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## Preemption, Federalism, and Local Democracy

Kenneth A. Stahl

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# PREEMPTION, FEDERALISM, AND LOCAL DEMOCRACY

*Kenneth A. Stahl\**

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## INTRODUCTION

Throughout the United States, city residents are coming to the uncomfortable realization that they have no right to local democracy. In just the past few years, state legislatures have blocked local governments from enacting all kinds of legislation, including ordinances dealing with smoking, hydraulic fracturing, the minimum wage, gun control, nutrition,

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\* Professor of Law, Chapman University Fowler School of Law. Many thanks to the editors of the *Fordham Urban Law Journal* for inviting me to participate in the Symposium on Home Rule and Municipal Innovation, and for their excellent editorial work.

civil rights, immigration, plastic bags, and more.<sup>1</sup> The sheer volume of local enactments being “preempted” by state legislation has reached nearly epidemic proportions. One watchdog organization reported that 2015 was the most popular year for preemption in American history, with twenty-nine states considering comprehensive bills to preempt all manner of local legislation.<sup>2</sup>

Though it is hardly unprecedented for states to preempt local regulations, the breadth and ambition of the recent preemption efforts have rarely been seen in American history. These efforts are the result of a profound political realignment within many states that is reverberating throughout our democratic system, and undermining many assumptions about the nature of our democracy. This Article uses the lens of preemption to examine the broader political trends it exemplifies and gauge the capacity of our democratic institutions to withstand them. Part I explains that preemption has become more prevalent because cities are now overwhelmingly Democratic while state legislatures, dominated by representatives of rural areas, are overwhelmingly Republican. The vertical relationship between cities and states is now an outlet for a partisan conflict between rural and urban areas. Part II describes how the nearly perfect alignment of geographic divisions with partisan affiliations has elevated the stakes of political conflict between cities and states, and raised important questions about the future of liberal democracy. The

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1. See NATIONAL LEAGUE OF CITIES, CITY RIGHTS IN AN ERA OF PREEMPTION: A STATE-BY-STATE ANALYSIS (2017), <http://www.nlc.org/sites/default/files/2017-03/NLC-SML%20Preemption%20Report%202017-pages.pdf> [<https://perma.cc/463Q-45HW>] (highlighting several areas where states are active in preempting city authority); Shaila Dewan, *States Are Blocking Local Regulations, Often at Industry's Behest*, N.Y. TIMES (Feb. 23, 2015), <http://www.nytimes.com/2015/02/24/us/govern-yourselves-state-lawmakers-tell-cities-but-not-too-much.html> [<https://perma.cc/7BDU-AY75>]; Brian Eason, *State to Locals: You Can't Do That. Or That*, INDYSTAR (Mar. 6, 2016, 7:02 AM), <http://www.indystar.com/story/news/politics/2016/03/06/state-locals-you-cant-do/80607546> (focusing on preemption in Indiana but also touching on national trends) [<https://perma.cc/7S5N-Q3YK>]; Cora Lewis, *States Are Barring Cities from Raising the Minimum Wage*, BUZZFEED NEWS (Mar. 23, 2016, 4:37 PM), <https://www.buzzfeed.com/coralewis/states-are-banning-cities-from-raising-the-minimum-wage> [<https://perma.cc/PAG7-KBPS>] (discussing preemption of minimum wage laws); Harold Meyerson, *Blue Cities, Red States*, L.A. TIMES (Mar. 7, 2016, 5:00 AM), <http://www.latimes.com/opinion/op-ed/la-oe-0307-meyerson-city-state-divisions-20160307-story.html> [<https://perma.cc/E8N6-4L5D>] (describing how preemption battles are becoming “routine”); Claire Cain Miller, *Liberals Turn to Cities to Pass Laws and Spread Ideas*, N.Y. TIMES (Jan. 26, 2016), <http://www.nytimes.com/2016/01/26/upshot/liberals-turn-to-cities-to-pass-laws-and-spread-ideas.html> [<https://perma.cc/G55Y-K53L>]. The “Preemption Watch” website, hosted by Grassroots Change, is a good resource focusing on public health-related preemption issues. See *Preemption Watch*, GRASSROOTS CHANGE, <http://grassrootschange.net/issues/preemption/> [<https://perma.cc/3D9V-8DNR>].

2. Allie Yee, *Growing Southern Cities Are Increasingly Targets of State Pre-emption*, FACING SOUTH (Apr. 1, 2016), <https://www.facingsouth.org/2016/04/growing-southern-cities-are-increasingly-targets-o> [<https://perma.cc/Y8M5-R935>].

“Madisonian” vision of a democratic society characterized by ever-shifting coalitions has been threatened as heightened partisanship, geographic segregation, and the cultural and economic impacts of globalization have hardened the division between urban Democrats and rural Republicans into a perhaps permanent zero-sum conflict. Preemption is one front in this conflict, as rural Republicans seek to negate the cultural and economic gains they see urban Democrats making at their expense.

Part III looks to federalism as a possible means of mediating the conflict between urban and rural areas. Federalism has long been a tool for accommodating the competing claims of different groups within the framework of the nation-state. Though state constitutions lack the robust federal structure of our national Constitution, conferring upon sub-state groups few of the rights that the national Constitution grants states, most states nevertheless provide some recognition for group rights through a de facto sort of intrastate federalism. The widespread practice of electing legislators from single-member geographic districts provides some representation for groups at the state level, while municipal home rule grants groups some autonomy at the local level. However, intrastate federalism has always been weak because courts are wary of recognizing the rights and interests of sub-state groups. As a result, courts have freely allowed states to dilute the influence of political minorities through gerrymandering, and to quash local autonomy by preempting local legislation despite the supposed protections of home rule.<sup>3</sup> The current rash of preemption follows directly from the weakness of intrastate federalism. Although I conclude that stronger intrastate federalism is necessary in an age of deepening urban/rural conflict, I also doubt that we can count on the judiciary to save us from this predicament. Ultimately, it is up to the citizenry to decide how much it values local democracy.

As a case study of the preemption phenomenon and the broader political context it embodies, this Article examines one recent preemption effort that has drawn substantial media attention and become a matter of national controversy—North Carolina’s “bathroom bill.” The North Carolina legislature convened a special session of the state legislature specifically to preempt an ordinance enacted by the city of Charlotte, scheduled to go into effect within a few days, that would have provided certain anti-discrimination protections to gays, lesbians, and transgender individuals, including the freedom to use the bathroom of one’s identified gender.<sup>4</sup> The legislature ultimately passed House Bill 2 (“HB2”), a sweeping piece of legislation that not only preempted the Charlotte ordinance, but prohibited

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3. See *infra* text accompanying notes 193-99.

4. See Charlotte, N.C., Ordinance 7,056 (Feb. 22, 2016).

all North Carolina municipalities from enacting any law dealing with wages and hours, employment discrimination, public accommodations, or municipal contracts.<sup>5</sup> Under pressure from business interests including the National Collegiate Athletic Association, the state recently repealed part of HB2 but left in place the prohibition on local anti-discrimination ordinances.<sup>6</sup>

The bathroom bill presents an interesting example of the political trends examined here. North Carolina is a state poised between a largely agrarian past and an increasingly urban future, and today is evenly balanced between Republicans and Democrats.<sup>7</sup> As its cities grow and its population of left-leaning Democrats expands, however, rural Republicans have tightened their grip on the state legislature and increasingly embarked on an anti-urban legislative agenda.<sup>8</sup> The bathroom bill is one illustration of the conflict between an emerging urban Democratic alliance that sees diversity as vital to a globally networked future, and an aging rural power structure that is fighting tooth and nail to preserve traditional morality and prevent the state's seemingly inevitable urbanization. As such, North Carolina highlights many of the points of political division that will likely dominate the near future.

## I. THE CONTEXT OF THE PREEMPTION BATTLE

### A. Republican States and Democratic Cities

The driving cause behind the recent preemption trend is a striking political phenomenon: cities across the nation are becoming more

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5. See 2016 N.C. Sess. Laws 3. See generally Michael Gordon et al., *Understanding HB2: North Carolina's Newest Law Solidifies State's Role in Defining Discrimination*, CHARLOTTE OBSERVER (Mar. 26, 2016, 11:00 AM), <http://www.charlotteobserver.com/news/politics-government/article68401147.html> [<https://perma.cc/L3EL-CWPG>]; David A. Graham, *North Carolina Overturns LGBT-Discrimination Bans*, ATLANTIC (Mar. 24, 2016), <http://www.theatlantic.com/politics/archive/2016/03/north-carolina-lgbt-discrimination-transgender-bathrooms/475125/> [<https://perma.cc/RP2U-Q23B>].

6. See Craig Jarvis et al., *HB2 Off the Books as Gov. Roy Cooper Signs Compromise Into Law*, NEWS & OBSERVER (Mar. 30, 2017), <http://www.newsobserver.com/news/politics-government/politics-columns-blogs/under-the-dome/article141716579.html> [<https://perma.cc/9SKK-RM8Q>].

7. See, e.g., ROB CHRISTENSEN, *THE PARADOX OF TAR HEEL POLITICS: THE PERSONALITIES, ELECTIONS, AND EVENTS THAT SHAPED MODERN NORTH CAROLINA* 317 (2008); TOM EAMON, *THE MAKING OF A SOUTHERN DEMOCRACY: NORTH CAROLINA POLITICS FROM KERR SCOTT TO PAT MCCRORY* 325 (2014) (observing that, between 2000 and 2012, North Carolina was about as evenly matched as possible between Republicans and Democrats).

8. See generally Alan Ehrenhalt, *Resisting Inevitable Urbanization*, GOVERNING (Dec. 2015), <http://www.governing.com/columns/assessments/gov-urbanization-north-carolina.html> [<https://perma.cc/K3B3-9KLP>] (reporting on the state legislature's "anti-Charlotte vendetta" after 2012 election).

Democratic, while state legislatures are becoming more Republican.<sup>9</sup> Twenty-six of the nation's thirty largest cities have Democratic mayors.<sup>10</sup> Even in solidly Republican states like Texas, major cities such as Dallas, Houston, San Antonio, El Paso, and Austin are all led by Democrats.<sup>11</sup> While city voters have been an important Democratic constituency for the past century, demographic trends have pushed cities to support the Democratic Party more overwhelmingly than ever before. Immigrants and young professionals in the finance and services industries have flocked to cities in recent years, causing them to become more populous, younger, ethnically diverse, and consequently, more liberal.<sup>12</sup> Charlotte, for example, has doubled its population in the last twenty-five years and is now among the twenty most populous municipalities in the country.<sup>13</sup> Young professionals, who are drawn to the nation's largest financial sector outside

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9. The emerging political divide between cities and state legislatures is surely not the sole cause of the current preemption trend. Another key factor has been a concerted effort by conservative political organizations like the American Legislative Exchange Council (ALEC) and industry executives to push for uniform statewide legislation in many areas. *See generally* Thomas B. Edsall, *The Republican Party's 50-State Solution*, N.Y. TIMES (Jan. 13, 2016), <http://www.nytimes.com/2016/01/13/opinion/campaign-stops/the-republican-party-s-50-state-solution.html> [<https://perma.cc/2LQT-HJZZ>]. However, ALEC's role in preemption is not clearly distinct from the political factors mentioned in the text. *See infra* note 42. The rise of ALEC and other ideologically motivated political organizations (such as the liberal-leaning State Innovation Exchange, formed in opposition to ALEC) are themselves part of the same process of political and geographic polarization that has caused city and state governments to assume such divergent political profiles. *See* BILL BISHOP, THE BIG SORT 221-28 (2008) (discussing ALEC in context of increasing political polarization). It is therefore not surprising that ALEC has also played a key role in trying to ensure that Republicans are elected at the state level. *See* Edsall, *supra* note 9. For additional commentary on how Republicans have achieved control of many state legislatures, see Gary Gerstle, *America's Other Election*, DISSENT MAG. (Fall 2016), <https://www.dissentmagazine.org/article/americas-other-election> [<https://perma.cc/8GKY-NFH8>].

10. *See* Meyerson, *supra* note 1.

11. *See id.*; *see also* Alan Greenblatt, *Beyond North Carolina's LGBT Battle: States' War on Cities*, GOVERNING (Mar. 25, 2016), <http://www.governing.com/topics/politics/gov-states-cities-preemption-laws.html> [<https://perma.cc/ZN3R-AQ4U>].

12. *See* Louis Jacobson, *Why Democratic Governors and Republican Mayors Have Become Rare*, GOVERNING (July 16, 2015), <http://www.governing.com/topics/politics/gov-political-party-success-president-governor-congress-mayor.html> [<https://perma.cc/SK8Y-ZBPV>] (noting that cities are becoming younger, more diverse, and more liberal); Campbell Robertson & Richard Fausset, *Southern Cities Split with States on Social Issues*, N.Y. TIMES (Apr. 15, 2016), <http://www.nytimes.com/2016/04/16/us/southern-cities-move-past-states-on-liberal-social-issues.html> [<https://perma.cc/FP5V-XN2A>] (noting that fast-growing cities in the south, fueled by banking, insurance, health care, and technology, are becoming more liberal).

13. *See* Stephen Wolf, *Why North Carolina Is Turning Blue: A Look at the State's Political Geography*, DAILY KOS (Sept. 10, 2015, 11:29 AM), <http://www.dailykos.com/story/2015/9/10/1414999/-Why-North-Carolina-is-turning-blue-A-look-at-the-state-s-political-geography> [<https://perma.cc/8VWY-56W7>].

of New York, have bolstered its growth.<sup>14</sup> In addition, the Hispanic population of Charlotte has grown by almost fifteen percent since 2010 and helped make Mecklenburg County a majority-minority county.<sup>15</sup> Thus, the city and county have transformed from a Republican stronghold to a heavily Democratic region.<sup>16</sup>

A similar pattern is evident in North Carolina's other major urban areas, including Greensboro, Fayetteville, and the Raleigh-Durham-Chapel Hill Research Triangle, which are also experiencing rapid growth fueled by immigrants and young professionals.<sup>17</sup> Overall, the growing populations and the changing demographics and political compositions of these cities have remade North Carolina from a predominantly rural, largely white, and conservative state to an urbanized, diverse state that is evenly divided between conservative Republicans and liberal Democrats.<sup>18</sup> While North Carolina may be an extreme example, a similar pattern is occurring

14. See generally Owen Furuseth et al., *Belonging in Charlotte: Multiscalar Differences in Local Immigration Politics and Policies*, 105 GEOGRAPHICAL REV. 1, 1 (2015).

15. See *id.* at 2; Adam Bell, *Mecklenburg's Hispanic Growth Rate Still Booming, New Census Records Show*, CHARLOTTE OBSERVER (June 25, 2015, 1:00 AM), <http://www.charlotteobserver.com/news/local/article25453342.html> [<https://perma.cc/BKY7-UDVU>] (noting that Charlotte experienced 14.8% growth in Hispanic population since 2010, and in 2012 Mecklenburg county became majority-minority).

16. See generally CHARLOTTE, NC: THE GLOBAL EVOLUTION OF A NEW SOUTH CITY (William Graves & Heather A. Smith eds., 2010).

17. See Charles Prysby, *North Carolina: No Longer Federal Red and State Blue?, in SECOND VERSE, SAME AS THE FIRST: THE 2012 PRESIDENTIAL ELECTION IN THE SOUTH* 171, 174-75 (Scott E. Buchanan & Branwell DuBose Kapeluck eds., 2014) (noting influx of Hispanics and younger, more liberal migrants into Research Triangle area and state generally); Betina Cutaia Wilkinson, *North Carolina Latinos: An Emerging, Influential Electorate in the South*, in *LATINOS AND THE 2012 ELECTION* 149, 149 (Gabriel R. Sanchez ed., 2015) (noting rapid growth of Hispanic population in Raleigh-Durham); Micah Cohen, *In North Carolina, Obama's 2008 Victory Was Ahead of Schedule*, N.Y. TIMES: FIVETHIRTYEIGHT (Sept. 4, 2012, 1:15 PM), <http://fivethirtyeight.blogs.nytimes.com/2012/09/04/in-north-carolina-obamas-2008-victory-was-ahead-of-schedule/> [<https://perma.cc/5N3P-NYD2>] (noting that Hispanic population in the state grew almost tenfold from 1990 to 2010, mostly in main urban centers, and North Carolina now has eleventh largest Hispanic population of any state). See generally Suzanne Gamboa, *From Tobacco to Tortillas: Latinos Remake Durham, North Carolina*, NBC NEWS (Sept. 26, 2014, 7:37 AM), <http://www.nbcnews.com/storyline/hispanic-heritage-month/tobacco-tortillas-latinos-remake-durham-north-carolina-n203276> [<https://perma.cc/68BS-P5ZB>] (describing the influx of Hispanic immigrants to Durham and how they are refashioning local culture).

