

Punitive Preemption and the First Amendment

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TABLE OF CONTENTS

I.	INTRODUCTION: CITY POWER AND STATE PUSHBACK.....	2
II.	THE PUSH AND PULL OF TRADITIONAL PREEMPTION	7
	A. <i>The Nature of Push-Pull Preemption</i>	7
	B. <i>The Value of Push-Pull Preemption to Democratic Deliberation</i>	11
III.	EXAMPLES OF PUNITIVE PREEMPTION	13
	A. <i>Removal from Office</i>	13
	B. <i>Cutting Off Funding</i>	17
	C. <i>Criminalizing Lawmaking</i>	19
	D. <i>Enhanced Citizen Suit Provisions</i>	21
	E. <i>The Effects of Punitive Preemption</i>	22
IV.	THE FIRST AMENDMENT AND PUNITIVE PREEMPTION	22
	A. <i>State Regulation of Local Officials' Speech</i>	24
	1. <i>Imminent Lawless Action</i>	25
	2. <i>Defining and Enforcing Qualifications of Service</i>	26
	3. <i>Government Employee Speech</i>	28
	B. <i>Burdens on Lawmaking</i>	30
	1. <i>Lawmaking and Expression</i>	30
	a. <i>The Law Itself</i>	31
	b. <i>Public Debate</i>	33
	c. <i>The Lawmaker's Vote</i>	35
	2. <i>First Amendment Protections for Local Lawmaking</i>	40

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a.	<i>Democratic Deliberation as a Normative Underpinning</i>	41
b.	<i>Limitations on Public Debate</i>	43
c.	<i>Viewpoint Discrimination in a Public Forum</i>	46
d.	<i>Insulating the Government from Legal Challenge</i>	49
V.	CONCLUSION	52

I. INTRODUCTION: CITY POWER AND STATE PUSHBACK

It is widely accepted that the U.S. Constitution has little to say about the relationship between states and the cities within them, which have long been conceived as mere administrative subunits of the state.¹ This “state creature” doctrine² would likely come as a surprise to most city residents. From Keep Austin Weird³ to Charm City⁴ to Boston Strong,⁵ city residents often boast of a unique local culture and hometown pride. Cities are communities—“groups of people with shared concerns and values, tied up with the history and circumstances of the particular place in which they are located.”⁶ As communities, cities also have their own political culture. Particularly in the large, urban municipalities that the word “city” generally brings to mind,⁷ the culture is often overwhelmingly

1. See *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (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 [en]trusted to them.”); David J. Barron, *The Problem of Cooley’s City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 487 (1999) (stating that state creature doctrine is “black-letter” constitutional law).

2. See, e.g., *Richmond, F. & P.R. Co. v. City of Richmond*, 133 S.E. 800, 803–04 (1926) (noting that municipal corporations are “creatures of the state”).

3. Jim Yardley, *Austin Journal; A Slogan Battle Keeps Austin Weird*, N.Y. TIMES (Dec. 8, 2002), <http://www.nytimes.com/2002/12/08/us/austin-journal-a-slogan-battle-keeps-austin-weird.html?mcubz=0>.

4. Gilbert Sandler, *How the City’s Nickname Came To Be*, BALT. SUN (July 18, 1995), http://articles.baltimoresun.com/1995-07-18/news/1995199190_1_charm-city-bill-evans-loden [https://perma.cc/26LL-S9RV].

5. Kyle Scott Clauss, *Does ‘Boston Strong’ Mean Anything Anymore?*, BOS. DAILY (Apr. 17, 2016, 5:00 AM), <http://www.bostonmagazine.com/news/2016/04/17/boston-strong/> [https://perma.cc/9MRE-79PU].

6. Richard Briffault, *Home Rule for the Twenty-First Century*, 36 URB. LAW. 253, 259 (2004).

7. This Article uses the term “city” to mean any unit of municipal government, although as a practical matter, many preemption battles involve laws passed by large, urban municipalities. The notable exception is fracking, which often involves suburbs and small-town municipalities. See, e.g., Jim Malewitz, *Texas Drops Suit over Dead Denton Fracking Ban*, TEX. TRIB. (Sept. 18, 2015, 11:00 AM), www.texastribune.org/2015/09/18/texas-drops-suit-over-dead-denton-fracking-ban [https://perma.cc/94MY-VXMY] (discussing legal and legislative action over a fracking ban in Denton, Texas, a suburb of the Dallas–Fort Worth metro region).

Democratic.⁸ This is no coincidence: recent decades have seen Americans “sort[ing]” themselves geographically into like-minded communities—so much so that so that as a statistical matter, population density correlates with surprising accuracy to political affiliation.⁹ Huge Democratic majorities have allowed cities to advance policies unimaginable at any other level of government, particularly on progressive issues ranging from climate change to the minimum wage and from gun control to LGBTQ rights.¹⁰ Cities are routinely praised—particularly by those who favor such policies—as incubators of policy leadership¹¹ and leaders on the global stage.¹²

But the “big sort”—combined with the lack of limitations on political gerrymandering¹³—also means that while urban electorates bleed blue, state election maps sweep red. After the 2016 elections, Republicans enjoyed

8. See Kenneth A. Stahl, *Preemption, Federalism, and Local Democracy*, 44 *FORDHAM URB. L.J.* 133, 136–37 (2017).

9. BILL BISHOP, *THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICA IS TEARING US APART* 205 (2008) (noting that high density correlates with Democratic voters); see also Paul A. Diller, *Reorienting Home Rule: Part I—The Urban Disadvantage in National and State Lawmaking*, 77 *LA. L. REV.* 287, 292–98 (2016).

10. See, e.g., Briffault, *supra* note 6, at 254; Matthey J. Parlow, *Progressive Policy-Making on the Local Level: Rethinking Traditional Notions of Federalism*, 17 *TEMP. POL. & C.R.L. REV.* 371, 375 (2007). Ironically, however, municipal power has long come under scholarly criticism for facilitating sprawl, enabling exclusionary zoning, and creating other decidedly non-progressive results. See, e.g., Paul A. Diller, *Intrastate Preemption*, 87 *B.U. L. REV.* 1113, 1132 (2007).

11. See generally BRUCE KATZ & JENNIFER BRADLEY, *THE METROPOLITAN REVOLUTION: HOW CITIES AND METROS ARE FIXING OUR BROKEN POLITICS AND FRAGILE ECONOMY* (2013); Jamie Bartlett, *Return of the City-State*, *AEON* (Sept. 5, 2017), <https://aeon.co/essays/the-end-of-a-world-of-nation-states-may-be-upon-us> [<https://perma.cc/438X-NERM>]; Heather K. Gerken & Joshua Revesz, *Progressive Federalism: A User's Guide*, *DEMOCRACY* (Spring, No. 44), <http://www.democracyjournal.org/magazine/44/progressive-federalism-a-users-guide/> [<https://perma.cc/K7R8-854D>].

12. See Gerald E. Frug & David J. Barron, *International Local Government Law*, 38 *URB. L.* 1, 1–2 (2006); Ileana M. Porras, *The City and International Law: In Pursuit of Sustainable Development*, 36 *FORDHAM URB. L.J.* 537, 545–49 (2009); Kenneth A. Stahl, *Local Home Rule in the Time of Globalization*, 2016 *BYU L. REV.* 177, 179–80; Hiroko Tabuchi & Henry Fountain, *Bucking Trump, These Cities, States and Companies Commit to Paris Accord*, *N.Y. TIMES* (June 1, 2017), <https://www.nytimes.com/2017/06/01/climate/american-cities-climate-standards.html?action=click&contentCollection=Climate&module=RelatedCoverage®ion=Marginalia&pgtype=article> (describing a petition by local actors to commit to Paris Accord).

13. Commentators disagree as to the extent that lopsided Republican majorities in state legislatures are attributable to political gerrymandering or to geographic sorting. See Jowei Chen & Jonathan Rodden, *Unintentional Gerrymandering: Political Geography and Electoral Bias in Legislatures*, 8 *Q.J. POL. SCI.* 239, 241 (2013).

comfortable majorities in 32 statehouses.¹⁴ And over the same years that the chorus of voices praising urban political leadership has swelled, state legislators with a different set of ideological preferences have begun to push back with an unprecedented range of state laws aimed at stripping away cities' power.¹⁵ Because states enjoy broad authority to preempt local laws,¹⁶ many cities are increasingly constrained by creative state laws designed to rein them in.¹⁷ For example, the North Carolina “bathroom bill” that became the focus of national attention because it required public agencies to designate bathroom access based on “biological sex” also contained a broad provision preempting local wage and hour restrictions.¹⁸ Florida’s legislature considered a ban on any “regulation of matters relating to commerce, trade, and labor.”¹⁹ The Texas legislature spent the

14. Stephen Wolf, *Republicans Now Dominate State Government, With 32 Legislatures and 33 Governors*, DAILY KOS (Nov. 14, 2016, 10:09 AM), <https://www.dailykos.com/stories/2016/11/14/1598918/-Republicans-now-dominate-state-government-with-32-legislatures-and-33-governors> [<https://perma.cc/24VU-3N7W>]. This Article uses “red” and “blue” in their colloquial sense of majority-conservative and majority-liberal, respectively, even though reality—as always—is far more complicated. See John Sides, *Most Americans Live in Purple America, Not Red or Blue America*, WASH. POST (Nov. 12, 2013), https://www.washingtonpost.com/news/monkey-cage/wp/2013/11/12/most-americans-live-in-purple-america-not-red-or-blue-america/?utm_term=.fd7e1f87507a [<https://perma.cc/K224-QQDH>]. Some have theorized there is a causal connection between the increasing prominence of rich, liberal cities and the recent success of conservative politics in rural areas and suburbs. See Katherine Cramer, *How Rural Resentment Helps Explain the Surprising Victory of Donald Trump*, WASH. POST (Nov. 13, 2016), https://www.washingtonpost.com/news/monkey-cage/wp/2016/11/13/how-rural-resentment-helps-explain-the-surprising-victory-of-donald-trump/?utm_term=.aebbcba2581b [<https://perma.cc/72F9-5ZJ6>].

15. This is not to say that preemption is a one-sided game. The California legislature is considering a bill that would preempt certain local land-use controls that legislators believe stand in the way of affordable housing construction. See Ben van der Meer, *State Senate Approves Housing Bills, Including SB 35*, SACRAMENTO BUS. J. (June 1, 2017, 11:40 AM), <https://www.bizjournals.com/sacramento/news/2017/06/01/state-senate-approves-housing-bills-including-sb.html> [<https://perma.cc/ZB5E-VWX4>]. However, the geographic concentration of Democrats in cities—and the fact that Republican-controlled state governments will usually have little reason to preempt the policy preferences of Republican-controlled suburbs and small towns—means punitive preemption is, at the moment, primarily a battle between red states and blue cities.

16. See generally GERALD E. FRUG & DAVID J. BARRON, *CITY BOUND: HOW STATES STIFLE URBAN INNOVATION* (2013).

17. See generally NAT’L LEAGUE OF CITIES, *CITY RIGHTS IN AN ERA OF PREEMPTION: A STATE-BY-STATE ANALYSIS* (2018), <http://www.nlc.org/sites/default/files/2017-03/NLC-SML%20Preemption%20Report%202017-pages.pdf> [<https://perma.cc/S9BR-XMSF>] (detailing the increase in preemptive state laws).

18. H.B. 2, 2016 Gen. Assemb., 2d Extra Sess., S.L. 2016-3 (N.C. 2016). House Bill 2 was later repealed and replaced with a provision that preempted local regulation of access to restrooms and changing facilities. It also imposed a moratorium on local laws that regulate “private employment practices.” H.B. 142, 2017 Gen. Assemb., S.L. 2017-4 (N.C. 2017).

19. S.B. 1158, 2017 Leg. Sess. (Fla. 2017).

summer of 2017 considering so many preemption bills that one mayor called it a “war against cities.”²⁰ Many of these laws prevent or would prevent local governments from taking action on issues that—beyond the fact that any policy issue is of interest to anybody, anywhere who has an opinion on the subject—have few, if any, statewide impacts.²¹ Texas, for example, considered a ban on local tree-preservation ordinances,²² while Arizona considered a ban on local ordinances regulating backyard chickens.²³

The number of preemptive laws is striking in itself. As one observer put it, “The sheer volume of local enactments being ‘preempted’ by state legislation has reached nearly epidemic proportions.”²⁴ But the wave of preemptive laws is not merely striking for their quantity: many are also *qualitatively* different from their predecessors. Some are what have been called “blanket” or “maximum” preemption because their design is to take entire policy categories off the table for local consideration.²⁵ Other laws, which this Article will refer to as “punitive preemption,” impose harsh penalties on cities that take actions legislators believe contravene state laws. The consequences they attach include financial penalties for the city, civil or criminal penalties for the policymakers, or even removal from office.²⁶ The punitive nature of these laws is particularly striking when paired with the open partisan animus displayed by their supporters. In Texas, one state official told the Washington Post that his goal was to rein in cities because they “seem to be sort of the last vanguard of Democratic and progressive ideals.”²⁷

20. Philip Jankowski, *Austin Mayor: Abbott’s Call for Special Session Is ‘A War Against Cities,’* MYSTATESMAN (June 6, 2017, 7:04 PM), <http://www.mystatesman.com/news/state—regional-govt—politics/austin-mayor-abbott-call-for-special-session-war-against-cities/40bpFqTSfFo4rFuasW5EIP/> [https://perma.cc/N4KC-CX3U].

21. See Briffault, *supra* note 6, at 261 (noting that extraterritorial impact is a principle undergirding the preemption doctrine).

22. Elizabeth Findell, *Bill To Ban Tree Ordinances Passes Texas Senate*, STATESMAN (July 27, 2017), <http://www.statesman.com/news/state—regional-govt—politics/bill-ban-tree-ordinances-passes-texas-senate/x8jEOph56O5qljO8mymQTP/> [https://perma.cc/4LD4-UQCP].

23. See Harmony Huskinson, *Arizona Lawmaker Seeks To Bar Cities from Prohibiting Chickens in Backyards*, INSIDE TUCSON BUS. (Mar. 27, 2014), <http://www.insidetucsonbusiness.com/news/arizona-lawmaker-seeks-to-bar-cities-from-prohibiting-chickens-in/article319695c4-b5de-11e3-ae0a-001a4bcf887a.html> [https://perma.cc/MJ7E-8JRD].

24. Stahl, *supra* note 8, at 134.

25. Lori Riverstone-Newell, *The Rise of State Preemption Laws in Response to Local Policy Innovation*, 47 PUBLIUS 403, 405, 417–18 (2017).

26. See TEX. CIV. PRAC. & REM. CODE ANN. § 66.003(1) (West 2017).

27. Sandhya Somashekhar, *In Austin, the Air Smells of Tacos and Trees—and City-State Conflict*, WASH. POST (July 1, 2017), <https://www.washingtonpost.com/national/in->

The purpose of this Article is to explore whether this new breed of punitive preemption laws is susceptible to challenge under the free speech clause of the First Amendment of the U.S. Constitution.²⁸ Although the “big sort” thesis certainly suggests that for many residents, city residence is a form of political association, this is not an associational argument. Nor is it an argument that states cannot, as a substantive matter, thwart local policy preferences through preemption.²⁹ It is, rather, an argument grounded in the contested nature of preemption³⁰ and the unique contribution that local lawmaking makes to democratic deliberation. Specifically, punitive preemption prevents local lawmakers from passing laws that local majorities favor and that they believe are within their authority to pass—foreclosing the unique form of public debate that precedes passage of a local law—and from defending the law against state claims of preemption in court. The Supreme Court’s precedents suggest that such prohibitions violate recognized First Amendment limits as well as the long-recognized normative principles undergirding those precedents.

This is a descriptive argument, based on established Supreme Court precedents and the normative principles recognized in those precedents. It proceeds in three parts. Part I provides a brief overview of “traditional” preemption to demonstrate the contribution that local lawmaking makes to public debate regarding both the substantive policy matter at issue and the balance of state-local power. Part II describes in detail a number of “punitive preemption” laws that punish the passage of certain kinds of local laws to illustrate how punitive preemption forecloses this contribution. Part III identifies the ways in which punitive preemption burdens protected speech and offers a descriptive account of relevant First Amendment doctrine—primarily the prohibitions on laws designed to limit public debate, on viewpoint discrimination in a public forum, and on laws that insulate the government from legal challenge—that offer strong support for a First Amendment challenge against punitive preemption.

austin-the-air-smells-of-tacos-and-trees—and-city-state-conflict/2017/07/01/682eb420-54f7-11e7-ba90-f5875b7d1876_story.html?utm_term=.50099d07f7d7 [https://perma.cc/57VU-XBYW] (quoting Matthew Walter, president of the Republican State Leadership Committee, an organization of state elected officials).

