

Public Health Preemption+: Constitutional Affronts to Public Health Innovations*

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* This Article is based in part on the lecture by James G. Hodge, Jr. for the Symposium, *Re-Thinking State Relevance*, on November 3, 2017, at The Ohio State University Moritz College of Law, as well as the following Article: James G. Hodge, Jr. et al., *Public Health “Preemption Plus,”* 45(1) J.L. MED. & ETHICS 156 (2017). The authors would like to thank Kim Weidenaar, J.D., Alicia Corbett, J.D., Lane Conrad, J.D., Brian Fillmore, M.P.H., and Sarah Lemelman with the Center for Public Health Law and Policy (CPHLP), Sandra Day O’Connor College of Law, and Arizona State University (ASU), for their research, reviews, and other contributions.

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I. INTRODUCTION

Constitutional principles and doctrines, whether structural (e.g., federalism,¹ separation of powers²) or rights-based (e.g., due process³), provide various safeguards against unwarranted uses of government powers applied to the detriment of citizens.⁴ The constitutional doctrine of preemption serves a similar role. Whether ensconced in the Supremacy Clause of the U.S. Constitution or arising from state sovereign powers, preemption refers to how laws at lower levels of government may be altered or negated by conflicting laws at higher levels.⁵ Federal laws may expressly or impliedly⁶ preempt state

¹Federalism divides powers between federal and state governments to promote political accountability in furtherance of individual freedoms. *See, e.g.*, *United States v. Lopez*, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring) (“[I]t was the insight of the Framers that freedom was enhanced by the creation of the two governments, not one.”); LAWRENCE O. GOSTIN & LINDSAY F. WILEY, *PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT* 111 (3d ed. 2016) (“The [Chief Justice] Roberts Court appears less focused on protecting states’ rights for their own sake, preferring instead to police the constitutional design in ways that protect individual liberty.”); *see also* DERRICK A. BELL, JR., *CONSTITUTIONAL CONFLICTS, PART I* 46 (1997) (“The hope for American federalism’s divided delegation of sovereignty was that, in a manner similar to the separation of powers in the federal government, levels of government with opposing interests would check one another and thus prevent any one level from becoming dangerously powerful.”).

²*See, e.g.*, Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1513 (1991) (“The principle of separated powers is a prominent feature of the body of the Constitution, dictating the form, function, and structure of a government of limited powers.”).

³Substantive and procedural due process principles limit government overreaching in multiple settings. *See, e.g.*, WENDY E. PARMET, *POPULATIONS, PUBLIC HEALTH, AND THE LAW* 124–29 (2009).

⁴*See, e.g.*, ERWIN CHERMERINSKY, *INTERPRETING THE CONSTITUTION* 100 (1987) (“The Constitution creates the structure of government, in part, to prevent those in power from increasing their authority.”); GOSTIN & WILEY, *supra* note 1, at 83 (“The constitutional design, then, is one in which government is afforded ample power to safeguard the commonweal but is prohibited from exercising it to trample individual rights.”); *see also* Brown, *supra* note 2, at 1514 (“[T]he structure of the government is a vital part of a constitutional organism whose final cause is the protection of individual rights.”).

⁵James G. Hodge, Jr. & Alicia Corbett, *Legal Preemption and the Prevention of Chronic Conditions*, 13 PREVENTING CHRONIC DISEASE (June 30, 2016), https://www.cdc.gov/pcd/issues/2016/16_0121.htm [<https://perma.cc/L3MQ-WYGR>].

⁶The focus of this commentary is on the general meaning and basis for the constitutional doctrine of preemption, and not its manifestations in express or implied forms. Preemption analysis by the U.S. Supreme Court is “anything but analytically air-tight.” LAURENCE H. TRIBE, 1 *AMERICAN CONSTITUTIONAL LAW* 1177 (3d ed. 2000). To the extent these issues delve into the deeper realms of preemption analyses or conflicts of laws principles, they are not addressed substantively despite their potential relevance.

or local laws because federal law is supreme. State laws can preempt local laws because local governments are lawfully controlled by their sovereign states.⁷

A major premise of the doctrine of preemption arising from the Supremacy Clause is the preservation of continuity among tri-levels of government in the United States in furtherance of political order and stability.⁸ While this facet of preemption underscores its utility as a structural principle, various applications of preemption (e.g., floor, ceiling, field) are highly complex, especially in inter-jurisdictional fields like public health law.⁹

Preemption is a double-edged sword capable of promoting or limiting state or local public health objectives. Federal preemption may be used to create a national baseline standard for public health policies (e.g., menu labeling provisions¹⁰) that would not otherwise exist across all states.¹¹ Alternatively, preemption can thwart state or local public health legal innovations in diverse areas such as gun control, tobacco use, food policy, employment protection, and the environment.¹² Though frustrating to policymakers, preemptive limits are a lawful consequence of the constitutional doctrine.¹³

However, emerging “preemption plus(+)” tactics reveal a darker policy realm. Law and policy-makers increasingly seek to control lower-level governments through actions exceeding traditional boundaries or specific targets of preemption. Preemption+ schemes include lawmakers’ efforts to tack on direct threats, fines, loss of funds, and broad de-authorizations of powers to traditional preemption clauses or provisions. These tactics are prominent in public health areas impacting large industries (e.g., tobacco and sugar sweetened beverages (SSBs)) and specific interests (e.g., rights to bear arms and religious freedom). The impetus is to essentially force states or localities to comply with higher level policies often antithetical to the public’s health.

Our exploration of preemption+ examines its historic and modern applications at federal and state levels as well as political and judicial arguments to limit negative impacts on public health policy. Though it has emerged as an oppressive obstacle to public health innovation, the roots of preemption+ are embedded in constitutional precepts and long-standing policies. Modern

⁷ Even some local governments with sufficient state-delegated authority may preempt laws among lesser municipalities. See Andrew Selsky, *Oregon County Says No to Nestle Water-Bottling Plant*, SEATTLE TIMES (May 18, 2016), <http://www.seattletimes.com/business/oregon-county-says-no-to-nestle-water-bottling-plant/> [https://perma.cc/7BSF-VTR7] (explaining how Oregon county law overrode city law approving manufacturing plant within the county’s borders).

⁸ Bradford R. Clark, *Constitutional Compromise and the Supremacy Clause*, 83 NOTRE DAME L. REV. 1421, 1422 (2008).

⁹ GOSTIN & WILEY, *supra* note 1, at 78 (“The taxonomy of preemption is complex.”).

¹⁰ JAMES G. HODGE, JR., *PUBLIC HEALTH LAW IN A NUTSHELL* 213–17 (2d ed. 2016).

¹¹ Mark Pertschuk et al., *Assessing the Impact of Federal and State Preemption in Public Health: A Framework for Decision Makers*, 19 J. PUB. HEALTH MGMT. & PRAC. 213, 214 (2012).