18. See Christopher A. Cooper & H. Gibbs Knotts, *The Bluest Red State in America: Exploring North Carolina's Political Past, Present, and Future*, in *PRESIDENTIAL SWING STATES: WHY ONLY TEN MATTER* 111 (Stacy Hunter Hecht & David Schultz eds., 2015); Prysby, *supra* note 17, at 171-84. See generally CHRISTENSEN, *supra* note 7; EAMON, *supra* note 7.

throughout the south, as cities are becoming younger and more diverse, changing the political and demographic profiles of states in the process.<sup>19</sup>

Nevertheless, in North Carolina and many other states, Republicans dominate at the state level. Republicans control both houses of the legislature in thirty-two states, and have veto-proof majorities in seventeen, including North Carolina. Democrats control both houses in only thirteen states, and have veto-proof majorities in just five.<sup>20</sup> Many factors have contributed to Republican dominance at the state level, but two are of particular importance. First, rural voters have overwhelmingly sided with the Republicans. As recently as the 1990s, half of all rural residents were represented by a Democratic congressperson.<sup>21</sup> Today, that number is under twenty-five percent.<sup>22</sup> Unlike any previous era in American history, there is now a nearly precise correlation between an area's population density (that is, how urban it is) and its political affiliation.<sup>23</sup> Standing

19. See generally Prysby, *supra* note 17, at 171-84 (anthology of essays describing shifting political demographics throughout the south); Ronald Brownstein, *The States That Will Pick the President: The Sunbelt*, ATLANTIC (Feb. 4, 2015), <http://www.theatlantic.com/politics/archive/2015/02/the-states-that-will-pick-the-president-the-sunbelt/431838/> [<https://perma.cc/GP8R-FGGZ>] (noting that white share of population in North Carolina and other states is declining due to urban growth, causing a shift in political preferences); Jen Kinney, *Houston Attitudes Changing on Inequality, Urban Life*, NEXT CITY (Apr. 27, 2016), <https://nextcity.org/daily/entry/survey-houston-urban-change-immigration-inequality> [<https://perma.cc/DP9F-HVMS>] (reporting that Houston is becoming increasingly more Democratic and liberal on issues such as immigrants, gay rights, and criminal justice); Meyerson, *supra* note 1 (noting the same); Robertson & Fausset, *supra* note 12.

20. See Stephen Wolf, *Republicans Now Dominate State Government, With 32 Legislatures and 33 Governors*, DAILYKOS (Nov. 14, 2016, 9:09 AM), <http://www.dailykos.com/story/2016/11/14/1598918/-Republicans-now-dominate-state-government-with-32-legislatures-and-33-governors> [<https://perma.cc/HNQ5-VWE5>]; Paul Woolverton, *Republicans Retain Veto-Proof Control of N.C. Legislature*, FAYETTEVILLE OBSERVER (Nov. 9, 2016, 2:16 AM), <http://www.fayobserver.com/b91337dc-a63b-11e6-94b0-df0d1417c782.html> [<https://perma.cc/CRP9-NKP3>].

21. Laura Meckler & Dante Chinni, *City vs. Country: How Where We Live Deepens the Nation's Political Divide*, WALL ST. J. (Mar. 21, 2014, 7:45 AM), <http://www.wsj.com/articles/SB10001424052702303636404579395532755485004> [<https://perma.cc/9AEQ-556E>].

22. *Id.*

23. See BISHOP, *supra* note 9, at 204-05; Paul Diller, *The Urban Disadvantage in National and State Lawmaking*, 77 LA. L. REV. 287, 292-97 (2016); Richard Florida, *America's Class-Divided Electorate*, CITYLAB (Oct. 27, 2016), <http://www.citylab.com/politics/2016/10/trump-clinton-and-the-creative-class/504827> [<https://perma.cc/THK2-6TS8>] (noting correlation between density and party affiliation). The urban/rural political divide appears to elide the important question of suburban voters, who are neither clearly urban nor clearly rural, but are perhaps the largest single bloc of the electorate in many states. See *infra* text accompanying notes 77-85. However, the suburbs too have been drawn into the urban/rural political conflict, with more urban inner suburbs siding with Democrats and more rural outer suburbs and exurbs tending to vote Republican. See BRIAN MANN, WELCOME TO THE HOMELAND: A JOURNEY TO THE RURAL HEART OF AMERICA'S CONSERVATIVE REVOLUTION 66, 86-88 (2006). As the text states, there is a nearly precise correlation between an area's degree of urbanness and its predominant political affiliation.



alone, the polarization of urban and rural voters would not explain Republican dominance at the state level because, in many Republican states, urban voters probably outnumber, or at least match, the number of rural voters.<sup>24</sup> However, rural voters tend to vote at a substantially higher rate than urban voters, especially in midterm elections.<sup>25</sup>

The second major factor contributing to Republican dominance at the state level is the population distribution of voters. While Democratic voters are concentrated in a handful of urban legislative districts, Republicans are more diffused among numerous, less dense districts.<sup>26</sup> This disparity is the combined effect of Republican legislatures intentionally gerrymandering legislative districts to maximize the number of Republican seats and the natural population distribution of the two parties' voters. Republicans came to power in many states in 2010, just in time for a new round of mandatory re-drawing of legislative district lines after the 2010 census.<sup>27</sup> Although states are required to create legislative districts that have equal numbers of people, Democratic voters tend to cluster at exceptionally high rates in small urban areas, whereas Republicans are more spread out in rural areas.<sup>28</sup> This pattern makes it fairly easy for Republican legislatures to gerrymander districts to favor Republicans by packing huge numbers of Democratic voters into a few urban districts and distributing Republican voters somewhat more thinly among numerous districts.<sup>29</sup>

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24. See MANN, *supra* note 23, at 67.

25. See *id.*

26. See Diller, *supra* note 23, at 291 (“Republicans win more seats by 55-40%, while Democrats win more by 75-20%.”).

27. See EAMON, *supra* note 7, at 328 (discussing Republican gerrymandering in North Carolina after 2010 election); Diller, *supra* note 23, at 326 (“Following the censuses of 2000 and 2010, many Republican-controlled state legislatures engaged in intense gerrymandering of state legislative and House seats.”).

28. This pattern has been referred to as “unintentional gerrymandering.” See Jowei Chen & Jonathan Rodden, *Unintentional Gerrymandering: Political Geography and Electoral Bias in Legislatures*, 8 Q.J. POL. SCI. 239, 239 (2013); see also Alec MacGillis, *Go Midwest, Young Hipster*, N.Y. TIMES (Oct. 22, 2016), <http://www.nytimes.com/2016/10/23/opinion/campaign-stops/go-midwest-young-hipster.html> [<https://perma.cc/CRN3-KUHZ>]. There is some disagreement about the causal role of intentional versus unintentional gerrymandering in accounting for Republican legislative gains. Compare MacGillis, *supra* (attributing gains to unintentional gerrymandering), with Stephen Wolf, *Gerrymandering Could Cost Democrats the House in 2016. Why? Because It Probably Did in 2012*, DAILY KOS (Oct. 18, 2016, 3:17 PM), <http://www.dailykos.com/story/2016/10/18/1583215/-Gerrymandering-could-cost-Democrats-the-House-in-2016-Why-Because-it-probably-did-in-2012> [<https://perma.cc/M9AJ-CQ3R>] (denying claims of “unintentional gerrymandering” and asserting that intentional gerrymandering alone cost Democrats twenty-five seats in the House of Representatives in 2012).

29. See, e.g., Chen & Rodden, *supra* note 28, at 264.

As an illustration, Republicans in North Carolina gained a supermajority in both houses of the state legislature during the 2012 presidential election despite the fact that Republican presidential candidate Mitt Romney won the state by only two percent over Barack Obama, the Democratic incumbent.<sup>30</sup> The discrepancy occurred in large part because Obama had overwhelming support in North Carolina's urban areas, but much less support outside of them.<sup>31</sup> The concentration of Democratic voters in urban areas, and the dispersion of Republican voters in rural areas allowed Republican legislators to cram those Democrats into a small number of legislative districts, while spreading Republicans out into a far greater number of districts. As a crude indicator, Obama won four state senate districts by over eighty percent, all in the urban centers of Charlotte, Raleigh-Durham and Greensboro, and another five by over sixty-five percent.<sup>32</sup> Romney, on the other hand, won no districts with over eighty percent, and only four with more than sixty-five.<sup>33</sup> In short, a huge percentage of the urban Democratic vote is being "wasted" in legislative districts where those votes are irrelevant to the outcome, and many fewer Republican votes are similarly wasted.<sup>34</sup> The result is that, although the state's urban voters are nearing, and may have actually surpassed, half the

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30. See Stephen Wolf, *A Comprehensive Look at the NC State Legislature Elections and the 2014 Landscape Part 1: The Senate*, DAILY KOS (July 22, 2013, 3:55 PM), <http://www.dailykos.com/story/2013/7/22/1223992/-A-Comprehensive-Look-at-the-NC-State-Legislature-Elections-and-the-2014-Landscape-Part-1-The-Senate> [https://perma.cc/2G4C-STWJ].

31. See EAMON, *supra* note 7, at 295, 317 (noting rural/urban disparity in support for Obama in both 2008 and 2012 elections). Although increasingly rare in today's era of polarized partisan politics, some of the discrepancy is also attributable to "ticket splitting" by voters who selected a Democratic presidential candidate and Republican state legislators. See *id.* at 318. As Charles Prysby notes, North Carolina voters were clearly unhappy with the Democrats who had controlled the state government for many years prior to 2010. See Prysby, *supra* note 17, at 184.

32. This is a crude indicator because, among other things, voters may split their tickets and vote for a presidential candidate from one party and a legislator from a different party, although this is becoming increasingly rare in an era of partisan polarization. See Wolf, *A Comprehensive Look at the NC State Legislature Elections and the 2014 Landscape Part 1: The Senate*, *supra* note 30.

33. See *id.*

34. See Diller, *supra* note 23, at 336-42. Legislative districts in North Carolina are so precisely drawn to provide secure partisan advantage that a whopping fifty-three legislators ran unopposed in North Carolina's 2016 elections. See Colin Campbell, *53 NC Legislators Lack Opponents as Filing Deadline Ends*, NEWS & OBSERVER (Dec. 21, 2015, 3:31 PM), <http://www.newsobserver.com/news/politics-government/state-politics/article50935595.html> [https://perma.cc/TA7S-4EW8]; see also Alan Greenblatt, *Uncontested Legislative Races Are Becoming More Common*, GOVERNING (June 2016), <http://www.governing.com/topics/elections/gov-uncontested-legislative-races.html> [https://perma.cc/4H3G-X3G4] (noting the large number of uncontested races in many states).

actual electorate, North Carolina's legislature is dominated by rural rather than urban legislators.<sup>35</sup>

North Carolina is an exemplar of an emerging national pattern. Nationwide, support for Democratic Presidential candidates has been overwhelmingly concentrated in the most urban areas since 2008.<sup>36</sup> In 2012, President Obama won only twenty-two percent of the nation's counties, fewer than even Democratic presidential candidate Michael Dukakis won in the course of a landslide loss to George H.W. Bush in 1988.<sup>37</sup> Obama won re-election by a healthy margin anyway because he garnered an enormous sixty-nine percent of the votes in cities with more than 500,000 people.<sup>38</sup> Hillary Clinton improved even on that margin in 2016, winning seventy-one percent of the vote in the largest counties.<sup>39</sup> The problem for the Obama/Clinton coalition is that, while urban areas help Democrats attain votes, elections are determined by territory as well as votes, and Republicans control far more territory.<sup>40</sup> Clinton lost the election despite winning the popular vote because she ran up huge leads in urban states and lost by slim margins in less urban states. At the legislative level, the concentration of Democratic voters in urban areas has had a similar result—Democrats get more votes, but Republicans win the elections. For example, although Obama won Virginia, Michigan, Wisconsin, Pennsylvania, and Ohio in 2012, Republicans took a two-thirds advantage in congressional districts in those states because so much of

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35. See generally Chris Kardish, *How North Carolina Turned So Red So Fast*, GOVERNING (July 2014), <http://www.governing.com/topics/politics/gov-north-carolina-southern-progressivism.html> [<https://perma.cc/3CBL-77A7>] (explaining causes for Republican domination in North Carolina after 2010); Wolf, *Why North Carolina Is Turning Blue: A Look at the State's Political Geography*, *supra* note 13.

36. Ronald Brownstein, *Town and Country*, ATLANTIC (June 26, 2015), <http://www.theatlantic.com/politics/archive/2015/06/town-and-country/432195> [<https://perma.cc/4EL2-7UZ9>] (noting that Democratic coalition under Obama is overwhelmingly urban).

37. David Wasserman, *The GOP's House Majority Is Safe... Right?*, FIVETHIRTYEIGHT (June 20, 2016, 7:00 AM), <http://fivethirtyeight.com/features/the-gops-house-majority-is-safe-right> [<https://perma.cc/WS2C-DM3J>] (noting that Dukakis won twenty-six percent of counties, compared to Obama's twenty-two percent).

38. See Greenblatt, *supra* note 11.

39. See Lazaro Gamio, *Urban and Rural American Are Becoming Increasingly Polarized*, WASH. POST (Nov. 17, 2016), <https://www.washingtonpost.com/graphics/politics/2016-election/urban-rural-vote-swing/> [<https://perma.cc/9SK9-E7PT>].

40. Compare FED. ELECTION COMM'N, FEDERAL ELECTIONS 2012, (2013), <http://www.fec.gov/pubrec/fe2012/federaelections2012.pdf> [<https://perma.cc/YW8D-62CP>], and FED. ELECTION COMM'N, FEDERAL ELECTIONS 2008, (2009), <http://www.fec.gov/pubrec/fe2008/federaelections2008.pdf> [<https://perma.cc/4B7C-3TSP>], with FED. ELECTION COMM'N, FEDERAL ELECTIONS 96 (1997), <http://www.fec.gov/pubrec/fe1996/cover.htm> [<https://perma.cc/8BVA-GWWJ>], and FED. ELECTION COMM'N, FEDERAL ELECTIONS 93 (1993), <http://www.fec.gov/pubrec/fe1992/federaelections92.pdf> [<https://perma.cc/4AFJ-TTXE>].

Obama's support was concentrated in urban areas that were packed into a handful of congressional districts.<sup>41</sup> State legislative districts in these and other states were similarly gerrymandered to favor Republicans because Democrats were so heavily clustered in urban areas. Republican domination at the state level is, therefore, largely a consequence of the fact that Democrats are overwhelmingly popular in the cities but extremely unpopular outside of them.<sup>42</sup>

### B. Preemption and the Urban/Rural Rivalry

A consequence of this political phenomenon is the intensification of a long-running urban/rural political rivalry. Historically, urban and rural voters have held divergent political preferences.<sup>43</sup> Urbanites generally have a greater tolerance than rural dwellers do for government regulation because aggressive state intervention is often required to coordinate activity among large groups of strangers in a densely populated area. As Edward Glaeser explains in *Triumph of the City*, although aggregating millions of people into a small land area dramatically increases public health risks and the potential for crime, city leaders can make cities safe through massive public investments in clean water supplies and professional police forces.<sup>44</sup> According to Glaeser, the need for a "vigorous public sector to combat crime and illness" may explain "why people in New York are so much fonder of big government than rural Kansas."<sup>45</sup> People in rural areas tend to value individualism and to be more skeptical of government regulation, which they often see as reflecting corrupt urban values and benefitting urban areas at their expense.<sup>46</sup>

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41. See Jonathan Chait, *Who Needs to Win to Win?*, N.Y. MAG. (Feb. 3, 2013), <http://nymag.com/news/features/republican-party-2013-2/> [https://perma.cc/C6KJ-6S5E]; see also Jacobson, *supra* note 12 (noting that clustering and post-2010 gerrymandering created Republican advantage in the House); Wasserman, *supra* note 37 (noting that the House of Representatives has a built-in Republican advantage due to the clustering of urban voters and the huge number of wasted votes in urban areas).

