Enacting Local Workplace Regulations in an Era of Preemption

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ENACTING LOCAL WORKPLACE REGULATIONS IN
AN ERA OF PREEMPTION

Dilini Lankachandra

ABSTRACT

Since San Francisco enacted the first paid sick leave ordinance in 2007, cities and counties across the country have quietly emerged as drivers of the modern labor movement. Local governments are now increasingly playing a pivotal role in developing, enacting, and enforcing workplace regulations ranging from local minimum wage increases to LGBTQ-inclusive nondiscrimination ordinances to fair scheduling requirements. As a result, the question of which level of government should have the power to regulate business and protect workers has become a flash point in contemporary state-local conflicts, inciting state legislatures to adopt far-reaching, sweeping preemption laws that eliminate local authority across a wide swath of labor-related issues, and sparking widespread litigation.

Given the rapidly changing legal landscape around preemption, advocates and policymakers must consider a variety of state-specific questions before enacting local workplace regulations, including the structure of the state’s home rule authority, whether a local regulation is preempted by state law, and what kind of reception certain local regulations might receive at the state level. Closely examining these local workplace regulatory issues is not only helpful for scholars, advocates, and policymakers, but also sheds light on the larger preemption landscape.

This Article, accordingly, will (1) sketch out the important role that modern cities play in developing and enacting local workplace regulations and the state-local conflicts that have emerged in response; (2) frame the primary legal considerations that advocates and policymakers should take into account when pursuing local workplace regulations, using case studies from several states, including Texas, Pennsylvania, and Tennessee; and (3) suggest several promising pathways—such as initiatives like West Virginia’s Home Rule Pilot Program and other structural changes to state home rule regimes—for states to modernize their approach to local authority and to empower localities to adopt legislation on labor issues and beyond.

* Director of A Better Balance’s Defending Local Democracy Project.
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I. INTRODUCTION

Across the country, cities are increasingly taking the lead when it comes to passing and enforcing labor laws, acting as true Brandesian laboratories of democracy by developing and testing novel worker protections. Cities were the first to embrace the “fight for $15,” living wage policies, paid sick leave, fair scheduling requirements, and more. And this trend is not limited to large, politically progressive regions. For example, the cities that have passed paid sick leave laws—from the city of Duluth, Minnesota, in the Midwest, to Pittsburgh, Pennsylvania, in the Northeast, to Dallas, Texas, in the South—are diverse in terms of population, geography, and other characteristics. There is also a growing movement in Southern cities to enact municipal paid sick leave and minimum wage laws.

There are many reasons for this uptick in local workplace regulations. One of the most obvious is that many states and the federal government have done little in recent years to protect the rights and interests of workers. The federal minimum wage has stagnated at $7.25 per hour since 2009, and 18 states have declined to enact their own higher minimum wage. There is no nationwide right to paid or even unpaid sick time, and only 11 states and the District of Columbia have adopted comprehensive paid sick time laws. Twenty-six states have no explicit nondiscrimination protections for LGBTQ individuals, nor is there any federal law that explicitly prohibits discrimination based on sexual orientation or gender identity. Against this background of federal and state inaction, it makes sense for advocates and policymakers to push for workplace regulations at the local level that protect the city’s residents and workforce.

But the growth in local workplace regulations has led to a backlash from some state legislators and business groups, both of which have increasingly

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1 Special thanks to Jared Make and Sherry Leiwant at A Better Balance; the Local Solutions Support Center, with whom A Better Balance works closely in addressing preemption issues across the country; and Nestor Davidson of Fordham Law School.


4 The Families First Coronavirus Response Act, which was passed in 2020 at the beginning of the COVID-19 pandemic, does provide some workers with 80 hours of emergency paid sick time, but only for purposes related to coronavirus sickness. Pub. L. No. 116-127, Div. E, § 5102 (2020).

5 Paid Sick Time Laws, supra note 2.

looked to preemption to limit local policymaking. Simply put, it has become more common when cities pass regulations that are in tension with state policy preferences for those states to legislatively remove local authority to regulate the particular issue at hand.\(^7\)

Since 2010, 16 states have preempted local minimum wage increases, 9 have preempted fair scheduling policies, 17 have preempted paid leave requirements, and another 5 have preempted local additions to a comprehensive state-wide paid sick leave law.\(^8\) Part of this preemption push has come from business groups and trade associations.\(^9\) The American Legislative Exchange Council ("ALEC") provides a clear example. ALEC is an association of legislative and corporate members with an explicitly deregulatory agenda; they have developed and distributed model legislation on preemption of minimum wages, paid sick leave, project labor agreements, and more.\(^9\)

Alongside this explosion of preemption from state legislatures is an increase in business groups using aggressive preemption litigation as a tactic to dissuade cities from taking advantage of their regulatory authority. For example, the Texas Association of Business and the National Federation of Independent Business challenged three local paid sick leave laws in Texas, arguing that the state's minimum wage preemption law, on its face, prohibits localities from requiring employers to provide paid leave to their workers.\(^1\)

As these examples demonstrate, cities are playing an increasingly pivotal role in developing, enacting, and enforcing workplace regulations ranging from local minimum wage increases to LGBTQ-inclusive nondiscrimination ordinances to paid sick leave requirements. The increased role played by cities has led to a corresponding increase in state-local conflicts as advocates and policymakers struggle to determine which level of government should have regulatory authority. As a result, state legislatures have turned to the adoption of far-reaching, sweeping preemption laws that eliminate local authority across a wide swath of labor-related issues, and business groups have turned to the courts to strike down local workplace regulations as preempted.