28. The First Amendment, of course, protects rights other than free speech. However, this Article is concerned only with the free speech clause and, unless otherwise noted, uses “First Amendment” to refer to that clause.

29. A right to local self-government has never been recognized under the U.S. Constitution. See Barron, *supra* note 1, at 487 & n.1.

30. See Lynn A. Baker & Daniel B. Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, 86 DENV. U. L. REV. 1337, 1338 (2009) (explaining that state home rule doctrines represent a “highly developed, and still developing, case law, one that involves drawing lines between what is properly the domain of state government and the powers which may be exercised by municipalities free of state preemption”).

II. THE PUSH AND PULL OF TRADITIONAL PREEMPTION

A. *The Nature of Push-Pull Preemption*

When a city passes a law and the state claims it is preempted, it generally takes a trip to the courthouse to reach resolution, and the answer the court will provide is frequently difficult to predict.³¹ This is because, even though the state creature doctrine means a state's power to preempt is often described in expansive terms,³² the legislature's supremacy is not as absolute as it is sometimes portrayed.³³ Although some states grant cities only narrow, specifically designed powers,³⁴ the nineteenth-century movement for "home rule" granted cities in most states broad statutory authority to pass laws in at least some areas.³⁵ While such "legislative" home rule powers can still be preempted by statute,³⁶ a significant number of state constitutions also either expressly or through judicial interpretation recognize meaningful boundaries on the state's power to override local laws under what is called "imperio" or "constitutional" home rule.³⁷

31. See, e.g., Hannah J. Wiseman, *Disaggregating Preemption in Energy Law*, 40 HARV. ENVTL. L. REV. 293, 299 (2016) (noting that cases considering similar issues of whether local land-use enactments regulating fracking are preempted by state oil and gas regulation have varied widely in both their reasoning and results).

32. See, e.g., *Richmond, F. & P.R. Co. v. City of Richmond*, 133 S.E. 800, 803–04 (1926) (“[Municipal corporations] are mere political subdivisions of the state created for the convenient administration of such governmental powers as may be entrusted to them. They are creatures of the state, which may grant or withhold such powers as to it shall seem meet. The state may grant these powers in whole or in part, conditionally or unconditionally, and may, at its pleasure, modify or withdraw them, with or without the consent of the citizens, or even against their protest. It may, if it chooses, repeal the charter and destroy the corporation.”).

33. See, e.g., Diller, *supra* note 10, at 1138 (“In most states . . . the legislature is free to expressly preempt any local ordinance.”).

34. This system is often called Dillon’s Rule, named after a nineteenth century jurist who articulated an extremely cramped conceptualization of municipal powers. See *City of Clinton v. Cedar Rapids & Missouri River R.R. Co.*, 24 Iowa 455, 464–82 (1868).

35. See generally David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2285–322 (2003) (describing the history of state home rule laws).

36. See, e.g., Jarit C. Polley, *Uncertainty for the Energy Industry: A Fractured Look at Home Rule*, 34 ENERGY L.J. 261, 262 (2013).

37. See Baker & Rodriguez, *supra* note 30, at 1338–39 nn.11 & 13 (observing that about half the states follow the constitutional model); Paul A. Diller, *Reorienting Home Rule: Part 2—Remedying the Urban Disadvantage Through Federalism and Localism*, 77 LA. L. REV. 1045, 1065–77 (2017).

Constitutional home rule is, to be sure, a limited doctrine.³⁸ However, the dramatic increase in states' assertion of the powers they can deny local majorities will likely force state courts to confront novel questions regarding the state's power to preempt,³⁹ particularly when preemption concerns an area of primarily local concern or without identifiable extraterritorial impacts.⁴⁰ In other words, as states pass "maximum" preemption laws, it will—or should—be up to the courts to determine whether they act within their powers under the state constitution in doing so. Certainly, in many, if not most cases, the answer will be yes. However, for purposes of this Article, the important point is that the interplay of statutory and home rule provisions means cities and states can legitimately disagree over whether a local law is—or can constitutionally be—preempted.⁴¹

The result is a push and pull in which a city passes a law, the state claims preemption, and the answer is provided by the courts. This push and pull is perhaps best illustrated by cases involving local fracking laws. In a typical fracking preemption debate,⁴² a local government exercises its statutorily granted powers to regulate the land use aspects of fracking. The state, in turn, claims the local law is preempted by a state oil and gas law that regulates drilling operations.⁴³ For the court, preemption is a search for legislative intent, which can be found through either an express preemption provision, a demonstrated state intent to "occupy the field" and leave no room for local regulation,⁴⁴ or an irreconcilable conflict between the local ordinance and a state law.⁴⁵ Thus, courts resolve a preemption

38. See Diller, *supra* note 37, at 1050.

39. See *City of Cleveland v. Ohio*, 90 N.E. 3d 979, 989 (Ohio Ct. App. 2017) (holding that a state law preempting certain municipal set-asides on public construction projects to be "an unconstitutional attempt to eliminate a local authority's powers of local self-government in negotiating the terms of public improvement projects" under Ohio's constitution); Briffault, *supra* note 6, at 261.

40. See Baker & Rodriguez, *supra* note 30, at 1349 (noting that courts look primarily to extraterritorial effects and the need for statewide uniformity in determining whether a power is "local" under state preemption doctrines). The fact that certain decisions have traditionally been made at the local level can also affect judicial reasoning. See, e.g., *Anschutz Exploration Corp. v. Town of Dryden*, 940 N.Y.S.2d 458, 461 (Sup. Ct. 2012) (reading a preemption provision against the backdrop of the long tradition of local control over zoning).

41. See Briffault, *supra* note 6, at 254 ("It is striking just how many home rule cases our courts consider . . .").

42. Fracking debates are numerous. See generally Wiseman, *supra* note 31.

43. *Id.* at 304.

44. See, e.g., *Order Preempting the City's Ordinance, Ne. Nat. Energy, LLC v. City of Morgantown, Ne. Natural Energy, LLC v. City of Morgantown*, slip op. 6285 (Monongalia Cty. Cir. Ct. Aug. 12, 2011) (No. 11-C- 411).

45. See *Newbury Twp. Bd. of Trs. v. Lomak Petroleum (Ohio), Inc.*, 583 N.E.2d 302, 306 (Ohio 1992); *Huntley & Huntley, Inc. v. Borough of Oakmont*, 964 A.2d 855, 862–63 (Pa. 2009) (explaining conflict preemption).

claim through statutory interpretation of the preemption provision—if an express provision exists—or an interpretation of what precisely the local and state ordinances regulate to find conflict or field preemption.⁴⁶

For example, differences in the structure of two local fracking ordinances led the Supreme Court of Pennsylvania to conclude one was preempted by Pennsylvania’s Oil and Gas Act, which regulated the technical features of oil and gas operations, and one was not.⁴⁷ The Oil and Gas Act contained an express provision preempting all local oil and gas development *except* with regard to municipal land use ordinances enacted pursuant to a city’s statutory authority; such laws were only preempted to the extent they either “contain[ed] provisions which impose[d] conditions, requirements or limitations on the same features of oil and gas well operations” regulated by the Act, or “accomplish[ed] the same purposes” as set forth in the Act.⁴⁸

Two local governments enacted, pursuant to their land use powers, ordinances regulating fracking. In *Huntley & Huntley, Inc. v. Borough Council of the Borough of Oakmont*, the town of Oakmont made drilling a conditional use, meaning it could only be allowed in a given location pursuant to a specially granted authorization by the town.⁴⁹ In *Range Resources Appalachia, LLC v. Salem Township*, the township of Salem enacted a “comprehensive regulatory scheme” that regulated a number of technical aspects of fracking beyond its location and land use impacts.⁵⁰ The court held that Oakmont’s ordinance could stand, but Salem’s ordinance must fall.

To reach this conclusion, the court read the express preemption provision in the Oil and Gas Act against the backdrop of the Pennsylvania Municipalities Planning Code—the legislative grant of land use powers to cities—and reasoned that if the legislature granted land use powers to cities, it intended cities to use those powers unless another state law clearly indicated otherwise, which the Oil and Gas Act did not do.⁵¹ The court also read the Oil and

46. See Wiseman, *supra* note 31, at 317.

47. *Huntley & Huntley*, 964 A.2d at 866; *Range Resources Appalachia LLC v. Salem Twp.*, 964 A.2d 869, 877 (Pa. 2009).

48. *Huntley & Huntley*, 964 A.2d at 858.

49. *Id.* at 857–58, 860.

50. *Range Resources*, 964 A.2d at 870, 875.

51. *Huntley & Huntley*, 964 A.2d at 863, 865–66. Other courts have recognized that an express statutory preemption provision must be read against the backdrop of cities’ statutorily granted powers—particularly the zoning powers. See, e.g., *Anschutz Exploration Corp. v. Town of Dryden*, 940 N.Y.S.2d 458, 461, 466 (Sup. Ct. 2012); *Cooperstown Holstein Corp. v. Town of Middlefield*, 943 N.Y.S.2d 722, 777–79 (Sup. Ct. 2012).

Gas Act against a presumption that zoning addresses concerns that are inherently local and difficult to address on a statewide level.⁵² Under this analysis, Oakmont’s ordinance, which made drilling a conditional use, could stand.⁵³ Salem’s regulatory scheme, on the other hand, went beyond land use into a number of technical issues and therefore fell under the express preemption provision.⁵⁴ A New York trial court reached a similar result in *Anschutz Exploration Corp. v. Town of Dryden*.⁵⁵ The court held that the legislature had not intended to preempt local land use controls with a state oil and gas law, which preempted “all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries,” because local land use regulations do not “relat[e] to” regulation of oil, gas, and solution mining within the meaning of the provision.⁵⁶ Thus, even an express preemption provision does not ensure that a local law in the same policy area is preempted.

These cases demonstrate that, as a matter of statutory interpretation, it will often be difficult to tell at the outset whether a state’s claim of preemption will prevail in court. Of course, the state holds a powerful trump card. If a court interprets a state statute as *not* preempting a local ordinance, the legislature can simply pass a new one that does. For example, after *Huntley & Huntley* established that Pennsylvania’s Oil and Gas Act did not preempt all municipal fracking regulation,⁵⁷ the legislature amended the Oil and Gas Act by adding comprehensive requirements for technical operations, permitting, reporting, and the enforcement of all wells in the state, and explicitly stripping municipalities of virtually all power to regulate fracking.⁵⁸ The legislature’s intent to preempt was abundantly clear.

However, the legislature’s trump card, while powerful, is not all-powerful. When Act 13 was challenged by a coalition of municipalities and interest groups, the Pennsylvania Supreme Court struck it down, holding that it

52. *Huntley & Huntley*, 964 A.2d at 866 (noting that although oil and gas regulation is best managed by an expert state environmental agency, local governments have “unique expertise” to “designate where different uses should be permitted in a manner that accounts for the community’s development objectives, its character, and the ‘suitabilities and special nature of particular parts of the community’”).

53. *Id.*

54. *Range Resources*, 964 A.2d at 877.

55. *Anschutz Exploration Corp.*, 940 N.Y.S.2d at 461.

56. *Id.* at 466–67. Noting the backdrop of statutory local zoning powers, the court pointed to the fact that the express preemption provision at issue did not explicitly mention zoning, unlike two other state laws that expressly superseded local control over the siting of hazardous waste and commercial residential facilities. *Id.* Moreover, those latter statutes included provisions to ensure that traditional zoning concerns were taken into account, while the state oil and gas law did not even allow the agency granting permits to consider such factors. *Id.* at 467.

57. *Huntley & Huntley*, 964 A.2d at 866.

58. *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 913 (Pa. 2013).

violated an unusual environmental rights provision in the Pennsylvania Constitution.⁵⁹ As more legislatures push their preemptive powers to their limits, the constraining powers of state constitutions are likely to come into increasingly sharp focus.⁶⁰

B. The Value of Push-Pull Preemption to Democratic Deliberation

At the end of a legal battle over preemption, one of two things will happen. The law may stand validated, in which case it can be enforced. Alternatively, the law may be invalidated, in which case it is unenforceable. Whether a law is invalidated or it stands, the push and pull serves important functions for our system of democratic self-governance.

As a starting point, the act of passing the local law communicates a uniquely strong commitment to the policy enacted. It is one thing to advocate for a policy in the abstract; it is something else entirely to demonstrate a willingness to live under such a policy and to take action to make it happen. The passage of a gun control law, for example, sends a qualitatively different message than does a speech advocating for the passage of gun control laws in the abstract. It sends a particularly powerful message when the local government passes a law despite triggering a preemption battle with the state by doing so. The battle over preemption of the fracking ordinance in Denton, Texas, for example, garnered international headlines.⁶¹

The audience for this message is not simply the local electorate. Cities look to each other for policy ideas and inspiration, and local laws influence the national debate by lending legitimacy to new or contested ideas—such as support for action on climate change or LGBTQ rights.⁶² Local lawmaking also influences the public debate because cities are “laboratories of democracy”⁶³ where new ideas, or variations on similar ideas, can be road-

59. *Id.* at 979, 983–84.

60. *See, e.g.,* City of Austin’s Opposed Motion to Intervene at 16–17, City of San Antonio v. Texas, No. 5:17-cv-00489 (W.D. Tex. June 1, 2017) (arguing that a Texas anti-sanctuary cities law violates home rule provisions of the Texas Constitution).

61. *See* Malewitz, *supra* note 7 (noting that the city–state battle over fracking preemption made “international headlines”).

62. *See* Claire Cain Miller, *Liberals Turn to Cities To Pass Laws and Spread Ideas*, N.Y. TIMES (Jan. 26, 2016), https://www.nytimes.com/2016/01/26/upshot/liberals-turn-to-cities-to-pass-laws-and-spread-ideas.html?mcubz=0&_r=0.

63. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Justice Brandeis was referring to states, but the principle that democracy is enhanced when different ideas are developed and tested at a smaller scale applies as well, if not better, to cities.

tested and refined.⁶⁴ This is particularly true because local lawmaking presents heightened opportunities for citizen participation. Without romanticizing local lawmaking, which can be dominated by elites or otherwise can be less than fully inclusive, it does frequently offer citizens direct opportunities to participate in policymaking, such as task force involvement in drafting ordinances,⁶⁵ direct citizen dialogue,⁶⁶ formal roles for civic associations,⁶⁷ and public hearings.⁶⁸ Local lawmaking thus allows citizens a unique role in advocating and shaping homegrown policies that, in turn, can shape state and national debates.

In addition to influencing the national debate on a substantive policy area, the push and pull of preemption challenges serve an entirely different function of shaping the balance of state-local power. When a city passes a law, it communicates a belief that the city has the authority to pass that law. If a preemption challenge ensues and the city wins, the city has protected its ability to exercise the powers granted to it by the state's constitution and laws to their fullest extent. This result serves important principles of separation of powers by ensuring it is the judiciary, and not the state legislature or executive branch, that provides binding interpretations of the laws and the state constitution. In addition, the preemption challenge itself also serves an important communicative function.⁶⁹ Even if the city's challenge fails, the passage of the law and the fight to defend it communicates a strong belief that the city *should* have the claimed power—a message with the potential to influence statewide voters, who ultimately control the balance of state-local power through their legislators.

“Regular” non-punitive preemption allows this push and pull to take place: the consequences for a city that passes a preempted law are legal

64. See Riverstone-Newell, *supra* note 25, at 418–19.

65. See Jody Spear, *Maine Voices: Portland Task Force's Pesticide Ordinance Is Full Of Loopholes*, PORTLAND PRESS HERALD (July 18, 2017), <http://www.pressherald.com/2017/07/18/maine-voices-portland-task-force-pesticide-ordinance-is-full-of-loopholes/> [<https://perma.cc/FUS9-WLSK>].

66. See Doug Gross, *Peachtree Corners Passes New Gun Ordinance*, PEACHTREE CORNERS PATCH (Nov. 16, 2016, 2:15 PM), <https://patch.com/georgia/peachtreecorners/peachtree-corners-passes-new-gun-ordinance> [<https://perma.cc/5LM2-W33L>].