42. There are other factors besides geographic clustering and gerrymandering that help explain the Republican dominance at the state level. The electorate during midterm elections, when many state gubernatorial and state legislative races take place, skews older, whiter, and more Republican than the electorate during presidential election years. See Jacobson, *supra* note 12. Moreover, conservative political organizations like ALEC have undertaken a far more concerted effort to win control at the state level than liberal organizations. See generally Edsall, *supra* note 9.

43. See Diller, *supra* note 23, at 290, 295-97.

44. See generally EDWARD GLAESER, TRIUMPH OF THE CITY 93-116 (2011).

45. *Id.* at 116.

46. See Peter L. Francia & Jody Baumgartner, *Victim or Victor of the 'Culture War?'* *How Cultural Issues Affect Support for George W. Bush in Rural America*, 26 AM. REV. POLITICS 349, 355-62 (2005) (describing connection between rural voters' religious and cultural views and their political affiliations); James G. Gimpel & Kimberly A. Karnes, *The Rural Side of the Urban-Rural Gap*, 39 PS: POL. SCI. & POL. 467, 468-70 (2006) (describing

In addition, cities have usually been quicker than rural areas to embrace racial, religious, ethnic, and lifestyle diversity, because the anonymity and impersonality of city life provides a freer environment for the expression of various tastes and interests than the stricter moral order of smaller communities. Similarly, constant exposure to immigrants and strangers of all backgrounds breeds acceptance of new cultures and new ideas.<sup>47</sup> Rural areas, by contrast, are less densely populated and more ethnically homogenous, and, unlike cities, have been experiencing a sustained period of population loss rather than population growth.<sup>48</sup> As a result, rural residents have tended to adapt more slowly to cultural change and diversity, and indeed often pride themselves on being the guardians of traditional religion and morality against what they see as a morally corrosive urban culture.<sup>49</sup>

Today, with Democrats controlling most cities and rural Republicans controlling most states, the traditional rivalry between urban and rural areas in American politics is now expressed vertically in the relationship between the state and its cities. That is evident in the preemption battles. Unable to get much traction for their policy preferences at the state level, urban Democrats are enacting them at the far friendlier city level. Consistent with their embrace of diversity and comfort with government regulation, cities have recently adopted a flurry of laws dealing with health and safety, workplace relationships, civil rights, climate change, immigration, and others.<sup>50</sup> But because state legislators are simultaneously becoming more

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rural values of rugged individualism and skepticism of government). *See generally* KATHERINE J. CRAMER, *THE POLITICS OF RESENTMENT* (2016) (describing “rural consciousness” in Wisconsin that drives political participation, characterized by resentment of perceived urban values, antipathy towards government, etc.).

47. *See, e.g.*, GLAESER, *supra* note 44, at 129 (noting that anonymity and impersonality of large cities facilitates the loosening of moral constraints); Robert E. Park, *Human Migration and the Marginal Man*, 33 *AM. J. SOCIOLOGY* 881, 888 (1928) (In cosmopolitan cities, the individual “is not bound as others are by the local properties and conventions.”).

48. *See* Meckler & Chinni, *supra* note 21 (describing how loss of manufacturing jobs in rural areas has led to population exodus and insulation from cultural change).

49. *See generally* CRAMER, *supra* note 46, at 130-31, 222 (rural voters see themselves as having values that are distinct from, and superior to, those of urban voters); MANN, *supra* note 23, at 166-89 (describing how rural dwellers see themselves as champions of an embattled traditional moral and religious culture that is threatened by the encroachment of urban values). The past year or so has seen an explosion of interest in rural America and the “white working class.” Two notable recent books include NANCY ISENBERG, *WHITE TRASH* (2016), a historical discussion of the white lower class, and J.D. VANCE, *HILLBILLY ELEGY* (2016), an affecting memoir about life in a rural white working-class family. For a review and political context, see Alec MacGillis & Propublica, *The Original Underclass*, *ATLANTIC* (Sept. 2016), <http://www.theatlantic.com/magazine/archive/2016/09/the-original-underclass/492731/> [https://perma.cc/3C5R-RZV2].

50. *See, e.g.*, Kenneth A. Stahl, *Local Home Rule in the Time of Globalization*, 2016 *BYU L. REV.* 177, 179-86, 252-53 (2016); Diller, *supra* note 23, at 290, 295-97.

rural, conservative, and Republican, those local ordinances are increasingly answered with preemption.<sup>51</sup>

The current political environment is, in a sense, reminiscent of a previous era in American history. One hundred years ago, cities grew enormously thanks to an influx of capital and immigrant labor, but state legislatures were dominated by rural interests, largely as a result of legislative districts that were malapportioned to over-represent rural areas.<sup>52</sup> Then, as now, these rural-controlled state legislatures were displeased by the growth of cities and the threat they appeared to pose to a traditional rural culture. State legislatures snatched power away from cities through so-called “ripper” bills<sup>53</sup> and attempted to disenfranchise urban voters by adopting stringent voting rules such as onerous registration requirements, the secret ballot, literacy tests, poll taxes, and the exclusion of paupers from the franchise.<sup>54</sup>

At the same time, however, state legislative attitudes toward cities during the early twentieth century were not uniformly hostile. State legislatures also enacted laws designed to facilitate urban enterprise and growth, and the period was marked, as David Barron has noted, by “state legislative expansion of the spending, taxing, and regulatory powers of local governments,” not solely the restriction of local government power.<sup>55</sup> As Barron further explains, urban reformers in many states pushed for Constitutional amendments granting local governments “home rule,” which created a sphere of independent legislative activity for municipalities. Home rule was designed to prevent state legislatures from either curtailing

51. Since gaining a supermajority of the North Carolina legislature in 2012, Republicans preempted dozens of local laws and even changed voting rules in several urban areas to make it harder for Democrats to win. *See generally* Ehrenhalt, *supra* note 8. A particularly startling example of how preemption epitomizes the rural/urban political divide is gun control. Urban dwellers overwhelmingly support gun control measures, but local gun control ordinances are swiftly preempted by state legislatures because rural dwellers vigorously oppose all gun control measures. *See* Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82, 98-103 (2013).

52. *See* DENNIS R. JUDD & TODD SWANSTROM, *CITY POLITICS: PRIVATE POWER AND PUBLIC POLICY* 126 (3rd ed. 2002) (explaining that state governments were not responsive to urban needs because “districts were drawn up to ensure that rural counties would outvote cities in the state legislative chambers,” regardless of population).

53. *See, e.g.*, 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 (1992); Lyle Kossis, *Examining the Conflict Between Municipal Receivership and Local Autonomy*, 98 VA. L. REV. 1109, 1125-128 (2012).

54. *See, e.g.*, ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 37-53 (2000) (explaining that many voting rights innovations adopted in the late nineteenth and early twentieth century were efforts to prevent urban residents, and specifically immigrants, from voting).

55. *See* David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2286 (2003).

local government power through ripper bills *or* expanding local power.<sup>56</sup> That home rule simultaneously empowered and constrained local governments reflected the ambiguous attitude state governments then possessed toward cities.

The ambiguity had several sources. State legislatures understood that cities were the economic engines of their states' prosperity, and that state legislative power could be expanded by acting through local governments.<sup>57</sup> Furthermore, state governments' hostility toward cities was mitigated by the fact that both major political parties had rural and urban constituencies. This was especially true of the Democratic Party.<sup>58</sup> For over a century, from the end of the Civil War until the 1980s, the Democratic Party was an uneasy alliance of urban working-class voters in the north and rural populists and anti-desegregationists in the west and the "solid south."<sup>59</sup> Though bitterly antagonistic, these urban and rural voters were forced into a coalition initially by their shared interest in opposing the pro-business stance of the Republican Party, and then subsequently by the largesse each enjoyed under the New Deal.<sup>60</sup> The coalition began falling apart during the 1960s, as the Democratic Party focused its efforts on urban voters, while Republicans sought to peel away rural voters disaffected by racial and cultural change.<sup>61</sup>

Today, many of the factors that caused state legislators to mitigate their hostility to cities have vanished. After a long period of partisan realignment, rural residents are now solidly aligned with Republicans and urban dwellers with Democrats.<sup>62</sup> According to one observer, "never before in American history" have states and local governments "had such distinct political profiles."<sup>63</sup> Furthermore, as I explain in greater detail below, cities and rural areas are no longer as linked economically as they were a century ago, so state legislatures have little reason to worry that curtailing city power will have deleterious effects on the state's rural areas or its overall economic health. The dramatic scope of the current preemption epidemic is evidence of just how unusual the current political environment is.

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56. *See id.* at 2291-2321.

57. *See id.* at 2286.

58. *See* JUDD & SWANSTROM, *supra* note 52, at 110-14.

59. *See id.*

60. *See id.*

61. *See id.*; MANN, *supra* note 23, at 238-59 (arguing that Democrats made a conscious decision to abandon their rural base and focus on an urban agenda).

62. *See* Diller, *supra* note 23, at 292-97.

63. *See* Meyerson, *supra* note 1.

## II. HOW THE DEEPENING RURAL/URBAN CONFLICT THREATENS OUR DEMOCRACY

### A. Madisonian Democracy

The preemption controversy, and the larger urban/rural fissure it exemplifies, indicates that today's partisan politics is an all-out conflict between competing social groups, rather than a temporary alignment of ephemeral interests.<sup>64</sup> If that is true, it has dangerous implications for liberal democracy. James Madison's Federalist Number 10, often considered a keystone of our democratic tradition, famously worried about "factions" harming the paramount rights of individuals.<sup>65</sup> While recognizing the impossibility of eradicating these factions, Madison argued that introducing a wide diversity of interest groups into the political realm would make factions inherently unstable. He wrote:

Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other.<sup>66</sup>

As Madison saw it, in a large republic comprised of many diverse interests, factions would become temporary, shifting coalitions, not permanent cleavages among a fixed set of antagonists.<sup>67</sup> Expounding on Madison's insight, the political scientist Robert Dahl argued that government in a large, diverse polity such as our own is only possible if there are multiple cross-cutting lines of political division—"if the same persons are sometimes opponents and sometimes allies"<sup>68</sup> and today's minority has an expectation of being tomorrow's majority.<sup>69</sup> This notion of

64. Several recent works confirm that political affiliations today are permanent social groups. See, e.g., CHRISTOPHER H. ACHEN & LARRY M. BARTELS, *DEMOCRACY FOR REALISTS* 307 (2016); BISHOP, *supra* note 9, at 255-67.

65. See Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1106, 1127 (1980) (discussing how Madison's concern with factions reflects liberal suspicion of groups intermediate between the state and the individual).

66. See THE FEDERALIST NO. 10, at 64 (James Madison) (Jacob E. Cooke ed., 1961).

67. See ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 30 (1961) ("[B]ecause majorities are likely to be unstable and transitory in a large and pluralistic society, they are likely to be politically ineffective; and herein lies the basic protection against the exploitation of minorities.").

68. See ROBERT A. DAHL, *DEMOCRACY IN THE UNITED STATES* 279 (4th ed. 1981).

69. See ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* 161 (1989); see also Frank I. Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145, 173 (1977) (describing "[t]he Madisonian or Dahlian vision of coalitions that form and re-form from issue to issue, of legislators exchanging support here for support there in an ever-shifting alignment of



shifting coalitions enables everyone to see the long-term benefits of cooperation, and prevents politics and trade from devolving into zero-sum contests between warring classes.<sup>70</sup> Dahl warns that, on the other hand, “[i]f all the cleavages occur along the same lines, if the same people hold opposing positions in one dispute after another, then the severity of conflicts is likely to increase. The person on the other side is not just an opponent; he or she soon becomes an enemy.”<sup>71</sup> Where that happens, where “the conflict is over two completely incompatible ways of life—then any political system is likely to break down.”<sup>72</sup>

Dahl argues that our liberal democracy has usually functioned reasonably well because, with some exceptions, it has featured numerous cross-cutting allegiances that prevent extreme political polarization.<sup>73</sup> Our modern two-party system, for example, has tended to give our political system a remarkable degree of stability by ensuring that political differences are channeled through the two major national parties.<sup>74</sup> The two-party system also, however, provides an important warning. The original purpose of the two-party system was to short-circuit a potentially permanent cleavage between the north and south over slavery; both parties were to be national entities built on broad ideological platforms that would transcend the corrosive sectional conflict then building.<sup>75</sup> The system worked reasonably well as long as the parties were truly national. But once the parties became identified with specific territories and opposing stances on slavery, the country was almost immediately ripped apart.<sup>76</sup>

### B. The Hardening of Partisan Affiliations

Ominously, the territorial division of partisan allegiances that once proved so perilous for our democracy is happening again today, though the sectional conflict is now between urban and rural areas within states, rather

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interest groups, making plausible an expectation that over the long run everyone would enjoy a net balance of political gains in excess of losses . . .”).

70. See DAHL, *DEMOCRACY IN THE UNITED STATES*, *supra* note 68, at 252 (arguing that democracy is more likely to emerge where people see politics and trade as non-zero sum, which destabilizes group identities and creates confluence of interest among people).

71. DAHL, *A PREFACE TO DEMOCRATIC THEORY*, *supra* note 67, at 279.

72. *Id.* at 277. See also BISHOP, *supra* note 9, at 232, 297 (discussing some of Dahl’s research and its implications for today’s geographically polarized political culture).

73. See DAHL, *A PREFACE TO DEMOCRATIC THEORY*, *supra* note 67, at 284-307.

74. See generally Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121 (1990).

75. See JAMES L. SUNDQUIST, *DYNAMICS OF THE PARTY SYSTEM* 50-73 (1983) (noting that Martin Van Buren believed the modern system of national parties was “the means of keeping the slavery issue quiet”).

76. See *id.*

than between northern and southern states. The urban/rural divide now precisely corresponds to partisan affiliation.<sup>77</sup> It appears, further, that our urban and rural antagonists are not simply shifting coalitions but permanent rivals in an increasingly zero-sum conflict. As Dahl worried, instead of having multiple cleavages among multiple lines, today the cleavages all run along the single line of partisanship.<sup>78</sup> In a recent book, Christopher Achen and Larry Bartels argue that parties are all-encompassing social groups comprised of people who share similar values, not merely collections of individuals with shared interests or views.<sup>79</sup> Bill Bishop similarly argues that today's partisan divisions represent competing lifestyles with entirely distinct—and mutually opposed—cultures, beliefs, interests, politics, and geography. Bishop notes that this partisan identification has become so strong that people do not even want to live near those with different political affiliations, resulting in what he calls a “big sort” in which Democrats and Republicans have self-segregated into communities of the like-minded.<sup>80</sup>

In the past, when both parties had rural and urban voters, partisanship eased the tension between them by uniting them against a common enemy—the other party. Today, however, partisanship exacerbates that tension by pitting rural and urban voters against each other. Psychological research has persuasively demonstrated that the mere act of dividing people into two groups creates an “us-versus-them” mentality.<sup>81</sup> Moreover, the increasing partisan divide between urban and rural dwellers in turn causes partisans to take a zero-sum attitude towards politics. As Katherine Cramer notes, identification with a social group causes people to seek more resources for their own group, and where, as in politics, resources are finite, this necessarily becomes a zero-sum game; groups quickly come to resent other groups for taking more than their fair share of the resources.<sup>82</sup>

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77. See Greenblatt, *supra* note 11 (“traditional regional rivalries almost perfectly align with partisan divisions”); Seth C. McKee, *Rural Voters and the Polarization of American Presidential Elections*, 41 PS: POL. SCI. & POL. 101, 101-06 (Jan 2008); Meckler & Chinni, *supra* note 21 (chronicling the increasing urban/rural political divide).

78. See generally McKee, *supra* note 77, at 104-06.

79. See ACHEN & BARTELS, *supra* note 64, at 307; see also BISHOP, *supra* note 9, at 255-267; CRAMER, *supra* note 46, at 8.

80. See BISHOP, *supra* note 9, at 8-9, 22-23, 199 (defining current sort as “post-materialist” in that people are choosing where to settle based on lifestyle preferences, which today closely correlate with political affiliations). Recent research confirms that the “big sort” has continued and may have in fact gotten “bigger.” See Richard Florida, *America's 'Big Sort' Is Only Getting Bigger*, CITYLAB (Oct. 25, 2016), <http://www.citylab.com/politics/2016/10/the-big-sort-revisited/504830> [<https://perma.cc/BEY7-KW63>].

81. See BISHOP, *supra* note 9, at 282-86; see also ACHEN & BARTELS, *supra* note 64, at 220-21; CRAMER, *supra* note 46, at 8-9.