¹² *Id.* at 213.

¹³ See *id.* at 216.

expressions of preemption⁺, however, arguably exceed these core foundations, leading to an array of contemporary legal challenges. To counter the trend, state and local public health officials have engaged in political grassroots efforts and brought multiple lawsuits with varying degrees of success.

Defeating preemption⁺ tactics is obfuscated, particularly among local governments, by the constitutional entrenchment of the underlying doctrine. Enhanced understanding of the cohesiveness of structural and rights-based principles may provide alternative arguments to stem the tide of these schemes and open greater pathways to public health legal innovations.

II. CONSTITUTIONAL BASES OF PREEMPTION

While federal, state, and local governments often concurrently address shared public health concerns, inter-jurisdictional conflicts are controlled by principles of preemption emanating from allocations of powers among federal, state, and local governments.¹⁴ Constitutionally enumerated federal powers are limited but supreme.¹⁵ Federal entities may expressly or impliedly curtail state and municipal laws.¹⁶ Consistent with principles of federalism, states are reserved police and *parens patriae* powers as sovereign governments via the Tenth Amendment.¹⁷ Unlike federal authorities, states are not constrained in their dominance over local governments (absent state constitutional limits) because localities owe their existence to states.¹⁸ As a result, states may preempt local laws almost at will.

The politics, promises, and perils of preemption oscillate over time. Federal and state governments can use preemption to strengthen public health by authorizing lower levels of government to build upon national or state minimum standards.¹⁹ However, preemption is more commonly used to override or limit local authority.²⁰ More aggressive schemes have their roots in centuries-old policies. In the nineteenth century, state “ripper laws” arbitrarily stripped local powers from municipalities.²¹ In response to public outcry, forty-one states enacted state constitutional amendments forbidding these punitive laws (unless requested by local government).²²

¹⁴ Jennifer L. Pomeranz & Mark Pertschuk, *State Preemption: A Significant and Quiet Threat to Public Health in the United States*, 107 AM. J. PUB. HEALTH 900, 900 (2017).

¹⁵ U.S. CONST. art. VI, § 2.

¹⁶ See Pertschuk et al., *supra* note 11, at 214.

¹⁷ See U.S. CONST. amend. X.

¹⁸ Pomeranz & Pertschuk, *supra* note 14, at 900.

¹⁹ For example, the National School Lunch Act of 1946, ch. 281, 79 Pub. L. No. 396, 60 Stat. 230, 233, sets minimum nutritional standards that benefit all schoolchildren and empowers lower levels of government to enact or enforce additional measures. See Pomeranz & Pertschuk, *supra* note 14, at 900.

²⁰ JOSEPH F. ZIMMERMAN, CONTEMPORARY AMERICAN FEDERALISM: THE GROWTH OF NATIONAL POWER 165–67 (2d ed. 2008).

²¹ *Id.* at 166.

²² *Id.*

Sparse federal laws early in the nation's history led to few conflicts requiring preemptive overrides of state or local laws.²³ By the turn of the century, Congress had taken initial steps toward increased regulation with preemptive effects. In furtherance of national uniformity, Congress passed the Interstate Commerce Act of 1887 to strip states of their existing authorities to regulate the railroad industry.²⁴ In the 1930s, a rush of New Deal regulations, undergirded primarily by Congress' interstate commerce authority, greatly expanded the federal government's activities and presence.²⁵ Inconsistent state and local laws were dismissed to advance national goals and stability. Supported by major industries, multiple variations of preemption (illustrated in Figure 1) were used to block or override conflicting laws at lower levels.²⁶

Figure 1: *Preemption Variations*

FLOOR	CEILING	FIELD
		
Federal or state law establishes a minimum standard that lower levels may not go below but can surpass	Federal or state law sets maximum protections that lower levels may not exceed	Federal or state law "occupies a field," disempowering lower levels from acting in the same domain

Profound implications of preemption on public health law arose. State and local governments have tailored public health policies to meet the needs of their constituencies. Local innovations often serve as models for other localities as well as state and federal entities. Yet, higher levels of government increasingly wield preemption to deter local public health policies by restricting or curbing

²³ Early in the history of the country, it was more common for states to attempt to infringe on federal powers. *See* *McCulloch v. Maryland*, 17 U.S. 316, 328–29 (1819). (holding unconstitutional a Maryland law taxing notes produced by the Bank of the United States); *see also* JAMES T. O'REILLY, *FEDERAL PREEMPTION OF STATE AND LOCAL LAW: LEGISLATION, REGULATION, AND LITIGATION* 5–6 (2006).

²⁴ Interstate Commerce Act, Pub. L. No. 49-41, 49 Stat. 379 (1887).

²⁵ *See* Forrest Revere Black, *The Commerce Clause and the New Deal*, 20 CORNELL L.Q. 169, 169 (1935).

²⁶ Pertschuk et al., *supra* note 11, at 213.

lower level public health laws without providing meaningful alternatives or extinguishing local innovations and protections altogether.²⁷ In 2013, despite having the highest adult obesity prevalence among all states,²⁸ Mississippi prohibited local restrictions on food and beverages akin to New York City's SSB portion size proposal.²⁹ In 2014, Tennessee became the twelfth state to limit or eliminate local smoke-free laws.³⁰ In 2017, ordinances partially decriminalizing marijuana in Nashville and Memphis were nullified by state drug control legislation.³¹

Successful challenges to federal and state preemption are difficult, but localities may prevail legally³² by demonstrating that a preemptive law (1) violates individual rights,³³ (2) has a purpose distinct from local law, or (3) infringes on the municipality's ability to govern local matters.³⁴ In 1992, against a backdrop of municipal laws banning discrimination based on sexual orientation in health services and other areas, Colorado amended its state constitution to bar local laws (and other government actions) recognizing gay, lesbian, or bisexual individuals as a protected class.³⁵ The U.S. Supreme Court found the amendment violated Equal Protection principles.³⁶ In 2015, the Los

²⁷ Pomeranz & Pertschuk, *supra* note 14, at 901–02.

²⁸ *The State of Obesity: Better Policies for a Healthier America*, ROBERT WOOD JOHNSON FOUND. (Sept. 2014) <https://www.stateofobesity.org/files/stateofobesity2014.pdf> [<https://perma.cc/X6AY-55WM>].

²⁹ MISS. CODE ANN. § 75-29-901(2) (West 2013); *see* Bruce Yee, *5 More Locations Pass Soda Taxes: What's Next for Big Soda*, FORBES (Nov. 14, 2016), <https://www.forbes.com/sites/brucelee/2016/11/14/5-more-locations-pass-soda-taxes-whats-next-for-bigsoda/#27e5e33aed19> [<https://perma.cc/XT4H-CACS>] (explaining that several other states and local governments have introduced laws aimed at curbing SSB consumption).