67. See Katherine Gregor, *VMU: Coming Soon Near You*, AUSTIN CHRON. (Mar. 23, 2007), <https://www.austinchronicle.com/news/2007-03-23/458471/> [<https://perma.cc/H49L-5WCC>].

68. INSTITUTE FOR LOCAL GOV'T, GETTING THE MOST OUT OF PUBLIC HEARINGS: AN IDEAS INVENTORY 2 (2005), http://www.ca-ilg.org/sites/main/files/file-attachments/resources_getting_the_most_3__11-7.pdf [<https://perma.cc/8BBH-SQZA>].

69. See *infra* pp. 43–45 (discussing First Amendment protections for challenges to state laws).

bills and an invalid ordinance.⁷⁰ The purpose of punitive preemption laws is to foreclose the legal battle by preventing the lawmaking process from happening in the first place through imposing weighty consequences on cities that test the boundaries of preemption and lose. The next section describes the means by which these laws do so.

III. EXAMPLES OF PUNITIVE PREEMPTION

Preemption has long been a feature of our legal landscape, and preemptive laws have long been structured as a prohibition on local lawmaking. In *Romer v. Evans*, for example, the Supreme Court struck down, on equal protection grounds, a state constitutional amendment that provided that no unit of Colorado government shall “enact, adopt, or enforce” any local anti-discrimination laws protecting LGBTQ persons.⁷¹ However, the consequences of a city passing a law that turns out, after challenge, to be preempted are typically nothing more than that the law cannot be enforced, and that the city lost whatever expenses it incurred unsuccessfully trying to defend it.⁷² Punitive preemption, on the other hand, attaches harsh consequences to passing laws, endorsing policies, or even violating the undefined “spirit” of a state law. Thus, local officials considering enacting a policy or law that may be preempted do not merely face the prospect of a court challenge; they face the potential for fines, civil liability, criminal sanction, and other penalties as creative as they are severe, enacted precisely to prevent local governments from passing laws or enacting policies that are, or may be, preempted in the first place.

A. *Removal from Office*

Texas offers perhaps the most straightforward example of punitive preemption that directly limits speech through a prohibition on “adopt[ing], enforce[ing], or endor[s]ing” a sanctuary cities policy, sanctionable by—among other potential penalties—removal of an elected official from office for making the prohibited endorsement.⁷³ The First Amendment implications of the prohibition on “endorsement” are clear: indeed, the Fifth Circuit

70. See, e.g., *City of Longmont v. Colo. Oil & Gas Ass’n*, 369 P.3d 573, 579, 583, 585 (Colo. 2016) (en banc) (affirming an injunction barring the enforcement of a local fracking ban).

71. *Romer v. Evans*, 517 U.S. 620, 624 (1996) (quoting COLO. CONST. art II, § 30b).

72. See, e.g., *Webb v. City of Black Hawk*, 295 P.3d 480, 486 (Colo. 2013).

73. S.B. 4, Tex. Leg. Sess. 85(R) (codified at TEX. GOV’T CODE § 752.053(a)(1)).

affirmed a district court's injunction of the endorsement provision on First Amendment grounds.⁷⁴ Separate from the "endorsement" issue, however, the threat of removal from office for taking an action the state considers preempted is a punitive provision that could be attached to any number of policies or laws.

Senate Bill 4 (S.B. 4), the sanctuary cities bill, was passed in a show of political theater that has become a regular occurrence in strongly Republican-dominated Texas,⁷⁵ and is an apt metaphor for city-state relations in many areas of the country. An estimated 1,000 shouting protestors packed the pink dome of the Capitol, others occupied the governor's office, and one particularly creative group blared mariachi music outside the governor's mansion at 3 a.m.⁷⁶ Elected officials played their part with aggressive shoving and alleged death threats on the House floor.⁷⁷ When the curtain fell, the legislature had passed a bill intended to foreclose any Texas city from implementing a sanctuary cities policy.⁷⁸

A "sanctuary" city is generally understood to be one that limits its cooperation with requests by the federal immigration officials to hold persons while the federal officials inquire into the detainee's immigration status.⁷⁹ For example, Travis County—the territory of which is largely taken up by the City of Austin and its suburbs—announced its policy was to only comply with civil detainer requests when supported by a warrant or backed by

74. *City of El Cenizo v. Texas*, 890 F.3d 164, 185 (5th Cir. 2018); Order Granting Preliminary Injunction at 44, 93–94, *City of El Cenizo v. Texas*, 264 F. Supp. 3d 744 (W.D. Tex. Aug. 30, 2017) (No. SA-17-cv-404).

75. See Aman Batheja, *Texas' Shift from Blue to Red Informs 2014 Races*, TEX. TRIB. (June 6, 2014, 6:00 AM), <https://www.texastribune.org/2014/06/06/how-texas-shifted-blue-red-informs-democrats-today/> [<https://perma.cc/B5JU-2QAR>] (describing Republican dominance in the legislature, congressional delegation, and the holding of every statewide office since 1998). Progressive political theater is perhaps best embodied by the eleven-hour filibuster by state legislator Wendy Davis that delayed a controversial set of restrictions on abortion providers. See Manny Fernandez, *In Texas, A Senator's Stand Catches the Spotlight*, N.Y. TIMES (June 26, 2013), <http://www.nytimes.com/2013/06/27/us/politics/texas-abortion-bill.html?mcubz=0>.

76. Gus Bova, *What You Need To Know About the SB 4 Legal Battle*, TEX. OBSERVER (June 19, 2017, 2:02 PM), <https://www.texasobserver.org/need-know-sb-4-legal-battle/> [<https://perma.cc/LT5E-3F8W>].

77. See Peter W. Stevenson, *A Texas Republican Is Accused of Threatening to 'Put A Bullet in One of My Colleagues' Heads*, WASH. POST (May 30, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/05/29/a-texas-republican-called-ice-on-protesters-then-lawmakers-started-to-scuffle/?utm_term=.646a5afaa8e6 [<https://perma.cc/57FD-K87N>].

78. See *id.*

79. Tal Kopan, *What Are Sanctuary Cities, and Can They Be Defunded*, CNN POL. (Jan. 25, 2017, 5:09 PM), <http://www.cnn.com/2017/01/25/politics/sanctuary-cities-explained/index.html> [<https://perma.cc/7Q4S-F5NC>].

probable cause.⁸⁰ An important point is that sanctuary cities policies are often a form of *inaction*—a failure to enforce federal laws that does not necessarily require an affirmative act of local lawmaking.⁸¹ Thus, anti-sanctuary cities laws are not always technically preemption, although they are closely analogous.

Under S.B. 4, a “local entity” or campus police department is forbidden to “adopt, enforce, or endorse a policy” that “prohibits or materially limits the enforcement of immigration laws,” that demonstrates by a pattern or practice that immigration laws are not being enforced, or that interferes with an officer’s cooperation with immigration agents.⁸² Any citizen residing in that entity’s jurisdiction may file a complaint with the Texas Attorney General alleging the city is out of compliance, at which point the Attorney General may petition the district court for a writ of mandamus compelling the local entity to comply.⁸³

S.B. 4 includes a range of enforcement mechanisms. Entities found to be in violation face civil penalties of up to \$1,500 per day for the first violation and \$25,000 per day for subsequent violations.⁸⁴ A sheriff, chief of police, or other person with “primary authority for administering a jail” commits a misdemeanor involving official misconduct if that person refuses to comply with a detainer request.⁸⁵ And an elected official may be removed from office for “violat[ing] Section 752.053”—the section of S.B. 4 prohibiting the “adopt[ion], enforce[ment], or endorse[ment]” of a sanctuary cities policy.⁸⁶

The question that immediately arises from the removal penalty is where the state found the authority to remove a local official from office at all. The Texas Constitution authorizes cities with a population greater than 5,000 to adopt a charter that, among other things, defines how elected officials are elected or removed from office.⁸⁷ However, the removal provision makes use of the quo warranto provision of Texas law. Quo warranto stems from an ancient English writ that allowed a person to challenge the

80. See, e.g., *City of Austin’s Complaint in Intervention at 4, City of San Antonio v. Texas*, No. 5:17-cv-00489 (W.D. Tex. June 2, 2017).

81. See Kopan, *supra* note 79.

82. S.B. 4, Tex. Leg. Sess. 85(R) (codified at TEX. GOV’T CODE § 752.053(a)–(b)).

83. *Id.*

84. *Id.*

85. TEX. PENAL CODE § 39.07 (2017).

86. S.B. 4, Tex. Leg. Sess. 85(R) (codified at TEX. GOV’T CODE §§ 752.053(a)(1), 752.0565).

87. TEX. CONST. art. XI, § 5.

validity of an official's claim of office.⁸⁸ In its current form, it offers a procedure for the state to remove from office any "public officer" who unlawfully holds an office or "does an act or allows an act that by law causes a forfeiture of his office."⁸⁹ S.B. 4, in turn, provides that noncompliance with section 752.053 is such an act.⁹⁰ The result is that the Attorney General, or a county or district attorney, may now file a proceeding in state court seeking removal of officials for endorsing sanctuary cities policies.⁹¹ An official so removed "shall" pay the cost of prosecution, and may also face fines.⁹²

In granting a preliminary injunction against S.B. 4, the district court focused on the argument that a policy prohibiting "endorse[ment]" is facially invalid under the First Amendment as a restriction on the officials' speech⁹³ and did not consider the propriety of this use of the quo warranto provisions of state law. If enacting a policy with which state legislators disagree may permissibly be defined as official misconduct for which the quo warranto remedy is available, the results could be significant. For example, the state could conceivably declare the adoption of a policy premised on a belief that human activity is causing the climate to change to be a removable offense. The implications are also not limited to Texas because most states have some form of official misconduct statute. As discussed below, Kentucky legislators used an official misconduct statute to punish the passage of gun-related laws.⁹⁴ While many such laws appear written to address corruption or bribery, the language is often broad,⁹⁵ and in any case, nothing prevents the legislature from amending their misconduct

88. JAMES L. HIGH, A TREATISE ON EXTRAORDINARY LEGAL REMEDIES EMBRACING MANDAMUS, QUO WARRANTO, AND PROHIBITION 545 (Chicago, Callaghan & Co. 3d ed. 1896) (describing the history of the writ, which dates back to at least 1198).

89. TEX. CIV. PRAC. & REM. CODE ANN. § 66.001 (West 2008). Older Texas cases stand for the proposition that quo warranto "is employed only to test the actual right to an office or franchise . . . and cannot be used to test the legality of the official action of public or corporate officers." *State v. Rigsby*, 43 S.W. 271, 272 (Tex. Civ. App. 1897). However, the current statute, last amended in 1985, appears to have a broader reach. *See* TEX. CIV. PRAC. & REM. § 66.001.

90. TEX. GOV'T CODE ANN. § 752.0565(a) (West 2017) ("For purposes of Section 66.001 . . . a person holding an elective or appointive office of a political subdivision of this state does an act that causes the forfeiture of the person's office if the person violates Section 752.053.").

91. TEX. CIV. PRAC. & REM. CODE ANN. § 66.003(1) (West 2008).

92. *Id.* § 66.003(2)–(3).

93. Order Granting Preliminary Injunction, *supra* note 74, at 33–48. The court held the law both overbroad and void for vagueness. *Id.*

94. *See infra* Section III(C).

95. *See, e.g.*, ALASKA STAT. ANN. § 11.56.850 (West 2017) (explaining that acts constitute official misconduct only if undertaken "with intent to obtain a benefit or to injure or deprive another person of a benefit"); WYO. STAT. ANN. § 6-5-107 (West 2017) (explaining that public offenses justifying removal must be committed "with intent to obtain a pecuniary benefit or maliciously to cause harm to another").

statutes to remove such limitations. The threat of removal from office for taking action that conflicts with state law therefore provides a strong disincentive to pass laws testing the boundaries of the city's authority.

B. Cutting Off Funding

If a city ordinance tests the boundaries of a preemptive state law, is the ordinance an illegitimate attempt to exploit a loophole or a legitimate effort to use the full range of a city's non-preempted powers? In Arizona, the legislature determined it was the former⁹⁶ and passed a sweeping law that cuts off the city's funding upon a determination by the Attorney General that a city ordinance violates state law or the Arizona constitution.

The law, S.B. 1487,⁹⁷ allows any legislator to request an Attorney General investigation into whether "any ordinance, regulation, order or other official action adopted or taken by the governing body" of a local government violates state law or the Arizona Constitution.⁹⁸ Upon receiving such request, the Attorney General has thirty days to investigate the local action and, if the Attorney General concludes the action violates state law or the Constitution, requires the treasurer to withhold the city's share of state funds until the law is repealed and redistribute the funds to other cities.⁹⁹ In other words, S.B. 1487 grants the Attorney General the unilateral power to impose drastic penalties on local governments based on the Attorney General's own view that the law is preempted.¹⁰⁰ The Attorney General may also conclude the local action "may violate" a provision of state law, in which case it may initiate an expedited special proceeding in the state Supreme Court.¹⁰¹ If it does so, the local government is required to post a bond equal to the amount of state-collected revenue distributed to it over the last six months.¹⁰²

An Attorney General finding that a local ordinance violates state law has significant financial consequences. For example, after the Attorney

96. Tim Steller, *Steller: City-State Debates Always Return to Gun Issue*, ARIZ. DAILY STAR (Dec. 13, 2016), http://tucson.com/news/local/columnists/steller/steller-city-state-debates-always-return-to-gun-issue/article_1d213890-1e5e-5be5-84c6-8a1ec575fc4a.html [https://perma.cc/2FYN-CE9W].

97. S.B. 1487, 52d Leg., 2d Reg. Sess. (Ariz. 2016) (codified at ARIZ. REV. STAT. ANN. § 41-194.01 (West 2016)).

98. ARIZ. REV. STAT. ANN. § 41-194.01(A).

99. *Id.* § 41-194.01(B)(1).

100. The law therefore appears to present significant separation of powers concerns.

101. ARIZ. REV. STAT. ANN. §§ 41-194.01(B)(2), 42-5029(L).

102. *Id.* § 41-194.01(B)(2).

General concluded that the City of Bisbee’s ban on plastic bags violated state law, the City repealed the ordinance rather than lose \$2 million in state-collected revenue—a quarter of the city’s annual budget.¹⁰³ The bond requirement under a “may violate” scenario also provides a significant disincentive to defending an ordinance in court. Tucson, for example, had to post a \$57 million bond to challenge the Attorney General’s finding that its policy of destroying confiscated guns “may violate” state law.¹⁰⁴ The law therefore provides an enormous disincentive to passing any laws that could be interpreted as preempted.

More ominously, S.B. 1487 covers any “official action” taken by a governing body¹⁰⁵ and leaves the term undefined; the law therefore applies to more than just the passage of a law, and would appear to cover the passage of symbolic resolutions¹⁰⁶ or actions related to the city’s internal operations.¹⁰⁷ For example, if the state decided to prohibit local climate action, a local commitment to purchase renewable energy could be impossible under S.B. 1487.¹⁰⁸ In other words, S.B. 1487 could be applied in ways directly analogous to S.B. 4’s prohibition on the “endorse[ment]” of a policy.

The reach of the law is enormous and growing. In the same session in which S.B. 1487 was passed, the Arizona legislature vastly expanded the universe of state laws with which a local enactment could conflict, passing

103. Dustin Gardiner, *Bisbee Repealing Plastic-Bag Ban To Dodge State Bullet*, REPUBLIC, (Oct. 31, 2017, 6:26 PM), <https://www.azcentral.com/story/news/politics/arizona/2017/10/31/bisbee-plastic-bag-ordinance-repeal-attorney-general-mark-brnovich-ruling/819584001/> [https://perma.cc/P7NA-HJN7].

104. See Elvia Diaz, *Tucson’s Gun Fight Isn’t About Guns*, AZCENTRAL (Dec. 15, 2016), <https://www.azcentral.com/story/opinion/op-ed/elviadiaz/2016/12/15/tucson-gun-fight-republicans/95441600/> [https://perma.cc/8L8F-CXY9].

