Fighting the Pandemic of Preemption: Local Governance and Home Rule in the Aftermath of COVID-19

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I. INTRODUCTION

Local public health measures were flashpoints from the very beginning of the COVID-19 pandemic.[1] Some local governments passed restrictions that

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[1] *See, e.g.*, Katie Canales, *The Face Mask Is a Political Symbol in America, and What It Represents Has Changed Drastically in the 100 Years Since the Last Major Pandemic*, BUS. INSIDER (May 29, 2020), https://www.businessinsider.com/masks-political-symbol-coronavirus-covid-19-spanish-1918-flu-pandemic-2020-5 [https://perma.cc/PD2W-TDZ7]. For details on COVID-19 responses, with a focus on preemption, see *At a Glance: Preemption and the Pandemic*, LOC. SOLUTIONS SUPPORT CTR., https://www.supportdemocracy.org/the-latest/at-a-glance-state-and-city-action-on-covid-19

were more protective of public health than their respective state governments.[2] And some state governments took the drastic step of *prohibiting* local public health action.[3] Although these tiffs played out through a political lens, they are largely products of the law.

This Note considers home rule and preemption in wake of COVID-19.[4] Part II argues that COVID-19 conflicts were largely inevitable, given recent preemption trends. Part III identifies generic scenarios, inspired by the COVID-19 pandemic. And finally, Part IV discusses a partial landscape of solutions that strike a balance between uniformity and autonomy. Drawing on pre-pandemic scholarship, it concludes that state-court-developed standards are most workable.

II. TWO SIMULTANEOUS PANDEMICS

It came as no surprise to public health experts and political scholars that preemption was an issue during the COVID-19 pandemic.[5] To discern why, it is helpful to understand the origins of our current "pandemic of preemption."[6]

[https://perma.cc/3LU8-S5BA] (last updated Nov. 18, 2020) (archiving updates). *See also* ANNA PRICE & LOUIS MYERS, UNITED STATES: FEDERAL, STATE, AND LOCAL GOVERNMENT RESPONSES TO COVID-19 10–20 (Nov. 2020).

[2] *See* Seanna Adcox, *SC Coronavirus Stay-At-Home Orders Latest in Ongoing Spat Between State, Local Governments*, POST & COURIER (Mar. 31, 2020), https://www.postandcourier.com/health/covid19/sc-coronavirus-stay-at-home-orders-latest-in-ongoing-spat-between-state-local-governments/article_bcb6340e-736d-11ea-b515-2bb5886da8df.html [https://perma.cc/FL5D-RB2J].

[3] Greg Bluestein & Jeremy Redmon, *Kemp's Ban of Mask Mandates Puts Georgia on Collision Course with Its Cities*, ATL. J.-CONST. POL. INSIDER BLOG (July 16, 2020), https://www.ajc.com/politics/politics-blog/kemps-ban-of-mask-mandates-puts-georgia-on-collision-course-with-its-cities/PUDMOPL2CNCCVBQRDGTIIF2AX4/ [https://perma.cc/N9VE-KJKL].

[4] This Note was primarily written before the rise of the SARS-CoV-2 "Delta" variant. Nevertheless, the rapidly-spreading Delta variant highlights the relevance of this Note, as localities consider implementing new restrictions despite conflicting statewide guidance. *See, e.g.*, Rong-Gong Lin II & Luke Money, *Does L.A. County's New COVID-19 Mask Mandate Make Any Sense?*, L.A. TIMES (July 16, 2021), https://www.latimes.com/california/story/2021-07-16/does-l-a-countys-new-covid-19-mask-mandate-make-any-sense [https://perma.cc/3UVW-H3HK].

[5] Maresa Strano, *COVID-19 Hits Local Democracy Where It Hurts*, NEW AM. (Apr. 22, 2020), https://www.newamerica.org/weekly/covid-local-democracy-where-it-hurts/ [https://perma.cc/U6NN-FPTB]; *see also* Jessica Amoroso & Sarah Winston, *COVID-19 Unmasks Issues Around Public Health Preemption*, BILL OF HEALTH BLOG (Dec. 21, 2020), https://blog.petrieflom.law.harvard.edu/2020/12/21/covid-public-health-preemption/ [https://perma.cc/3BWK-BPXE].