In this rapidly changing landscape, it is more important than ever for advocates, policymakers, and scholars to understand not only the scope of local

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power, but how the state-local relationship is still shifting. Part II of this Article will explore the rise of localities as workplace regulators. Then, Part III will discuss the ensuing state-local conflicts that have emerged on the topic of workplace regulations. Part IV will lay out potential legal arguments against state laws limiting local authority over such regulations. Finally, Part V will identify several potential ways to modify home rule doctrines to empower communities to pass workplace regulations.

II. THE RISE OF LOCALITIES AS WORKPLACE REGULATORS

Under federal law, cities are generally considered creatures of the state and are subject to almost any constraint the state applies to them. This means that local authority to regulate workplace and economic issues depends on whether states have granted them that power. This Part will describe the historical shift toward allocating greater substantive legislative power to municipalities and the resulting flourish of innovative workplace regulations.

A. Historical Dillon's Rule Approach to Local Authority

To understand current preemption conflicts, it is useful to consider the historical context of the state-local regulatory relationship. Until the late 19th century, conflicts between state and local regulation were governed by what is known as Dillon’s Rule, named after the influential Iowa Supreme Court Judge John Dillon. In his restatement of municipal law, Dillon wrote that “[municipalities] possess no powers or faculties not conferred upon them, either expressly or by fair implication, by the law which creates them.” In other words, the general understanding was that cities could only perform whatever functions their state explicitly enabled them to do. Dillon’s Rule also consists of the rule of statutory construction that “[a]ny fair, reasonable doubt concerning the existence of power [is to be] resolved by the courts against the [municipal] corporation.” In this era, cities were rarely granted broad regulatory authority, and given that grants of authority were to be narrowly construed, “state and local regulation rarely overlapped,” meaning that preemption fights were few and far between.

B. The Emergence of Home Rule

The emergence of home rule in the 19th and 20th centuries was a

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12 Hunter v. City of Pittsburgh, 207 U.S. 161, 178 (1907) (“The number, nature, and duration of the powers conferred upon [municipal] corporations and the territory over which they shall be exercised rests in the absolute discretion of the state.”).

13 JOHN F. DILLON, THE LAW OF MUNICIPAL CORPORATIONS § 9b, at 93 (2d ed. 1873).

14 Id. § 55 at 173.

15 Diller, supra note 7, at 1123.
response to the restrictiveness of Dillon’s Rule. Under Dillon’s Rule, cities had to petition their state legislature in order to make any legislative enactment, while under a home rule regime, localities are generally given a broad grant of power, along with the presumption that local regulations are a valid exercise of municipal power.16 This shift not only allowed cities to govern their own affairs, but freed up state legislatures, many of which met only once every two years, to focus on issues of more pressing state-wide concern.17 Beyond those practical considerations, home rule also limits state meddling with local matters and avoids the log-rolling and horse-trading that often occurred in enacting local legislation at the state level.18 It has also been argued that home rule encourages civic participation by giving municipal residents a sense of responsibility over local policymaking.19 Finally, home rule allows municipalities to enact policies that reflect the unique views and values of their citizenry, even if that differs from state policy preferences.

While earlier home rule regimes limited this authority to matters of “local” concern, a second wave of home rule reform in the 1950s and 1960s led to increased adoption of a local government model where it was “presumed that cities would have any power the state possessed, unless the state legislature had exclusively reserved power over a particular subject matter to the state.”20 While this broad grant of power greatly increased the scope of municipal regulation, it also expanded the sphere of potential conflict between state and local laws.

C. The Modern Rise of Local Workplace Regulations

It is against this backdrop that cities increasingly began to not only regulate but also innovate in the area of workplace protections and labor laws. For example, Minneapolis was the first jurisdiction in the country to pass an LGB-inclusive nondiscrimination ordinance when, in 1974, the city added “affectional or sexual preference” to the list of protected classes in its human rights ordinance.21 Similarly, paid sick leave began as a local policy, adopted first in San Francisco in 2006.22 More recently, the small city of SeaTac, Washington,

18 Vanlandingham, supra note 16, at 270.
19 Id. at 271.
20 Diller, supra note 7, at 1125.

Local policymaking authority is vitally important in an era of rapidly changing workplace standards and state and federal inaction on labor issues. First, enacting workplace regulations at the local level has real, demonstrable impacts on workers in those jurisdictions. When cities and counties enact paid sick leave laws, for example, workers get access to a benefit that allows them to take time off to care for their health and that of their loved ones without having to give up a paycheck. When localities raise the minimum wage, the lowest-paid workers see a difference in their paychecks.

But innovation at the local level can also pave the way for more widespread policy shifts. In the cases of nondiscrimination protections, minimum wage increases, access to paid sick leave, and fair scheduling, novel local policies paved the way for other cities to adopt similar ones, and eventually for states to adopt state-wide workers’ protections. This pattern played out especially clearly in New Jersey, where advocates worked for years to enact local paid sick leave laws to show the efficacy and impact of such policies and develop momentum for a state-wide paid sick leave enactment.\footnote{New Jersey Becomes 10th State to Pass Paid Sick Time!, BETTER BALANCE (Apr. 18, 2018), https://www.abetterbalance.org/new-jersey-becomes-10th-state-to-pass-paid-sick-time/.} As this example demonstrates, when localities are allowed to act as Brandesian laboratories of democracy, the policies they develop can spread outward to other cities and upward to state and federal governments.