³⁰ *Preemption Watch: Smokefree*, GRASSROOTS CHANGE, <https://grassrootschange.net/preemption-watch/#/category/smokefree> [<https://perma.cc/MN3Q-E7YN>].

³¹ Joey Garrison, *Bill Haslam Signs Repeal of New Nashville, Memphis Marijuana Laws*, TENNESSEAN (Apr. 13, 2017), <http://www.tennessean.com/story/news/2017/04/13/bill-haslam-signs-repeal-new-nashville-memphis-marijuana-laws/100416186/> [<https://perma.cc/FGX5-XPPF>].

³² Nonlegal solutions can also negate preemptive impacts. In 2011, Seattle introduced de facto decriminalization of certain drug possession violations through its “Law Enforcement Assisted Diversion” (LEAD) program. Rather than criminalizing individuals violating drug possession laws, police direct them to drug treatment, harm reduction, and other supportive services to reduce stigma, incarceration, and barriers to care. An initial evaluation showed that LEAD reduces the number of people who are arrested, prosecuted, and incarcerated, as well as levels of recidivism. *See, e.g.*, DRUG POLICY ALL., IT'S TIME FOR THE U.S. TO DECRIMINALIZE DRUG USE AND POSSESSION 19 (July 2017).

³³ *Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank*, 136 F.3d 1360, 1364–65 (9th Cir. 1998) (Kozinski, J., concurring). Political subdivisions only have standing to challenge state statutes on constitutional grounds in certain jurisdictions. *See id.* at 1363 (holding that local government, as a political subdivision of the state, lacked standing under federal law to challenge state law).

³⁴ *See infra* Part III.

³⁵ *Romer v. Evans*, 517 U.S. 620, 623–24 (1996).

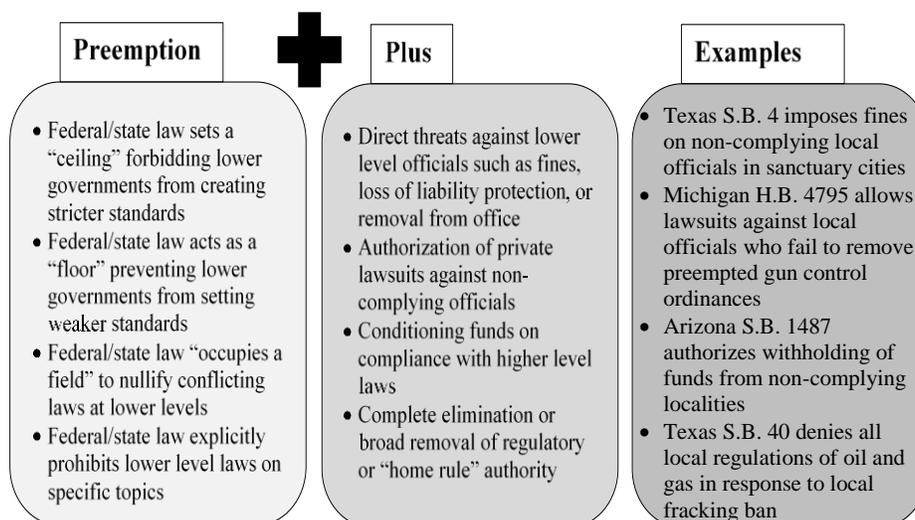
³⁶ *Id.* at 635.

Angeles City Council approved a ban on alcohol advertisements on city property to reduce underage drinking and alcohol abuse.³⁷ The ordinance survived a preemption challenge because its purpose was to address alcohol marketing rather than state-regulated alcohol sales.³⁸

III. PUBLIC HEALTH PREEMPTION⁺

Preemption⁺ strategies involving enhanced punishments or disincentives frequently accompany state or federal laws targeting public health efforts.³⁹ Figure 2 illustrates how these strategies threaten local public health efforts in diverse areas including gun control, tobacco use, food policy, and employee and environmental protections.

Figure 2: *Preemption⁺ Tactics*⁴⁰



A. *Preemption⁺ Trends*

Multiple states supplement preemptive laws with provisions penalizing local officials who enforce or enact contrary ordinances or other laws. A 2011

³⁷ Soumya Karlamangla, *Council Votes to Ban Alcoholic Beverage Ads on Most City Property*, L.A. TIMES (Jan. 20, 2015), <http://www.latimes.com/local/lanow/la-me-ln-alcohol-ad-ban-20150120-story.html> [<https://perma.cc/A83T-GQKU>].

³⁸ Molly Cohen, *A Lawyer’s Playbook to Fight State Preemption*, CITYLAB (July 19, 2017), <https://www.citylab.com/equity/2017/07/a-lawyers-playbook-to-fight-state-preemption/533862/> [<https://perma.cc/WF7S-M8PP>].

³⁹ James G. Hodge, Jr. et al., *Public Health “Preemption Plus,”* 45 J. L. MED. & ETHICS 156, 156 (2017).

⁴⁰ *Id.* at 157.

firearm preemption statute in Florida penalizes local officials with fines up to \$5,000, loss of governmental immunity, and possible removal from office or employment by the Governor.⁴¹ Florida Carry, a pro-gun nonprofit, brought numerous lawsuits under the statute, including one against the City of Tallahassee and its mayor in 2017.⁴² In 2012, Kentucky⁴³ and Mississippi⁴⁴ also amended their firearm preemption statutes to impose criminal or other penalties on local officials. In 2016 and 2017, legislatures in five more states proffered additional bills to punish local officials for enacting preempted ordinances.⁴⁵

Backed by pro-gun industries and advocates, multiple state legislators support gun-related preemption⁺ legislation even harsher than the Florida law.⁴⁶ Introduced in 2015, Michigan H.B. 4795 (1) allots a ninety-day time period for municipalities to repeal any preempted gun control ordinances; (2) allows the state attorney general or private individuals to sue non-compliant local officials; and (3) makes local government agencies accountable for all associated legal costs and fines.⁴⁷ Although the bill ultimately failed,⁴⁸ it reveals the potential preemption⁺ challenges local jurisdictions face in seeking to advance gun control measures that promote the public's health.

Funding withdrawals are a prodigious leverage tool for higher levels of government to militate lower-level compliance. President Donald Trump's Executive Order 13768 threatens to defund local jurisdictions espousing "sanctuary city" status in violation of federal and state immigration laws.⁴⁹ State legislatures have introduced over eighty anti-sanctuary city bills, including North Carolina's version that threatens to suppress state funding.⁵⁰ The

⁴¹ FLA. STAT. § 790.33(3)(a)–(f) (West 2017).