105. S.B. 1487, 52d Leg., 2d Reg. Sess. (Ariz. 2016) (codified at ARIZ. REV. STAT. ANN. § 41-194.01(A) (West 2016)).

106. See, e.g., *City Council Passes Resolution Opposing Cuts to Federal Arts Funding*, CITY MINNEAPOLIS NEWS (Apr. 28, 2017), <http://news.minneapolismn.gov/2017/04/28/city-council-passes-resolution-opposing-cuts-federal-arts-funding/> [https://perma.cc/WH57-9ZWE].

107. As a practical matter, the law also turns the state attorney general into a new zoning board of appeal. The first request for an attorney general investigation was brought by a legislator on behalf of residents aggrieved by the Town of Snowflake’s decision to grant a special use permit to a marijuana greenhouse, which the legislator claimed violated various procedural requirements and the prohibition on contract zoning. See MARK BRNOVICH, STATE OF ARIZ. OFFICE OF THE ATTORNEY GENERAL, INVESTIGATIVE REPORT NO. 16-001, RE: SNOWFLAKE TOWN COUNCIL’S APPROVAL OF A SPECIAL USE PERMIT AND MEDICAL MARIJUANA CULTIVATION FACILITIES AGREEMENT FOR COPPERSTATE FARMS, LLC (2016), <https://www.azag.gov/complaints/sb1487-investigations/pending-sb1487-investigations> [https://perma.cc/79V5-LGQ8].

108. See *Hundreds of U.S. Mayors Endorse Switch to 100% Renewable Energy by 2035*, GUARDIAN (June 26, 2017, 10:53 AM), <https://www.theguardian.com/environment/2017/jun/26/hundreds-of-us-mayors-vow-not-to-wait-for-trump-on-clean-energy> [https://perma.cc/7YAJ-PTH9].

bills preempting local regulation of dog breeders, short-term rentals, plastic bags, and more.¹⁰⁹ It considered but rejected others, including proposed bans on sanctuary city policies and backyard chicken regulations.¹¹⁰ It also passed S.B. 1524, which provides that unless specifically authorized, a local government, county, or agency may not “take any action that increases the regulatory burdens on a person unless there is a critical or urgent need that has not been addressed by legislation or self-regulation within the proposed regulated field.”¹¹¹ What constitutes a “critical or urgent need” is undefined. Although the express focus of S.B. 1524 is “sharing economy” companies such as Airbnb,¹¹² the law is broadly worded to apply to the regulatory burdens on any “person.” Thus, the combination of broad preemption laws and S.B. 1487 erects significant practical barriers to a wide range of local enactments that “may violate” a state law.

C. Criminalizing Lawmaking

While S.B. 1487 targets the municipal corporation, other punitive preemption provisions target the lawmakers themselves. At least two states have passed laws that actually criminalize the passage of preempted local laws. In 2012, the Kentucky legislature adopted, as part of a package of gun-friendly bills, a law aimed at ensuring no local government steps in to fill any remaining gaps.¹¹³ H.B. 500¹¹⁴ provides that no local government “or any person acting under [its] authority . . . may occupy any part of the field of regulation of the manufacture, sale, purchase, taxation, transfer, ownership, possession, carrying, storage, or transportation of firearms, ammunition, components of firearms, components of ammunition, firearms accessories, or combination thereof.”¹¹⁵ It declares any such “law, regulation, or policy” null and void

109. See Alia Beard Rau, *Legislature Keeps Its Thumb on Arizona Cities*, REPUBLIC (May 9, 2016, 5:01 AM), <http://www.azcentral.com/story/news/politics/legislature/2016/05/09/legislature-keeps-its-thumb-arizona-cities/83842924/> [https://perma.cc/G8LB-UEEK].

110. *Id.*

111. S.B. 1524, 52d Leg., 2d Reg. Sess. (Ariz. 2016).

112. *Id.*; see also Steven Totten, *Governor Ducey Signs Airbnb Bill, Other Sharing Economy Bills*, PHX. BUS. J. (May 12, 2016, 1:57 PM), <https://www.bizjournals.com/phoenix/blog/business/2016/05/governor-ducey-signs-airbnb-bill-other-sharing.html> [https://perma.cc/89BV-FKSQ] (describing S.B. 1524 as targeting companies such as Airbnb).

113. *Kentucky Governor Signs Three NRA-Backed Bills into Law*, NRA INST. FOR LEGIS. ACTION (Apr. 12, 2012), <https://www.nraia.org/articles/20120412/kentucky-governor-signs-three-nra-backed-bills-into-law> [https://perma.cc/A3CN-FXLA].

114. KY. REV. STAT. ANN. § 65.870 (West 2012).

115. *Id.* § 65.870(1).

and requires the immediate repeal of any laws, regulations, or policy in violation.¹¹⁶

Among the punitive enforcement provisions¹¹⁷ is one that makes it a form of “official misconduct” for a “public servant” to “violat[e] this section.”¹¹⁸ Official misconduct in Kentucky is a criminal misdemeanor punishable by jail time of up to twelve months.¹¹⁹ The law is highly vague: how, precisely, does “any person” “occupy any part of the field” of firearms regulation?¹²⁰ By voting on a gun ordinance? By serving in a city that has failed to repeal one? By attending in an official capacity a mayors’ conference on combatting gun violence? The chilling potential of Kentucky’s law is extreme.

Arizona, however, took the concept a step farther by making it a *felony* to pass a smart gun law.¹²¹ The source of this high degree of legislative concern is unclear. The express inspiration for the 2017 bill was a 2002 New Jersey law requiring all guns sold in the state to employ “smart” technology.¹²² In the ensuing fifteen years, no local government in Arizona passed any similar ordinance. But if they get tempted to try, H.B. 2216¹²³ now provides it is unlawful to “require a person to use or be subject to electronic firearm tracking technology or to disclose any identifiable information about the person or the person’s firearm for the purpose of using electronic firearm tracking technology.”¹²⁴ Local officials who “require” anyone to do so face

116. *Id.* § 65.870(2)–(3).

117. For a discussion of its citizen suit provision, see *infra* Section III(D).

118. KY. REV. STAT. ANN. § 65.870(6) (“A violation of this section by a public servant shall be a violation of either KRS 522.020 or 522.030.”). Section 522.020 governs first-degree official misconduct: “(1) A public servant is guilty of official misconduct in the first degree when, with intent to obtain or confer a benefit or to injure another person or to deprive another person of a benefit, he knowingly: (a) Commits an act relating to his office which constitutes an unauthorized exercise of his official functions; or (b) Refrains from performing a duty imposed upon him by law or clearly inherent in the nature of his office; or (c) Violates any statute or lawfully adopted rule or regulation relating to his office. (2) Official misconduct in the first degree is a Class A misdemeanor.” *Id.* § 522.020. Section 533.030 governs second-degree official misconduct, which is when the official acts in violation of Section 1(a)–(c) without the intent to obtain a benefit or injure another. *Id.* §§ 522.030, 522.010. Second-degree misconduct still carries the threat of jail time up to ninety days. *Id.* § 532.090(1)–(2).

119. *Id.* §§ 522.020(2), 532.090(1)–(2).

120. *Id.* § 65.870(1).

121. Smart guns typically employ fingerprint recognition or radio frequency identification triggered by a ring or bracelet to render the gun operable only by its owner. See SENATE RESEARCH, ARIZ. STATE SENATE, AMENDED FACT SHEET FOR H.B. 2216, at 1–2 (2017), <https://apps.azleg.gov/BillStatus/GetDocumentPdf/452284> [<https://perma.cc/4TBL-XADD>].

122. *Id.*

123. H.B. 2216, 53d Leg., 1st Reg. Sess. (Ariz. 2017) (codified at ARIZ. REV. STAT. ANN. § 13-3122 (2017)).

124. ARIZ. REV. STAT. ANN. § 13-3122(A).

a minimum of one year and maximum of nearly four years' imprisonment, and a fine of up to \$150,000.¹²⁵

D. Enhanced Citizen Suit Provisions

Several other states have taken the approach of facilitating private preemption suits against local governments, and making it more difficult for cities to defend themselves.¹²⁶ Florida, for example, enforces its intent to “occupy[] the whole field of regulation of firearms and ammunition”¹²⁷ with a powerful citizen suit provision aimed at local officials. Florida’s section 790.33¹²⁸ authorizes any citizen or organization “adversely affected”¹²⁹ by a local enactment to bring suit against the local government. It further prohibits the local government from using public funds to “defend or reimburse the unlawful conduct of any person found to have knowingly and willfully violated” the section.¹³⁰ The law therefore presents the puzzle of how the local government will determine whether it can participate in its official’s legal defense prior to the official being adjudged a willful violator. A finding of a “knowing and willful” violation subjects the responsible elected officials to civil fines of up to \$5,000 and possible removal from office by the governor.¹³¹ Consequences for the municipality are also significant. Section 790.33(f) provides that a court “shall” award attorney’s fees and costs and actual damages up to \$100,000 to the “prevailing plaintiff.”¹³² This means individuals or nonprofits can bring suits with few consequences: if they win, they receive costs; if they lose, they don’t have to pay the city’s costs.¹³³

Kentucky’s section 65.870, discussed above, contains a similar provision to Florida’s citizen suit provision—indeed, much of the language is identical.¹³⁴

125. *Id.* §§ 13-703(H)–(J), 13-801(A).

126. *See, e.g.*, OKLA. STAT. ANN. tit. 21, § 1289.24(D) (West 2015) (creating civil liability for violating a firearms preemption provision).

127. FLA. STAT. ANN. § 790.33(1) (West 2015).

128. *Id.* § 790.33.

129. *Id.* § 790.33(3)(f).

130. *Id.* § 790.33(3)(d).

131. *Id.* § 790.33(3)(c).

132. *Id.* § 790.33(3)(f)(1)–(2).

133. In contrast, Kentucky’s law provides for costs, but not damages, for the “prevailing party.” KY. REV. STAT. § 65.870(4)–(5) (2017).

134. The similar wording of preemptive laws is likely attributable to advocacy organizations such as the American Legislative Exchange Council (ALEC), which provide

It creates a private cause of action for any person or organization “adversely affected by any ordinance, administrative regulation, executive order, policy, procedure, rule, or any other form of executive or legislative action” promulgated or enforced “in violation of this section or the spirit thereof.”¹³⁵ The law also strips government employees of any immunity.¹³⁶ When a local government faces potential liability for violating the letter—or, in Kentucky’s case, the undefined “spirit” of a state law—the chilling potential for local lawmaking is extreme.

E. The Effects of Punitive Preemption

This section demonstrates that punitive preemption laws often reach undeniably expressive conduct—the endorsement of a policy under S.B. 4, or an expressive “official action” under S.B. 1487, such as a symbolic resolution or official speech.¹³⁷ The First Amendment implications are clear for state laws that target what could very imperfectly be called “purely expressive” activities that express support for a particular policy without substantive legal effect.

But these punitive preemption laws also burden lawmaking. Lawmaking, as an act of governing with substantive legal effect, less obviously merits First Amendment protections. At the same time, and as discussed above, local lawmaking serves unique communicative and deliberative functions related to both the substantive policy and the balance of state-local power through the unique public debate that inevitably precedes a law’s passage and through the substantive act of passing the law and then defending it against preemption challenge. The following Part argues that a number of recognized strands of free speech doctrine suggest viable First Amendment challenges to punitive preemption laws.

IV. THE FIRST AMENDMENT AND PUNITIVE PREEMPTION

When a state law prohibits a person from “endorsing” a policy, as did Texas’ S.B. 4, the intuition is immediate that the First Amendment is implicated. An official’s “endorsement” of a policy can come in many forms, from public speeches to dinner-party conversation, and the Court has been

model state laws. See Rau, *supra* note 109 (noting the prevalence of ALEC model legislation in the Arizona legislature).

135. KY. REV. STAT. § 65.870(4).

136. *Id.*

137. As noted above, “preemption” is not always the perfect term for such laws, as the action being forbidden is not lawmaking; however, this Article uses it as admittedly imprecise shorthand because of its close parallels to preemption and because some provisions, such as S.B. 1487, would also have a preemptive effect when applied to lawmaking.

clear that “statements by public officials on matters of public concern must be accorded First Amendment protection.”¹³⁸

It is less intuitive that the lawmaking process could also implicate the First Amendment. After all, there exists no clear case law standing for the premise that passing a law is protected speech, and one Supreme Court case held, in the context of a challenge to a state conflict-of-interest law, that a legislator has no personal expressive interest in the act of voting.¹³⁹ However, the passage of a law involves a lot of *different* speakers and speech that may be burdened by limitations on local lawmaking. Such limitations affect numerous kinds of speech by the elected officials who draft, discuss, and ultimately vote on local laws. They affect the citizens who put local officials in office to enact policies they favor and who express their enthusiasm or opposition for those policies during the lawmaking process. Passing a law may also be a step in bringing a legal challenge, arguing that the local law is not validly preempted. Thus, lawmaking is about far more than the personal expressive functions that voting may serve for a lawmaker; it implicates a broad swath of political speech that arises only in the context of lawmaking.

However, it is also important to note that different First Amendment arguments apply to laws burdening what can imperfectly be called “pure expression,” such as S.B. 4’s “endorse[ment]” provision, and those burdening lawmaking. Section A of this Part considers the First Amendment arguments against laws restricting local officials’ expression that has no direct legal effect, such as a speech advocating sanctuary cities policies.¹⁴⁰ The aim of this Section is to reject arguments that a state may restrict local officials’ speech by virtue of the legal relationship between local governments and the government of the state in which they lie.

Section B considers arguments for First Amendment protection for the passage of laws that might be preempted. In referring to laws that are “possibly” or “might be” preempted, the Article intends to capture the fact that a city that passes a law typically has a good-faith argument that the local law is *not* preempted. While it is also possible to conceive of a category

138. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 574 (1968).

139. *See Nev. Comm’n on Ethics v. Carrigan*, 564 U.S. 117, 127–29 (2001).

140. Somewhere in between “pure” expression and lawmaking is communication with the goal of effectuating an unofficial policy. For example, if a sheriff informally tells an employee not to comply with federal detainer requests, this is neither lawmaking nor “pure” expression. However, a prohibition on “endorsing” a policy *would* cover “pure” expression, such as the pro-sanctuary-cities speech, and it is this aspect of the law that will be discussed.

of “protest” laws—laws passed without a good-faith belief in their viability, purely for the political or expressive value of doing so¹⁴¹—such laws are not the primary focus of this Article. Section B begins by identifying the speech implicated by restrictions on lawmaking, and then explores specific First Amendment doctrines supporting an argument that such restrictions burden that speech.

The argument that local lawmaking can enjoy First Amendment protections against punitive preemption is not an argument that states cannot, as a substantive matter, preempt local laws. This Article accepts that if a state law validly preempts a local law, the local law has no effect and cannot be enforced.¹⁴² However, the question of whether a preempted local law can be enforced—it cannot—is a different question from whether states can burden the passage of laws that may turn out to be preempted and unenforceable. This Article offers a number of arguments from existing First Amendment for why a state cannot do so.

A. *State Regulation of Local Officials’ Speech*

The proposition is straightforward that a law like Texas’ S.B. 4, which imposes penalties on the “endorse[ment]” of a policy with which the state disagrees, burdens speech based on viewpoint. The Supreme Court considers viewpoint discrimination an “egregious” form of content discrimination, and has warned that “[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.”¹⁴³ On the other hand, scholars have noted that many permissible laws, such as securities disclosure requirements or prohibitions on cigarette advertising, limit speech based on the viewpoint

141. Stahl, *supra* note 8, at 150 (“Democratic city officials may enact legislation they know will be preempted in order to demonstrate their commitment to progressive causes.”).

142. It is possible to conceive of an argument to the contrary grounded in representational rights, perhaps flowing from the demonstrated tendency of people to move to cities where they can be surrounded by people who can share their ideological preferences. However, such an argument faces significant challenges. Thus, the fact that a minority of voters in a state want a certain policy and are not able to implement it is not necessarily a problem, even if that minority all lives together in a certain place. To the contrary, one can easily argue that this is democracy working as it should, unless equal protection or other constitutional guarantees are implicated. *See Romer v. Evans*, 517 U.S. 620, 645–48 (1996) (Scalia, J., dissenting) (noting that statewide minority is not burdened by inability to use their “geographic concentration” to pass policies they prefer at the local level).

143. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (“Viewpoint discrimination is . . . an egregious form of content discrimination.”); *see also R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992) (invalidating a hate-speech ordinance as viewpoint discrimination).

expressed.¹⁴⁴ Moreover, when the government is involved in facilitating the speech, such as through subsidizing the speech of private individuals or when a government employee speaks in her official capacity, the Court has recognized that the government can decide what message it wants to convey.¹⁴⁵ The question presented by laws such as S.B. 4, then, is whether these or other doctrines enable the state to permissibly limit local officials' speech.