## III. The Conflict Over Local Workplace Regulations: Preemptive Legislation and Litigation

As cities have entered the sphere of workplace regulations, there has been an increase in potential and actual conflict between state and local preferences on a particular policy matter. This Part will discuss the rise in state-local conflicts around workplace regulations and describe how state legislatures and business interests have responded to those conflicts in both legislative and litigation settings.

### A. Preemption Under a Home Rule Regime

Because home rule grants cities and states concurrent regulatory power, it creates more potential for conflict between state and local laws, which has led
to an increase in preemption legislation and litigation in home rule regimes. That is, in a Dillon’s Rule state, most challenges to a local enactment would presume the city did not have the threshold authority, or initiative power, to enact a piece of legislation. In a home rule state, on the other hand, local authority is generally presumed, so the question of whether a local law is valid is more likely to turn on whether it impermissibly conflicts with state law.

Most states recognize two forms of preemption: express and implied. Express preemption occurs when a state law explicitly forbids local action on a particular topic. Some common examples include prohibitions on local minimum wage increases beyond the rate set by the state, or laws stating municipalities may not require private employers to provide paid or unpaid leave or other employee benefits to their workers. While there may be arguments, described further below, that such expressly preemptive laws violate particular state constitutions or run afoul of the federal Constitution, for the most part, express preemption is a straightforward exercise of state legislative power.

Claims of implied preemption are more likely to be raised in litigation against a local ordinance since these involve a judicial determination that, absent a state legislative statement of preemption, the state indeed intended to limit local authority in a particular area. Implied preemption claims often arise when a local law might adversely affect businesses or other special interests. In many states, a local law can be impliedly preempted if state regulation of the issue is so pervasive as to indicate that the state intended to “occupy the field” of regulation on that topic or if the local law impermissibly conflicts with state law. Two cases involving local minimum wage ordinances provide good examples of both of these concepts.

In Wholesale Laundry Board of Trade v. City of New York, the New York Appellate Court, in a decision affirmed by the Court of Appeals, addressed the question of whether the State’s Minimum Wage Act preempted New York City’s higher minimum wage requirement. The Court ultimately found that it did, in part on field preemption grounds. The Minimum Wage Act was found to be comprehensive because it not only established a state minimum wage but also empowered the Commissioner of Labor to determine varying minimum wage rates across different occupations and localities.

In another minimum wage case in Kentucky, involving a Louisville minimum wage ordinance that applied to private employers, the Kentucky

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26 Diller, supra note 7, at 1123.
27 Id.
28 See infra Part IV.
29 Diller, supra note 7, at 1134.
31 Id. at 864.
32 Id.
33 Id.
Supreme Court interpreted the state’s minimum wage statute as affirmatively making it legal for businesses to pay their workers any rate at or above the statutory minimum wage.\(^{34}\) Thus, Louisville’s higher minimum wage was considered in conflict with the state law because “[a]n ordinance . . . cannot forbid what a statute expressly permits.”\(^{35}\)

Not all states take such a strict view of conflict preemption, however. In Texas, for example, even when a local ordinance appears to be in conflict with a state statute, a court still has the “duty . . . to reconcile the two ‘if any fair and reasonable construction of the apparently conflicting enactments exist[s] and if that construction will leave both enactments in effect.’”\(^{36}\)

B. The Legislative Response to Local Workplace Regulations

This increase in local economic regulation has resulted in significant legislative pushback at the state level, guided largely by business interests.\(^{37}\) For example, groups like the ALEC consistently push for deregulatory policies at the state level, including preemption of local workplace regulations.\(^{38}\)

State preemption of local workplace regulations has mostly taken one of two forms. First, targeted preemption of a particular topic or issue area, which is often in response to the passage of that kind of policy for the first time at the local level, and second, blanket preemption of broad swaths of potential local power. Additionally, state legislatures are increasingly adding punitive elements to preemptive laws that impose financial penalties on cities that enact potentially preempted policies and even the local legislators that vote for them. Since the rise in state preemptive legislation in the last decade has already\(^{39}\) been rather extensively\(^{40}\) documented,\(^{41}\) this Article intends to provide only a snapshot of how the increase has played out in the sphere of workplace regulations.

1. Targeted Preemption

One common state response to local economic regulations is a targeted, express preemption provision that removes local authority around a particular issue. For instance, when St. Louis, Missouri, passed an ordinance in 2015 to


\(^{35}\) Id. at 428 (quoting City of Harlan v. Scott, 162 S.W.2d 8, 9 (Ky. 1942)).

\(^{36}\) Cooke v. City of Alice, 333 S.W.3d 318, 323 (Tex. App. 2010) (citation omitted).

\(^{37}\) See Riverstone-Newell, supra note 9, at 405.

\(^{38}\) Id. at 405–06.

\(^{39}\) See id.


gradually raise the minimum wage to $11 per hour, the state responded by passing a law prohibiting cities from enacting a minimum wage higher than the State’s.\(^{42}\) Similarly, when Birmingham enacted a $10.10 per hour minimum wage ordinance in 2016, Alabama quickly responded by preempting local wage increases and blocking the Birmingham law.\(^{43}\) The same pattern has played out in recent years in Florida, Iowa, Kentucky, and Ohio.\(^{44}\) Many other minimum wage preemption laws have been passed despite there being no local efforts to increase the minimum wage, and in total, 25 states preempt local minimum wage regulations.\(^{45}\)

State preemption efforts in the paid sick leave sphere have been slightly less successful. In Texas, when Austin became the first city in the South to pass a local paid sick leave law, the State considered, but ultimately failed to pass, a bill that would have blocked that and other paid or unpaid leave laws.\(^{46}\) Several states have, however, adopted provisions limiting local paid sick leave laws as part of a broader, comprehensive state-wide paid sick leave policy.\(^{47}\) Including the 5 states that have done so, a total of 22 states preempt local paid or unpaid sick time regulations.