[6] This is adapted from Professor Stahl, who has referred to preemption as an "epidemic." *See* Kenneth A. Stahl, *Preemption, Federalism, and Local Democracy*, 44 FORDHAM URB. L.J. 133, 134, 146 (2017).

Local governments are "creatures" of state statute and are therefore limited in their powers.[7] But states allocate authority in different ways. "Dillon's Rule" jurisdictions only grant power in enumerated policy areas, whereas "home rule" jurisdictions afford considerable local autonomy.[8] In reality, every state falls on a spectrum between the two,[9] but even in robust home rule states, local decisions are subject to preemption.[10]

Intrastate preemption occurs when state governments override local decisions, or when they withdraw local authority.[11] Preemption can be explicit or implied.[12] But while facially benign, it is increasingly used in a punitive manner—by withholding funds, exposing cities to liability, and imposing civil penalties on officials.[13] It has undercut several local policy objectives—including local anti-discrimination protections,[14] workplace regulations,[15] environmental ordinances,[16] and most relevant to this Note, public health efforts.[17] Public health scholars recognize that punitive preemption has the unfortunate effect of stifling local public health innovation.[18] And, as others have identified, it tends to be waged by conservative legislatures against progressive cities.[19]

These patterns are fitting for some examples from the COVID-19 pandemic, particularly where Republican-led state governments prevented Democratic-leaning localities from implementing mask mandates.[20] Yet in other instances,

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[7] Richard Briffault, *Our Localism: Part I – The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 7 (1990) [hereinafter Briffault, *Our Localism*]; *cf.* PRICE & MYERS, *supra* note 1, at 14 (discussing Supreme Court precedents).

[8] *See* Briffault, *Our Localism*, *supra* note 7, at 6–12.

[9] *See id.* at 10–11.

[10] *See* Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1114 (2007) [hereinafter Diller, *Intrastate*].

[11] Richard Briffault, Nestor Davidson, Paul A. Diller, Olatunde Johnson & Richard C. Schragger, *The Troubling Turn in State Preemption: The Assault on Progressive Cities and How Cities Can Respond*, 11 ADVANCE 3 (2017).

[12] *See* Diller, *Intrastate*, *supra* note 10, at 1140–42.

[13] *See* Briffault, et al., *supra* note 11, at 3.

[14] *See* William Peter Maruides, Note, *The Use of Preemption to Limit Social Progress in South Carolina: The Road to the Bathroom Bill*, 69 S.C. L. REV. 977, 978 (2018).

[15] *See* Dilini Lankachandra, *Enacting Local Workplace Regulations in an Era of Preemption*, 122 W. VA. L. REV. 941, 944 (2020).

[16] *See* Sarah J. Fox, Essay, *Why Localizing Climate Federalism Matters (Even) During A Biden Administration*, 99 TEX. L. REV. ONLINE 122, 140–41 (2021).

[17] *See* James G. Hodge, Danielle Chronister, Alexandra Hess, Madeline Morcelle, Jennifer Piatt & Sarah A. Wetter, *Public Health Preemption+: Constitutional Affronts to Public Health Innovations*, 79 OHIO ST. L.J. 685, 703 (2018).

[18] *Id.*

[19] *See* Stahl, *supra* note 6 at 136–45. *See generally* Briffault, et al., *supra* note 11 (describing recent preemption trends as an "assault" on progressive cities).

[20] *See, e.g.*, Bluestein & Redmon, *supra* note 3 (describing Georgia's response).

rural, predominately-Republican areas cried home rule.[21] In either case, pre-pandemic preemption trends "left cities starting from behind" when COVID-19 arrived.[22] As a result, some have called for a rebalancing of power between state and local governments in wake of COVID-19—in part because the current balance hampers local recovery and perpetuates inequities.[23]

At the very least, preemption has been a disruptive force in the pandemic response. A September 2020 report noted that municipalities in preemption-heavy states took fewer proactive steps to deal with COVID-19, while local policymaking was more robust in states with a lower propensity for preemption.[24] As the next section of this Note suggests, this may be due to the myriad considerations local governments must account for when enacting policy, especially when preemption looms.

III. PREEMPTION SCENARIOS FROM THE COVID-19 PANDEMIC

COVID-19 preemption came in varying degrees.[25] A few states created "regulatory floors," allowing local governments to go beyond state action, others created "regulatory ceilings" on local policymaking, and others created "regulatory vacuums" by refusing to act and telling local governments they lacked the authority to make policy.[26] In essence, this set the range of acceptable local policymaking.