82. See generally CRAMER, *supra* note 46, at 8-12 (describing how partisanship contributes to rural “resentment” towards urban dwellers).

This dynamic of mutual resentment is evident in the preemption conflict. One of the chief causes of the current preemption trend is the herding of voters into gerrymandered legislative districts. As it turns out, this dynamic is itself partially the result of the self-sorting Bishop describes – people have sorted themselves into legislative districts in which one party predominates.<sup>83</sup> Bishop notes that although individuals do not consciously move to particular legislative districts, they do migrate towards other people who share their lifestyles, which today is overwhelmingly correlated with partisan affiliation. The herding together of people with similar views and their isolation from people with opposing views causes existing partisan biases to harden and become more pronounced.<sup>84</sup> As a result, legislators in many districts now answer to an insular and ideologically extreme constituency that desires nothing more intently than to notch a victory against the competing political culture. Because Republican legislators in states like North Carolina answer almost exclusively to rural residents, preempting local legislation that reflects urban values is an easy way to score points with rural voters without alienating any political supporters. Likewise, Democratic city officials may enact legislation they know will be preempted in order to demonstrate their commitment to progressive causes.<sup>85</sup>

### C. The Zero-Sum Political Economy of Globalization

In addition to the urban/rural partisan realignment, globalization and the aftermath of the Great Recession have also intensified the political divide between urban and rural dwellers, and increased the sense that they are competing in a zero-sum game in which one class will emerge victorious and the other will be defeated. The rift over globalization, like today's hyper-partisanship, is also reflected in the preemption conflict.

As an initial matter, globalization has created a huge geographic imbalance in economic fortunes as capital investment is increasingly directed towards urban centers and away from rural areas. The global economy is largely a service and knowledge based system that places less emphasis on manufacturing capacity and a premium on innovation, which is disproportionately occurring in places where creative people with diverse

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83. See DAVID DALEY, *RATF\*\*CKED* xxiv-xxv (2016) (arguing that today's gerrymandered districts have less to do with sorting and more to do with the increasingly sophisticated technology legislators use to draw district lines).

84. See BISHOP, *supra* note 9, at 73-75.

85. In states like California where the situation is reversed, Democratic legislatures can enact a pro-urban, anti-rural agenda with little fear of reprisal. See generally Victor Davis Hanson, *How the Widening Urban-Rural Divide Threatens America*, L.A. TIMES (Nov. 1, 2015, 5:00 AM), <http://www.latimes.com/opinion/op-ed/la-oe-1101-hanson-rural-urban-divide-20151101-story.html> [<https://perma.cc/D9PQ-Q94B>].

skills and knowledge are clustered together; that is, urban places.<sup>86</sup> Firms are located in cities where they can take advantage of the deep and diverse labor pool.<sup>87</sup> Cities across the world are increasingly connected to each other through trade and the sharing of information.<sup>88</sup> As jobs and capital concentrate in urban centers, they spark demand for both skilled and unskilled labor, so workers have flocked to cities as well, which explains the population growth of cities such as Charlotte and Raleigh-Durham.<sup>89</sup> A large number of these workers are immigrants, whose diversity of skills and knowledge boost cities' economic prospects.<sup>90</sup> Cities are being transformed demographically in the process.<sup>91</sup> The flow of capital and labor into cities has been facilitated by liberal trade and immigration policies that weaken national borders, a signature attribute of globalization.<sup>92</sup>

As Richard Florida notes, though, if cities like Durham and Charlotte are “winners” under globalization because free trade and liberal immigration policies benefit them, rural and white working class suburban areas see themselves as “losers” under globalization for the same reason.<sup>93</sup> As the

86. See BISHOP, *supra* note 9, at 144-55 (describing how dense, diverse cities foster innovation); Richard Florida, *How the Crash Will Reshape America*, ATLANTIC (Mar. 2009), <http://www.theatlantic.com/magazine/archive/2009/03/how-the-crash-will-reshape-america/307293/> [<https://perma.cc/KB5N-KM56>]; Richard Florida, *The Winners and Losers of Economic Clustering*, CITYLAB (Jan. 6, 2016), <http://www.citylab.com/work/2016/01/creativity-clustering-us-cities/422718/> [<https://perma.cc/447R-GS42>].

87. See Furuseth et al., *supra* note 14, at 2-4 (discussing Charlotte's efforts to become a “global city”).

88. See generally RICHARD FLORIDA, WHO'S YOUR CITY (2008); SASSIA SASKEN, THE GLOBAL CITY (1991).

89. See, e.g., Heather A. Smith & Warren Graves, *Introduction. From Mill Town to Financial Capital*, in CHARLOTTE, NC: GLOBAL EVOLUTION OF A NEW SOUTH CITY (discussing Charlotte's transformation into a globalizing city) *supra* note 16, at 1; Furuseth et al., *supra* note 14, at 2-4.

90. See Clayton P. Gillette, *Local Redistribution, Living Wage Ordinances, and Judicial Intervention*, 101 NW. U. L. REV. 1057, 1077-79 (2007) (citing John M. Quigley, *Urban Diversity and Economic Growth*, J. ECON. PERSPECTIVES 127, 130-32 (2008)); Tanvi Misra, *Immigration Is Absolutely an Urban Issue*, CITYLAB (June 10, 2016), <http://www.citylab.com/politics/2016/06/immigration-is-absolutely-an-urban-issue/486386/> [<https://perma.cc/ZZR2-PJ6M>]; see also Louis Wirth, *Urbanism as a Way of Life*, in CLASSIC ESSAYS ON THE CULTURE OF CITIES 143, 150 (Richard Sennett ed., 1969) (“[The city] has brought together people from the ends of the earth because they are different and thus useful to one another, rather than because they are homogenous and like-minded.”).

91. See Misra, *supra* note 90.

92. See Wilkinson, *supra* note 17, at 150-51 (explaining how free trade policies such as NAFTA created demand for low-skilled immigrant labor); Yishai Blank, *The City and the World*, 44 COLUM. J. TRANSNAT'L L. 868, 907-10 (2006) (noting that, as cities have become significant sites of global economic activity, international economic institutions such as the World Bank are advancing policies to decentralize power from nation-states to cities and to push cities to adopt policies that encourage efficiency and innovation.).

93. See generally RICHARD FLORIDA, THE RISE OF THE CREATIVE CLASS (2002).

new global economy has linked cities together, it has also severed the connection between cities and their surrounding rural areas, and those rural areas have been left behind economically.<sup>94</sup> The globalization of capital and the loosening of trade barriers have caused manufacturing jobs to be exported overseas while the globalization of labor and the liberal immigration policies have led to fears that low-wage immigrant workers will undercut wages for American citizens.<sup>95</sup> Mechanization of agriculture and other technological developments have also led to rural job loss.<sup>96</sup> Being less dense and diverse than cities, rural areas cannot match the advantages cities have in the new knowledge-based economy. This disparity has been especially prevalent since the Great Recession. A recent report demonstrates that half of the job growth since 2010 has been concentrated in seventy-three counties comprising just a third of the nation's population.<sup>97</sup> Not coincidentally, those seventy-three counties are all among the country's densest urban areas (including Mecklenberg and Wake counties in North Carolina, which contain Charlotte and Raleigh, respectively). Florida concludes that

America's new economy is increasingly uneven not just across classes, but across geography, with a few big winners and many more losers. This is a product of the decline of manufacturing and the rise of an increasingly concentrated knowledge economy, which is propelled by the clustering of knowledge, talent, and innovation.<sup>98</sup>

The sense that the global economy is driving a wedge between urban and rural areas, turning trade and immigration into zero-sum contests, is hardening the political divide between urban and rural areas. The depth of this divide is evident in the preemption conflict. To the extent they see themselves winning from globalization, Democratic cities have embraced political moves to encourage in-migration, free trade, and the

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94. See Parag Khanna, *A New Map for America*, N.Y. TIMES (Apr. 15, 2016), <http://www.nytimes.com/2016/04/17/opinion/sunday/a-new-map-for-america.html> [https://perma.cc/CUH3-F269] ("America is increasingly divided not between red states and blue states, but between connected hubs and disconnected backwaters.").

95. See Cohen, *supra* note 17 (describing decline of manufacturing and tobacco in North Carolina and replacement by global banking, biotechnology, pharmaceuticals, and telecommunications industries).

96. See Alana Semuels, *The Graying of Rural America*, CITYLAB (Jun. 2, 2016), <http://www.citylab.com/housing/2016/06/the-graying-of-rural-america/485288/> [https://perma.cc/9MAQ-TFN8].

97. See Richard Florida, *Geographic Inequality Is Swallowing the Recovery*, CITYLAB (May 23, 2016), <http://www.citylab.com/politics/2016/05/there-are-more-losers-than-winners-in-americas-economic-recovery-due-to-geographic-inequality/483989/> [https://perma.cc/56XL-WZFU]. Florida also notes increasing inequality in job growth between the twenty largest counties nationwide and the rest of the country. *Id.*

98. *Id.*

clustering of creative people.<sup>99</sup> Several cities have adopted “living wage” ordinances to entice lower-income workers, redeveloped waterfronts and derelict industrial sites, and crafted special zoning laws and tax incentives to lure artists and creative people.<sup>100</sup> Mayors across the country came out widely in favor of President Obama’s proposed Trans-Pacific Partnership trade agreement, which they saw as increasing cities’ abilities to connect to each other and leverage the global economy to their advantage.<sup>101</sup> Many cities, including Charlotte, have attempted to adopt “sanctuary city” type policies to signal friendliness to immigrants (such as the adoption of municipal identification cards, requesting or requiring police to refrain from questioning people about their immigration status in certain types of stops, and the like).<sup>102</sup> Charlotte’s decision to extend civil rights protections to gay and transgender individuals, which ultimately led to North Carolina’s “bathroom bill,” can also be viewed as an attempt to enhance the city’s position in the global knowledge-based economy by attracting members of what Florida calls “the creative class.”<sup>103</sup> As Florida’s famous “gay-Bohemian” index demonstrates, there is a close correlation between

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99. See, e.g., Furuseth et al., *supra* note 14, at 2-4.

100. See, e.g., Tyrel G. Moore & Gerald L. Ingalls, *A Place for Old Mills in a New Economy: Textile Mill Reuse in Charlotte*, in CHARLOTTE, NC: GLOBAL EVOLUTION OF A NEW SOUTH CITY, *supra* note 16, at 119 (discussing adaptive reuse of old textile mills in Charlotte as loft living spaces for financial services employees, and use of tax incentives to encourage adaptation).

101. See Ronald Brownstein, *Mayors Rise to the Defense of Free Trade*, ATLANTIC (Mar. 24, 2016), <http://www.theatlantic.com/politics/archive/2016/03/clinton-sanders-free-trade/475113/> [https://perma.cc/M755-6TEQ]; Vicki Needham, *Dem Mayors Line Up for Obama Trade Deal*, HILL (Jan. 27, 2016, 6:00 AM), <http://thehill.com/policy/finance/267091-dem-mayors-line-up-for-obama-trade-deal> [https://perma.cc/HCD3-NEP4]. But see Jillian Jorgensen, *De Blasio Rips Trans Pacific Partnership, Calls NAFTA a ‘Disaster,’* OBSERVER (Apr. 7, 2016, 4:08 PM), <http://observer.com/2016/04/de-blasio-rips-trans-pacific-partnership-calls-nafta-a-disaster/> [https://perma.cc/8MAB-K25T]. See generally Binyamin Appelbaum, *Simmering for Decades, Anger About Trade Boils Over in ‘16 Election*, N.Y. TIMES (Mar. 29, 2016), <http://www.nytimes.com/2016/03/30/business/economy/trade-donald-trump-bernie-sanders.html> [https://perma.cc/C5KV-DY6C] (explaining the complex politics of trade and the TPP); Jackie Calmes, *Trans-Pacific Partnership Supporters Pin Hopes on Lame-Duck Vote*, N.Y. TIMES (June 1, 2016), <http://www.nytimes.com/2016/06/02/business/trans-pacific-partnership-supporters-pin-hopes-on-lame-duck-vote.html> [https://perma.cc/8ZHH-ZEL6].

102. See Steve Harrison, *New Sanctuary City Law Could Force Charlotte to Change Civil Rights Resolution*, CHARLOTTE OBSERVER (Oct. 29, 2015, 6:14 PM), <http://www.charlotteobserver.com/news/local/article41857026.html> [https://perma.cc/6PZ5-8H6G]; see also Amber Tong, *What Exactly Is a Sanctuary City?*, GOVERNING (July 29, 2016), <http://www.governing.com/topics/public-justice-safety/gov-sanctuary-city-congress-georgia-north-carolina.html> [https://perma.cc/8C8N-JSUN] (describing some examples of sanctuary cities).

103. See generally FLORIDA, THE RISE OF THE CREATIVE CLASS, *supra* note 93, at 283-314.

cities with concentrations of gays and artists, and higher incomes and housing prices. Florida theorizes that this is so because communities that are friendly towards bohemians and gays are more likely to be open to talented people “across racial, ethnic and other lines,” that creative people are more likely to be attracted to communities with inclusive cultures, and that historically marginalized groups like artists and gays are more likely to themselves be involved in the innovative and creative work that the knowledge-based economy values.<sup>104</sup> Indeed, in a recent interview, Charlotte mayor Jennifer Roberts explained, citing Florida’s work, that one motivation behind the city’s decision to extend civil rights protections to gays and transgender individuals was the desire to boost the city’s economy by bringing in more creative people.<sup>105</sup>

Republican state legislators, who answer almost exclusively to rural residents, are motivated to enact policies that reflect their rural constituents’ hostility towards globalization. Preempting local laws designed to enhance cities’ position in a global economy is a natural expression of this underlying hostility. North Carolina’s HB2, of course, preempted Charlotte’s effort to provide civil rights protections for transgender individuals as well as all other local civil rights and workplace protection laws, and the state also preempted all local sanctuary city policies after Charlotte announced its intention to adopt such policies.<sup>106</sup> Many other states have similarly blocked local immigration, civil rights, and workplace regulations (including living wage laws).<sup>107</sup> In effect, if not intent, these laws make it harder for cities to succeed in a global economy that rewards diversity and a liberal approach to immigration. Charlotte has already felt some of the adverse impacts of these preemption efforts, as, in light of HB2, the electronic payment service PayPal recently cancelled plans to build a facility in Charlotte, the National Basketball Association moved the annual All-Star Game from the city, and several performers cancelled concerts in the state.<sup>108</sup> State legislators, though, have little

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104. See FLORIDA, WHO’S YOUR CITY, *supra* note 88, at 135-39.

105. See Ronald Brownstein, ‘Just Let Charlotte Be Charlotte,’ ATLANTIC (Jun. 17, 2016), <http://www.theatlantic.com/politics/archive/2016/06/just-let-charlotte-be-charlotte/487499/> [<https://perma.cc/3W9T-76ZV>] (transcribing interview with Charlotte mayor Jennifer Roberts); Ronald Brownstein, *The Twin Challenges Facing Charlotte*, ATLANTIC (Jun. 16, 2016), <http://www.theatlantic.com/politics/archive/2016/06/charlottes-web/487256/> [<https://perma.cc/S5DH-4DXB>] (noting that Charlotte’s immigration and civil rights policies are intended to create an inclusive environment that will attract young, well-educated professionals and boost the city’s economy, citing Florida’s “creative class” theory).

106. See Harrison, *supra* note 102; Tong, *supra* note 102 (noting that North Carolina has some of the strictest laws against sanctuary cities).

107. See Tong, *supra* note 102 (on immigration).

108. See Jennifer Bendery, *HB2 Just Cost North Carolina Another \$250 Million*, HUFFINGTON POST (Oct. 26, 2016, 6:12 PM), <http://www.huffingtonpost.com/entry/pat-mcc>

disincentive to take actions that harm cities because, in today's global economy, cities are already so completely disconnected from rural areas that an urban economic downturn is unlikely to have ripple effects on the places Republicans care about. In fact, in a political environment divided between apparent "winners" and "losers," a city's economic loss can easily be presented as a win for declining rural areas.<sup>109</sup>

Republican attitudes with regard to trade are complex, but it is notable that Donald Trump won the Presidency in part due to his hardline opposition to free trade and immigration, despite renouncing Republican orthodoxy on many other issues. Trump's message resonated primarily in economically declining, rural areas of the country, where most of his support was concentrated.<sup>110</sup> His campaign, epitomized by his "Make America Great Again" slogan, was driven by supporters' sense that they were "losers" under globalization.<sup>111</sup> A recent survey shows that Republican attitudes toward trade have made a dramatic negative turn over the last ten years—in 2006, forty-three percent of Republicans had positive attitudes toward trade compared to twenty-seven percent with negative attitudes; today, forty-seven percent view trade negatively and only eighteen percent view it positively.<sup>112</sup> Indeed, there is increasing speculation that globalization may be sparking a partisan realignment, with Democrats becoming the pro-globalization party and Republicans the anti-

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rory-hb2-north-carolina\_us\_5811213ee4b0990edc2f0cad [https://perma.cc/76ZE-KBWC] (describing these and other adverse impacts of HB2); Gordon et al., *supra* note 5; *see also NBA Moves North Carolina All-Star Game over 'Bathroom Bill,'* BBC NEWS (July 22, 2016), <http://www.bbc.com/news/world-us-canada-36863216> [https://perma.cc/NX49-39FV].