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Policies like private sector ban-the-box, fair scheduling, and salary history inquiry bans have also been subject to targeted preemption. In 2018, Michigan passed a law prohibiting localities from creating laws concerning what employers can or cannot ask during a job interview, essentially preempting local private sector ban-the-box and salary history inquiry bans. No city in Michigan had passed or was considering one of these regulations. In 2019, three years after Austin first introduced a ban-the-box law, a bill was considered, but ultimately did not pass, in Texas that would have prohibited localities from limiting an employer’s ability to consider an applicant’s criminal history. As of 2019, ten states preempt local fair scheduling laws, at least five states preempt local private sector ban-the-box policies, and at least two states preempt local salary history inquiry bans.

A handful of states have made moves to limit local authority to prevent discrimination against LGBTQ individuals. The most famous example is probably North Carolina’s HB2, which, in addition to forbidding schools and other public facilities from allowing transgender individuals to use the bathroom of the gender they identify with, preempted local nondiscrimination ordinances and other local workplace regulations. Although the restroom access portion of the bill was later revisited through a legislative compromise, the preemption provisions remain, forbidding cities from enacting a nondiscrimination ordinance that differs from the state’s, which does not protect against

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48 Ban-the-box, or “fair chance,” policies forbid employers from asking job applicants to indicate on their application whether they have a criminal conviction or arrest record, with the purpose of making it easier for the formerly incarcerated to enter the workforce by delaying background checks until later in the job hiring process. See “Ban the Box” Is a Fair Chance for Workers with Records, NAT’L EMP. L. PROJECT (Aug. 2017), https://s27147.pcdn.co/wp-content/uploads/Ban-the-Box-Fair-Chance-Fact-Sheet.pdf.

49 Fair scheduling policies prohibit abusive scheduling practices like “clopening” (working a closing shift and then the following opening shift), on-call scheduling (where a worker must be available to work if called, but is not paid if they are not called upon), and fluctuating work schedules, which make it difficult to balance work with other obligations. See, e.g., Fact Sheet: The Need for Fair Schedules, BETTER BALANCE (Dec. 14, 2016), https://www.abetterbalance.org/resources/fair-schedules-factsheet/.


discrimination based on gender identity or sexual orientation.\textsuperscript{55}

Although North Carolina’s HB2 garnered more national press attention, Tennessee was actually the first state to preempt local nondiscrimination measures in 2011. In response to the passage of an LGBTQ-inclusive nondiscrimination ordinance in Nashville, the State passed a law prohibiting localities from enacting nondiscrimination policies that went beyond state law.\textsuperscript{56}

Rounding out the trio of states with local nondiscrimination preemption is Arkansas, which enacted its preemption law in 2015, months after Fayetteville passed and referred its own to the city’s voters, who eventually approved the measure.\textsuperscript{57} Similar bills have been introduced in West Virginia, Texas, and Oklahoma, but have not passed.\textsuperscript{58}

Nondiscrimination preemption has followed a different path than that of other workplace regulations for several reasons. First, these preemption laws have not been pushed by business interests, but by conservative religious groups like the Southern Baptist Convention and the Alliance Defending Freedom.\textsuperscript{59} In fact, part of the reason nondiscrimination preemption laws have not spread as widely as other workplace regulation preemption laws is due to the strong pushback by the business community. When HB2 passed, some of the most vocal opposition came from corporations.\textsuperscript{60} While nondiscrimination preemption bills have since been considered in a handful of states, including Texas and West Virginia, and while laws aiming to limit local authority to protect transgender individuals’ access to bathrooms have been considered in at least 17 other states,

none except those in Tennessee, Arkansas, and North Carolina have yet passed.61

2. Blanket Preemption

Beyond targeted preemption, another form of pushback against local workplace regulations has taken is that of "blanket preemption." This relatively new form of preemption occurs when a state walls off broad swaths of local authority in one legislative swoop.62 In the words of Texas Governor Greg Abbott, "[a]s opposed to the state having to take multiple rifle-shot approaches at overriding local regulations... a broad-based law... that says across the board, the state is going to pre-empt local regulations, is a superior approach."63

There has been a general trend towards broader, more sweeping blanket preemption laws and laws that implicate even core local powers, such as contracting authority.64 It is also worth noting that many of these bills' stated purposes are to create a uniform set of regulations to promote intrastate commerce, despite the fact that multi-jurisdiction businesses already navigate variations in local laws, including those related to zoning, taxation, and environmental regulations, to name a few. What these bills actually do is create a regulatory vacuum around workplace issues by prohibiting local action while failing to adopt state-wide labor regulations. That is, blanket preemption laws do not merely create a uniform business environment across the state; what they actually do is shield businesses from any local workplace regulation and worker protection law in one legislative swoop.

Blanket preemption can take the form of bills that preempt local authority on a raft of individual issues at once, removing regulatory authority over a broadly defined issue area, prohibiting local regulations that have any effect on businesses, or limiting local authority to determine whether to do business with or give grants or contracts to businesses based on their internal practices and policies.65 These kinds of bills potentially have an immense scope. While laws that ban any local business regulations would clearly preempt local authority on minimum wage, paid and unpaid leave, ban-the-box, and fair

scheduling, they could also preempt nondiscrimination ordinances as applied to businesses, or even local health and safety regulations like licensing requirements for child care facilities.\textsuperscript{66} Laws prohibiting localities from regulating or contracting with businesses on account of their internal practices or policies could also implicate local nondiscrimination ordinances and health and safety regulations.