⁴² Julie Montanaro & Mariel Carbone, *Appellate Court Rejects Lawsuit Filed Against City of Tallahassee*, WCTV (Feb. 3, 2017), <http://www.wctv.tv/content/news/Tallahassee-leaders-in-court-over-gun-suit--410281715.html> [<https://perma.cc/RBN5-9YEC>] (court refusing to implement penalties authorized by the statute since the ordinances had not been enforced).

⁴³ KY. REV. STAT. ANN. § 65.870(6) (LexisNexis 2014).

⁴⁴ MISS. CODE. ANN. § 45-9-53(5)(c) (West Supp. 2017).

⁴⁵ *Preemption of Local Laws*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, <http://smartgunlaws.org/gun-laws/policy-areas/other-laws-policies/preemption-of-local-laws/> [<https://perma.cc/2LJN-ZNJD>].

⁴⁶ *Id.*

⁴⁷ H.B. 4795, 2015 Legis. Sess. (Mich. 2015); *Penalties for Local Limitations on Gun Ownership*, MICH. HOUSE FISCAL AGENCY 2 (May 2016), <https://www.legislature.mi.gov/documents/2015-2016/billanalysis/House/pdf/2015-HLA-4795-7FFE2B32.pdf> [<https://perma.cc/ST64-AYMH>].

⁴⁸ *Another NRA Defeat: Gun-Lobby Backed Bills Fail in Michigan Legislature*, EVERYTOWN FOR GUN SAFETY (Dec. 16, 2016), <https://everytown.org/press/another-nra-defeat-gun-lobby-backed-bills-fail-in-michigan-legislature/> [<https://perma.cc/48YU-S3H6>].

⁴⁹ Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

⁵⁰ Catherine E. Shoichet, *These States Have Banned Sanctuary Cities*, CNN (May 8, 2017), <http://www.cnn.com/2017/05/08/politics/sanctuary-city-state-bans/index.html> [<https://perma.cc/2R7U-28KQ>].

Department of Justice has clarified it will enforce federal controlled substances laws in states with legalized marijuana.⁵¹

A 2016 Arizona law presents the penultimate preemption⁺ penalty against localities. As explained further in Figure 2, S.B. 1487 authorizes the state attorney general to investigate any local action allegedly preempted by state law, and withhold all state funds from localities found in violation.⁵² The threat of losing revenue for essential government activities (e.g., fire and rescue services, law enforcement, sanitation) stymied local public health initiatives in the state.⁵³ Efforts in the City of Tempe to mandate paid sick and safe time for all employees were chilled in 2016.⁵⁴ The City of Bisbee's plastic bag ordinance was similarly targeted that same year.⁵⁵ Tucson faced losing over \$115 million in state funds for refusing to comply with a state firearm ordinance.⁵⁶

Sweeping removals of local regulatory or home rule authority proliferate across multiple public health areas, including nutrition-based regulation. Many localities across the United States are enacting innovative legal approaches to improve community nutritional standards by banning toys from kids' fast food meals, placing warning labels on SSB products and advertisements, and requiring labeling of high-sodium foods on restaurant menus.⁵⁷ In 2007, however, the Ohio legislature preempted nearly all local regulation of public health nutrition.⁵⁸ Kansas's 2016 preemption statute broadly precludes local regulation and oversight of food service operations, retail food establishments,

⁵¹ *Memorandum from Jeffrey B. Sessions, III, Attorney General, on Marijuana Enforcement to All United States Attorneys (Jan. 4, 2018)*; see also Sadie Gurman, *Sessions: US Prosecutors Won't Take on Small-Time Pot Cases* US NEWS & WORLD REPORT (2018), <https://www.usnews.com/news/politics/articles/2018-03-10/sessions-us-prosecutors-wont-take-on-small-time-pot-cases> (last visited Aug 6, 2018).

⁵² ARIZ. REV. STAT. ANN. § 41-194.01(A) (Supp. 2017).

⁵³ Pomeranz & Pertschuk, *supra* note 15, at 902.

⁵⁴ Chris Coppola, *State Threat Prompts Tempe Council to Drop Sick Leave Proposal*, ARIZ. CENT. (Feb. 27, 2016), <http://www.azcentral.com/story/news/local/tempe/2016/02/27/state-threat-prompts-tempe-council-drop-sick-leave-proposal/80712240/> [<https://perma.cc/GZ6C-R5W5>].

⁵⁵ Alia Beard Rau, *State Senator Goes After Bisbee's Plastic-Bags Ordinance*, ARIZ. CENT. (Aug. 11, 2016), <http://www.azcentral.com/story/news/politics/arizona/2016/08/11/state-senator-goes-after-bisbees-plastic-bags-ordinance/88544678/> [<https://perma.cc/3WCJ-EV7R>].

⁵⁶ Joe Ferguson & Howard Fischer, *Tucson and State Will Square off in Court over Gun Laws and Local Control*, ARIZ. DAILY STAR (Dec. 6, 2016), http://tucson.com/news/local/govt-and-politics/tucson-and-state-will-square-off-in-court-over-gun/article_37240e41-d340-55d2-ac74-a6755f7733a0.html [<https://perma.cc/X4BV-MEH2>].

⁵⁷ *Healthy Eating*, PUB. HEALTH L. CTR., MITCHELL HAMLIN SCH. OF LAW, <http://www.publichealthlawcenter.org/topics/healthy-eating> [<https://perma.cc/B38P-4WJ3>]; *State Laws Related to Dietary Sodium*, NAT'L CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/research/health/analysis-of-state-laws-related-to-dietary-sodium.aspx> [<https://perma.cc/VMF4-SM34>].

⁵⁸ See *State Policy: Preemption*, THE STATE OF OBESITY, <https://stateofobesity.org/state-policy/policies/preempt/> [<https://perma.cc/ZP37-VD8R>].

and other local food practices.⁵⁹ As of 2018, twelve states preempt localities from regulating on an extensive range of nutrition-based regulation.⁶⁰

B. Texas Preemption⁺ Strategies

Over the past several years, the Texas legislature has attempted multifarious efforts to preempt local regulatory authority in response to policies that clash with state interests. Though not all of Texas' preemption⁺ proposals have succeeded, they demonstrate the cumulative potential for supplemental tactics to stifle public health innovation.

Similar to strategies in Florida and Michigan⁶¹, a 2015 Texas statute bars local governments from excluding licensed gun holders from carrying concealed firearms on government property (except where prohibited by state law).⁶² Individuals alleging harm via a preempted local action may file a complaint with the Texas attorney general, who may subsequently sue the local agency or subdivision to terminate the offense and collect civil penalties.⁶³

In 2015, the City of Austin passed an ordinance requiring ride-share drivers to complete fingerprint background checks in the interest of public safety.⁶⁴ Concerned that ride-share companies may leave the state,⁶⁵ H.B. 100⁶⁶ was enacted to strip local governments of any authority to regulate ride-sharing. After the City of Denton banned fracking, the 2015 Texas legislature could have simply preempted localities from regulating fracking. Instead, it enacted H.B. 40 to declare the state's exclusive and broad authority to regulate *all* oil and gas operations.⁶⁷ In the same legislative session, H.B. 540 was introduced to prohibit adoption of local laws on nearly any issue.⁶⁸ Although the bill died in committee,⁶⁹ this and other "blanket preemption" proposals send a strong message to localities that their long-standing public health authorities are at risk.

