism has captured state legislatures); JONATHAN RODDEN, *WHY CITIES LOSE: THE DEEP ROOTS OF THE URBAN-RURAL POLITICAL DIVIDE* (2019) (describing how geography has disadvantaged the Democratic Party).

164. See Seifter, *Countermajoritarian Legislatures*, *supra* note 41, at 1750–56.

165. See Joan C. Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law*, 1986 WISC. L. REV. 83, 85–87.

166. *Id.*

167. See *supra* Section II.A.

responded to particular policy concerns. For John Dillon, the problem of economic favoritism was paramount. Chastened by state and local bond defaults during the mid- to late-1800s, Dillon's Rule was designed to limit government's collusion with special interests: the corrupt giveaways of grants and special privileges to the street railways, and gas, water, and electric companies.<sup>168</sup> Like many classical jurists, Dillon distrusted government and tasked the courts with policing the line between appropriate public and private interests.<sup>169</sup>

Thomas Cooley—the nineteenth-century jurist who embraced an inherent right of local self-government—also worried about government's inclination to show economic favoritism.<sup>170</sup> But he believed that the state legislature was a more likely source of those ills than were local governments. For Cooley, the central problem was the influence of the “great and wealthy corporations”;<sup>171</sup> state legislatures were violating the public trust by favoring those interests.<sup>172</sup>

To be sure, turn-of-the-century reformers had their pick of “corrupt” governments: state legislatures were no “cleaner” than municipal governments in an era of Tammany Hall.<sup>173</sup> Revisionist historians, in fact, have argued that municipal government in the nineteenth and early part of the twentieth centuries was an “unheralded triumph,”<sup>174</sup> not the failure it is sometimes characterized to be.

Many reform-minded Progressives agreed. Consider Frederic Howe, member of the Cleveland City Council and author of *The City: The Hope of Democracy*.<sup>175</sup> Howe had no illusions about the quality of city governance, but he believed that state supremacy was the central problem, not city independence. Howe pointed out that municipal democracy had never really been tried. Rather, state political machines worked in tandem with local leaders to take advantage of the spoils available in the newly industrializing cities. Progressive Era reformers needed to free the municipalities from corrupt state control first. Only then could they work on reforming and improving municipal government.<sup>176</sup>

168. See *City of Clinton v. Cedar Rapids & Mo. River R.R. Co.*, 24 Iowa 455, 475 (1868); DILLON, *supra* note 113, at 101–02.

169. Cf. Williams, *supra* note 165, at 86–100 (discussing Dillon's Rule).

170. See *People ex rel. Le Roy v. Hurlburt*, 24 Mich. 44, 108 (1871) (Cooley, J., concurring); THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 261–63 (7th ed. 1903).

171. COOLEY, *supra* note 170, at 393 n.1.

172. Cf. HERTEL-FERNANDEZ, *supra* note 123 (discussing contemporary corporate capture of state legislatures).

173. See generally JON C. TEAFORD, THE UNHERALDED TRIUMPH: CITY GOVERNMENT IN AMERICA, 1870–1900, at 305 (1984) (discussing Tammany).

174. See *id.* at 307–13.

175. FREDERIC C. HOWE, THE CITY: THE HOPE OF DEMOCRACY, at vii (1905).

176. Cf. Robert C. Brooks, *Metropolitan Free Cities: A Thoroughgoing Municipal Home Rule Policy*, 30 POL. SCI. Q. 222, 226 (1915) (“Under existing conditions great cities have to seek their legislative

Critics of city power—our modern-day Dillons—have their own favored set of policy ills, which, like Dillon, they place entirely at the feet of local government. But maybe there is a lurking distrust of all government here. Perhaps the critics of city power are unearthing classical constitutional theories in more than just their distrust of the city. For his part, Schleicher seems to embrace a public choice theorist’s skepticism of government—the suspicion that all governments are prone to special interest capture and that all regulation is some form of rent seeking. The classical theorists also distrusted government regulation—perhaps for similar reasons; they were the primogenitors of laissez-faire.

This brings us full circle, back to the jurisprudence of Dillon and Cooley, with a clear emphasis on Dillon. On this account, government intervention in markets is dangerous. Local governments in particular have to be constrained or they will engage in economic favoritism and fiscally irresponsible practices. Never mind that states are as guilty of those practices as any local government. And never mind that pro-housing, anti-corporate-subsidy political coalitions are already exercising power in cities and influencing urban policy. The instinct to centralize is hard to resist. It is easier and quicker to go to the state legislature and get blanket bans on things one does not like instead of doing the work of building political coalitions locally.

#### CONCLUSION

Schleicher and others join a long line of skeptics of city power. They are in good company. As Howe observed in 1905, “reform organizations” have “voted democracy a failure”—“[t]hey have petitioned State Legislatures to relieve the overburdened city of the duty of self-government.”<sup>177</sup> But as Howe also observed, to that point the actual exercise of local power had never been tried.<sup>178</sup>

Howe’s statement is as true today as it was over a century ago. We are currently living under a regime of state supremacy, but the solutions to the challenges of urban governance have not been forthcoming. More to the point, the increasing abuse of that state supremacy in so much of the country has undermined policy innovation, harmed public health, and threatened what democracy has been allowed at the local level. We need a different approach. The *Principles* provides that.

For at least a century, state-and-local government law has repeatedly raised the promise that cities could be empowered to respond to the needs and

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salvation in two separate and widely dissimilar bodies. The municipal council controls in minor affairs, the state legislature in more important matters.”).

177. HOWE, *supra* note 175, at 1–2.

178. See Brooks, *supra* note 176, at 225 (observing that home rule does little to advance city power).

2022] *UNDERSTANDING THE PRINCIPLES OF HOME RULE* 1419

values of their communities. Waves of home-rule reform have tried but largely failed to live up to that promise. The NLC has offered a vision and a model constitutional home rule article that can finally set municipal power on a strong foundation. That foundation is not intended to destroy the ability of states to articulate and advance genuine statewide interests nor is it designed to permit cities to secede from the obligations of common governance. Instead, the *Principles* is a call to finally realize the potential of something urgently needed in these challenging times: real local democracy.