109. Ironically, rural areas do benefit from urban prosperity insofar as urban tax dollars are redistributed to rural areas. In fact, rural places receive far more in tax dollars than they pay. However, as Kathryn Cramer's important recent study reveals, rural dwellers *believe* that they pay more than they receive from cities because they perceive themselves as hard workers and urban dwellers as lazy. *See* CRAMER, *supra* note 46, at 8, 45-65, 130-31, 145-49. This perception, of course, reflects differences in urban and rural cultural values, discussed further in the next section.

110. *See* Edsall, *supra* note 9.

111. James Surowiecki, *Losers!*, NEW YORKER (June 6 & 13, 2016), <http://www.newyorker.com/magazine/2016/06/06/losers-for-trump> [https://perma.cc/VS6F-4QMR] (noting that Trump's campaign was driven by a sense of loss among his supporters). There has been a wealth of literature in the last few years on the rural white working class and its politics. *See, e.g.,* Rod Dreher, *Trump: Tribune of Poor White People*, AM. CONSERVATIVE (July 22, 2016, 10:58 AM), <http://www.theamericanconservative.com/dreher/trump-us-politics-poor-whites/> [https://perma.cc/HHS5-HUVQ].

112. *See* Vicki Needham, *Trump's Negative Trade Views Influencing GOP, Polls Show*, HILL (Sept. 23, 2016, 3:21 PM), <http://thehill.com/policy/finance/297506-trumps-negative-views-on-trade-influencing-republicans-poll-shows> [https://perma.cc/MG5V-FYH4].



globalization, nationalist party.<sup>113</sup> This move would track similar trends elsewhere in the world. Anti-immigrant and anti-trade nationalist political parties are gaining strength across Europe, driven by fears that globalization and immigration are weakening national identity.<sup>114</sup> Concerns about immigration and global economic integration were also behind the successful campaign for Britain to withdraw from the European Union.<sup>115</sup> It should come as no surprise that support for Britain leaving the European Union, as well as for nationalist political parties elsewhere in Europe, has been strongest in depopulating, declining rural and industrial areas outside urban centers and weakest within growing cities.<sup>116</sup>

#### D. The Cultural Costs of Globalization

The rising anxiety about immigration and global integration indicates that globalization's economic changes are increasingly entwined with cultural changes, and these cultural changes have similarly increased the social and political divide between urban and rural areas. By enabling and incentivizing mobility, globalization has intensified the geographic self-sorting of populations by both socio-economic status and cultural attitudes towards government and diversity. Intentionally or not, people are gravitating toward communities in which most of their neighbors share

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113. See Michael Lind, *This Is What the Future of American Politics Looks Like*, POLITICO MAG. (May 22, 2016), <http://www.politico.com/magazine/story/2016/05/2016-election-realignment-partisan-political-party-policy-democrats-republicans-politics-213909> [<https://perma.cc/9HAA-Q58C>]; see also David Brooks, *Where America Is Working*, N.Y. TIMES (June 3, 2016), <http://www.nytimes.com/2016/06/03/opinion/where-america-is-working.html> [<https://perma.cc/RUK2-6XF7>]; Needham, *supra* note 112 (finding a positive change among Democrats in their attitudes of trade compared to ten years ago).

114. See Ronald Brownstein, *Why Trump Looks Eerily Familiar to Germans*, ATLANTIC (May 12, 2016), <http://www.theatlantic.com/international/archive/2016/05/atlantic-crossings/482448/> [<https://perma.cc/T5XW-BA9R>] (noting the popularity of right-wing nationalist parties in Europe was driven by “fear that economic and cultural globalization, along with demographic change, is erasing their nation’s unique identity”).

115. See *id.*; Annie Lowrey, *How Donald Trump Explains ‘Brexit,’* N.Y. MAG. (June 21, 2016, 9:47 AM), <http://nymag.com/daily/intelligencer/2016/06/how-donald-trump-explains-brexit.html> [<https://perma.cc/YW6J-RQZR>] (noting connections between the Brexit campaign and the rise of Trump).

116. See Daniel Davies, *Brexit Supporters Say They’re Worried About Immigration. The Real Problems Are Deeper*, VOX (June 20, 2016, 7:30 AM), <http://www.vox.com/2016/6/20/11965064/brexit-immigration-economic-decline> [<https://perma.cc/6LMC-4MRA>]. In Austria’s recent presidential election, the far right nationalist candidate Norbert Hofer narrowly lost to mainstream candidate Alexander van der Bellen. See Boris Groendahl & Alexander Weber, *Austrian Far Right Defeated in Cliffhanger Presidential Vote*, BLOOMBERG (May 23, 2016, 10:58 AM), <http://www.bloomberg.com/news/articles/2016-05-23/austrian-far-right-defeated-in-cliffhanger-presidential-election> [<https://perma.cc/T6W8-A55Q>]. Hofer’s support was overwhelmingly concentrated in rural areas, while Van der Bellen’s was almost entirely in the country’s urban regions, especially the capital city of Vienna. See *id.*

their own political and cultural perspectives.<sup>117</sup> At the same time, because cities are no longer economically linked with adjacent rural areas, city and rural dwellers rarely have any reason for contact with one another, and no longer see their fates as linked together in any significant way.<sup>118</sup> The evolution of distinct and mutually exclusive political cultures is magnified by the rise of the internet and twenty-four hour cable news networks that enable people with distinct cultural and political preferences to receive their news and entertainment from entirely distinct sources that expressly cater to those preferences.<sup>119</sup>

Moreover, the sorting process itself hardens the cultural boundaries between rural and urban dwellers. The population mobility that globalization enables is almost entirely one way—from rural to urban areas.<sup>120</sup> Between 2010 and 2014, rural areas lost an average of 33,000 people per year, a period during which cities gained as many as 2.3 million people per year.<sup>121</sup> City dwellers have become accustomed to constant change, disruptive innovation, and swelling diversity, which yields more liberal and accommodating attitudes, while rural areas have become insulated against cultural change and diversity, resulting in a more conservative perspective.<sup>122</sup> In the absence of any economic or cultural interchange between the two regions, each sees the other as morally corrupt or backward.<sup>123</sup>

As before, this cultural divide between urban and rural areas leads to an increasingly zero-sum political contest. Since the 1960s, Democrats have pursued a deliberate strategy to concentrate their resources on urban voters,

117. See generally BISHOP, *supra* note 9 (describing increasing “sorting” of population into communities with nearly homogenous political preferences).

118. See *id.* at 72-77 (describing studies showing that, as communication between members of the two parties diminishes, both sides “come to see each other as more extreme or radical”).

119. See *id.* at 74-77; see also MANN, *supra* note 23, at 75-85 (describing how segmenting of American media has enabled rural areas to create their own cultural universe that is distinct from, and antithetical to, the urban culture).

120. See generally Semuels, *supra* note 96.

121. See *id.* (on rural population loss); Emily Badger, *Metropolitan Areas Are Now Fueling Virtually All of America’s Population Growth*, WASH. POST (Mar. 27, 2014), <https://www.washingtonpost.com/news/wonk/wp/2014/03/27/metropolitan-areas-are-now-fueling-virtually-all-of-americas-population-growth/> [<https://perma.cc/9ENF-LHDJ>] (on urban population growth).

122. See generally Rob Christensen, *GOP Confronts Rural-Urban Divide*, NEWS & OBSERVER (Mar. 17, 2015, 5:30 PM), <http://www.newsobserver.com/news/politics-government/politics-columns-blogs/rob-christensen/article15113450.html> [<https://perma.cc/73F8-7C6F>] (describing how aging rural areas become more isolated from cultural change as young skilled people leave).

123. See generally BISHOP, *supra* note 9 at 74-77; MANN, *supra* note 23, at 79-85 (“People in your world who think urban progressives aren’t just different, they’re bad or evil.”).

while Republicans have appealed to white voters disaffected by cultural and racial change and disenchanted by liberal urban values.<sup>124</sup> That trend reached its apotheosis during the 2016 presidential election, as Donald Trump ran a campaign that, despite his status as a lifelong New Yorker, was anti-urban to its core.<sup>125</sup> On the other hand, Democratic presidential candidate Hillary Clinton's campaign paid more attention to issues of concern to urban voters.<sup>126</sup>

The social and geographic distance between urban and rural areas has caused cultural conflict to become increasingly uncompromising, with each side seeing issues related to race, gay marriage, gun control, abortion, and civil rights for transgender individuals as, once again, zero-sum contests in which either urban or rural culture will decisively win out over the other. One example is the debate over the “Black Lives Matter” movement, which both sides of the 2016 presidential campaign exploited to mobilize voters.<sup>127</sup> Though the phrase and the larger movement grew out of several controversial police killings of unarmed black men and were aimed at establishing the seemingly uncontroversial proposition that black lives should be accorded the same value as white lives, the phrase was attacked as racist for the supposed implication that “*only* black lives matter.”<sup>128</sup> The leap from “Black Lives Matter” to the inference that “*only* black lives matter” reflects a zero-sum racial logic—emphasizing the value of black lives somehow devalues other lives. On the other hand, there have been several troubling incidents on university campuses of left-leaning groups

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124. See JUDD & SWANSTROM, *supra* note 52, at 110-14; MANN, *supra* note 23, at 238-59 (arguing that Democrats made a conscious decision to abandon their rural base and focus on an urban agenda).

125. See David Dudley, *The GOP Is Afraid of My City*, CITYLAB (July 22, 2016), <http://www.citylab.com/crime/2016/07/the-gop-is-afraid-of-baltimore-chicago-detroit-st-louis/492671> [<https://perma.cc/PWG3-QDUQ>] (arguing that Trump's anti-urban platform is aimed at scaring rural voters who are terrified of cities); Vann R. Newkirk II, *Mayors vs. Trump*, CITYLAB (July 27, 2016), <http://www.citylab.com/politics/2016/07/cities-mayors-trump/493211> [<https://perma.cc/DQ9F-43V6>] (observing that Trump's message on crime, immigration and other issues is essentially anti-urban); Josh Stephens, *Trump to Cities: You're Dead to Me*, PLANETIZEN (July 26, 2016, 8:00 AM), <http://www.planetizen.com/node/87620/trump-cities-you-re-dead-me> [<https://perma.cc/ANF8-NR57>] (comparing Trump's “law and order” message to its Nixonian forerunner in the 1970s and noting the anti-urban roots of the message).

126. See Erick Trickey, *Hillary Clinton's Urban Agenda*, NEXT CITY (Oct. 19, 2016), <https://nextcity.org/features/view/hillary-clinton-urban-agenda> [<https://perma.cc/BG6E-4SZ2>].

127. See Ronald Brownstein, *Trump and the City*, ATLANTIC (July 14, 2016), <http://www.theatlantic.com/politics/archive/2016/07/trump-and-the-city/491249/> [<https://perma.cc/FZ69-KBCC>] (suggesting “Black Lives Matter” is an urban issue).

128. See, e.g., Mario L. Barnes, *Criminal Justice for Those (Still) at the Margins—Addressing Hidden Forms of Bias and the Politics of Which Lives Matter*, 5 U.C. IRVINE L. REV. 711 (2015) (discussing the controversy over “Black Lives Matter”).

attempting to prevent the airing of views that dissent from a supposed moral consensus, on the grounds that these views are not only clearly wrong, but are so offensive that mere exposure to them would inflict harm on students.<sup>129</sup> On both sides of the debate, there is the sense that any gains one moral culture achieves must come at the expense of the alternative moral culture. Because, in our age of geographic self-sorting and a globally networked urban economy, people so rarely come into contact with those who have different views or lifestyles, it becomes all too easy to demonize the “other” and avoid any kind of compromise or debate.

### E. Fight over the Franchise

Perhaps the clearest evidence of how uncompromising the political struggle between urban and rural areas has become is that both sides have given up attempting to persuade the other and have instead devoted their resources to achieving victory through demography. The last few years have witnessed a flurry of new voting rules in Republican-controlled states, usually enacted on a strict-party line vote, that make voting harder for likely Democrats. The new rules limit early, absentee, and mail-in voting, require voter registration prior to Election Day, purge voter rolls of individuals who are suspected of being ineligible, and impose strict requirements that certain forms of identification be provided as a prerequisite to voting.<sup>130</sup> Though styled as efforts to attack voter fraud, these new rules appear intended to depress turnout by likely Democratic voters, especially the poor and African Americans.<sup>131</sup> North Carolina adopted perhaps the strictest set of voter restrictions in the country, eliminating same-day registration, reducing the early voting period,

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129. See, e.g., Zachary Benjamin and Michael Qian, *Campus Reacts to Blue Lives Matter Display Replaced by #BlackLivesMatter Posters*, DARTMOUTH (May 13, 2016, 7:14 AM), <http://www.thedartmouth.com/article/2016/05/display-removed-in-collis-replaced-with-blacklivesmatter-posters> [https://perma.cc/K56X-D42E] (describing one incident of student silencing on moral grounds at Dartmouth College).

130. For a survey of some of the restrictions recently adopted in Republican-controlled states, see Ryan P. Haygood, *Hurricane Scotus: The Hubris of Striking Our Democracy's Discrimination Checkpoint in Shelby County and the Resulting Thunderstorm Assault on Voting Rights*, 10 HARV. L. & POL'Y REV. S11, S35-S49 (2016). As Haygood notes, the recent wave of new voting rules began shortly after the Supreme Court's controversial decision in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013). *Shelby County* struck down a part of the Voting Rights Act that required many jurisdictions, including North Carolina, to seek “pre-clearance” from the United States Justice Department before making any alterations to their voting rules. See *id.* Many of the new voting rules adopted after *Shelby County* have been challenged in court under various provisions of federal law, and the results so far have been mixed. See *id.*

131. See N.C. State Conference of the NAACP v. McCrory, 831 F.3d 204, 214 (2016) (describing North Carolina Voter ID law as targeting African Americans “with almost surgical precision”).

enacting stringent identification requirements, and making the casting of provisional ballots more difficult.<sup>132</sup> The Fourth Circuit Court of Appeals recently struck down North Carolina's law as an intentional effort to keep black voters from the polls in violation of Section 2 of the Voting Rights Act.<sup>133</sup> Challenges to voter ID laws in other Republican states have had mixed success in the courts.<sup>134</sup>

As Republicans have moved to shrink the pool of urban Democratic voters, Democrats have responded by attempting to expand the pool. For example, Democratic Governor Terry McAuliffe of Virginia recently issued an executive order (thereby circumventing a vote in the Republican-controlled legislature) enfranchising thousands of convicted felons, many of whom are likely to be Democrats.<sup>135</sup> The order could have huge political implications in a state that, like neighboring North Carolina, is closely divided between urban Democrats and rural Republicans. Democrats have also sought to expand the Democratic voter base by pushing statehood for the District of Columbia.<sup>136</sup> The state would be solidly Democratic and, as the only city-state in the union, increase the strength of the urban alliance in Congress (for that very reason, Republicans oppose the campaign).<sup>137</sup> As this discussion makes clear, both

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132. See Haygood, *supra* note 130 at S37.

133. See McCrory, 831 F.3d at 214.

134. Compare *Veasey v. Perry*, 29 F. Supp. 3d 896 (S.D. Tex. 2014) (invalidating voter ID law because disproportional effects of law were related to past intentional discrimination, but noting that disparate impact alone is not enough to invalidate voter ID law), with *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014) (upholding Wisconsin voter ID law despite disparate impact on Latinos and African Americans).