⁵⁹ KAN. STAT. ANN. § 12.16.137 (West 2017).

⁶⁰ *Preemption Watch*, *supra* note 30.

⁶¹ *See infra* Part IV.A.

⁶² TEX. GOV'T CODE ANN. § 411.209 (West Supp. 2015).

⁶³ *Id.*

⁶⁴ Ben Wear, *Austin Council OKs Fingerprint Requirement for Ride-Hailing Drivers*, STATESMAN (Dec. 18, 2015) <https://www.statesman.com/news/local/austin-council-oks-fingerprint-requirement-for-ride-hailing-drivers/qv965Fve5Hh19IfZ8HaJGO/> [<https://perma.cc/X8M5-D6Y7>].

⁶⁵ *See* Alex Samuels, *Uber, Lyft Return to Austin as Texas Gov. Abbott Signs Ride-Hailing Measure into Law*, TEX. TRIB. (May 29, 2017), <https://www.texastribune.org/2017/05/29/texas-gov-greg-abbott-signs-measure-creating-statewide-regulations-rid/> [<https://perma.cc/3PDL-PDZ7>].

⁶⁶ H.B. 100, 85th Leg., Reg. Sess. (Tex. 2017) codified as TEX. OCC. CODE § 2402 (2017).

⁶⁷ H.B. 40, 84th Leg. Reg. Sess. (Tex. 2015) codified as TEX. OCC. CODE § 81 (2015).

⁶⁸ H.B. 540, 84th Leg., Reg. Sess. (Tex. 2015).

⁶⁹ *See id.*

In 2017, the Texas legislature introduced S.B. 6 to preempt all local anti-discrimination ordinances allowing transgender individuals to use public bathrooms aligned with their gender identity.⁷⁰ The bill proposed penalizing schools or governmental entities that refuse to regulate bathrooms based on the sex listed on individuals' birth certificates.⁷¹ The legislature passed S.B. 4 the same year to ban municipalities from adopting policies limiting immigration enforcement.⁷² The statute subjects local law enforcement and other officials to misdemeanor charges for failing to cooperate with federal and state preemptive immigration authorities.⁷³

IV. LEGAL CHALLENGES TO PREEMPTION⁺

Preemption⁺ tactics can be perverse, but municipalities are fighting back through (1) grassroots movements pushing for anti-preemption legislation or ballot initiatives; (2) litigation challenging the constitutionality of preemption⁺ efforts on state and federal levels; and (3) invocation of home rule provisions in some state constitutions or statutes.

A. Grassroots Movements

Local officials, legal scholars, and community members are politically resisting industry-led preemption⁺ schemes. In September 2017, over 500 city officials in Florida conferenced to brainstorm anti-preemption efforts.⁷⁴ They proposed requiring state lobbyists to disclose whether clients have promoted preemption, educating voters and stakeholders on the value of local autonomy, and holding industries accountable by identifying corporations that rely on preemption⁺ strategies.

Municipalities may bolster constitutional or statutory home rule authority by advancing legislation on matters within local control.⁷⁵ Researchers with the Legal Effort to Address Preemption (LEAP) project are developing model language to insert in home rule legislation.⁷⁶ In addition, laws featuring explicit non-preemptive language can hamper preemption⁺ strategies. Kansas's Indoor

⁷⁰ S.B. 6, 85th Leg., Reg. Sess. (Tex. 2017).

⁷¹ *Id.*

⁷² S.B. 4, 85th Leg., Reg. Sess. (Tex. 2017).

⁷³ *Id.*

⁷⁴ Joe Kefauver, *Revenge of the Cities*, CONVENIENCE STORE NEWS (Sept. 6, 2017), <https://csnews.com/revenge-cities> [<https://perma.cc/BY7C-QRFH>].

⁷⁵ *Legal Strategies to Counter State Preemption and Protect Progressive Localism: A Summary of the Findings of the Legal Effort to Address Preemption (LEAP) Project*, (May 2017), BETTER BALANCE 1, 5 (May 2017), <http://www.abetterbalance.org/wp-content/uploads/2017/08/Summary-of-LEAP-Findings.pdf> [<https://perma.cc/2MJL-A7TM>].

⁷⁶ *Id.* at 3.

Clean Air Act explicitly allows more stringent local laws relating to indoor smoking.⁷⁷

State legislatures can also repeal preemptive laws via statute or ballot initiatives. The 2002 Delaware Clean Air Act repealed state-wide tobacco control preemption provisions and expanded smoke-free regulations.⁷⁸ Connecticut introduced a similar bill in 2017 to remove language preempting municipal smoking restrictions.⁷⁹ North Carolina repealed portions of its “bathroom bill” (similar to Texas’ Senate Bill 6) to allow local regulation on anti-discrimination measures.⁸⁰ Repeals of expressly preemptive state law may not be fully effective because field preemption may be presumed by some states’ courts whenever the state extensively regulates.⁸¹ Thus, explicit non-preemption language may better protect local home rule.

B. *Constitutional Arguments*

Municipalities are judicially challenging preemption⁺ on procedural and substantive grounds. In *Leach v. Commonwealth*, a Pennsylvania firearm preemption statute was invalidated solely because it violated the Commonwealth’s single-subject rule.⁸² More commonly, however, municipalities’ arguments against preemption⁺ fixate on purported violations of federalism, separation of powers, due process, or equal protection.

⁷⁷ KAN. STAT. ANN. § 21-6114 (West 2012) (“Nothing in this act shall prevent any city or county from regulating smoking within its boundaries, so long as such regulation is at least as stringent as that imposed by this act. In such cases the more stringent local regulation shall control to the extent of any inconsistency between such regulation and this act.”).

⁷⁸ DEL. CODE ANN. tit. 16, §§ 2901–2908 (2002).

⁷⁹ Connecticut’s preemptive smoking law states “[t]he provisions of this section shall supersede and preempt the provisions of any municipal law or ordinance relative to smoking effective prior to, on or after October 1, 1993.” CONN. GEN. STAT. § 19a-342 (2011). The bill introduced in 2017 seeks to strike this language completely. See Raised B. 7089, 2017 Gen. Assemb., 2017 Jan. Sess. (Conn. 2017) <https://www.cga.ct.gov/2017/TOB/h/pdf/2017HB-07089-R00-HB.pdf> [<https://perma.cc/H8KQ-MYFQ>].