Dozens of blanket preemption bills have been introduced in the past few years, and at least two have been enacted. Michigan’s H.B. 4052, passed in 2015, was one of the first blanket preemption bills in the country.\textsuperscript{67} The bill targeted so many areas of local authority that it was termed the “Death Star” bill in the media, a reference to the space weapon in the Star Wars movies that can destroy entire planets with a powerful laser.\textsuperscript{68} H.B. 4052, titled the Local Government Labor Regulatory Limitation Act, preempted local action in Michigan on ban-the-box policies, salary history inquiry bans, local minimum wage, fringe benefits that could incur expenses for employers, employment benefits like paid or unpaid leave, regulations around work stoppages or strike activities, fair scheduling laws, local regulations around apprenticeships or training programs, and local remedies for wage, hour, and benefit disputes.\textsuperscript{69} Two years later, in 2017, Iowa enacted H.F. 295, which preempted local regulations related to minimum wages, employment leave, hiring practices, employment benefits, fair scheduling, or other “terms or conditions of employment.”\textsuperscript{70}

A similar “Death Star” bill was introduced, but did not pass, in West Virginia in 2019. H.B. 2708 would have preempted local regulations dealing with employment applications, minimum wage, fringe benefits, regulations around work stoppages or strike activities, fair scheduling, sale or marketing of consumer merchandise, or professional licensing.\textsuperscript{71} Also in 2019, Texas saw S.B. 15, which would have prohibited any local regulations “that exceed or conflict with federal or state law” relating to paid or unpaid leave, hiring practices (which would implicate ban-the-box and salary history inquiry ban policies), employment benefits, scheduling, or “other terms of employment.”\textsuperscript{72}

The Florida Legislature has considered even more sweeping blanket preemption bills every year since at least 2017, though none have passed. In 2017, H.B. 17 was introduced, which would have preempted local authority to enact any regulation on a business, profession, or occupation unless expressly

\begin{itemize}
  \item \textsuperscript{66} LAURIE REYNOLDS & A BETTER BALANCE, supra note 62, at 3.
  \item \textsuperscript{67} H.R. 4052, 2015 Leg., Reg. Sess. (Mich. 2015).
  \item \textsuperscript{69} MICH. COMP. LAWS. ANN. §§ 123.1381–123.1396 (West 2015).
  \item \textsuperscript{70} IOWA CODE ANN. §§ 331.304(12)(a) (West 2020) (for counties); 364.3(12)(a) (2018) (for cities).
  \item \textsuperscript{72} S. 15, 86th Leg., Reg. Sess. (Tex. 2019) (as introduced).
\end{itemize}
authorized by state law. If passed, this bill would have effectively returned Florida municipalities to a Dillon’s Rule regime regarding business regulations. S.B. 1158, also introduced in 2017, attempted to go even further, preempting local regulations that had extraterritorial effects or an adverse impact on economic growth in another local jurisdiction. In that bill, the terms “extraterritorial effect” and “adverse impact” were vaguely defined, making the scope of the bill potentially huge. When Florida’s Constitution Revision Commission met in 2018, it considered a proposal that would have prohibited localities from regulating commerce, trade, or labor, unless that law had no extraterritorial effects. In 2019, the Florida House of Representatives considered H.B. 3, a sweeping bill that would have placed numerous procedural obstacles in front of local attempts to regulate businesses, including holding additional hearings and publishing findings about the necessity of the regulation and passing the ordinance by a supermajority. The bill would also have caused any local business regulation to automatically sunset two years after its adoption. A pre-filed bill for the 2020 legislative session, H.B. 305, would prohibit localities from regulating “conditions of employment” not required by state or federal law.

Florida is not the only state to attempt to curtail local authority in a broad area. A handful of bills introduced in the last decade would prohibit local regulations on any topic covered by state law, including workplace issues. In 2015, the Texas Legislature introduced a bill that would have preempted any ordinance, rule, or regulation that differed from an existing state statute on any matter, essentially extinguishing local regulatory authority in any area the state has already regulated. The following year, Oklahoma considered, but also did not enact, a substantially similar bill, S.B. 1289. The final kind of blanket preemption prohibits localities granting or withholding benefits from businesses for their business policies. In 2018, the Florida Legislature considered H.B. 871, the so-called “Free Enterprise Protection Act,” which would have prohibited any “discriminatory government actions” against Florida businesses based on their internal policies or actions taken by them pursuant to their religious beliefs. So-called “discriminatory

77 Id.
79 S. 343, 84th Leg., Reg. Sess. (Tex. 2015).
government actions" included any imposition of a tax or penalty, the delay or denial of a business’s tax benefit, withholding or denying a business a grant or contract, or refusing to make property or facilities available for a business to use. Tennessee considered strikingly similar bills in 2017 and 2019; though those bills did not explicitly protect regulations targeting business actions based on religious belief. Nevertheless, both the Florida and Tennessee bills would not only have limited local authority to directly regulate businesses, but would have stripped them of the authority to consider a business’s employment practices—such as wage levels, access to paid or unpaid leave, and nondiscrimination policies—in deciding who should be awarded public contracts.

3. Punitive Preemption

Perhaps the most troubling legislative response to local regulations and innovation has been punitive preemption. Here, states fine cities that have enacted arguably preempted laws and even fine, remove from office, or hold personally liable the elected officials who passed the laws. By contrast, under most preemption laws, local ordinances will simply be considered void or unenforceable if preempted. While most punitive preemption statutes have been seen in the gun preemption context, states are increasingly applying the practice to other issue areas, especially sanctuary cities and immigration.