1. Imminent Lawless Action

In justifying punitive preemption, states often argue they are simply trying to prevent local officials from breaking the law.¹⁴⁶ As to a sanctuary cities policy, the state may claim that the policy is aimed at ensuring compliance with federal immigration law, although as a practical matter, such policies are often designed to technically comply with federal immigration law.¹⁴⁷ A broader version of the argument is that because state laws trump local laws, preempted local laws are literally illegal, and therefore punitive preemption presents no problem because it is merely demanding local officials to follow state law, just like everybody else does.¹⁴⁸ It certainly cannot be the answer to a First Amendment inquiry that a state has made a category of speech illegal and therefore the restriction on speech is simply restricting illegal activity—if that were the case, the free speech guarantee would be meaningless. However, the First Amendment does recognize the need to restrict speech with the likely effect of producing imminent lawlessness.¹⁴⁹

144. See Cass R. Sunstein, *Half-Truths of the First Amendment*, 1993 U. CHI. LEGAL F. 25, 27–29.

145. See generally Steven G. Gey, *Why Should the First Amendment Protect Government Speech When the Government Has Nothing To Say*, 95 IOWA L. REV. 1259 (2010) (exploring the government speech doctrine).

146. See Order Granting Preliminary Injunction, *supra* note 74, at 38. According to the Order, the author of S.B. 4 responded to a question about the free speech implications of the bill with the statement, “I don’t know that that’s a free speech issue if you’ve been elected to uphold the law. You don’t get the right as a free speech to go out and not uphold the law.” *Id.*

147. See, e.g., City of Austin’s Opposed Motion to Intervene, *supra* note 60, at 13 (arguing Austin complies with 8 U.S.C. § 1373 and therefore is not a sanctuary city under federal law).

148. See Rau, *supra* note 109. Rau’s article quotes an advocate of Arizona’s S.B. 1487 as saying “If you knowingly violate state law, why should you get a pass? . . . Local jurisdictions are subdivisions of the state; they are violating the law.” *Id.*

149. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (“[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy

This narrow exception cannot be stretched to cover endorsement of a policy. “Imminent lawless action” refers to “violence” or “disorder,”¹⁵⁰ and it is difficult to conceive of a local policy that would incite imminent disorder. While a state could conceivably argue that a sanctuary city policy undermines public safety, this is still a far cry from the paradigm of violence in the streets. The state may argue it is more “likely”¹⁵¹ that lawless action will follow from the endorsement when the speaker is an elected official, but this doesn’t change the fact that the lawlessness at issue is not imminent violence.

2. *Defining and Enforcing Qualifications of Service*

A more colorable variation on the “lawlessness” argument is that the state has an interest in ensuring local officials, as a qualification of service, are law-abiding citizens who respect and uphold the Constitution and laws of the state, and it can therefore punish those who fail to do so.¹⁵² While this proposition, writ large, is uncontroversial, it cannot apply in a blanket fashion to a law that simply recasts a restriction on speech restrictions as a form of official misconduct. The Court has made clear that public officials do not surrender their free speech rights as a condition of service.¹⁵³

Indeed, the Court rejected a closely analogous argument in the civil rights case *Bond v. Floyd*.¹⁵⁴ Julian Bond was a civil rights activist elected to the Georgia House of Representatives in 1965.¹⁵⁵ In his prior work with the Student Non-Violent Coordinating Committee, he had expressed his opposition to the Vietnam War and advocated resisting the draft.¹⁵⁶ After his election, his would-be colleagues claimed his statements advocated law-breaking in the form of violating the selective service laws and otherwise dishonoring the House, and they argued he could not sincerely take the oath of office swearing to uphold the Constitution, which was a requirement

of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is *likely* to incite or produce such action.” (emphasis added)).

150. *Id.*; see also *Hess v. Indiana*, 414 U.S. 105, 106–07 (1973) (per curiam) (holding that First Amendment protects protestor’s statements advocating lawless action because they were “likely to[] produce imminent disorder”).

151. See *supra* note 149 and accompanying text.

152. In defending S.B. 4, the state pointed to provisions allowing the legislature to define the “duties” of sheriffs. See *Order Granting Preliminary Injunction*, *supra* note 74, at 39.

153. See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 574 (1968).

154. 385 U.S. 116 (1966).

155. *Id.* at 118.

156. *Id.* at 118, 120–21.

to be seated as a legislator.¹⁵⁷ The clerk refused to give him the oath, so Bond could not be seated.¹⁵⁸ He brought a First Amendment suit.¹⁵⁹

The state argued that the Georgia Constitution provides qualifications for office—such as not being convicted of a crime of moral turpitude—and also provides that members can be removed, including for undefined “misconduct.”¹⁶⁰ Thus, they argued, the legislature has the authority to determine a legislator is unqualified.¹⁶¹ This includes the authority to determine, based on a legislator’s statements regarding public policy, whether the legislator can sincerely swear to uphold the Constitution.¹⁶²

The Court held that the refusal to allow Bond to take the oath of office violates the First Amendment, because “[s]uch a power could be utilized to restrict the right of legislators to dissent from national or state policy or that of a majority of their colleagues under the guise of judging their loyalty to the Constitution.”¹⁶³ The Court also rejected the legislature’s argument that their actions were justified by Bond’s alleged advocacy for draft-dodging.¹⁶⁴ The state did not argue that it could prevent citizens from advocating against the draft, but argued instead that it could “apply a stricter standard to its legislators,” a premise the Court expressly rejected.¹⁶⁵ Citing the principle that the “central commitment of the First Amendment,” is that “debate on public issues should be uninhibited, robust, and wide-open,”¹⁶⁶ the Court observed

[t]he interest of the public in hearing all sides of a public issue is hardly advanced by extending more protection to citizen-critics than to legislators. Legislators have an obligation to take positions on controversial political questions so that their constituents can be fully informed by them, and be better able to assess their qualifications for office; also so they may be represented in governmental debates by the person they have elected to represent them.¹⁶⁷

157. *Id.* at 123.

158. *Id.* The U.S. Constitution requires state legislators to swear to uphold the Constitution. U.S. CONST. art. VI, cl. 3.

159. *Bond*, 385 U.S. at 125–26.

160. *Id.* at 128–29.

161. *Id.* at 130.

162. *Id.*

163. *Id.* at 132.

164. *Id.* at 132–33.

165. *Id.*

166. *Id.* at 136 (citing *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964)).

167. *Id.* at 136–37.

Bond therefore supports an argument that a state cannot restrict speech through a claimed enforcement of qualifications of office. More broadly, it also recognized the unique value of speech by elected officials, noting “[t]he manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy”¹⁶⁸—both so the electorate can be fully informed and so the legislators can represent the people they were put into office to represent. This latter principle provides support for the argument, discussed below, that lawmaking merits First Amendment protection.

3. Government Employee Speech

Under the doctrine of unconstitutional conditions, the state may not deny a benefit, such as employment, on a basis that infringes constitutionally protected interests—“especially” freedom of speech.¹⁶⁹ However, the Court has also recognized that the government may restrict the speech of its employees “made pursuant to the employee’s official duties.”¹⁷⁰ A state may therefore argue—as Texas did in defending *S.B. 4*¹⁷¹—that because local governments are, legally speaking, administrative subunits of the state, the state may restrict the speech of their officials under the doctrine allowing the government to restrict the speech of its employees.¹⁷²

The arguments against such as position are compelling. As a factual matter, local government officials are not usually employees of the state and may not—in the case of volunteer legislators—be employees at all.¹⁷³ In Texas, for example, local government officials are elected pursuant to a city charter—their salaries are determined by the city charter or city policymaking processes, and they are paid from city, not state, funds.¹⁷⁴ However, even though the state is not acting as an employer, neither is the local official acting as the paradigm “citizen” speaking on a matter of public concern in the model of a school employee writing a letter to the editor about

168. *Id.* at 135–36.

169. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *see also Garcetti v. Ceballos*, 547 U.S. 410, 413 (2006) (“It is well settled that ‘a State cannot condition public employment on a basis that infringes the employee’s constitutionally protected interest in freedom of expression.’” (quoting *Connick v. Myers*, 461 U.S. 138, 142 (1983))).

170. *Garcetti*, 547 U.S. at 413, 426.

171. *See* Order Granting Preliminary Injunction, *supra* note 74, at 39.

172. *Garcetti*, 547 U.S. at 418–19.

173. *See* Order Granting Preliminary Injunction, *supra* note 74, at 39 (noting that although sheriffs’ duties are defined by the legislature, sheriffs are elected by local voters and employed by counties).

174. *See, e.g., Randy Bear, City Council Salaries: To Pay or Not To Pay*, RIVARD REP. (Nov. 24, 2013), <https://therivardreport.com/city-council-salaries-to-pay-or-not-to-pay/> [<https://perma.cc/48ND-4WH3>].

an issue related to public education.¹⁷⁵ But as *Bond* showed, elected officials' speech in their capacities as legislators is just as worthy of protection as that of the "citizen-critic."¹⁷⁶

In rejecting the state's "employee speech" defense of S.B. 4's "endorsement" policy, the district court noted that the employee speech doctrine turns on the role in which the state regulated.¹⁷⁷ Because the state was acting as a sovereign, not an employer, the employee speech doctrine was inapplicable.¹⁷⁸ This reasoning is compelling, and is consistent with Supreme Court precedent, which establishes that the government's "broader discretion to restrict speech" of its employees comes into play "when it acts in its role as employer."¹⁷⁹ Moreover, the Court made clear that in order for the government speech doctrine to apply, "the restrictions [the government] imposes must be directed at speech that has some potential to affect the entity's operations."¹⁸⁰ In other words, the reason the state, as employer, can limit its employees' speech stems from the operational exigencies that affect any employer—a set of interests encompassing professionalism, consistency of message, or promotion of an official position.¹⁸¹ Thus, although an elected official's speech in an official capacity may in some sense be "speech that owes its existence to a public employee's professional responsibilities," restricting that speech does not "simply reflect[] the exercise of employer control over what the employer itself has commissioned or created."¹⁸² An elected official is not hired by the state to implement an official government policy; an official is a citizen who has been elected to represent a larger group of citizens in determining what official policy should be.¹⁸³

175. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 563, 568 (1968).

176. *Bond v. Floyd*, 385 U.S. 116, 136–37 (1966).

177. Order Granting Preliminary Injunction, *supra* note 74, at 34 & n.41, 39.

178. *Id.*

179. *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006).

180. *Id.*

181. *Id.* at 422–23 (explaining operational reasons why the government, as employer, may need to control employee speech). *See generally* Matt Wolfe, *Does the First Amendment Protect Testimony by Public Employees?*, 77 U. CHI. L. REV. 1473 (2010) (discussing post-*Garcetti* case law).

182. *Garcetti*, 547 U.S. at 421–22.

183. Even further afield is the "narrow class of speech restrictions . . . based on an interest in allowing governmental entities to perform their functions." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 341 (2010). Under this line of cases, the Court has held that the government has more leeway to control speech in authoritarian environments like schools, the military, and prisons. *Id.* Although a local government needs to be able to "perform their functions," this line of cases is simply not analogous. *Id.* ("These

In sum, states will likely have a difficult time justifying a limit on local officials' speech as government employee speech or under its interest in ensuring that officeholders are law-abiding citizens. The First Amendment arguments against laws that burden "expressive" official actions, such as statements or resolutions endorsing a policy, are therefore strong.

B. Burdens on Lawmaking

States may also violate the free speech clause of the First Amendment when they burden the passage of laws that may be held preempted. Because lawmaking implicates a number of different speakers and kinds of expression, the starting point of this argument is identifying the speech burdened by punitive preemption. Although the First Amendment protects more than just "speech,"¹⁸⁴ analytic precision is necessary to sustain the novel argument that lawmaking can merit protection.

After identifying the nature of the speech burdened by limitations on lawmaking, this Section explores the strands of First Amendment doctrine offering grounds for protection of that speech. As discussed in Part I, a key point is that cities and states can legitimately disagree over whether the passage of a given law is within the city's powers. Although the legislature of a state that comes out on the losing side of a preemption lawsuit may go back and pass a law that more clearly expresses its preemptive intent, the state's ability to do so may be limited by the state's constitution. Thus, local lawmaking is both a statement about a substantive policy and a statement about the city's authority to pass the law.

1. Lawmaking and Expression

The passage of a municipal ordinance involves a number of speakers and kinds of speech. For example, a business group may bring a policy proposal to a local official's attention, and the official may have the proposal placed

precedents stand only for the proposition that there are certain governmental functions that cannot operate without some restrictions on particular kinds of speech. By contrast, it is inherent in the nature of the political process that voters must be free to obtain information from diverse sources in order to determine how to cast their votes.").

184. See *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (explaining that the First Amendment protects "the right to receive information and ideas"). See generally Ashutosh Bhagwat, *The Democratic First Amendment*, 110 N.W. U. L. REV. 1097 (2016) (discussing the rights protected under the First Amendment, including speech, religion, petition, and assembly). As previously noted, this Article is concerned with the free speech clause; Mark Jonathan Blitz, *Constitutional Safeguards for Silent Experiments in Living: Libraries, the Right To Read, and a First Amendment Theory for an Unaccompanied Right To Receive Information*, 74 UMKC L. REV. 799 (2006) (discussing information-gathering as a protected right).

on the city council agenda for public presentation and comment.¹⁸⁵ The public may also be invited to submit written comments,¹⁸⁶ and the media may cover the proposal, generating more speech. At some point, a draft ordinance is written, usually in whole or in part by municipal employees. The ordinance is debated in a public setting, such as a city council meeting, in which the public may again be invited to share their views. Finally, the city council votes, and elected officials communicate their ayes and nays through a voice vote or some other communicative act, such as pushing a button. The draft ordinance is now a law, the text of which will be incorporated in the municipal code.

These various forms of expression can be divided into at least three categories of speech that may be burdened by punitive preemption laws: the text that constitutes the law, the public debate and discussion surrounding whether the law should be passed, and the officials' votes in favor of passing the law. This Section explores the challenges to conceiving of any of these categories, on their own, as protected speech burdened by punitive preemption on their own. It nevertheless concludes that punitive preemption burdens protected speech because limitations on lawmakers' ability to vote on subjects favored by their constituents necessarily burdens the core political speech of the local electorate—speech at the heart of the First Amendment's protection.

a. The Law Itself

Although this Article does not argue that the law is itself protected speech, it is helpful to take a moment to explain the challenges in the way of such an argument, if for no other reason than to clarify what this Article is *not* arguing. Certainly, the text of the law—the enacted ordinance that becomes part of the city code—would appear to be speech. But if the law is speech, whose speech is it? Although a local law is, in a very real sense, an expression of its citizens' policy preferences, the entity that “speaks” those preferences through the text of the law is the municipal corporation.

185. See, e.g., *City of Austin Economic Development Proposal for National Instruments Corporation – Notice of Public Comment Period and City Council Meetings*, AUSTINTEXAS.GOV, <http://austintexas.gov/page/city-austin-economic-development-proposal-national-instruments-corporation-notice-public-comment-period-and-city-council-meetings> [<https://perma.cc/SB6N-ABMN>] (describing the policymaking process involving a public comment period, a city council informational presentation, and a final vote at a subsequent meeting).

186. *Id.*

This fact is not necessarily dispositive to a free speech inquiry. The Court’s conceptualization, in *Citizens United v. Federal Election Commission*, of a corporation as an association of citizens organized in corporate form would suggest that a municipal corporation could have free speech rights.¹⁸⁷ However, a municipal corporation is also *government*. This may seem to heighten the argument that a law is speech, given that the speech emerged from a democratic policymaking process. But while the Court has recognized that First Amendment limitations, such as viewpoint neutrality, do not apply when the government is the speaker,¹⁸⁸ it also has never held that government speech enjoys First Amendment *protections*. Nor is it likely to do so, because the practical implication of conceptualizing a law as protected speech is that “virtually every *regulatory* act of government could be transformed into an act of government expression, and then sheltered from attack under the shield of the First Amendment.”¹⁸⁹

An additional problem for conceptualizing the enacted law as speech that merits protection comes from the doctrine that cities are administrative subunits of the state.¹⁹⁰ Under the state creature doctrine, a state law limiting official city “speech” could be conceived of as a state limiting its *own* speech, which a state would seem to be allowed to do under the government speech doctrine.¹⁹¹

On the other hand, there are arguments to be made against applying the government speech doctrine to state restrictions of the speech of municipal corporations. For example, in determining whether expression falls under the “government speech” doctrine, the Court has considered a number of factors, such as “direct state control” that do not apply cleanly to the official actions of municipal corporations whose very purpose is to implement

187. *Citizens United*, 558 U.S. at 343, 356 (“Corporations and other associations, like individuals, contribute to the discussion, debate, and the dissemination of information and ideas that the First Amendment seeks to foster. The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not natural persons.” (citations omitted)); *see also id.* at 392 (Scalia, J., concurring) (“[T]he individual person’s right to speak includes the right to speak *in association with other individual persons.*”).