⁸⁰ Camila Domonoske & James Doubek, *North Carolina Repeals Portions of Controversial ‘Bathroom Bill,’* NPR (Mar. 30, 2017), <http://www.npr.org/sections/thetwo-way/2017/03/30/522009335/north-carolina-lawmakers-governor-announce-compromise-to-repeal-bathroom-bill> [<https://perma.cc/J8DJ-YAEZ>].

⁸¹ *Repealing Preemption and Advancing Non-Preemption Language in State Law: Examples*, A BETTER BALANCE, 1, 2 (Aug. 9, 2018), <https://www.abetterbalance.org/resources/repealing-preemption-and-advancing-non-preemption-language-in-state-law-examples/> [<https://perma.cc/Q3U5-DQYX>].

⁸² *Leach v. Commonwealth*, 141 A.3d 426, 435 (Pa. 2016) (holding that a statute providing penalties for theft of secondary materials as well as standing for organizations seeking to challenge municipal firearm legislation violated Pennsylvania’s single-subject rule).

As noted in Part II, in 2017, Florida Carry argued that Florida's field-occupying gun statute preempted a Tallahassee ordinance.⁸³ The City of Tallahassee counterclaimed that the state statute, specifically its penalty provision,⁸⁴ unconstitutionally violated absolute legislative immunity and freedom of speech.⁸⁵ The court held that the City of Tallahassee had not violated the State's preemption statute because the ordinance was unenforced. However, the court refused to address Tallahassee's cross claim because no officials actually suffered statutory penalties.⁸⁶ The City won, but its victory was shallow as Florida's preemption⁺ gun law remains intact.

Several municipalities have contested state and federal preemption⁺ tactics involving sanctuary cities.⁸⁷ Two judges upheld injunctions against President Trump's aforementioned executive order. In *City of Chicago v. Sessions* (2017), a court held the order at issue violated separation of powers principles by attempting to impose conditions on funds without sufficient congressional approval.⁸⁸ Similarly, in *County of Santa Clara v. Trump* (2017), Santa Clara County and the City and County of San Francisco challenged the order as unconstitutionally vague, commandeering, and contrary to principles of separation of powers and procedural due process.⁸⁹ The court granted the municipalities' injunction based on separation of powers violations and deprivation of municipal rights under the Tenth⁹⁰ and Fifth Amendments.⁹¹ When the City of El Paso sued to enjoin enforcement of Texas' anti-sanctuary

⁸³ See Fla. Carry, Inc. v. City of Tallahassee, 212 So. 3d 452, 465 (Fla. Dist. Ct. App. 2017).

⁸⁴ FLA. STAT. § 790.33 (2017) ("Any person, county, agency, municipality, district, or other entity that violates the Legislature's occupation of the whole field of regulation of firearms and ammunition . . . by enacting or causing to be enforced any local ordinance or administrative rule or regulation impinging upon such exclusive occupation of the field shall be liable as set forth herein . . . If the court determines that a violation was knowing and willful, the court shall assess a civil fine of up to \$5,000 against the elected or appointed local government official . . . public funds may not be used to defend or reimburse the unlawful conduct of any person found to have knowingly and willfully violated this section.").

⁸⁵ Fla. Carry, 212 So. 3d at 455.

⁸⁶ *Id.* at 466.

⁸⁷ Suzannah Gonzales et al., *U.S. Judge Sides Against Trump in Fight Over 'Sanctuary Cities'*, REUTERS (Sept. 15, 2017), <https://www.reuters.com/article/us-usa-immigration-sanctuary/u-s-judge-sides-against-trump-in-fight-over-sanctuary-cities-idUSKCN1BQ2VL> [https://perma.cc/R4K4-VVSD].

⁸⁸ *City of Chi. v. Sessions*, 250 F. Supp. 3d 933, 943 (N.D. Ill. 2017).

⁸⁹ *Cty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 507 (N.D. Cal. 2017).

⁹⁰ In attempting to "conscript states and local jurisdictions into carrying out federal immigration law." *Id.* at 533.

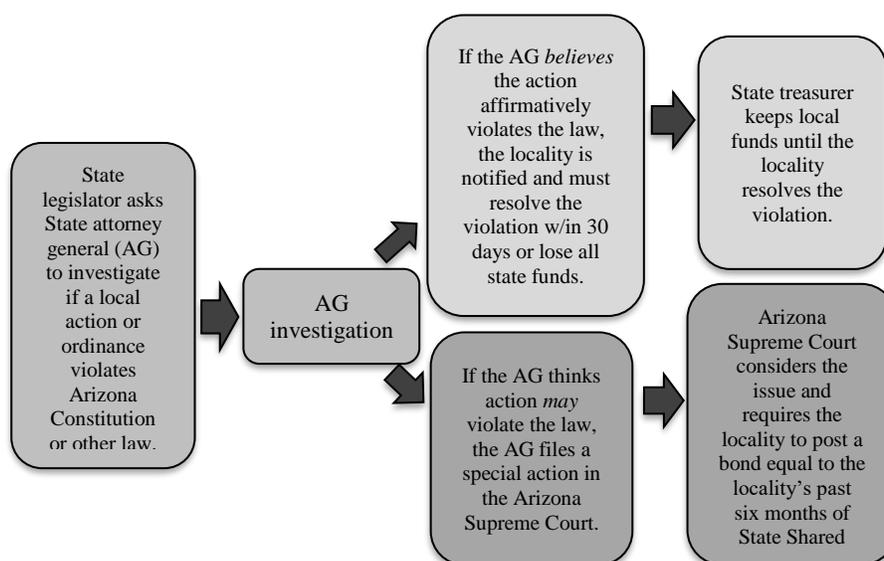
⁹¹ In that the executive order is "unconstitutionally vague in violation of the Fifth Amendment's Due Process Clause" and "fails to provide [the Counties] with procedural due process." *Id.* at 534–36.

city bill, the federal court temporarily blocked its provisions on grounds that the provisions preempted federal law or were otherwise unconstitutional.⁹²

C. Home Rule

Municipalities may also question preemption⁺ tactics as contrary to state constitutional or statutory home rule rights as highlighted in *State ex rel. Brnovich v. City of Tucson*.⁹³ At the source of the challenge in *Brnovich* is the aforementioned legislative scheme embedded in Arizona Senate Bill 1487 and illustrated in Figure 3.⁹⁴

Figure 3: Brnovich Preemption⁺ Statutory Framework



In *Brnovich*, the Arizona attorney general investigated a Tucson gun disposal ordinance and submitted a special action to the Arizona Supreme Court.⁹⁵ The City of Tucson challenged the action and Senate Bill 1487, arguing

⁹² *Federal Judge Blocks Texas' Tough 'Sanctuary Cities' Law*, CNBC (Aug. 31, 2017), <https://www.cnbc.com/2017/08/31/federal-judge-blocks-texas-tough-sanctuary-cities-law.html> [<https://perma.cc/3G9D-TB7C>]. A provision barring local officials from adopting, enforcing, or endorsing “any policy limiting the enforcement of immigration laws” was enjoined on the premise it could violate First Amendment principles and substantive due process by failing to define specific, prohibited conduct. Manny Fernandez, *Federal Judge Blocks Texas' Ban on 'Sanctuary Cities,'* N.Y. TIMES (Aug. 30, 2017), <https://www.nytimes.com/2017/08/30/us/judge-texas-sanctuary-cities.html> [on file with *Ohio State Law Journal*].