Arizona’s infamous S.B. 1487, for example, is a broad-ranging punitive preemption law that allows any state legislator to ask the attorney general to review any locality’s law to determine whether it is preempted by state law. If the attorney general, not a court, finds that the local measure is preempted, he or she must inform the state treasurer, who must then withhold the locality’s state-shared revenue until the violation is cured. If the attorney general thinks the ordinance may be preempted, he or she must bring the matter before the state supreme court. Though in order to be heard, the city must post a bond of six months of its state-shared revenue. The challenged city has no opportunity under the statute to bring the matter before the state supreme court. The withholding of a locality’s state-shared revenue is a serious penalty—it makes

82 Id.
86 See id. at 10–12.
87 ARIZ. REV. STAT. ANN. §41-194.01 (2020).
88 Id. § 41.194.01(B)(1).
89 Id. § 41.194.01(B)(2).
up about a third of a municipality’s budget on average.\(^9\)

Though no other state has a similarly egregious punitive preemption measure resembling S.B. 1487 in Arizona, several have introduced bills related to the payment of attorneys’ fees in cases involving any kind of preemption. A Florida bill introduced in 2019—S.B. 1140 and its companion H.B. 829—would have allowed any party that successfully challenges a local law as preempted to obtain attorneys’ fees and damages from the locality.\(^9\) The bill would have applied retroactively to cases pending or commenced by July 1, 2019.\(^2\)

These kinds of punitive preemption laws chill valid exercises of local democracy by creating the threat of fines if a city tries to pass an ordinance to test the limits or validity of a state preemption law.\(^3\) It also limits the power of cities to use legislation to make a statement of the values of their community by passing an ordinance they know cannot or might not go into effect.\(^4\) While this trend is certainly a threat to local workplace regulations, it also carries broad risks to local lawmaking authority more generally, especially in the realms of gun preemption and sanctuary city policies, where these punitive measures have more often been applied.

**C. Litigation in Response to Local Economic Regulations**

Another piece of the backlash against local workplace regulations has been the increased use of litigation by corporate interests that seems intended to stretch the preemptive effect of state laws and chill local policymaking.

One prime example is the ongoing case *Texas Ass’n of Business v. City of Austin*.\(^5\) In that case, the Texas Association of Business and the National Federation of Independent Business argued the state minimum wage preemption law also preempted Austin’s recently enacted paid sick leave law.\(^6\) The novel argument the business groups presented was that, since the paid sick leave ordinance requires businesses to pay workers for hours not worked, it, in effect, forces businesses to pay them more than the minimum wage, an impermissible outcome because the state preempts local minimum wage regulations.\(^7\) The Third District Court of Appeals agreed and granted the business groups’ request for a temporary injunction against the ordinance. The Court pushed aside the arguments that minimum wage and employment benefits like paid leave are

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\(^9\) *Id.*


\(^9\) *Id.*


\(^9\) *Id.* at 430.

\(^9\) *Id.* at 439–40.
separate issues, and that the reasoning adopted by the business groups would lead to the absurd result that, if an employer were to provide sufficient leave benefits to its workers, it could arguably pay them a sub-minimum base wage. This case is currently on appeal before the Texas Supreme Court.98

The above-mentioned case demonstrates that business groups are willing to use litigation, and the threat of litigation, to pursue a deregulatory agenda, potentially chilling the valid exercise of municipal authority in setting workplace standards.

IV. POTENTIAL LEGAL CHALLENGES TO WORKPLACE REGULATION PREEMPTION LAWS

The increasingly aggressive nature of state preemption of local workplace regulations in some ways creates opportunities to challenge those preemptive laws in court. For example, many states’ constitutions have legislative procedural requirements such as single-subject rules and generality requirements that can be brought to bear against preemption provisions that have been rushed through the legislative process or inserted into unrelated bills. Some preemptive laws might also be ripe for substantive challenges, either based in the state’s constitution or the federal Constitution.

Given the paucity of case law around challenges to these newer, more aggressive preemptive state laws, the dramatic and relatively recent change in the kinds of state preemptive laws that are being passed, and the individual differences in state home rule regimes and state constitutional law, it is difficult to overstate how dependent any of these legal arguments are on the unique facts and law around any particular case. That said, many of the following claims could be promising in challenging state preemption of local workplace regulations.

A. State Procedural Challenges

Some states require the legislature comply with certain procedures for a law to be valid, such as ensuring that bills deal with only one subject or that a bill title accurately reflects the content of the bill.99 For example, in 2017, the Missouri Supreme Court struck down the State’s minimum wage preemption statute because it was passed in a bill that encompassed more than one subject.100 Given the apparent haste with which many labor preemption laws are enacted at the state level, there are instances in which procedural challenges can be raised by local governments or advocates.

The major limitation to this approach is that a procedural violation can

98 Id. at 425.

99 Briffault et al., supra note 40, at 12.

100 Coop. Home Care, Inc. v. City of St. Louis, 514 S.W.3d. 571, 575 (Mo. 2017) (en banc).
often be cured in subsequent legislative sessions. After Missouri’s minimum wage preemption statute was struck down in 2017, the legislature re-enacted the law later that year via the proper procedure.101

B. Substantive State Constitutional Challenges

Many state constitutions also place substantive limitations on the kinds of preemptive laws the legislature can impose on cities, such as insulting certain kinds of local legislation from state preemption or prohibiting “special laws.”102 The scope of blanket preemption laws in particular could also leave them vulnerable to challenges brought under a state’s home rule constitutional provision or statute.