Existing scholarship largely compares COVID-19 responses through case studies, identifying the role preemption played and critiquing the sustainability of intrastate preemption generally.[27] Yet more importantly, the scholarship suggests that COVID-19 preemption presents broader lessons, particularly for

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[21] *See* Thomas Suddes, Opinion, *Coronavirus Impact in Ohio Creates 'Home Rule' Fans in Unexpected Places*, CLEVELAND.COM (Apr. 19, 2020), https://www.cleveland.com/opinion/2020/04/coronavirus-impact-in-ohio-creates-home-rule-fans-in-unexpected-places.html [https://perma.cc/MQ3H-VBU8] (discussing how legislators preempted local gun control but favored home rule during COVID-19).

[22] Nestor M. Davidson & Kim Haddow, *State Preemption and Local Responses in the Pandemic*, AM. CONST. SOC'Y (June 22, 2020), https://www.acslaw.org/expertforum/state-preemption-and-local-responses-in-the-pandemic/ [https://perma.cc/73JD-YQJJ].

[23] *Id.*; *see also* Kim Haddow, Derek Carr, Benjamin D. Winig & Sabrina Adler, *Preemption, Public Health, and Equity in the Time of COVID-19* 74 (*Assessing Legal Responses to COVID-19*, Aug. 18, 2020), https://ssrn.com/abstract=3675886 [https://perma.cc/KB2T-3QL4] (mentioning that preemption harms marginalized groups).

[24] MARK TRESKON & BENJAMIN DOCTER, URB. INST., PREEMPTION AND ITS IMPACT ON POLICY RESPONSES TO COVID-19 7 (2020), https://www.urban.org/sites/default/files/publication/102879/preemption-and-its-impact-on-policy-responses-to-covid-19.pdf [https://perma.cc/UZ3S-A5FX].

[25] Haddow, et al., *supra* note 23, at 72 (identifying "three forms" of COVID-19 preemption).

[26] *See id.* at 72–73.

[27] *See generally id.*; Davidson & Haddow, *supra* note 22; TRESKON & DOCTER, *supra* note 24.

future "timely and targeted policy responses."[28] This Part distills the regulatory "ceiling," "floor," and "vacuum" analysis into generic scenarios, which have continued relevance beyond the COVID-19 pandemic. Each scenario works through the considerations[29] local governments face when making public health decisions.

A. *When a Locality Enacts a Public Health Measure*

Consider a local jurisdiction that simply wants to pass a measure, and assume the measure will promote health to a scientific certainty. Logically and politically, it would make sense to start with the substance of the policy.[30] But the legal apportionment of state-local power requires our hypothetical jurisdiction to first ask: *can* we do this? [31]

The answer hinges on who controls the policy sphere.[32] If the state has strong home rule, the answer may be yes, assuming the proposed policy does not run afoul of statewide objectives.[33] But if the state uses Dillon's Rule, it depends on whether the local health board has the explicit power to act.[34] Even then, the question of subsequent preemption remains.[35] Whether the jurisdiction is characterized as "home rule" state or a "Dillon's Rule" state is inconsequential if local policymaking is consistently preempted.[36] Moreover, the *threat* of preemption may act as an additional constraint on the ability of a local

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[28] TRESKON & DOCTER, *supra* note 24, at 7.

[29] Some of these considerations were identified in guides released by think tanks during the pandemic. *See, e.g.*, LOC. SOLUTIONS SUPPORT CTR., HOW DO YOU KNOW IF YOUR LOCAL GOVERNMENT HAS THE LEGAL AUTHORITY TO ADOPT A POLICY IN RESPONSE TO THE CORONAVIRUS PANDEMIC? (Mar. 18, 2020) [hereinafter LOC. SOLUTIONS], https://www.supportdemocracy.org/the-latest/how-do-you-know-if-your-local-government-has-the-legal-authority-to-adopt-a-policy-in-response-to-the-coronavirus-pandemic [https://perma.cc/P4JV-L6PC] (identifying six steps).

[30] *See id.* (noting that policy identification is the first step).

[31] *See* Haddow, et al., *supra* note 23, at 72–73 (discussing regulatory "floors," "ceilings," and "vacuums").