188. *See generally* Gey, *supra* note 145 (describing and criticizing the Court’s government speech doctrine).

189. *See* Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1442 (2001).

190. *See supra* notes 1–2.

191. *See Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009). The government speech doctrine is grounded in the premise that the government could not function if it had to be viewpoint neutral in its own speech, as the government necessarily must take positions in order to govern. *Id.* at 468. Note that this is a distinct issue from the government employee doctrine discussed above, which concerns the circumstances under which the state can limit its *employees’* speech.

diverse local policies.¹⁹² Indeed, a small number of courts have suggested that municipalities may enjoy free speech rights.¹⁹³ For example, writing for the Seventh Circuit, Judge Posner suggested “if federal law imposed a fine on municipalities that passed resolutions condemning abortion, one might suggest that a genuine First Amendment issue would be presented.”¹⁹⁴ While this hypothetical has some similarities to the issues presented in this Article, it does not implicate the significant problem that cities are conceived of as creatures of the state, not the federal government.

An argument may therefore exist that municipal corporations enjoy free speech rights against state restriction. However, given the challenges facing such an argument, this Article will instead focus on the protections that may exist for lawmakers and the public that participates in the policymaking process.

b. Public Debate

A second kind of speech that is burdened by punitive preemption is the advocacy, protest, and debate by citizens and lawmakers that precede the passage of a local law. As observed above, a key principle underlying the First Amendment is that “debate on public issues should be uninhibited,

192. See *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2249 (2015) (identifying specialty license plates as government speech because they have long been used by the state to convey state messages, they are closely identified in the public mind with the state, and the state maintained “direct control over the messages,” the latter of which, at a minimum, does not apply to city speech). The government speech doctrine is based on the premise that the government needs to be able to express a viewpoint in order to govern. In holding that trademarks are not government speech in *Matal v. Tam*, the Court found it significant that the trademarks were not an expression of a government policy. 137 S. Ct. 1744, 1758 (2017). If they were, the government would be “babbling prodigiously and incoherently.” *Id.* A similar claim could be made to the enactments of local governments. The Court in *Matal* also warned that because the doctrine could be used to “muffle the expression of disfavored viewpoints” by finding a way to cast private speech as government, courts must “exercise great caution before extending our government-speech precedents.” *Id.*

193. See David Fagundes, *State Actors as First Amendment Speakers*, 100 Nw. U. L. REV. 1637, 1643 nn.24–32 (2006) (collecting cases in which courts have recognized that municipal corporations may have First Amendment rights). *But see* *Creek v. Village of Westhaven*, 80 F.3d 186, 192–93 (7th Cir. 1996) (collecting cases in which courts have rejected arguments that municipalities have free speech rights).

194. *Creek*, 80 F.3d at 193.

robust, and wide-open,”¹⁹⁵ and the citizen speech involved in passing a law is nothing if not core political speech.¹⁹⁶

It is also speech that is qualitatively different from public debate surrounding a policy in the abstract because the law, if passed, will impose real restrictions on the speaker. This context makes the expression of one who speaks in support of, for example, banning plastic bags in her jurisdiction in a public hearing the day of the city council vote on the draft ordinance meaningfully different from speech expressing general support for bag bans at any other time. Likewise, the lawmaking process also requires the scope of a possible ordinance to be considered and debated in significant detail, forcing lawmakers and advocates to confront, discuss, and address hard trade-offs and negative side effects.

Passing a law also inspires a greater *quantity* of speech. The possibility that the city may pass an ordinance will likely bring out speakers in opposition to the ordinance, who may not otherwise find themselves motivated to participate in the debate without the immediate threat of its passage. The media will certainly cover the debate regarding an ordinance that may actually pass with far greater attention than it would abstract advocacy of a policy disconnected to any concrete policy initiative. The passage of a law also has a greater chance of attracting the attention of other cities or even a nationwide audience, particularly when the city and state disagree over whether the state can preempt the city law.

Burdens on local lawmaking thus indirectly burden the unique form of public debate that precedes the passage of a law. The Court has repeatedly recognized that “[l]aws enacted to control or suppress speech may operate at different points in the speech process,”¹⁹⁷ such that free speech rights may be violated by laws that “necessarily reduce[] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.”¹⁹⁸ For example, in *Meyer v. Grant*, discussed further below, the Court invalidated restrictions on the use of paid petition-gatherers to help get a citizen referendum on the statewide ballot.¹⁹⁹ The restriction was held invalid, even though it was not a direct restriction on speech, because the procedural restriction was likely to reduce the amount of speech on topics the policy advocates wanted to discuss.²⁰⁰ Even outside the realm of political speech, the Court’s precedents make clear that it offends

195. *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964).

196. *Meyer v. Grant*, 486 U.S. 414, 422 (1988) (defining core political speech as “interactive communication concerning political change” (citing *Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620, 632 (1980))).

197. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 336 (2010).

198. *Id.* at 339 (quoting *Buckley v. Valeo*, 424 U.S. 1, 19 (1976) (per curiam)).

199. 486 U.S. at 414.

200. *Id.*

the First Amendment to take actions that prevent or deter speech from happening in the first place.²⁰¹ Thus, even without restricting public debate, punitive preemption burdens public debate by restricting the topics discussed, the depth of their exploration, and the size of the audience reached.

c. The Lawmaker's Vote

The third category of speech that may be burdened by punitive preemption is the local official's act²⁰² of voting on the law.²⁰³ The question of whether a vote can be speech is a complicated one. As a starting point, a lawmaker's vote certainly involves expression of a political viewpoint that the proposed ordinance is good policy supported by the voting public and that the city has the authority to pass the ordinance—i.e., it is not preempted). And just as public debate in the context of lawmaking is qualitatively different from advocacy in support of a policy in the abstract, a lawmakers' vote sends a different and more powerful message than other kinds of expression. It is akin to special nature, recognized in the Court's cases considering associational rights, of group speech that—*because* it is group speech—conveys a different and often more powerful message than speech by individuals.²⁰⁴ This is not to say that a lawmaker's vote is an exercise of

201. See, e.g., *Simon & Schuster, Inc. v. N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (invalidating law that prohibited a person from keeping the profits of selling the tales of their criminal activity because it offends the First Amendment to create a disincentive to speaking).

202. Even though a vote may be an act (e.g., pushing a button or making a gesture) rather than speech (saying 'aye' or 'nay'), the Court has in recent years demonstrated a great willingness to recognize speech-facilitating conduct as speech. See *Citizens United*, 558 U.S. at 336–37. Voting is also a poor fit for the “expressive conduct” doctrine under *United States v. O'Brien*, 391 U.S. 367, 376, 382 (1968) (stating that the case before it was one “where the alleged governmental interest in regulating conduct arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful”). Under *O'Brien*, restrictions on conduct that involves both “speech” and “nonspeech” elements can be sustained if they “further[] an important or substantial governmental interest” that is “unrelated to the suppression of free expression and . . . is no greater than is essential to the furtherance of that interest.” *Id.* at 377. But punitive preemption is hardly content-neutral, because the state is not burdening voting *in general*; it is burdening voting based on the subject being voted upon.

203. A local official can also be a speaker advocating for a law's passage whose speech falls into the category of “public debate” described above. See *supra* Section IV(B)(1)(b). The focus of this Section is the act of passing the law, as distinct from any advocacy or explanation the lawmaker provides in addition to his vote.

204. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958) (“Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably

associational rights, but rather that, like group messages, a vote conveys a unique message that cannot be conveyed any other way.

But even if a lawmaker's vote conveys a message, this does not necessarily mean it is expressive activity recognized by the First Amendment. Certainly, the Court has recognized that when a *citizen* casts a vote in the electoral process, the citizen expresses a political viewpoint.²⁰⁵ The Court has also held that other forms of political participation, such as signing a petition to place a referendum before voters, implicate First Amendment rights.²⁰⁶

However, the Court has expressly distinguished a citizen's vote from that of a lawmaker, holding in *Nevada Commission on Ethics v. Carrigan*²⁰⁷ that a legislator does not have a personal free speech right in the act of casting a vote. *Carrigan* involved a First Amendment challenge by a local lawmaker who had been censured by a state ethics commission because he voted in favor of a hotel-casino project that would financially benefit his longtime campaign manager, in violation of state conflict-of-interest laws.²⁰⁸ The Court rejected the challenge. Although it relied in large part on the long tradition of conflict-of-interest laws dating back to the founding era,²⁰⁹ it also justified that tradition on the grounds that a lawmaker has no

enhanced by group association" (citations omitted)). Indeed, the text of the First Amendment does not mention freedom of association; that right flows in part from the free speech clause because the right to speak includes the right to speak as part of a group because of the unique message thereby conveyed. *See* Bhagwat, *supra* note 184, at 1116 (explaining that a message conveyed by a group is qualitatively different than a message conveyed by an individual); *see also* John D. Inazu, *The First Amendment's Public Forum*, 56 WM. & MARY L. REV. 1159, 1177–80 (2015) (criticizing the collapsing of speech and associational rights in certain Court precedents).

205. *Burdick v. Takushi*, 504 U.S. 428, 438 (1992) (recognizing that voting involves "expressive activity at the polls"); *see also* Richard E. Levy, *The Nonpartisanship Principle*, 25 KAN. J.L. & PUB. POL'Y 377, 380 (2015) ("Although the Supreme Court has not definitively addressed the issue, it is reasonable to assume that the act of casting a vote is a form of speech.").

206. *Doe v. Reed*, 561 U.S. 186, 194–95 (2010) ("An individual expresses a view on a political matter when he signs a petition under Washington's referendum procedure. . . . [T]he expression of a political view implicates a First Amendment right."). *Reed* demonstrates the difficulty the Court has balancing the expressive component of participation in electoral policies with the legitimate state interest in regulating electoral processes: it generated five concurring opinions, at least one of which was joined by each justice, except Chief Justice Roberts, who authored the Court's opinion, as well as a dissent from Justice Thomas. *Id.* at 190, 202, 212, 215 (Sotomayor, J., concurring), 219, 228 (Scalia, J., concurring).

207. *Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 126 (2001); *see also Reed*, 561 U.S. at 221–22 (Scalia, J., concurring) (reasoning that signing a referendum is a legislative act that does not merit First Amendment protection).

208. *Carrigan*, 564 U.S. at 120. The Court, in an opinion written by Justice Scalia, also scoffed at the idea that a vote conveys a message, given that a wide range of factors may influence a lawmaker's vote. *See id.* at 126.

209. *Id.* at 122–23.

personal right in a vote.²¹⁰ A legislator’s vote, the Court reasoned, is not the legislator’s personal speech, but rather a “commitment of his apportioned share of the legislature’s power,” which “belongs to the people.”²¹¹

Although *Carrigan* appears to present a challenge to First Amendment protections for local lawmaking, the holding that a lawmaker has no personal right to vote on a proposal for which he has a personal conflict is distinguishable in important respects from a situation in which limitations on a lawmaker’s vote interfere with local democratic processes. Justice Kennedy recognized this distinction in his concurring opinion in *Carrigan*. The specific source of Kennedy’s concern was that the text of the statute—which prohibited voting on matters in which the lawmaker’s independence was affected by “[h]is commitment in a private capacity to the interests of others”—could be read to prohibit votes by a legislator that were influenced by the legislator’s ties to a community of advocates sharing a particular political outlook.²¹² As Justice Kennedy explained, voting on policies favored by supporters, including supporters with whom a lawmaker may have personal connections because of a shared history of political activity, is precisely what lawmakers are supposed to do.²¹³ Thus, even if a lawmaker has no personal expressive right to cast a vote, limitations on the topics that a lawmaker can vote on may be impermissible if those limitations burden the core political speech of the voters who elected that official to represent their interests. This argument was not at issue in, and therefore not foreclosed by, *Carrigan*.²¹⁴

Justice Kennedy’s reasoning also expressly recognized the broader principle that limitations on lawmakers’ votes have a “logical and inevitable burden

210. *Id.* at 125–26.

211. *Id.* In concurrence, Justice Alito disagreed with the Court that “restrictions upon legislators’ voting are not restrictions upon legislators’ protected speech[.]” *Id.* at 126, 133 (Alito, J., concurring). Justice Alito took the position that “[v]oting has an expressive component in and of itself.” *Id.* at 133. Alito also noted the Court’s decision was difficult to square with its opinion in *Doe v. Reed*, in which the Court observed that “the expression of a political view implicates a First Amendment right.” *Id.* at 133–34; *Reed*, 561 U.S. at 195.

212. *Carrigan*, 564 U.S. at 129–30 (Kennedy, J., concurring) (quoting NEV. REV. STAT. § 281A.420(2) (2007)).

213. *Id.* at 131–32 (Kennedy, J., concurring) (“[T]he Court has made it clear that ‘the right of citizens to band together in promoting among the electorate candidates who espouse their political views’ is among the First Amendment’s most pressing concerns.” (quoting *Clingman v. Beaver*, 544 U.S. 581, 586 (2005))).

214. *Carrigan* also observed that the conflict-of-interest law did not constitute viewpoint discrimination. *Id.* at 125.

on speech and association that preceded the vote.”²¹⁵ Thus, statutes that impose a burden on a lawmaker’s vote must be considered in light of the “burdens they impose on the First Amendment speech rights of legislators and constituents apart from an asserted right to engage in the act of casting a vote.”²¹⁶ Because “[t]he democratic process presumes a constant interchange of voices,” a statute that restricts a lawmaker’s vote “may well impose substantial burdens on what undoubtedly is speech.”²¹⁷

The recognition that burdening a vote can burden core political speech does not end the inquiry, however.²¹⁸ A second issue is that a vote serves a functional purpose in the process of governing. In *Carrigan*, the Court observed that a legislator enjoys no right to “use government mechanics to convey a message.”²¹⁹ The Court has recognized an analogous principle in case law involving elections: the state has an interest in regulating electoral processes, even though procedural restrictions inevitably have some impact on speech and association.²²⁰ For example, recognizing that states may implement “reasonable, politically neutral regulations that have the effect of channeling expressive activity at the polls,” the Court in *Burdick v. Takushi* upheld a ban on write-in votes.²²¹ The Court explained that elections have a purpose—electing officials—and the state’s interest in regulating the voting process may justify restrictions on the expressive component of the vote.²²²

215. *Id.* at 131 (Kennedy, J., concurring) (“The constitutionality of a law prohibiting a legislative or executive official from voting on matters advanced by or associated with a political supporter is therefore a most serious matter from the standpoint of the logical and inevitable burden on speech and association that preceded the vote.”).

216. *Id.* at 129.

217. *Id.*

218. The law readily proscribes a wide range of speech that simply falls outside of First Amendment protection, such as libel, sexual harassment, or securities laws violations. See generally Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765 (2004). However, this speech falls outside the First Amendment either because the free speech guarantee does not cover false statements or because it must be possible to punish crimes that are effectuated through words. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340–41 (1974). This seems unlikely given its political nature.

219. *Carrigan*, 564 U.S. at 127; see also *Doe v. Reed*, 561 U.S. 186, 221–22 (2010) (Scalia, J., concurring) (observing that when a voter signs a referendum to place an initiative on the ballot, he is acting as a legislator, and the plaintiffs had identified “no precedent from this Court holding that legislating is protected by the First Amendment” (citing *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002))).

220. See *Reed*, 561 U.S. at 195–96 (“To the extent a regulation concerns the legal effect of a particular activity in that [electoral] process, the government will be afforded substantial latitude to enforce that regulation.”); *id.* at 212–13 (Sotomayor, J., concurring).

221. 504 U.S. 428, 438 (1992).