135. See Sheryl Gay Stolberg & Erik Eckholm, *Virginia Governor Restores Voting Rights to Felons*, N.Y. TIMES (Apr. 22, 2016), <http://www.nytimes.com/2016/04/23/us/governor-terry-mcauliffe-virginia-voting-rights-convicted-felons.html> [https://perma.cc/3HUB-BWZA]. McAuliffe's order was reversed by the Virginia Supreme Court, which held he could not order a blanket clemency for all convicted felons, so McAuliffe has stated his intent to sign individualized orders for the thousands of disenfranchised Virginians. See David A. Graham, *Terry McAuliffe's Second Try at Restoring Felon Voting Rights*, ATLANTIC (Aug. 22, 2016), <http://www.theatlantic.com/politics/archive/2016/08/virginia-felon-disenfranchisement-mcauliffe/496898/> [https://perma.cc/3R5U-HKYT]. On the rural/urban politics of Virginia, see Ronald Brownstein, *Why Cities Love Tim Kaine*, ATLANTIC (July 27, 2016), <http://www.theatlantic.com/politics/archive/2016/07/tim-kaine-metropolitan-model/493238> [https://perma.cc/6V35-PL2F].

136. See Hillary Clinton, *Hillary Clinton: Restoring Faith in Democracy*, WASH. INFORMER (May 11, 2016, 3:00 PM), <http://washingtoninformer.com/news/2016/may/11/hillary-clinton-restoring-faith-democracy/> [https://perma.cc/2E7B-ZEDV] (referencing both McAuliffe's executive order and North Carolina's restrictive voter identification law).

137. See Perry Stein, *Kasich on D.C. Voting Rights: 'That's Just More Votes for the Democratic Party.'*, WASH. POST (Apr. 21, 2016), <https://www.washingtonpost.com/news/local/wp/2016/04/21/kasich-on-d-c-voting-rights-thats-just-more-votes-in-the-democratic-party/> [https://perma.cc/A4CZ-LKF2] (transcribing interview with then-

parties have largely abandoned their appeal to the once-exalted “swing voters,” and focused instead on mobilizing the voters who are already loyal to their party.<sup>138</sup>

#### F. Reasons for Optimism

In light of the foregoing observations, the assumption of liberal democracy that group affiliations are temporary, fleeting coalitions looks to be untenable. The rural/urban political divide appears to be a lasting one, and there are few obvious ways to bridge that divide. There may, however, be reason to hope that this will change in the future. Urban dwellers may become more skeptical of government as they see that private individuals can coordinate their conduct through sharing and crowd sourcing without government oversight, as housing costs rise due to onerous land use regulations, and as cities continue to struggle to manage their finances and provide basic services.<sup>139</sup> Minority communities displaced by gentrification as the “creative class” bids up housing prices in cities may ask whether they too have become losers under globalization.<sup>140</sup> Meanwhile, as white rural communities struggle with a burgeoning heroin

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Republican presidential candidate and Ohio Governor John Kasich, who stated one reason for opposing D.C. statehood as “that’s just more votes in the Democratic Party”).

138. See BISHOP, *supra* note 9, at 250-75 (observing that Republican President George W. Bush defeated Democratic challenger John Kerry in 2004 in part because Bush understood that voters were polarized politically and focused on mobilizing Republicans, whereas Kerry focused on persuading shrinking number of swing voters).

139. See Edward L. Glaeser, *The GOP and the City*, CITY J. (Winter 2013), <http://www.city-journal.org/html/gop-and-city-13527.html> [<https://perma.cc/XR5Y-L2ES>] (arguing that cities could benefit from free-market thinking on school choice, transportation, land use, provision of municipal services, and other areas). On the difficulties of regulating the sharing economy, see Nestor Davidson & John Infranca, *The Sharing Economy as an Urban Phenomenon*, 34 YALE L. & POL’Y REV. 215 (2016), and Kellen Zale, *Sharing Property*, 87 U. COLO. L. REV. 501 (2016). As an extreme example of the fallout from a city’s financial mismanagement, in the fall of 2015 the city of Chicago adopted the largest property tax increase in the city’s modern history, which all went to pay down the city’s existing pension obligations. See Hal Dardick, *2016 Brings Tax Hikes for Chicago*, *Cook County, City Schools*, CHI. TRIB. (Dec. 31, 2015, 2:15 PM), <http://www.chicagotribune.com/news/local/politics/ct-illinois-new-taxes-fees-20151231-story.html> [<https://perma.cc/GE4A-CY88>].

140. See Gillian B. White, *The Downside of Durham’s Rebirth*, ATLANTIC (Mar. 31, 2016), <http://www.theatlantic.com/business/archive/2016/03/the-downside-of-durhams-rebirth/476277/> [<https://perma.cc/TMB2-FSWP>] (detailing Durham’s struggles with growth, gentrification, rising housing costs and pricing out existing residents); see also Aaron M. Renn, *Trump’s Pitch to Blacks*, CITY J. (Aug. 18, 2016), <http://www.city-journal.org/html/trumps-pitch-blacks-14695.html> [<https://perma.cc/VE99-CA7Q>] (arguing that urban blacks have been harmed more than any other group by mass immigration).

epidemic, they may join with urban dwellers to reject the harsh tactics of the drug war.<sup>141</sup>

Likewise, the politics of globalization are not, or at least not yet, a neat urban/rural division. For example, the Trans-Pacific Partnership was supported by former President Obama, several big-city mayors, and many Republican members of Congress, but opposed by other big-city mayors, many Democratic members of Congress, and both the Democratic and Republican presidential candidates in 2016.<sup>142</sup> This unusual alignment demonstrates that the costs and benefits of globalization do not break down cleanly along urban/rural lines. If globalization has been a net harm for rural areas, it has hardly been an unvarnished boon for urban areas. Globalization has contributed to a widening economic inequality within as well as between cities, and the threat of global climate change and international terrorism is probably most acute in cities.<sup>143</sup> Cities have attempted to mitigate many of these impacts through affordable housing legislation, minimum wage and other workplace rules, financial regulations, and enactments aimed at climate change.<sup>144</sup> Although, as we have seen, many state preemption efforts today are motivated by a backlash against globalization, the reality is that state legislatures are not immune to the pressures of a transnational economy, despite their accountability to rural residents who are wary of globalization. One signature characteristic of globalization is the mobility of business firms, so states must be wary of taking actions that might spark disinvestment. By preempting local business regulations, state legislatures are deferring to global industry leaders who demand uniform statewide commercial regulation. For instance, in Republican-controlled Georgia, Governor Nathan Deal vetoed the state's equivalent of North Carolina's "bathroom bill" after facing intense pressure from mobile business interests like the National Football League, which threatened to pass over Atlanta for future Super Bowls.<sup>145</sup>

While the discussion above provides some reason to hope that the current polarized political environment may not be permanent, there are unfortunately just as many reasons to fear that it will be. Unlike Georgia,

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141. See MANN, *supra* note 23, at 130, 185 (describing drug epidemic in rural areas as "so devastating that drug experts compare it to the urban crack explosion of the late 1980s").

142. On the complex politics of trade and the TPP, see Appelbaum, *supra* note 101, and Calmes, *supra* note 101.

143. See Stahl, *Local Home Rule in the Time of Globalization*, *supra* note 50, at 179-86, 252-53 (noting several impacts of globalization upon cities).

144. See *id.* at 179-86.

145. See Sandhya Somashekhar, *Georgia Governor Vetoes Religious Freedom Bill Criticized as Anti-Gay*, WASH. POST (Mar. 28, 2016), <https://www.washingtonpost.com/news/post-nation/wp/2016/03/28/georgia-governor-to-veto-religious-freedom-bill-criticized-as-anti-gay> [<https://perma.cc/P332-4KTA>].

North Carolina went through with its bathroom bill despite the severe economic consequences, perhaps because legislators saw that those consequences would largely be concentrated in the very cities that opposed the bill. Indeed, Charlotte itself has borne the brunt of the backlash against HB2, as several rock singers cancelled concerts scheduled in the city and, as mentioned before, employers like PayPal and the NBA All-Star game withdrew their plans for the city.<sup>146</sup> Reflecting the zero-sum nature of state politics, Republican state legislators might well have figured that HB2 would only help their standing with rural constituents if the law proved harmful to Charlotte. Although the state did repeal some of HB2's provisions, it did so only because it was threatened with losing the one thing urban and rural dwellers both care about – college basketball.<sup>147</sup> The bruising preemption battles between cities and states nationwide, as well as the scorched-earth nature of the 2016 presidential campaign, reveal that urban and rural dwellers have not only different interests, but profoundly disparate and deeply opposed worldviews.<sup>148</sup> On balance, while globalization may confound partisan realignment, it does not look likely to resolve the widening cultural, economic, and political chasm between urban and rural residents.

### III. THE FAILED PROMISE OF INTRASTATE FEDERALISM

#### A. Federalism and Madisonian Democracy

If it is true that rural and urban voters now represent two permanently warring classes, then the “Madisonian” vision of liberal democracy does not adequately describe our republic. Instead of shifting coalitions along multiple lines, we now have a society divided firmly into two camps along the single line of partisanship. In place of the belief that there can be mutual gains in politics—that today’s minority may be tomorrow’s majority—there is now the widely shared belief that politics is zero-sum, that one group gains only at the expense of another, and that every loss will prove apocalyptic. Dahl warns that “[t]here are no cases in which a democracy has managed to settle conflicts of this kind peacefully.”<sup>149</sup>

Fortunately, perhaps, the Madisonian view of liberal democracy is only one strand in our political tradition. There is a competing strand (with which Madison himself sometimes agreed) that frankly recognizes the durability of group conflict in our society and tries to mitigate it structurally. This strand is federalism. Under the federal structure of our

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146. See Gordon et al., *supra* note 5.

147. See Jarvis, et al., *supra* note 6 (explaining that state repealed part of HB2 due to concerns that NCAA would refuse to host college basketball championships there).

148. See *supra* text accompanying notes 127, 144-45.

149. See DAHL, DEMOCRACY IN THE UNITED STATES, *supra* note 68, at 277.



Constitution, states are considered neither arbitrary collections of individuals nor fleeting coalitions, but permanent sovereign entities that enjoy direct representation of their collective interests at the national level, and autonomy over their internal affairs. While federalism today serves many purposes,<sup>150</sup> its original and perhaps abiding goal is to provide a mechanism for recognizing group rights and mediating tensions between competing groups within the framework of the nation-state.<sup>151</sup> The framers of our Constitution were generally less concerned with individual rights than with the rights of states against intrusion by the national government.<sup>152</sup> Accordingly, our Constitution recognizes states' group interests in two distinct ways. First, it provides direct representation for states in the national government, most significantly through the Senate,<sup>153</sup> and second, it limits the scope of national power in order to maximize states' autonomy to act with respect to their own internal affairs.<sup>154</sup> As Will Kymlicka argues, this combination of group-based representation and group self-government is a particularly effective means of ensuring group rights within a federal structure. Group-based representation enables the group to integrate into the wider society on its own terms, whereas group self-government gives the group a measure of freedom from the wider society.<sup>155</sup>

A robust federalism, then, offers a potential solution to the rural/urban divide embodied in the preemption conundrum. As it happens, most states do practice a version of federalism that provides representation for urban and rural areas and limited autonomy for local government, often including some immunity from state preemption. Ironically, however, as the remainder of this Part shows, the unprincipled way in which federalism has been implemented in most states has actually worsened the rural/urban divide. The deepening preemption conflict is one manifestation of this problem.

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150. See ERIN RYAN, *FEDERALISM AND THE TUG OF WAR WITHIN* 34-67 (2011) (reviewing justifications for federalism).

151. See James F. Blumstein, *Federalism and Civil Rights: Complementary and Competing Paradigms*, 47 VAND. L. REV. 1251, 1300 (1994) (noting that federalism provides "political autonomy" for groups).

152. See generally AKHIL AMAR, *THE BILL OF RIGHTS: CREATION AND RECREATION* (1999) (arguing that the Bill of Rights was more focused on protecting rights of groups like states, militias, churches, and juries against the federal government than on individual rights against government generally).

153. See U.S. CONST. art. I, § 3, cl. 1 (providing equal representation for states in the Senate).

154. See U.S. CONST. amend. X (reserving powers not expressly granted the federal government to the states).

155. See Will Kymlicka, *Multicultural Citizenship*, in *THE CITIZENSHIP DEBATES* 167, 170-77 (Gershon Shafir ed., 1998).

### B. Intrastate Federalism

While at the time of the Constitution's framing and for many decades thereafter the predominant line of political cleavage was between northern and southern states, today the major cleavage is between urban and rural areas *within* states.<sup>156</sup> The difficulty this raises is that federalism does not exist at the intrastate level in the same way that it does at the national level. Local governments, for example, have never been perceived as sovereign in the way states are. It has long been established that local governments are mere creatures of the state with no inherent power and no immunity from interference by their "parent" state.<sup>157</sup> Furthermore, states cannot provide distinctive representation for groups at the state level by, for example, giving cities or counties designated legislators because states are required to apportion votes for the legislature in accordance with the principle of "one person, one vote."<sup>158</sup> As a result, sub-state groups have neither autonomy nor direct representation.

Nevertheless, states have attempted to circumvent this problem by creating a quasi-federal structure in which rural and urban areas have both direct representation and committed authority over matters affecting themselves. States have provided some degree of direct representation by requiring the election of legislators through geographic districts, and they have provided a measure of committed authority by giving local governments home rule. The following two sections describe these complementary aspects of "intrastate federalism." The combination of legislative districting and local home rule does not create a true federal structure, but has perhaps come close enough most of the time. However, as I conclude, the political realignment and resultant preemption trend we are witnessing today demonstrate that this quasi-federal structure is

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156. See McKee, *supra* note 77, at 101-02 (political conflict between rural northern Republicans and rural southern Democrats has been displaced by conflict between rural Republicans and urban Democrats).

157. See, e.g., *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178-79 (1907) ("Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted [sic] to them . . . . The state, therefore, at its pleasure, may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the state is supreme, and its legislative body, conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States.").

158. See *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016) (reaffirming validity of one person, one vote rule and clarifying its application); *Reynolds v. Sims*, 377 U.S. 533 (1963).

insufficient to mitigate the rural/urban conflict, and may in fact be making it worse.

### 1. Legislative Districting

To begin with districting, the constitutionally mandated “one person, one vote” rule prohibits states from providing direct representation for urban or rural groups of voters. Prior to *Baker v. Carr*<sup>159</sup> and *Reynolds v. Sims*,<sup>160</sup> states routinely provided such group-based representation by apportioning legislators so that less populous rural areas had disproportionate voting power, in order to ensure that rural interests were not drowned out by the emerging urban majority.<sup>161</sup> In *Reynolds*, however, the Court held this system to be unconstitutional and required that all votes be weighted equally regardless of geography.<sup>162</sup> In fact, one central purpose of the one person, one vote rule was to prevent states from weighting rural interests more heavily than urban interests.<sup>163</sup> Though dissenters in the early one person, one vote cases argued that “[r]epresentative government is a process of accommodating group interests,”<sup>164</sup> the majority responded that the right to vote is “individual and personal in nature.”<sup>165</sup> The *Reynolds* court specifically rejected the notion that local governments were sovereign entities that were entitled to direct representation in the state legislature.<sup>166</sup>

There is, however, still a way of providing representation for sub-state groups that is consistent with the one person, one vote rule, and it is a mechanism that has been adopted by every state (as well as the U.S. House of Representatives): electing legislators from single-member geographic districts rather than “at-large,” in which all of the state’s representatives are chosen in a single, statewide election. Districting may not seem a particularly effective mechanism for recognizing groups in light of the one person, one vote rule, since the boundaries of districts are constantly

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159. 369 U.S. 186 (1962).

160. 377 U.S. 533 (1963).

161. See JUDD & SWANSTROM, *supra* note 52, at 126 (state governments were not responsive to urban needs because “districts were drawn up to ensure that rural counties would outvote cities in the state legislative chambers,” regardless of population).

162. See 377 U.S. at 562 (“Legislators represent people, not trees or acres.”).

163. See generally Kenneth A. Stahl, *Local Government, “One Person, One Vote,” and the Jewish Question*, 49 HARV. C.R.-C.L. L. REV. 1, 21-23 (2014).

164. *Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713, 749 (1964) (Stewart, J., dissenting).

165. *Reynolds*, 377 U.S. at 561 (1963); see also *Davis v. Bandemer*, 478 U.S. 109, 149 (1986) (O’Connor, J., concurring in the judgment) (“*Reynolds* makes plain that the one person, one vote principle safeguards the individual’s right to vote, not the interests of political groups.”).