1. Local Immunity from State Preemption

Immunity from state preemption usually occurs when a constitutional home rule amendment sets matters of “local concern” out of reach from state preemption.103 Colorado and California, for example, look at factors like extraterritorial effects and the need for state-wide uniformity when determining whether a municipal action is purely local in scope and thus immune from state preemption.104 In Arizona, where matters of local concern are purportedly protected from preemption, courts have narrowed the sphere of “local concern” to authority over local elections and, in some cases, the disposition of real property.105 In any case, there is certainly a valid argument to be made that workplace regulations are local in nature and respond to local health, welfare, and safety concerns; depending on particular case law, this argument should be considered in states that offer some kind of immunity for matters of local concern.

2. Prohibition on “Special” Laws

Many state home rule regimes also prevent the legislature from enacting “special laws,” which are usually defined as laws that are directed at a particular person or class.106 In the home rule context, special laws are legislation that create

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102 See Briffault et al., supra note 40, at 11.
103 Id.
106 See Briffault et al., supra note 40, at 11.
rules for a particular municipality or small group of municipalities with which others in the state do not have to comply.\textsuperscript{107} Case law on the application of state prohibitions on special laws is decidedly varied, and while the purpose of these prohibitions is to prevent the unfair singling out of a particular municipality for special treatment, preemptive laws that in effect only apply to one or two jurisdictions are often upheld if they are \textit{facially} generally applicable.\textsuperscript{108}

One interesting exception to the usual jurisprudence around general and special laws has emerged in Ohio, where the state Supreme Court has articulated a unique test to determine if a state statute is general or not. In Ohio, a law is a general one if it "(1) [is] part of a statewide and comprehensive legislative enactment, (2) [applies] to all parts of the state alike and [operates] uniformly throughout the state, (3) set[s] forth police, sanitary, or similar regulations, . . . and (4) prescribe[s] a rule of conduct upon citizens generally."\textsuperscript{109} The first prong is the most interesting since it requires that preemptive laws establish a statewide policy rather than merely remove local authority to enact regulations in a certain area. This requirement provides a potentially powerful backstop against purely deregulatory preemption.

\section*{C. Federal Constitutional Challenges}

There are, in a few cases, some federal constitutional arguments that can be brought to bear against state laws preempting local workplace regulations. For the most part, these claims are implicated when the preemptive law in question intentionally affects members of a protected class—such as racial minorities or LGBTQ individuals—or when punitive preemption is involved.

\subsection*{1. Equal Protection Challenges to Preemptive Laws that Implicate Local LGBTQ-Inclusive Nondiscrimination Ordinances}

Preemption laws that might overturn local nondiscrimination ordinances could be vulnerable against challenges based in the Fourteenth Amendment to the United States Constitution.\textsuperscript{110} In \textit{Romer v. Evans},\textsuperscript{111} for example, the Court overturned a state constitutional amendment that was found to be motivated by a "bare . . . desire" to harm LGBTQ individuals.\textsuperscript{112}

However, \textit{Romer} involved a constitutional amendment that was \textit{facially} discriminatory against LGBTQ individuals. Most recent preemptive laws are not

\textsuperscript{107} Id.
\textsuperscript{108} Id. at 12; see, e.g., Treadway v. State, 988 S.W.2d 508, 510–11 (Mo. 1999) (en banc).
\textsuperscript{109} Canton v. State, 766 N.E.2d 963, 968 (Ohio 2002).
\textsuperscript{110} U.S. CONST. amend. XIV, § 1.
\textsuperscript{111} 517 U.S. 620 (1996).
\textsuperscript{112} Id. at 634–35 (internal quotation marks omitted) (quoting Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).
facially discriminatory, requiring only that municipalities not establish protections not already provided for in state or federal law, and in these cases, state law does not protect against discrimination based on gender identity or sexual orientation.\textsuperscript{113}

That said, it is possible to pursue a claim under the Equal Protection Clause against \textit{facially neutral} laws that are \textit{intended} to discriminate against a protected class.\textsuperscript{114} If, for example, a broad-based blanket preemption law that implicates LGBTQ protections was passed for the purpose of overturning local LGBTQ-inclusive nondiscrimination ordinances, it would be possible, if evidence of animus existed, for a court to strike down the law as violating the Fourteenth Amendment.

2. First Amendment Challenges to Punitive Preemption Laws

Some punitive preemption laws that impose penalties on officials who vote for potentially preempted ordinances might be subject to the First Amendment to the United States Constitution\textsuperscript{115} because it places limits on the ability of local officials to express their opinions on a particular subject matter. One difficulty in bringing such a claim is the Supreme Court decision in \textit{Nevada Commission on Ethics v. Carrigan},\textsuperscript{116} which found that a state legislator had no “personal right” based in the First Amendment to vote in a legislative body.\textsuperscript{117} But the Supreme Court has also indicated a concern over requirements that local officials vote in a particular way on a particular matter, indicating that there could be room for First Amendment claims against state punitive preemption statutes.\textsuperscript{118}

V. APPROACHES TO MODIFYING HOME RULE TO EMPOWER COMMUNITIES TO ENACT WORKPLACE PROTECTION LAWS

As the changing preemption landscape demonstrates, the relationship between state and local authority is not, nor does it need to be, a static one. While it might be true that it is time for a dramatic overhaul of home rule, there are also a number of discrete structural policy changes that could shore up local authority to enact workplace and worker protection regulations.