222. *Id.* at 438. The Court also recognized that Art. I, § 4 of the Constitution allows states to regulate the time, place, and manner of elections. *Id.* at 433. Justice Kennedy, in dissent, went farther, arguing the “right to freedom of expression [was] not implicated” by the ban on write-in votes. *Id.* at 445 (Kennedy, J., dissenting). On the other hand, Justice Kennedy

Thus, a First Amendment argument against punitive preemption must address the argument that local lawmaking has a purpose—passing laws—and whatever expressive component it also has may be regulated because preemption serves important purposes, such as protecting citizens from inconsistent burdens imposed by different levels of government. But the fact that a law, once passed, may be unenforceable because it is preempted is distinct from the question whether the state can prevent the law from being passed in the first place. As has been noted several times, the argument of this Article is not that local majorities should be able to enact *and enforce* any policy they choose; it is that they should be able to *pass* laws and, if challenged, defend their right to enforce them in court. The interests protected by preemption—preventing different levels of government from subjecting citizens to inconsistent and competing laws—are served by the fact that a preempted law is unenforceable. It does not take a prohibition on passing the law in the first place to serve that interest.²²³

A related issue is that a legislator’s vote is an act with substantive legal effect. On the one hand, the Court has never held that expressive activity loses its protection because it has legal effect—and indeed has held the opposite: “adding [a] legal effect to an expressive activity” does not “somehow deprive[] that activity of its expressive component, taking it outside the scope of the First Amendment.”²²⁴ It has applied this principle in a number of contexts. For example, it held that the government violated the First Amendment by preventing a band from registering an offensive trademark—a trademark being a substantive act that confers legal rights and benefits on the registrant.²²⁵ Likewise, in *Legal Services Corp. v. Velazquez*, discussed in detail below, the Court invalidated a law preventing the recipients of certain federal funds from bringing certain kinds of lawsuits.²²⁶ It, too, involved speech with a substantive legal effect.

In *Carrigan*, however, the Court distinguished an expressive activity that does not *lose* First Amendment protections because it has a legal

expressed significant concern that because Hawaii’s elections are dominated by the Democratic party, the write-in ban functioned to disadvantage political minorities. *See id.* at 444–46.

223. One can argue states also have an interest in avoiding preemption lawsuits. *See infra* Section IV(B)(2)(d).

224. *Reed*, 561 U.S. at 195 (noting that the act of signing a referendum petition, which has the legal effect of helping place the referendum on the ballot, is protected expression under the First Amendment).

225. *Matal v. Tam*, 137 S. Ct. 1744, 1752–53 (2017) (noting that trademarks may be used without registration, but registration “confers important legal rights and benefits”).

226. 531 U.S. 533, 536–37 (2001).

effect from “a governmental act [that] becomes expressive simply because the governmental actor wishes it to be so.”²²⁷ Specifically, the Court distinguished a citizen’s act of signing a petition to place a referendum on the statewide ballot—held to be First Amendment speech in *John Doe No. 1 v. Reed*²²⁸—from the City Council member’s vote on his friend’s casino project at issue in *Carrigan*. The distinction the Court seems to be drawing is fine indeed: in both cases, the activity at issue—the act of signing or the act of voting—would not exist but for the substantive legal process in which the citizen or lawmaker, respectively, is participating. In any case, *Carrigan*’s focus was on the *personal* expressive function a lawmaker may wish to fulfill through voting,²²⁹ and it did not address a situation in which a restriction on lawmakers’ votes restricted their ability to fulfill the purposes for which they were elected by their constituents.

Ultimately, then, the importance of an official’s vote to a First Amendment argument against punitive preemption is not grounded in the personal expressive component of the act of voting. Rather, punitive preemption burdens a lawmaking process with unique communicative functions, which concern both the substantive policy and the balance of state-local power. The uniqueness stems from the fact that at the end of the process, lawmakers vote. The vote is both a precondition to public debate and a statement reflecting, albeit imperfectly, the electorate’s sentiment about a controversial issue. Particularly under the current court’s broad conception of First Amendment protections,²³⁰ therefore, strong support exists for the argument that limitations on a local officials’ ability to vote on laws favored by their constituents implicates the First Amendment by limiting the unique form of political expression that goes into lawmaking.

2. *First Amendment Protections for Local Lawmaking*

This Section explores First Amendment doctrines supporting an argument that the state’s power to preempt does not extend to prohibiting the passage of the possibly-preempted laws in the first place, rather than allowing preemption to play out through the traditional push and pull. This argument is descriptive. The attempt to find a coherent theory or even descriptive account underlying First Amendment precedents has generated an enormous body

227. Nev. Comm’n on Ethics v. Carrigan, 564 U.S. 117, 128 (2001).

228. 561 U.S. at 195.

229. 564 U.S. at 126.

230. See Stuart Minor Benjamin, *Algorithms and Speech*, 161 U. PA. L. REV. 1445, 1456–58 (2013) (describing the history of the expansion of protected First Amendment speech).

of scholarship to which this Article does not intend to add.²³¹ However, it does draw on the certain underlying normative principles that have been recognized by the Court, even if those principles are not consistently applied.²³² It argues that First Amendment prohibitions on viewpoint discrimination within state-created fora and on laws designed to insulate the state from legal challenge both offer strong support for a First Amendment argument against punitive preemption, particularly in light of the normative emphasis the Court has consistently placed on speech in aid of democratic self-government.

a. Democratic Deliberation as a Normative Underpinning

Many are the instances in which the Court has said, with lofty prose and sweeping rhetoric, that the core purpose of the First Amendment is to protect robust public debate.²³³ Scholars have likewise argued the key normative principle underlying First Amendment doctrine is the need for information to be freely exchanged in a system of democratic self-government.²³⁴ This approach leads to a focus on the “quality of the expressive arena,” for speech

231. See, e.g., Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1785 (2004) (describing the scholarly search for coherent theories underlying the First Amendment and concluding that “descriptive or explanatory accounts of the existing coverage of the First Amendment are noticeably unsatisfactory”).

232. See Schauer, *supra* note 218, at 1786–87 (noting that the “historically recognized and judicially mentioned normative theories” include “self-expression, individual autonomy, dissent, democratic deliberation, the search for truth, tolerance, checking governmental abuse, and others”).

233. See, e.g., *Elrod v. Burns*, 427 U.S. 347, 347 (1976) (“[P]olitical belief and association constitute . . . the core of those activities protected by the First Amendment.”); *Bond v. Floyd*, 385 U.S. 116, 136 (1966) (“The central commitment of the First Amendment . . . is that ‘debate on public issues should be uninhibited, robust, and wide-open.’” (quoting *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964))); *Roth v. United States*, 354 U.S. 476, 484 (1957) (noting that the First Amendment “was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people”).

234. See, e.g., James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491, 497–504 (2011). Perhaps the quintessential foundational text for this position is Alexander Meiklejohn’s *Free Speech and Its Relation to Self-Governance*. ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNANCE* 26–27 (1948) (“The principle of the freedom of speech springs from the necessities of the program of self-government. It is not a Law of Nature or Reason in the abstract. It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage.”).

related to public policy matters, rather than on the individual's opportunities for self-expression.²³⁵

This principle has been embraced by Justices across the spectrum, as illustrated by the long struggle over electoral expenditures that culminated in *Citizens United*.²³⁶ Some Justices came from the position that the First Amendment required public debate to be fair, so that well-funded voices did not result in less-funded voices going unheard.²³⁷ Others came from the position that, even though fair debate was a worthy goal, it could not be pursued through limitations on speech because “a self-governing people depends upon the free exchange of political information.”²³⁸ This latter rationale was embraced by the Court in invalidating the ban on corporate expenditures in *Citizens United*: “The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it.”²³⁹ Importantly, however, both positions are grounded in the principle that the First Amendment protects the exchange of information in service of self-government.

Citizens United, like many of the Court's precedents involving “political speech,” involved *electoral* speech: i.e., speech by and about candidates.²⁴⁰ However, although political speech “includes” the discussions of candidates running for office,²⁴¹ it also broadly includes the “free discussion of governmental affairs.”²⁴² The principle that “legislative restrictions on advocacy of the election or defeat of political candidates are wholly at odds with the guarantees of the First Amendment” therefore “applies equally to the discussion of political policy generally or advocacy of the passage or defeat of legislation.”²⁴³

235. Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 424 (1996).

236. 558 U.S. 310 (2010).

237. See *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 399–403 (2000) (Breyer, J., Concurring) (drawing on the writings of Meiklejohn for the premise that the First Amendment is premised on full and fair discussion of public issues).

238. *Id.* at 411. (Thomas, J., dissenting).

239. 558 U.S. at 339.

240. *Id.* at 446.

241. *Mills v. Alabama*, 384 U.S. 214, 218–19 (1966).

242. *Brown v. Hartlage*, 456 U.S. 45, 52–53 (1982) (“Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes.” (quoting *Mills*, 384 U.S. at 218–19)).

243. *Meyer v. Grant*, 486 U.S. 414, 428 (1988) (quoting *Buckley v. Valeo*, 424 U.S. 1, 50, 96 (1976)).

Thus, the fact that punitive preemption restricts democratic deliberation—and often has that restriction as its goal—should generate suspicion in and of itself. In addition to this normative grounding, three specific strands of First Amendment doctrine support an argument against punitive preemption: cases invalidating laws with the effect of limiting public debate, laws that discriminate based on viewpoint in a public forum, and laws designed to insulate the government from challenge.

b. Limitations on Public Debate

The Court has enforced the normative principle that the First Amendment protects against laws with the effect of limiting public debate in analogous cases involving citizen referenda.²⁴⁴ One of the most powerful is *Meyer v. Grant*, in which the Court held that a Colorado law criminalizing the use of paid petition-gatherers in service of a citizen’s referendum violated the First Amendment.²⁴⁵ The citizens were attempting to pass a law deregulating the trucking industry under a Colorado law allowing citizens to place a proposal to amend the state Constitution on the ballot if five percent of qualified voters signed a petition supporting it.²⁴⁶ Concerned that paid petition-gatherers were more likely to engage in fraud, Colorado passed a law making it a felony to hire them. The advocates of the trucking amendment challenged the law, and the Court ruled in their favor.²⁴⁷

The Court first held that the case “involve[d] a limitation on political expression subject to exacting scrutiny.”²⁴⁸ This was because

[t]he circulation of an initiative petition of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change. Although a petition circulator may not have to persuade potential signatories that a particular proposal should prevail to capture their signatures, he or she will at least have to persuade them that the matter is one deserving of the public scrutiny and debate that would attend its consideration by the whole electorate. This will in almost every case involve an explanation of the nature of the proposal and why its advocates support it. Thus, the circulation of a petition involves the type of

244. See *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765 (1978) (holding that the First Amendment protects speech related to passage of a citizens referendum); *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 197–200 (1999) (same).

245. 486 U.S. at 428.

246. *Id.* at 416–22.

247. *Id.* at 417, 428.

248. *Id.* at 420.

interactive communication concerning political change that is appropriately described as “core political speech.”²⁴⁹

The Court concluded the law failed strict scrutiny for two reasons: “it limits the number of voices who will convey appellees’ message and the hours they can speak and, therefore, limits the size of the audience they can reach,” and “it makes it less likely that appellees will garner the number of signatures necessary to place the matter on the ballot, thus limiting their ability to make the matter the focus of statewide discussion.”²⁵⁰ The Court subsequently made clear that even minor impediments to participation—a requirement that petition-gatherers be registered voters and that they wear identification badges—are impermissible under this principle.²⁵¹

Both of these concerns are directly applicable to punitive preemption. First, as described above, the public debate engendered by a draft ordinance will be qualitatively and quantitatively different from a policy debate with no possibility of action, such as a speech by the mayor advocating a policy in the abstract. It again bears noting that two kinds of debate are implicated: the substantive policy issue and the question of whether the local law *should* be preempted. Thus, by prohibiting the city from considering the passage of a law and, if necessary, triggering a legal showdown, punitive preemption “limits the size of the audience” for these important debates and makes it less likely that the local support for the law and belief that the law is not preempted is “the focus of statewide discussion.”²⁵²

In *Meyer*, the Court also rejected two arguments that could be brought to bear in support of punitive preemption. First, it was irrelevant that the advocates of trucking deregulation had many alternative ways they could communicate their support for trucking deregulation when the law burdened their chosen means: ballot initiative circulated by paid petitioners.²⁵³ The Court has “consistently refused to overlook an unconstitutional restriction upon some First Amendment activity simply because it leaves other First Amendment activity unimpaired,”²⁵⁴ because “the First Amendment protects appellees’ right not only to advocate their cause but also to select what they believe to be the most effective means for so doing.”²⁵⁵ This is an important point for an argument against punitive preemption. Certainly, there are many ways for local officials and citizens to debate a policy issue without actually passing a law. A local official prohibited from passing a

249. *Id.* at 421–22.

250. *Id.* at 422–23.

251. *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 197 (1999).

252. *Meyer*, 486 U.S. at 424.

253. *Id.*

254. *Cal. Democratic Party v. Jones*, 530 U.S. 567, 581 (2000).

255. *Meyer*, 486 U.S. at 424.

law may still give speeches, call for informational presentations at city council, pen op-eds, tweet, or communicate with the electorate and policymakers in myriad ways other than passing the law. *Meyer* confirms that the mere fact that all speech has not been restricted does not excuse the restrictions that *do* exist.

The second important point from *Meyer* is that the Court rejected the state's argument that "because the power of the initiative is a state-created right, it is free to impose limitations on the exercise of that right."²⁵⁶ One can easily imagine a state defending punitive preemption on similar grounds: because state preemption doctrines ultimately allow the state to render preempted local laws invalid, the state must also have the power to limit passage of such laws in the first place. This argument fails as a factual matter as to laws that have not been held preempted in court because the power the state is claiming is the *larger* power to burden not only the passage of laws that are preempted—those held preempted by a court—but also those that *might be* preempted. In any event, *Meyer* rejects the "greater-includes-the-lesser" justification, holding that the power to ban initiatives entirely does not "include[] the power to limit discussion of political issues raised in initiative petitions."²⁵⁷

Meyer thus supports an argument that punitive preemption violates the First Amendment by limiting public debate. An objection that could be raised, however, is that *all* preemption can be seen as "limiting public debate" at the level of government at which preemption applies.²⁵⁸ That is, if the state provides that local governments cannot pass gun laws, then following the passage of that law there *is* no public issue as to what the local gun law should be—it has already been decided at the state level, presumably after public debate, that there should not be such a law. It cannot be the case that *any* law with the effect of limiting debate at one level of government runs afoul of the First Amendment: if it did, the doctrine of preemption could not exist.²⁵⁹

But even if there exists no affirmative right to have all topics open for consideration by policymakers at all levels of government at all times, this is a different question from whether the state can burden the passage of

256. *Id.*

257. *Id.* at 425

258. *See generally supra*, Section IV(B)(1).

259. Likewise, Constitutional guarantees "limit public debate" by taking certain topics off the table for possible lawmaking. *See, e.g.*, *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991).

possibly preempted laws for the purpose of foreclosing debate. As has been noted several times, because the doctrine of preemption renders preempted laws unenforceable, the only practical effect of punitive preemption is to dissuade cities from testing the boundaries of the preempted subject area. This purpose sets punitive preemption apart from “regular” preemption for First Amendment purposes.

c. Viewpoint Discrimination in a Public Forum

A First Amendment argument against punitive preemption is also supported by the limited public forum doctrine, under which the state is prohibited from imposing viewpoint-based restrictions in a forum it has created.²⁶⁰ The doctrine is an application of the broader principle that viewpoint discrimination is anathema to the First Amendment.²⁶¹ The Court has frequently articulated this principle as a limitation on government power that is distinct from any specific effect on particular speakers or speech: a rule that the First Amendment does not allow the government to act with the purpose of suppressing a particular viewpoint.²⁶² Although the Court has denied that motive is the touchstone of the First Amendment inquiry,²⁶³

260. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001).

261. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992) (invalidating a hate-speech ordinance as viewpoint discrimination); *see Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 340 (2010) (“Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints . . .”).