166. *Reynolds*, 377 U.S. at 575 (“Political subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities.”).

adjusted to account for population changes (and to accommodate legislators' desire to gerrymander districts for partisan benefit). As a result, the "group" represented by legislative districts is not a fixed normative or territorial entity such as a city, but is in some sense an arbitrary grouping of individuals.<sup>167</sup>

Nevertheless, legislative districting is at least a partial concession to group rights because geographic proximity clearly correlates with shared interests and political preferences to some degree.<sup>168</sup> This point was emphasized by the dissenters in the early one person, one vote cases: "[t]he very fact of geographic districting, the constitutional validity of which the Court does not question, carries with it an acceptance of the idea of legislative representation of regional needs and interests."<sup>169</sup> In the years since the early cases, the correlation between geography and group interest has only grown stronger. As Bill Bishop explains, Americans are increasingly segregating themselves into geographic enclaves of like-minded individuals who have similar lifestyles and political affiliations, and this self-sorting is one of the drivers of our current era of political polarization.<sup>170</sup>

Districting enables states to recognize group rights because it gives groups a degree of political representation that is, notwithstanding the one person, one vote rule, disproportionate to the size of those groups' population. In the words of one observer, "[d]istricting serves various purposes but important among them is giving representation to interests which would be submerged by majorities in larger groupings of voters."<sup>171</sup> Districting is able to circumvent the general principle of majority rule by selectively "wasting" votes. North Carolina, for example, has given its rural areas a huge majority in the state legislature, although rural dwellers are at best a small majority, and possibly a minority of the state's actual

167. See Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes*, 71 TEX. L. REV. 1589, 1607 (1993) ("[D]istricting under the one-person, one-vote rule is arbitrary.").

168. See Stahl, *Local Government, "One Person, One Vote," and the Jewish Question*, *supra* note 163, at 52 (territory is "a strong proxy for interest").

169. *Lucas*, 377 U.S. at 750 (Stewart, J., dissenting).

170. See BISHOP, *supra* note 9, at 22-35. Bishop's book implicitly answers Lani Guinier's argument that districting only imperfectly captures interests because voters do not consciously choose to move into electoral districts the way they move to a neighborhood or city. See Guinier, *supra* note 167, at 1606. Bishop notes that although individuals do not check voting records before moving, they do choose cultural and lifestyle attributes that are effective proxies for the community's political orientation. See BISHOP, *supra* note 9, at 22-23.

171. Phil C. Neal, *Baker v. Carr: Politics in Search of Law*, 1962 SUP. CT. REV. 252, 277; see also *Lucas*, 377 U.S. at 750 (Stewart, J., dissenting) ("The very fact of geographic districting, the constitutional validity of which the Court does not question, carries with it an acceptance of the idea of legislative representation of regional needs and interests.").

population, by packing urban Democratic voters into districts with huge Democratic majorities while spreading rural Republican voters more thinly across many districts. In this instance, the legislature has wasted far more Democratic than Republican votes – that is, many of the Democratic votes are irrelevant to the outcome of elections because they are cast in overwhelmingly Democratic districts, whereas Republican votes are more efficiently distributed in places where they actually determine the result. The state has deliberately chosen to waste more Democratic than Republican votes in order to give disproportionate political power to rural Republican voters.<sup>172</sup> While the wasting of votes may appear to be a deficiency in the districting process, Lani Guinier perceptively observes that the whole point of districting is to determine how to distribute wasted votes.<sup>173</sup> In other words, all districting is essentially gerrymandering. By choosing to waste more urban than rural votes, legislators are thereby choosing to give rural areas a voice disproportionate to their numbers. Although this strategy is obviously not majoritarian, it is consistent with federalism's goal to provide representation for distinct groups rather than treating them as aggregations of individuals to be combined into simple majorities.

## 2. *Local Government and Home Rule*

If districting provides a crude form of group-based representation at the state level, local government provides an equally crude form of the second feature of federalism: group autonomy. This is done somewhat differently from districting. Unlike districts, local governments can be created and modified without regard to the one person, one vote rule. In most states, local governments may be formed by any group of people who desire to incorporate a municipality, and neighboring areas that object to the incorporation generally have no right to a say in the matter notwithstanding the one person, one vote rule.<sup>174</sup> Courts frequently recognize that the one

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172. See Guinier, *supra* note 167, at 1615; Kardish, *supra* note 35.

173. See Guinier, *supra* note 167, at 1615 (districting “in essence is the process of distributing wasted votes”).

174. See Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 74-75 (1990) (observing that many states allow groups as small as seventy-five people to incorporate, and the main criterion is simply whether the people desire to incorporate); see also *Bd. of Supervisors v. Local Agency Formation Comm'n*, 838 P.2d 1198, 1206 (Cal. 1992) (holding that the state could constitutionally restrict vote on incorporation of new city to the voters residing within the territory to be incorporated notwithstanding one person/one vote rule and concluding that “the essence of this case is not the fundamental right to vote, but the state’s plenary power to set the conditions under which its political subdivisions are created”); cf. *Town of Lockport v. Citizens for Cmty. Action at the Local Level*, 430 U.S. 259, 269 (1977) (holding that one person/one vote rule

person, one vote rule is inappropriate in the context of municipal boundary change because the residents of different communities constitute distinct groups with divergent interests.<sup>175</sup> As a result, the boundaries of local governments are rarely the same as the boundaries of legislative districts, and so the “group” represented at the state level by a legislator is not the same group exercising autonomy at the local level.

Once in existence, local governments often enjoy home rule, which allows them to enact a wide range of legislation without specific state authorization, and even immunity against state preemption.<sup>176</sup> The original model of home rule, known as “imperio” home rule because it was designed to create an “imperium in imperio,” or “a state within a state,” attempted to introduce a federal structure into state/local relations akin to the relationship between the federal and state government, so that local governments would have constitutionally committed authority over certain “local” affairs.<sup>177</sup> As noted earlier, one of home rule’s specific purposes was to reduce state interference in local matters and to give local governments a degree of autonomy.<sup>178</sup> Courts typically defer widely to local enactments, particularly on matters relating to land use or school control, on the grounds that such decisions embody the collective will of the community.<sup>179</sup>

In tandem, districting and home rule can be very effective means of recognizing group rights and mitigating conflicts between groups.<sup>180</sup> Home

is inapplicable to state structuring of local governments because states have “wide discretion . . . in forming and allocating governmental tasks to local subdivisions”).

175. See *Lockport*, 430 U.S. at 268-72 (holding that the state of New York could constitutionally weigh votes of city and non-city voters in a referendum on county restructuring differently because city and non-city voters have “distinctive interests” in restructuring); *Bd. of Supervisors*, 838 P.2d at 1200 (“[C]ommunity residents and landowners often prefer to govern their local affairs insofar as possible, and cityhood provides them with greater opportunities for self-determination than does residence or ownership in a more amorphous unincorporated area.”).

176. On home rule, see, for example, Lynn A. Baker & Daniel B. Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, 86 DENV. U. L. REV. 1337 (2009), and Barron, *supra* note 55, at 2347.

177. See Stahl, *Local Home Rule in the Time of Globalization*, *supra* note 50, at 203-05 (noting parallels between early “imperio” model of home rule and national/state relationship under Commerce Clause jurisprudence).

178. See *supra* text accompanying notes 55-58.

179. See Kenneth A. Stahl, *Neighborhood Empowerment and the Future of the City*, 161 U. PA. L. REV. 939, 947-49; 997-99 (2013) (discussing judicial deference to local land use decisions with spillover impacts); Kenneth A. Stahl, *Reliance in Land Use Law*, 2013 BYU L. REV. 949, 982-87, 1016-17 (2013).

180. Cf. Pamela S. Karlan, *Our Separatism—Voting Rights as an American Nationalities Policy*, 1995 U. CHI. LEGAL F. 83, 84 (1995) (describing Voting Rights Act as recognizing “geographic and political separation” between groups); Guinier, *supra* note 167, at 1627 (arguing that race-conscious districting becomes necessary when racial divisions are

rule allows each group to create policies tailored to its specific needs without affecting neighboring communities who may have different needs or demands. To the extent communities see themselves as distinct moral cultures within the state, they can craft local rules that reflect their distinctive cultures and avoid conflicts between competing cultures that could arise if there were a uniform statewide standard.<sup>181</sup> If home rule thus segregates competing groups into semi-autonomous enclaves, legislative districting is a means of integrating those groups into a shared political culture.<sup>182</sup> As Pamela Karlan explains, the size and group dynamics of a legislature facilitate the bridging of differences between cultures more easily than would be possible among the electorate as a whole.<sup>183</sup> In sociological terms, home rule provides “bonding” social capital within communities, and districting provides “bridging” social capital between communities.<sup>184</sup>

### C. Intrastate Federalism’s Failure

In principle, intrastate federalism works beautifully. In practice, it does not work at all. Republican legislatures in states like North Carolina have drawn districts not simply to give rural areas a voice for their distinctive interests but to give them an insuperable advantage over growing urban areas. Far from mediating conflicts between competing groups, this arrangement only deepens such conflicts. Furthermore, the current rash of preemption demonstrates that local governments rarely have any meaningful autonomy against the state either. Through preemption, legislators can overturn local laws enacted by urban majorities to reflect urban values, and replace them with statewide laws reflecting rural values, even though rural voters are at best a small majority, and possibly a

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permanent, and winner-take-all majoritarianism consistently prevents minority voters from being part of winning coalition).

181. Cf. Richard Schragger, *Cities as Constitutional Actors: The Case of Same-Sex Marriage*, 21 J.L. & POL. 147, 183-84 (2003) (arguing that granting cities a sphere of “constitutional home rule” in matter of same-sex marriage can give local majorities the discretion to adopt more inclusive rules than are mandated at the statewide level without requiring courts to mandate a uniform rule regarding marriage, thus showing “respect [for] the significant differences of opinion regarding same-sex marriage by allowing such opinions to be expressed at the level of community most appropriate [for] their assertion”).

182. See Karlan, *supra* note 180, at 96-97; Kymlicka, *supra* note 155, at 169-75 (explaining that providing group representation in a legislative body is a mechanism for integrating groups into the larger political order, not segregating them).

183. See Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, HARV. C.R.-C.L. L. REV. 173, 215-19 (1989) (explaining how dynamics of legislatures enable coalition-building among legislators much more easily than among the citizenry as a whole).

184. ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 362, 400 (2000) (discussing “bridging” and “bonding” social capital).

minority, of the statewide electorate in many states. Where there is no room for local variation and every battle must be fought at the statewide level, it ensures a zero-sum battle in which one side will emerge as the winner and the other as the loser. On the whole, states like North Carolina have structured their state politics not to mediate between urban and rural interests but to resist the demographic tide of urbanization altogether.<sup>185</sup>

The root of the problem is that intrastate federalism is not a true federal system, in which subgroups have constitutionally committed power, but a unitary system in which state legislatures have ample room to decide how much authority to confer upon substate groups.<sup>186</sup> Courts have been reluctant to permit a meaningful exercise of federalism at the intrastate level because of an abiding suspicion of the very idea of group rights, a suspicion rooted in the tradition of Madisonian liberalism that fears “factions” and prefers that society be ordered around the individual rather than groups.<sup>187</sup>

To begin with home rule, courts have long resisted seeing local governments as deserving of autonomy, and have never treated home rule as providing any real federalism. Though the original “imperio” home rule model was supposed to transform the relationship between states and local governments into a true federal relationship in which local governments had relative autonomy over local affairs, in practice home rule has rarely worked this way because the dividing line between local and state affairs is extremely amorphous. On almost every subject of government regulation, from land use to health care, from the conditions of employment to civil rights, there are equally persuasive arguments that the matter requires statewide uniformity and that the matter calls for local experimentation and the application of local knowledge.<sup>188</sup> As a result, in situations where there is a conflict between states and local governments, courts are reluctant to compromise states’ police powers and undermine statewide uniformity in

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185. See Ehrenhalt, *supra* note 8 (arguing that wave of preemption in North Carolina represents effort by rural-controlled legislature to restore state’s rural past in the face of rapid urbanization).

186. See DAHL, *DEMOCRACY IN THE UNITED STATES*, *supra* note 68, at 200-01 (contrasting “federal” system against “unitary” system).

187. See, e.g., Frug, *supra* note 65, at 1088 (describing liberal tradition’s mistrust of groups intermediate between the state and the individual, particularly local governments: “[t]he evolution of liberalism thus can be understood as an undermining of the vitality of all groups that had held an intermediate position between what we now think of as the sphere of the individual and that of the state”).

188. See Stahl, *Local Home Rule in the Time of Globalization*, *supra* note 50, at 232 (“Any argument in favor of statewide uniformity can be met with an equally forceful argument on behalf of local diversity, and vice versa.”).



the interest of local self-government.<sup>189</sup> Moreover, many states have adopted a form of home rule that gives local governments no immunity against state interference, and a handful of others, like North Carolina, do not offer their local governments home rule at all.<sup>190</sup> States without home rule are subject to “Dillon’s Rule;” local governments are completely subservient to the state and have only those powers specifically delegated to them by the state.<sup>191</sup> Thus, in most states, including and perhaps especially in North Carolina, local governments have little power to block explicit state preemption whether they have home rule or not.<sup>192</sup>

With regard to districting, courts have tolerated the practice, even when used to gerrymander districts for partisan advantage, because they do not see districts as groups at all, but only as arbitrary collections of individuals who freely shift their allegiances in true Madisonian fashion. In *Davis v. Bandemer*, for example, the Court addressed the question of whether gerrymandering a legislative district for partisan advantage could violate the equal protection clause.<sup>193</sup> The dissent would have found an equal protection violation, arguing that “[t]he concept of representation necessarily applies to groups,” and therefore that members of the losing party in a gerrymandered district suffer harm as a group because they can expect to have less influence with their representative than members of the winning party.<sup>194</sup> However, a plurality of the Court answered that even if the minority party “loses election after election,”<sup>195</sup> its members would

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189. See Barron, *supra* note 55, at 2347-48 (noting that courts may be reluctant to broadly construe local governments’ home rule powers because of “a more general judicial uneasiness with creative local action and a corresponding preference for uniformity”).

190. See Baker & Rodriguez, *supra* note 176, app. at 1374-1424 (listing home rule status for all fifty states); Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1124-27 (2007) (discussing different models of home rule).

191. See, e.g., DALE KRANE ET AL., HOME RULE IN AMERICA: A FIFTY-STATE HANDBOOK 10-11 (2001); Barron, *supra* note 55, at 2285-88; Kenneth A. Stahl, *The Suburb as a Legal Concept: The Problem of Organization and the Fate of Municipalities in American Law*, 29 CARDOZO L. REV. 1193, 1206-11 (2008).

192. Some scholars have persuasively argued that where local governments act to protect certain constitutional liberties that are incapable of direct judicial enforcement, states may be prohibited from preempting them. See David J. Barron, *The Promise of Cooley’s City: Traces of Constitutionalism*, 147 U. PA. L. REV. 487 (1999); Schragger, *supra* note 181, at 172. Arguably, Charlotte’s “bathroom bill” could fall within the sphere of “constitutional home rule,” as it may be an effort by the city to enforce the guarantee of the Fourteenth Amendment to provide equal protection of the law to transgender individuals. However, even if constitutional home rule were explicitly recognized by the courts—which it never has been—it would not provide immunity against the vast majority of preemption laws, such as those dealing with the minimum wage, fracking, plastic bag bans, nutrition, and the like, which do not appear to involve local protections of any constitutional freedoms.

193. 478 U.S. 109 (1986).

194. See *id.* at 167, 170 (Powell, J., concurring in part and dissenting in part).

195. *Id.* at 132.

have no equal protection claim because the Court generally indulges the assumption that the winning candidate adequately represents everyone in the district, including those who voted for the losing candidate.<sup>196</sup> In an often-quoted line, the Court stated that “the power to influence the political process is not limited to winning elections.”<sup>197</sup> In a subsequent case, *Vieth v. Jubelirer*, a plurality of the Court went even further, finding partisan gerrymandering to be a non-justiciable “political question” in part because “[p]olitical affiliation is not an immutable characteristic, but may shift from one election to the next; and even within a given election, not all voters follow the party line.”<sup>198</sup> By contrast, in recent years the Court has become especially vigilant in preventing districts from being constructed in such a way as to explicitly take account of “immutable” group characteristics like race.<sup>199</sup>

In summary, neither districting nor home rule provide meaningful recognition for group rights. As a result, state legislatures are free to ignore or override group claims, and worse, to manipulate intrastate federalism to favor certain groups and disfavor others.