\textsuperscript{115} U.S. CONST. amend. I.
\textsuperscript{116} 564 U.S. 117 (2011).
\textsuperscript{117} \textit{Id.} at 126.
A. West Virginia’s Municipal Home Rule Pilot Project

West Virginia, for example, instituted a Municipal Home Rule Pilot Project ("Pilot") in 2007, which aimed to test whether municipalities should be allowed "to have broad-based state home rule to improve urban and state development."\(^{119}\) In the first iteration of the Pilot, participating municipalities could seek approval to pass any ordinance that did not violate the U.S. Constitution, the West Virginia Constitution, federal law, and West Virginia controlled substances laws.\(^{120}\) The 2015 amendment to the Pilot contained many more restrictions on the kinds of ordinances a municipality can enact.\(^{121}\) Among other things, municipalities participating in the Pilot could not pass resolutions, rules, or regulations pertaining to environmental law, wages for construction of public improvements, taxation, and natural resource extraction.\(^{122}\) The current iteration of the Pilot additionally restricts municipalities from passing an ordinance that "affects persons or property outside the boundaries of the municipality."\(^{123}\)

Beyond the limitations imposed by the 2015 amendment to the Pilot, the attempt to experiment with home rule in West Virginia was hobbled by the fact that applications to become a home rule municipality or enact legislation pursuant to the Pilot had to go through a Home Rule Board ("Board"), a body comprised mainly of state legislative officials.\(^{124}\) When the Pilot was eventually made permanent in 2019, the powers of the Board were greatly reduced. Now, the Board can only reject municipal proposals for any lawful reason, though home rule applications and proposed amendments must still be made through the Board.\(^{125}\) Despite the limitations of the West Virginia Home Rule Pilot Project, it demonstrates that it is possible for states to experiment with new home rule principles and evolve those principles over time.

B. Other Policies That Would Strengthen Home Rule

This Article presents two potential policies that could strengthen home rule and enable localities to better protect workers and residents: (1) limiting deregulatory preemption; and (2) limiting or eliminating the doctrine of implied preemption.

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\(^{120}\) Id.

\(^{121}\) W. VA. CODE ANN. § 8-1-5a(j) (West 2020).

\(^{122}\) Id. § 8-1-5a(i).

\(^{123}\) Id. § 8-1-5a(j).

\(^{124}\) Id. § 8-1-5a(e).

\(^{125}\) S. 4, 2019 LEG., REG. SESS. (W. VA. 2019).
1. Limiting Deregulatory Preemption

As discussed above in Part IV, Ohio courts have developed a way to distinguish and strike down preemption laws that merely take away local authority to act in certain areas, as many more recent preemption laws do. The relevant part of the test to determine if a state law is a permissible “general law” is whether it “set[s] forth police, sanitary, or similar regulations, rather than purport[s] only to grant or limit legislative power of a municipal corporation.” This approach, which forbids the state from enacting laws that attempt to *take away* local authority to act in a particular regulatory sphere rather than setting forth a state-wide regulation that localities cannot overturn, could be a useful way to empower localities to enact local workplace regulations without the fear of purely deregulatory state preemption.

2. Limiting the Doctrine of Implied Preemption

As discussed above, the doctrine of implied preemption often serves as the basis of corporate challenges to local workplace regulations. This does not need to be the case. In Illinois, for example, localities are presumed to have authority to legislate in areas where the state already has authority, unless the state legislature is specific, clear, and unambiguous in its limitation of local home rule power. Following that model, other states could pursue policies where localities are presumed to have authority to legislate, unless the state explicitly forbids them from doing so or such regulation conflicts with state law. This approach creates a default of non-preemption, so municipalities can presumably have the authority to enact workplace regulations.

126 See *supra* Part IV.
128 See *supra* Section III.C.
129 See, e.g., Neri Bros. Constr. v. Vill. of Evergreen Park, 841 N.E.2d 148, 152 (Ill. App. Ct. 2005) (noting that any limitation on the power of home rule units by the General Assembly must be specific, clear, and unambiguous. Absent such a limitation, the court will not find preemption. (citing Town of Cicero v. LaFrancis, 668 N.E.2d 164 (Ill. App. Ct. 1996)); Town of Cicero, 668 N.E.2d at 165 (holding, where legislature has not been specific, courts will not find preemption of home rule authority (citing Scadron v. City of Des Plaines, 606 N.E.2d 1154 (Ill. 1992)); Scadron, 606 N.E.2d at 1163 (“The purpose [of the home rule amendment] ‘is to eliminate or at least reduce to a bare minimum the circumstances under which local home rule powers are preempted by judicial interpretation of unexpressed legislative intention.’” (quoting David C. Baum, *A Tentative Survey of Illinois Home Rule (Part II): Legislative Control, Transition Problems, and Intergovernmental Conflict*, 1972 U. ILL. L.F. 559 (1972))).
130 In Illinois, the provision reads, “Home rule units may exercise and perform concurrently with the State any power or function of a home rule unit to the extent that the General Assembly by law does not specifically limit the concurrent exercise or specifically declare the State’s exercise to be exclusive.” Ill. Const. art. VII, § 6(i).
VI. CONCLUSION

Given the increasing importance of local legislation in the workplace and labor sphere, it is more important than ever for advocates, policymakers, and scholars to be aware of how preemption does and might impact those regulations. From legislative reactions to local enactments to business lawsuits against the same, many localities interested in pursuing any kind of labor policy face potential backlash. That said, there are important legal opportunities for localities to push back against preemption, either through litigation or with the policy proposals described above.