⁹³ See *State ex rel. Brnovich v. City of Tucson*, 399 P. 3d 663, 673 (Ariz. 2017).

⁹⁴ *Id.* at 667–68.

⁹⁵ *Id.* at 667.

that the law violated separation of powers principles⁹⁶ and infringed Tucson's home rule authority.⁹⁷ The State of Arizona responded that it (1) had lawfully preempted the City of Tucson;⁹⁸ and (2) its actions furthered state interests in protecting citizens' Second Amendment rights to bear arms.⁹⁹

In August 2017, the Arizona Supreme Court upheld the statute against Tucson's objections.¹⁰⁰ The court whisked aside separation of powers principles given the discretionary role of the attorney general to make legal judgments within the statute's framework.¹⁰¹ Tucson's home rule argument was dismissed on grounds that the local regulation involved matters of state concern (e.g., police departments, firearms, and city budgets).¹⁰² Arizona's constitution only grants home rule powers to charter cities like Tucson subject to the greater powers of the state.¹⁰³ When conflicts arise, state law wins unless a matter is purely of a local concern.¹⁰⁴ To retain its state funds, the City Council of Tucson repealed its gun disposal ordinance in September 2017.¹⁰⁵

V. PREEMPTION⁺ AND CONSTITUTIONAL COHESION

Preemption⁺ tactics present arduous political and legal challenges for local governments. From a political perspective, combatting higher-level governments over policies couched in preemption terms is difficult.¹⁰⁶ Federal

⁹⁶ *Id.* at 668 (arguing the statute violates separation of powers because a single member of the legislature can request the attorney general to perform special investigations, and then the attorney general can file a special action if she or he finds cause).

⁹⁷ *See id.* at 673. The City also raised a procedural due process argument against the statute's bond requirement, but the court did not address the argument since the City was not required to post the bond. *Id.* at 671.

⁹⁸ *See Brnovich*, 399 P.3d at 673 (arguing that firearms are a matter of statewide concern).

⁹⁹ *Id.* at 676.

¹⁰⁰ *Id.* at 679.

¹⁰¹ *See id.* at 668–69 (holding that there is no violation of separation of powers principles because the attorney general's inherent discretion does not usurp judicial authority).

¹⁰² *See id.* at 676.

¹⁰³ *See id.* at 675 (holding that even a charter city cannot encroach on matters of statewide concern; it must only be a local issue).

¹⁰⁴ *See Brnovich*, 399 P.3d at 676.

¹⁰⁵ *Arizona: Tucson Repeals Ordinance Requiring Destruction of Firearms*, NRA-ILA (Sept. 8, 2017), https://www.nraila.org/articles/20170908/arizona-tuscon-repeals-ordinance-requiring-destruction-of-firearms?utm_source=Preemption+Watch&utm_campaign=2b99f8ca23-EMAIL_CAMPAIGN_2017_09_20&utm_medium=email&utm_term=0_5829c34a3a-2b99f8ca23-78630993 [https://perma.cc/6CGB-A2DG].

¹⁰⁶ *See, e.g.,* Hodge, Jr., *supra* note 39, at 156–57 (2017) (describing the political threats such as loss in funding, fines for violators of preemption, and loss of regulatory authority).

supremacy¹⁰⁷ and sovereign police powers tend to override local policies.¹⁰⁸ When intractable conflicts arise, the presumption of preemption is that higher levels of government usually prevail.¹⁰⁹ Municipalities can still wage political battles with state or federal governments, but the odds of success can be long when resources and authorities are slim.

Outside the political realm, judicial challenges of preemption⁺ are dicey. Municipalities and courts struggle to separate and assess key distinctions between constitutionally-grounded facets of preemption and accompanying *plus* tactics. Failure to distinguish between these issues is a death knell for most disputes. When preemption is viewed as the foundation of *plus* strategies, local governments' objections hinging on pure preemption fall flat so long as higher levels of government are justified in their exercise of authority.¹¹⁰ Thus, as the Arizona Supreme Court determined in *Brnovich*, the premise that the State was acting within the gambit of its sovereign powers was sufficient to justify virtually all exercises impacting local governments, including those that arguably exceed the boundaries of preemption.¹¹¹

To prevail localities must pivot away from arguing whether federal or state governments can preempt local laws to explore whether distinct exercises of preemption⁺ are constitutionally sound.¹¹² This requires localities and courts to untangle exercises of preemption from *plus* strategies to separately assess the nature of a higher government's authority. Tucson attempted this approach in arguing that the Arizona state legislature's preemptive scheme intruded on constitutionally-vested local home rule powers.¹¹³ The argument was crafty, but the City still lost.¹¹⁴

Ultimately at the source of Tucson's and other localities' defeats may be a failure to recognize the interrelatedness of constitutional structural and rights-based principles. Tucson essentially fought fire with fire. It challenged the structural principle of preemption through competing structural principles of local home rule authority.¹¹⁵ Tucson's argument missed the mark in three

¹⁰⁷ See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824) (holding that to the extent that state or local exercises of powers "[interference] with, or are contrary to the law of Congress, made in pursuance of the constitution, . . . [i]n every such case, the act of Congress . . . is supreme," and sub-level governmental exercises "must yield to it.").

¹⁰⁸ E.g., *Brnovich*, 399 P.3d at 676 (holding that the broad police powers of the state make firearms a statewide concern).

¹⁰⁹ *Contra* Note, *New Evidence on the Presumption Against Preemption: An Empirical Study of Congressional Responses to Supreme Court Preemption Decisions*, 120 HARV. L. REV. 1604, 1607 (2007).

¹¹⁰ See, e.g., *Brnovich*, 399 P.3d at 678 (provided the state shows some statewide concern the preemption statute stands).

¹¹¹ See *id.* at 675–77.

¹¹² See Hodge, Jr., *supra* note 39, at 158–59 (discussing various successful challenges to preemption lawsuits).

¹¹³ *Brnovich*, 399 P.3d at 673.

¹¹⁴ *Id.* at 679.