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196. A plurality of the Court has subsequently opined that partisan gerrymandering is a nonjusticiable political question; thus, it is not even theoretically possible to attack partisan gerrymandering as an equal protection violation. *See Vieth v. Jubelirer*, 541 U.S. 267 (2004).

197. *Bandemer*, 478 U.S. at 132.

198. *See* 541 U.S. 267, 287-88 (holding that partisan gerrymandering is a nonjusticiable political question and does not violate equal protection clause because the clause “guarantees equal protection of the law to persons, not equal representation in government to equivalently sized groups”).

199. *See Miller v. Johnson*, 515 U.S. 900 (1995) (holding that the legislature violates the equal protection clause where race is the “dominant and controlling rationale” for creating electoral districts); *Shaw v. Reno*, 509 U.S. 630 (1993) (holding that where district’s shape can only be explained by reference to race, it violates equal protection clause); *cf. Holder v. Hall*, 512 U.S. 874, 905-06 (1994) (Thomas, J., concurring in the judgment) (describing the “assumption that racial groups can be conceived of largely as political interest groups” as “repugnant to any nation that strives for the ideal of a color-blind Constitution”). The recent fate of North Carolina’s egregious gerrymander is a remarkable demonstration of the current state of judicial doctrine regarding gerrymandering. A panel of three federal judges invalidated the state’s Senate districting map, not on the grounds that it was impermissible partisan gerrymandering, but that it was invalid racial gerrymandering. The court reached this conclusion because the state had attempted to disguise its partisan gerrymander as an effort to comply with Section 2 of the Voting Rights Act by creating safe majority-minority districts. *See Covington v. North Carolina*, 316 F.R.D. 117 (M.D.N.C. 2016). The problem, in other words, was not that the state had given too little attention to the rights of minority groups but that it had given too much. In the future, states like North Carolina will presumably be more forthright in declaring that partisan gerrymandering is their motivation. The *Covington* case may come before the Supreme Court this term.

#### D. Reviving Intrastate Federalism

The courts' reluctance to recognize a robust intrastate federalism stems from a suspicion of the idea of group rights and a corresponding preference for individual rights. In *Vieth* and *Davis*, for example, the Supreme Court assumes that districts—unless racially gerrymandered—are agglomerations of abstract individuals, that partisan affiliations are fleeting, and that political contests are endlessly malleable rather than fixed and zero-sum.<sup>200</sup> As this Article has shown, however, these assumptions no longer hold, if they ever did. It now appears that urban Democrats and rural Republicans have become permanent and fixed antagonists, not temporary coalitions, and the number of truly persuadable independent voters is declining.<sup>201</sup> Considering that partisans in both camps no longer wish to even socialize with each other, it is not plausible to suppose that voters will be convinced to change their beliefs or loyalties. The fact that party leaders on both sides have given up the effort to convince voters, and now focus instead on motivating their own partisans and suppressing votes from the competing party, is strong evidence of that point.<sup>202</sup> When courts proceed on the assumption that Madisonian democracy is still operative, despite increasing evidence that society is composed of competing groups, it leads precisely to the political crisis point we have now reached, in which a dominant group uses the structure of democratic institutions to preserve its dominance. In this case, that institution is federalism. Though intended as a tool for mediating group conflict, federalism has ironically become yet another front within that conflict.

It follows logically that federalism can only work if it is enshrined in the state constitution, and thereby immunized from partisan manipulation. Most states placed home rule provisions in their constitutions, committing certain functions to state and local authorities respectively, for exactly this reason.<sup>203</sup> But the failure of home rule to actually provide meaningful intrastate federalism should give us some pause before settling on this solution. Imperio home rule failed because there is no rational way to discern which matters ought to be handled locally and which by the state.<sup>204</sup> In the absence of a principled dividing line between state and local functions, judges have tended to import their own ideological views about the relative merits of centralized or decentralized powers into the resolution

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200. See *Vieth*, 541 U.S. 267; *Bandemer*, 478 U.S. 109.

201. See *supra* text accompanying notes 117-29.

202. See *supra* text accompanying notes 135-38.

203. See KRANE, *supra* note 191, at 11.

204. See *supra* text accompanying notes 188-90.

of this question, and they have generally favored centralization.<sup>205</sup> Ultimately, how much power is desirable for localities to exercise vis-à-vis the state and when to prefer uniformity over diversity or vice versa is in the nature of a political question that is more suitably resolved in the political forum than the judicial one.<sup>206</sup>

Of course, this conclusion takes us right back to the initial problem, which is that the political forum is itself so fractured into competing groups that it seems impossible to settle on any kind of policy decision about the appropriate place of local governments within the state that will not be perceived by one side or the other as a cynical power grab by a transitory majority. This is so because, while courts have erred in treating home rule as a justiciable question, they have made exactly the opposite mistake in the partisan gerrymandering cases, ruling such claims to be non-justiciable political questions. A persuasive and well-developed theory of judicial review holds that courts should most aggressively intervene in the political process when there is a failure in the political process that the process itself is incapable of correcting. In a much-quoted passage from his classic book *Democracy and Distrust*, John Hart Ely explains that such a process failure occurs where:

(1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or (2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby

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205. See Barron, *supra* note 55, at 2347 (noting that courts may be reluctant to broadly construe local governments' home rule powers because of "a more general judicial uneasiness with creative local actions and a corresponding preference for uniformity"); Stahl, *Local Home Rule in the Time of Globalization*, *supra* note 50, at 231-35 (providing example of courts importing ideological views into home rule dispute).

206. See Stahl, *Local Home Rule in the Time of Globalization*, *supra* note 50, at 232 (arguing that home rule could be considered a nonjusticiable political question). In a recent article, Paul Diller argues that state preemption of urban laws is inconsistent with democratic norms because urban areas are underrepresented relative to rural areas at the state and federal level as a result of intentional and unintentional gerrymandering and other factors. See Paul Diller, *Re-Orienting Home Rule: Part II—The Promise and Peril of 'Constitutional Home Rule'*, 77 LA. L. REV. (forthcoming) (on file with author); see also Diller, *supra* note 190. He argues that courts should recognize a sphere of "constitutional home rule" for cities above a certain size and density that would immunize them against some state acts of preemption, as a corrective against this underrepresentation. See Diller, *Re-Orienting Home Rule*, *supra*, at 4, 26-34. Diller is persuasive on many points, and his careful analysis is very rewarding. However, I am skeptical of the argument for constitutional home rule because, as stated in the text, courts have had a very unsuccessful track record at distinguishing "local" from "statewide" matters. See Stahl, *Local Home Rule in the Time of Globalization*, *supra* note 50. Furthermore, as explained below, the courts would go a long way toward correcting the urban disadvantage if they were more assertive in policing partisan gerrymandering. See *infra* text accompanying notes 202-12.

denying that minority the protection afforded other groups by a representative system.<sup>207</sup>

Partisan gerrymandering in states like North Carolina represents exactly the sort of process failure Ely describes. Gerrymandering closes the “channels of political change” by enabling the very representatives who are elected as a result of it to perpetuate it, thereby ensuring that the rural “ins” stay in and the urban “outs” stay out.<sup>208</sup> This process failure would perhaps be little cause for concern if, as the Court often assumes, districts were simply agglomerations of abstract individuals with fleeting allegiances. In an era when rural and urban dwellers have sorted themselves into competing political camps, however, partisan gerrymandering threatens to permanently shut the emerging majority of urban voters out of power.

The process failure created by partisan gerrymandering in turn affects the way we think about home rule. Because partisan gerrymandering assures rural Republican control of the statehouse in many places, urban Democrats can only wrest such control by relocating power elsewhere, and so home rule becomes a kind of code word for partisan politics. To strengthen home rule, in other words, would be to empower Democratic cities vis-à-vis Republican legislatures; to weaken it would be to do the opposite. In light of the obvious political implications of home rule, it is unlikely that voters and legislators will see the question of local power as anything but a partisan issue.<sup>209</sup>

To break the Gordian knot and enable the allocation of power between states and local governments to be evaluated on its merits would require the Court to reconsider the justiciability of partisan gerrymandering. Several gerrymandering cases are indeed pending before the Court at the time of

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207. JOHN HART ELY, *DEMOCRACY AND DISTRUST* 103 (1980).

208. *Id.*; see also Symposium, *John Hart Ely and the Problem of Gerrymandering: The Lion in Winter*, 114 *YALE L.J.* 1329 (2005) (describing how process-policing arguments set forth in Ely’s work could apply to gerrymandering).

209. The obvious political implications of home rule in light of partisan gerrymandering make me skeptical of Professor Diller’s proposal to create a sphere of constitutional home rule to counteract the urban disadvantage at the state level. See *supra* note 206. Intentionally or not, Diller’s proposal may be read as a tool for empowering Democrats against Republicans. On the other hand, attacking partisan gerrymandering directly would not have a similar implication, as a prohibition or limit on partisan gerrymandering would apply to all parties. The root of the disagreement between Diller and myself may be that he sees unintentional gerrymandering as a more significant factor than intentional gerrymandering in creating the urban disadvantage, whereas I believe the opposite. See Diller, *Re-Orienting Home Rule*, *supra* note 206, at 50 (“[E]ven neutral redistricting might not entirely eliminate the urban disadvantage in first-past-the-post elections so long as compact, contiguous districts are used.”). The empirical evidence on the impact of intentional versus unintentional gerrymandering is admittedly mixed. See *supra* note 28.

this writing.<sup>210</sup> However, the Court has been reluctant to enter this “political thicket,” a reluctance driven largely by its worry that it cannot formulate a judicially administrable standard to judge the practice.<sup>211</sup> Perhaps the Court will change its view if it becomes convinced that partisan divisions today represent a society irreparably fractured into competing groups.<sup>212</sup>

### CONCLUSION

Insofar as federalism is intended to accommodate competing groups within the nation-state, it is an alternative to a far more drastic solution to competing group claims—secession.<sup>213</sup> During the early twentieth century, a period much like our own during which globalization and an influx of immigrants transformed cities and drove a wedge between rural and urban voters, urban reformers argued that cities had so outpaced their states and become so different from other areas in the state that they should secede.<sup>214</sup> This did not happen, of course, because our political tradition makes secession extremely difficult. As creatures of their parent state, local governments cannot secede without permission from the state, and though in principle state constitutions sometimes permit areas of a city to secede

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210. The Court recently decided one gerrymandering case on technical grounds, see *Bethune-Hill et al. v. Virginia State Bd. Of Elections*, 137 S. Ct. 788 (2017). For another case heard the same day that is still pending, see *McCrorry v. Harris*, No. 15-1262 (North Carolina). See *Whitford et al. v. Gill*, No. 3:15 cv-00421 (Wisconsin) and *Alabama Legislative Black Caucus v. Alabama*, No. 2:12-CV-691 (Alabama), for other gerrymandering cases likely to be heard by the Court in 2017.

211. See *Vieth v. Jubelirer*, 541 U.S. 267, 287-88 (2004).

212. The *Whitford* case will be particularly interesting to watch because it provides a clear standard for judging extreme partisan gerrymandering that may satisfy the Court’s desire for a judicially manageable standard. The three-judge panel in *Whitford* determined that Wisconsin’s state assembly district map represented an unconstitutional partisan gerrymander using a standard developed by several election law scholars called the “efficiency gap.” The efficiency gap refers to the difference in the number of wasted votes across party lines. See Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831 (2015). The *Whitford* court found that the efficiency gap between wasted Republican and Democratic votes was sufficiently large to make the gerrymander unconstitutional. See *Whitford v. Gill*, No. 15-CV-421-BBC, 2016 WL 6837229 (W.D. Wisc. Nov. 21, 2016).

213. See Cass R. Sunstein, *Constitutionalism and Secession*, 58 U. CHI. L. REV. 633, 657-58, 664-65 (1991) (explaining that federalism can substitute for secession by providing voice for subunits within a federal structure). See generally Erin Ryan, *Secession and Federalism in the United States: Tools for Managing Regional Conflict in a Pluralist Society* (May 4, 2016), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2775377](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2775377) [https://perma.cc/LHM3-E5NW] (arguing that federalism is a substitute for secession).

214. See Robert C. Brooks, *Metropolitan Free Cities*, 30 POL. SCI. Q. 222, 230-31 (1915) (arguing that secession is necessary to “separate[] unlike social units and permit[] each to develop freely in its own way”).

from the city, the barriers to secession are usually so high that it very rarely occurs in practice.<sup>215</sup>

In place of secession, cities were offered home rule. Federalism was to be a substitute for secession. As we have seen, though, home rule today offers cities little protection from exploitation by the state. In the absence of strong home rule, the question must be asked: why shouldn't cities secede? Urban and rural areas are so radically divided that a single citizenship seems at least unreasonably optimistic. As Cass Sunstein argues, secession may be justified where a subunit has reason to believe that it will be more economically successful on its own; where it is the victim of consistent exploitation by the state; and where it has a distinct cultural identity.<sup>216</sup> All of these justifications apply to urban areas today.

Justified or not, the hurdles to secession are high, and rightly so. Secession, as Richard Briffault writes, "is a reflection of profound pessimism about the capacity of a polity to handle serious internal differences democratically and to govern all residents fairly."<sup>217</sup> One of the signature characteristics of today's nation-states is that they accommodate within their borders a wide variety of interests and cultures. The very concept of nationality is an "imagined community" of people who are in reality radically different but imagine themselves to be part of a single, transcendent union.<sup>218</sup> This fiction of nationality is a precarious one, however, sustained by a very thin tissue of shared history and values. Many scholars argue that globalization undermines the very idea of nationality, for it creates both supranational and subnational allegiances that are far stronger than any attachment to the arbitrary construction of the nation-state.<sup>219</sup> If every group that felt its ties to the nation-state attenuating were able to secede, the state would soon collapse.

What has been said so far leaves us with three possible resolutions to the political impasse preemption epitomizes. The first is the introduction into our state constitutions of a true federal system on the model of our national Constitution. For the reasons above this appears unlikely, and may be

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215. For the most famous case of an attempted secession that failed to clear the numerous legal hurdles, see Briffault, *supra* note 53 (regarding Staten Island's effort to secede from New York City in the early 1990s).

216. See Sunstein, *supra* note 213, at 659-61, 664-66.

217. See Briffault, *supra* note 53, at 846.

218. See generally BENEDICT ANDERSON, *IMAGINED COMMUNITIES* (1983) (describing the nation as an "imagined community" whose members have little organic connection to each other but imagine themselves as part of a single community thanks to novels and print media creating a sense of shared identity).

219. See, e.g., Linda Bosniak, *Citizenship Denationalized (The State of Citizenship Symposium)*, 7 *IND. J. GLOBAL LEGAL STUD.* 447, 505 (2000) ("[P]eople locate their fundamental identities in, and solidarities with, a variety of communities that are neither defined nor circumscribed by nation-state boundaries.").

unwise.<sup>220</sup> Courts are ill-suited to determine what matters are properly considered “local” and what “statewide.” The best the courts can do is to clear the channels of political change so that the citizenry can make a reasoned judgment about the preferred allocation of power between states and local governments. This outcome may alleviate the immediate preemption problem, but it will not resolve the larger rural/urban political divide that currently plagues our politics. The second possibility, then, is the further deterioration of the idea of the nation-state, which many scholars believe is already underway in this age of globalization.<sup>221</sup> Our political tradition suggests, however, that while the nation-state may become wobbly, our attachment to the status quo and the considerable amount of violence that has gone into establishing our current territorial boundaries means we are probably stuck with the nation-state for a while longer. That leaves the third possibility, which is that as the battle between urban and rural areas intensifies, we will answer by strengthening the myth of imagined community, and hoping that myth is sufficient to overcome our differences.

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220. See *supra* text accompanying notes 203-06.

221. See generally YALE H. FERGUSON & RICHARD W. MANSBACH, GLOBALIZATION: THE RETURN OF BORDERS TO A BORDERLESS WORLD? 75-78 (2012); Mauro F. Guillen, *Is Globalization Civilizing, Destructive or Feeble? A Critique of Five Key Debates in the Social Science Literature*, in READINGS IN GLOBALIZATION: KEY CONCEPTS AND MAJOR DEBATES 4, 11-13 (George Ritzer & Zeynep Atalay eds., 2010); Susan Strange, *The Westfailure System*, in READINGS IN GLOBALIZATION, *supra*, at 220.