262. *See, e.g., Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 830 (1995) (“[I]deologically driven attempts to suppress a particular point of view are presumptively unconstitutional . . .”); *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 641 (1994) (“Government action that stifles speech on account of its message . . . pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion.”); *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 695 (1992) (Kennedy, J., concurring) (“The First Amendment is a limitation on government . . .”); *R.A.V.*, 505 U.S. at 386 (“The government may not regulate based on hostility—or favoritism—towards the underlying message expressed.”); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46–47 (1986) (“This Court has long held that regulations enacted for the purpose of restraining speech on the basis of its content presumptively violate the First Amendment.”); *Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 530, 536 (1980) (“[W]hen regulation is based on the content of speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited ‘merely because public officials disapprove the speaker’s views.’” (quoting *Niemotko v. Maryland*, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring in result))); *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 785–86 (1978) (stating that where “the legislature’s suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended” (footnote omitted)).

263. *See United States v. O’Brien*, 391 U.S. 367, 383 (1968) (“[T]he ‘purpose’ of Congress . . . is not a basis for declaring legislation unconstitutional.”).

a number of scholars, including now-Justice Kagan, have observed that many First Amendment doctrines are best explained as a search for impermissible motives.²⁶⁴ Indeed, the Court’s explanations of its doctrines often sound strongly in a search for an improper censorial purpose.²⁶⁵

Thus, under the “limited public forum” doctrine, when the state creates a forum, “the state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.”²⁶⁶ Although the doctrine was originally applied to physical fora, such as public parks,²⁶⁷ it now also applies to “metaphysical” fora, such as public funding for student organizations, even when these “limited” fora are not open to the general public.²⁶⁸

The paradigm case is *Rosenberger v. Rector & Visitors of the University of Virginia*, in which the Court considered a university policy under which student media groups could apply for funds to subsidize their publishing, but a publication with a Christian editorial viewpoint could not apply. The Court held this was impermissible viewpoint discrimination because the forum—funding for student media—was created to encourage a free exchange of ideas, and it did not exclude “religion” from the subject matters allowed to be exchanged in the forum, but it *did* exclude a Christian editorial viewpoint.²⁶⁹ This was impermissible because once the state creates a forum, it cannot “exclude speech where its distinction is not ‘reasonable in light of the purpose served by the forum’” or “discriminate against speech on the basis of its viewpoint.”²⁷⁰ Thus, in a limited public forum, content discrimination may be permissible “if it preserves the purposes of that limited forum,”

264. Kagan, *supra* note 235, at 415, 423 (“[T]he concern with governmental motive remains a hugely important—indeed, the most important—explanatory factor in First Amendment law.”); Sunstein, *supra* note 144, at 26 (explaining that “the removal of impermissible reasons for government action” is one of the animating forces behind viewpoint discrimination).

265. See *supra* note 262.

266. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983).

267. See *Inazu*, *supra* note 204, at 1162–67; see also *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 696 (1992) (Kennedy, J., concurring) (describing genesis of public forum doctrine).

268. See, e.g., *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 830 (1995).

269. *Id.* at 830–31.

270. *Id.* at 829 (first quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 804–06 (1985); then citing *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392–93 (1993)).

while viewpoint discrimination “is presumed impermissible when directed against speech otherwise within the forum’s limitations.”²⁷¹

Local lawmaking bodies are state-created fora because municipal corporations are chartered under state law to debate and enact laws favored by local voters. However, the purpose of the forum is not primarily expressive: local lawmaking bodies exist to enact policy, not merely to discuss and debate it. As discussed further below, however, the Court has applied a public forum analysis to prohibit viewpoint discrimination in government funding of legal challenges brought in the courts.²⁷² Thus, although it is not self-evident that a local lawmaking body falls under the public forum doctrine, the Court’s precedents show that a forum need not be purely expressive—whatever that might mean—to fall under the rule that the government may not discriminate based on viewpoint.

But is punitive preemption viewpoint discrimination? After all, the range of laws that a local government can pass are, at their core, a function of state law. Isn’t punitive preemption simply the permissible enforcement of the boundaries of fora—local lawmaking bodies—the state created to consider and pass those laws *cities have been authorized to pass*? The problem with defining the forum in this way is, again, that it is not necessarily self-evident whether a proposed local policy is preempted. Thus, a forum allowing the free discussion of all policies a city is authorized to enact must also include, within its permissible categories of content, communication regarding whether a given policy is, in fact, preempted. The forum could not function otherwise. Because the *content* area of “what is preempted?” is included in the forum, then the state cannot discriminate against the *viewpoint* that “law X is not preempted.”

Relatedly, however, it could also be argued that punitive preemption targets content only and not viewpoint. To illustrate, a content restriction is one that excludes films about parenting, while a restriction on films about parenting from a “Christian perspective” is viewpoint discrimination.²⁷³ Punitive preemption is arguably more like the former category: it takes an entire subject matter, such as guns, off the table for local regulation, regardless

271. *Id.* at 829–30. It has often been observed that the line between “defining the forum” and viewpoint discrimination is difficult to draw, and that the Court’s use of the “government speech” doctrine has somewhat eroded the doctrine. *See, e.g., Gey, supra* note 145, at 1295–98. As argued above, however, when the state has authorized local decisionmaking bodies for the purpose of enacting *local*, not state policies, it is difficult to see why the lawmaking that goes on in those decisionmaking bodies would be seen as the speech of the state.

272. *E.g., Legal Services Corp. v. Velazquez*, 531 U.S. 533, 543 (2001).

273. *See Lamb’s Chapel*, 508 U.S. at 393–94.

of whether the local official's policy preferences are more liberal or more conservative than the state policymakers.²⁷⁴

However, this argument is akin to the old saying that the law equally “forbids the rich as well as the poor to sleep under bridges.”²⁷⁵ As a practical matter, punitive preemption only burdens the passage of laws that are *more strict*—in the sense of prohibiting more conduct—than the state law, because there would be no reason to pass a local law that is less strict than the state law. For example, an extremely pro-gun city could theoretically pass a law requiring less gun control measures than those required by the state, but the law would have no effect because its citizens would still be subject to the state's restrictions. As a practical matter, therefore, punitive preemption is a form of viewpoint discrimination.²⁷⁶

Thus, although the Court's public forum cases are not a precise fit, they support an argument against punitive preemption. Because preempted laws cannot be enforced, the punitive provisions serve no purpose beyond preventing local lawmakers from making the statement of passing a law. In other words, the primary purpose is to suppress a viewpoint favored by local majorities within a forum that the state created to allow those local majorities to enact policies they favor, merely because state legislators disagree with that viewpoint. Particularly given the close relationship between the public forum doctrine and the normative interest in democratic deliberation,²⁷⁷ the public forum doctrine therefore supports a First Amendment argument against punitive preemption.

d. Insulating the Government from Legal Challenge

One can argue that punitive preemption serves a purpose other than viewpoint discrimination: by deterring cities from passing laws that may be preempted in the first place, it protects the state from having to litigate whether those laws are preempted. Thus, additional support for First

274. See *Rosenberger*, 515 U.S. at 831.

275. ANATOLE FRANCE, *THE RED LILY* 75 (The Modern Library, Inc. 1917) (1894).

276. In the context of expressive conduct, the Court maintains a distinction between content-based and content-neutral laws, despite the fact that an ostensibly content-neutral law will often disproportionately affect one viewpoint. See Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 218–22 (1983). As Stone has pointed out, few are those who burn a draft card as a message of *support* for a governmental policy. *Id.*

277. See *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 696 (Kennedy, J., concurring) (noting that the public forum doctrine is “essential to a functioning democracy”).

Amendment limitations on punitive preemption comes from the rule that laws designed to insulate the government from legal challenge offend the First Amendment.

The key case is *Legal Services Corporation v. Velazquez*, in which the Court invalidated a federal statute that prevented recipients of federal legal services funds from bringing suit attempting to amend or otherwise challenge existing welfare laws.²⁷⁸ The Legal Services Corporation (LSC) was a nonprofit organization that distributed funds for noncriminal legal aid for indigent individuals, subject to various restrictions on how grant funds could be spent, such as restrictions on spending funds to advocate for a ballot measure or lobbying.²⁷⁹ *Velazquez* considered a challenge to a law prohibiting LSC from funding any organization “that initiates legal representation or participates in any other way, in litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system.”²⁸⁰ Thus, although a recipient attorney could argue that an agency had made an erroneous factual determination of eligibility under applicable statutes, the attorney could not raise arguments against the statute: either that a state statute was preempted by a federal statute or that either a state or federal statute violated the U.S. Constitution.²⁸¹ And, because the law applied to the organization receiving funds, and not to the activities, it prohibited the recipient organization from undertaking any such suits, even with funds from other sources.²⁸²

The Court decided the case under a limited public forum framework, even though legal challenges are not primarily “expressive.”²⁸³ It held that by funding legal services for indigent people, Congress had created a forum for advancing the legal arguments of indigent clients.²⁸⁴ The Court held the funding restrictions distorted the purposes of the program because it effected a “serious and fundamental restriction on the advocacy of attorneys and the functioning of the judiciary.”²⁸⁵ However, the Court was not entirely clear if the problem was that the law ran afoul of the purpose of the funding program, which is clearly covered by the Court’s precedents or the role of the judiciary, which is not.²⁸⁶ Justice Scalia, joined by three other Justices,

278. 531 U.S. 533, 548–49 (2001).

279. *Id.* at 536–37.

280. *Id.* at 538.

281. *Id.* at 537–39.

282. *Id.* at 538.

283. *See id.* at 543.

284. *See id.* The Court observed that because an attorney, even a government-funded attorney, represents the views of his clients, the program could not be likened to a “government speech” case, “even under a generous understanding of the concept.” *Id.* at 542–43.

285. *Id.* at 534.

286. *See id.* at 548.

wrote a strong dissent opining that Congress simply did not create a forum with the purpose of challenging welfare laws.²⁸⁷

Outside of its value as a public forum case, however, *Velazquez* is important for an entirely different reason: it stands for the premise that it offends the First Amendment for the government to enact policies to “exclude from litigation those arguments and theories Congress finds unacceptable but which by their nature are within the province of courts to consider.”²⁸⁸ Specifically,

[t]he attempted restriction is designed to insulate the Government’s interpretation of the Constitution from judicial challenge. The Constitution does not permit the Government to confine litigants and their attorneys in this manner. We must be vigilant when Congress imposes rules and conditions which in effect insulate its own laws from legitimate judicial challenge.²⁸⁹

This position, which was not addressed by the four dissenting Justices,²⁹⁰ is closely analogous to the principles animating the prohibition on viewpoint discrimination discussed above. Specifically, it conceives of the First Amendment as a limitation on governmental actions with impermissible motives: here, the motive of foreclosing legal challenges to state laws.

The prohibition on restricting legal challenges is a powerful argument against punitive preemption. Given that “regular” preemption prevents preempted local laws from being enforced, the only point of punitive preemption is to prevent local governments from testing the boundaries by passing and defending a law. Although local officials that believe their right to pass laws in a given area is protected by a state constitutional provision may sometimes be able to bring a facial challenge against a punitive preemption law without triggering the punitive consequences,²⁹¹

287. *Id.* at 555 (Scalia, J. dissenting). The dissent illustrates the slipperiness in distinguishing between defining the permissible content of the forum from improper viewpoint discrimination. *Id.*

288. *Id.* at 546–47. The Court also found it offensive to separation of powers principles.

289. *Id.* at 548.

290. The dissenters did not address whether the government may permissibly insulate its laws from challenge because they did not accept that the law had such an “insulating” effect: clients were free to pursue their challenges to the law through non-LSC attorneys. *Id.* at 554 (Scalia, J. dissenting). The dissenters concluded the statute “neither prevents anyone from speaking nor coerces anyone to change speech.” *Id.* at 558. At a minimum, there is nothing in *Velazquez* to suggest past *disagreement* with the premise that it offends the First Amendment to regulate speech so as to insulate laws from challenge. *See id.* at 547, 553.

291. For example, in *Robinson Township v. Commonwealth* a coalition of municipalities and interest groups brought a challenge directly against the state law that prohibited local

an “as-applied” challenge would be difficult to sustain without passing the law that triggers the consequences or seeking a disfavored advisory opinion.

One wrinkle is that punitive preemption does not directly restrict legal challenges, as preemption suits are a step or two removed from the passage of the law. Under a typical trajectory, the local officials vote to pass the law; the municipal corporation as a legal entity enacts the law; and then the state brings a preemption action against the law. But as has been noted above, impermissible restrictions may operate at various points in the speech process. Given that states have the power to preempt local actions and a law found preempted will be invalid, the only reason to pass a punitive preemption law is to avoid the legal fight. *Velazquez* holds this is impermissible.

V. CONCLUSION

This Article has demonstrated that the Court’s precedents support a First Amendment challenge to punitive preemption laws. While local lawmaking is a not a precise fit with existing precedents, the principles that a state cannot act with the purpose of limiting public debate, discriminate based on viewpoint, or insulate itself from legal challenge, offer each other significant reinforcement—particularly when viewed in light of the normative value of encouraging democratic self-government.

The argument rests in part—although not entirely—on the premise that it is not necessarily clear if a local law will be preempted. One of the features of modern preemption, however, is that it defines in ever-broader terms an ever-wider swath of regulatory terrain as off-limits for local action. Even if a First Amendment challenge may be sustained as a theoretical matter, such arguments offer little protection against a sufficiently expansive state preemption law. For example, under a law like Kentucky’s H.B. 500, is it really possible there could be a straight-faced argument that the legislator did *not* intend to preempt any local gun law of any kind, anywhere? To the extent that a First Amendment challenge rests on the contested nature of preemption, rather than in the unique message conveyed when a local electorate translates a policy preference into a law, its applicability will be relatively limited.

This Article accepts that situations might arise in which no good faith arguments exist that a locally desired law is *not* preempted.²⁹² However, it is also important to remember the important role played by state constitutions

fracking regulations, although the case did not involve punitive provisions. 83 A.3d 901, 913–15 (Pa. 2013).

292. A number of the First Amendment arguments discussed above, such as those involving limitations on public debate, could still be brought to bear. *See supra* Section IV(B)(2)(b).

in defining the state's ability to limit local actions. Although areas of recognized home rule immunity remain small and apply only in certain states,²⁹³ home rule protections may play an increasing role as states expand their preemptive reach far beyond the areas rendered off-limits in the past.²⁹⁴ After all, punitive preemption is a symptom of a larger phenomenon: a manifestation of a hyper-partisan political climate facilitated by ideologically segregated geographic housing preferences. This larger problem is straining doctrinal boundaries,²⁹⁵ including the already strained "state creature" fiction. In this context, local governments' ability to pass laws favored by local majorities, and then defend them against expansive, ideologically motivated preemptive laws, is critically important for allowing courts to consider and define the boundaries of state preemption doctrines under their state constitutions.²⁹⁶ In this context, local lawmaking contributes significantly to democratic deliberation and merits the protection of the First Amendment.

293. See Diller, *supra* note 37, at 1066.

294. See, e.g., ARIZ. REV. STAT. ANN. §§ 9-841, 11-1611, 41-1002 (Westlaw through the First Regular Session 2017 Legis. Sess.).

295. See, e.g., Edward B. Foley, *Due Process, Fair Play, and Excessive Partisanship: A New Principle for Judicial Review of Election Laws*, 84 U. CHI. L. REV. 655, 660 (2017) (arguing that partisan gerrymandering should be analyzed under due process rather than equal protection); Richard E. Levy, *The Nonpartisanship Principle*, 25 KAN. J.L. & PUB. POL'Y 377, 390 (2016). The question of whether a party in power can structurally disadvantage parties out of power will be addressed by the Court in the context of political gerrymandering in *Gill v. Whitford*, argued in the October Term of 2017. *Gill v. Whitford*, QPREPORT, <https://www.supremecourt.gov/docket/docketfiles/html/qp/16-01161qp.pdf> [<https://perma.cc/3G6L-CP9D>]. Interestingly, the lower court decided the case under both First and Fourteenth Amendment grounds. See *Gill v. Whitford*, 218 F. Supp. 3d 837, 884 (W.D. Wis. 2016). Although primarily a political association case, Justice Kennedy has suggested in the past that the political gerrymander also implicates expression. *Vieth v. Jubiler*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring) (arguing that political gerrymander implicates the "First Amendment interest [in] not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views").

296. *Vieth*, 541 U.S. at 316 (Kennedy, J., concurring) ("The ordered working of our Republic, and of the democratic process, depends on a sense of decorum and restraint in all branches of government, and in the citizenry itself. Here, one has the sense that legislative restraint was abandoned.").