¹¹⁵ See *id.* at 673.

primary ways by (1) failing to unravel the preemptive and non-preemptive facets of the underlying state; (2) wrongly purporting that preemptive exercises of state sovereign police powers must succumb to local home rule; and (3) opting against a potential stealthier option aligned with long-standing constitutional theory.

Under principles of constitutional cohesion,¹¹⁶ to the extent structural- and rights-based principles are interwoven within the fabric of federal or state constitutions, they are interdependent and subject to predictable interpretations.¹¹⁷ Stated succinctly, structural and rights-based principles are highly interrelated.¹¹⁸ Though conceptually simple, constitutional cohesion is non-intuitive in practice. Scholars, judges, policymakers, and others are quick to separate structural- and rights-based constitutional arguments when challenging varied laws.¹¹⁹ Federal laws attempting to classify persons in suspect ways are typically challenged on Equal Protection grounds. Federal laws impinging on state and local rights are countered with federalism-based arguments. To the degree these sensible arguments prevail, there is little need to go farther. However, linear challenges belie the notion that rights-based and structural approaches may present alternative, stronger options.

Constitutional cohesion is grounded in historical precedence. In *Jacobson v. Massachusetts* (1905), the U.S. Supreme Court rejected an individual's challenge to state and local vaccination authorities framed largely in terms of due process and equal protection violations.¹²⁰ Among the primary counter-arguments proffered by the Commonwealth of Massachusetts and acknowledged by Justice Harlan in the Court's Opinion were claims of federalism (i.e., the matter should be left to states to decide consistent with their sovereign authority) and separation of powers (i.e., courts must respect the legislative judgments of state and local governments in furtherance of the public's health).¹²¹

Decades later in *Morrison v. Olson* (1988), the Court examined a statute that empowered a special three-judge panel to appoint an independent counsel to

¹¹⁶ James G. Hodge, Jr., *Constitutional Cohesion and Public Health Promotion*, 45 J. L. MED. & ETHICS 688, 689 (2017).

¹¹⁷ *Id.* at 690.

¹¹⁸ See, e.g., Brown, *supra* note 2, at 1516 (arguing that “protection of individual rights—specifically, evenhanded treatment by the government, or ‘ordered liberty’—should be an explicit factor in the analysis of structural issues and should provide an animating principle for the jurisprudence of separated powers.”); see also TRIBE, *supra* note 6, at 124–26 (“The separation of powers shapes not only topics that obviously implicate governmental structure or the allocation of power . . . but also issues . . . such as the values of fairness embodied in the law of due process.”).

¹¹⁹ See, e.g., Ozan O. Varol, *Structural Rights*, 105 GEO. L.J. 1001, 1054 (2017) (“It is a theoretical mistake to cast rights and structure as conceptual opposites where rights serve functions similar to structure . . . [C]onstitutional theory . . . misses opportunities to examine how they fit into a coherent, harmonious whole.”).

¹²⁰ *Jacobson v. Massachusetts*, 197 U.S. 11, 30 (1905).

¹²¹ HODGE, JR., *supra* note 10, at 69–71.

investigate and prosecute crimes when certain executive officials came under suspicion.¹²² Separation of powers principles were implicated to the degree the statute empowered the judicial branch at the expense of the executive branch. The Court addressed the statute's constitutionality by analyzing its effect on individuals' due process rights. Since the statute guaranteed decision-makers would remain impartial, a core principle of due process, the Court dismissed any separation of powers concerns. In *United States v. Lopez* (1995), a minor faced federal criminal charges for possessing a gun at school in violation of the Gun-Free School Zones Act of 1990.¹²³ His attorneys looked beyond rights-based arguments to craft a successful federalism challenge to Congress's commerce authority to implement the Act itself.¹²⁴

In these and additional decisions, courts have recognized the interrelatedness of constitutional structural- and rights-based principles.¹²⁵ Mere recognition, however, is not the end game. Litigants should increasingly frame constitutional challenges that reflect a cohesive view of constitutional principles. In the context of preemption⁺ strategies, litigants may need to couch alternative arguments to defeat legislative or regulatory attempts to tamp down local public health innovations through the guise of preemption in rights-based principles.

In the aforementioned sanctuary cities challenge, San Francisco and Santa Clara successfully argued that the executive order was vague in violation of municipalities' Fifth Amendment rights to due process.¹²⁶ In *Brnovich*, Tucson could have similarly raised municipal due process concerns.¹²⁷ This argument is complex and by no means assured victory. However, to the degree it presents rights-based challenges (e.g., due process) to structurally-grounded strategies (e.g., preemption), it may untangle invidious preemption⁺ tactics from settled constitutional doctrine to shed light on challenges with greater chances of triumph than linear structural or rights-based positions.

¹²² *Morrison v. Olson*, 487 U.S. 654, 660–61 (1988).

¹²³ *United States v. Lopez*, 514 U.S. 549, 551 (1995).

¹²⁴ *Id.* at 567; see also HODGE, JR., *supra* note 10, at 31.

¹²⁵ The premise that these arguments are best made or resolved within the judiciary is itself controversial. Some scholars argue that conflicts grounded in structural principles like separation of powers belong to Congress and the Executive Branch to resolve. Jesse Choper suggests that separation of powers issues are purely political and thus should not be subject to judicial review. CHEMERINSKY, *supra* note 4, at 100. Erwin Chemerinsky counters that “[t]he courts should be the authoritative arbiter of the entire Constitution.” *Id.* at 101.

¹²⁶ *Cty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 534–40 (N.D. Cal. 2017) (finding that the executive order was “unconstitutionally vague in violation of the Fifth Amendment’s Due Process Clause” and “fail[ed] to provide [the counties] with procedural due process.”).

¹²⁷ See Josh Bendor, *Municipal Constitutional Rights: A New Approach*, 31 YALE L. & POL’Y REV. 389, 395–96 (2013).

VI. CONCLUSION

Preemption⁺ strategies polarize local public health authorities and their communities from federal and state governments whose shared mission should be to fully protect the public's health. These tactics defy conventional politics and threaten governmental stability in an era when traditional and emerging health threats are impacting local communities at alarming levels. Purported premises underlying preemption⁺ to bully localities into conformity or submission on key public health objectives inhibit local innovations at the heart of public health achievements regionally and nationally.

Battling these tactics entails a multi-faceted game plan centered on effective grass roots initiatives, political defenses of long-standing local public health authorities, and re-conceptualized legal challenges that embrace constitutional arguments outside the linear realm of traditional preemption approaches. Principles of constitutional cohesion suggest rights-based arguments may present an alternative framework to successfully challenge structurally-grounded preemption⁺ measures. This approach requires litigants and courts to unravel *plus* strategies from their preemptive core. Resulting judicial reviews may shift away from losing arguments focused on structural foundations of preemption and toward rights-based norms. This shift may sustain more critical reviews initially and greater leverage subsequently for inventive interpretations of municipal and individual rights.