[32] *See id.* at 1 (discussing "realms" of policy). "Policy sphere" is attributed to Deborah Stone. *See* DEBORAH STONE, POLICY PARADOX: THE ART OF POLITICAL DECISION MAKING 354–55 (Rev. ed. 2002).

[33] *See generally infra* Parts III.B–III.C (discussing conflicting state and local mandates).

[34] For a discussion of local board power, see Pekham Pal, Note, *History, Governmental Structure, and Politics: Defining the Scope of Local Board of Health Power*, 84 FORDHAM L. REV. 769, 776–82 (2015).

[35] *See* LOC. SOLUTIONS, *supra* note 29 (instructing localities to consider whether there has been express preemption (step "3") or implied preemption (step "4")).

[36] *Cf.* Jesse McKinley, *Why Can't New York City Govern Its Own Affairs?*, N.Y. TIMES (July 25, 2018), https://www.nytimes.com/2018/07/25/nyregion/nyc-home-rule-state-laws.html [https://perma.cc/7WMD-TY6K] (discussing why preemption makes New York's home rule especially weak).

government to carry out its public health objectives, especially if the policy is expected to draw the state government's ire.[37]

B. *When the State Preempts*

One way a state might preempt is by using its police powers to enact statewide measures first.[38] In these situations, the state legislature is free to act, unless there is some limitation in the state constitution.[39] The U.S. Constitution also matters, but absent discrimination or the implication of a fundamental right, the measure would likely stand.[40] So, if our hypothetical locality wants to enact its own order, it must observe the state's constraints.[41]

Yet states often act after local measures are already in place. Some subsequent statewide measures allow localities to retain their policies, namely by setting a reasonable floor.[42] When local governments are already mitigating a crisis, a data-driven floor is a measured way to create baseline uniformity. But state health measures can also be highly restrictive, effectively sidelining local decision-making.[43] A local health authority in a state that takes this approach becomes acutely aware of why home rule has gained traction in the United States, especially when the state's directive is not tailored to local needs. And even more vexing are state orders that are explicitly preemptive, create a vacuum, and run contrary to accepted science.[44] Such policies may be

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[37] *See supra* text accompanying note 24.

[38] *See* U.S. CONST. amend. X; *see also* Briffault, *Our Localism*, *supra* note 7, at 7.

[39] *See generally supra* text accompany notes 7–8.

[40] *See* Margaret Reiney & John C. O'Quinn, *Is Rational Basis the Appropriate Test to Apply in Reviewing Emergency COVID-19 Orders?*, FEDERALIST SOC'Y BLOG (Feb. 3, 2021), https://fedsoc.org/commentary/fedsoc-blog/is-rational-basis-the-appropriate-test-to-apply-in-reviewing-emergency-covid-19-orders [https://perma.cc/EW96-TM94] (discussing the levels of scrutiny as applied in COVID-19-related cases).

[41] *See* Haddow, et al., *supra* note 23, at 72.

[42] Ohio's mask mandate provides a good example. *See* OHIO DEPARTMENT OF HEALTH, DIRECTOR'S ORDER FOR FACIAL COVERINGS THROUGHOUT THE STATE OF OHIO 2 (2020), https://coronavirus.ohio.gov/static/publicorders/Directors-Order-Facial-Coverings-throughout-State-Ohio-reader.pdf [https://perma.cc/6XMZ-WC7S] ("This Order is not intended to supersede, supplant, or preempt any order or law of a local jurisdiction that is more restrictive than this Order").

[43] New York's from-the-top coronavirus response is one example. *See* Jimmy Vielkind, Joe Palazzolo & Jacob Gershman, *In Worst-Hit Covid State, New York's Cuomo Called All the Shots*, WALL ST. J. (Sept. 11, 2020), https://www.wsj.com/articles/cuomo-covid-new-york-coronavirus-de-blasio-shutdown-timing-11599836994 [https://perma.cc/S34A-YQ4X].

[44] This example is based loosely on the faceoff between Georgia Gov. Brian Kemp and Atlanta Mayor Keisha Lance Bottoms. *See supra* note 3; *see also* Haddow, et al., *supra* note 23, at 72–73 (describing policy vacuums).

misguided, but there is little room for recourse.[45] This problem, and judicially manageable preemption standards, are addressed in Part IV.

C. *When State Measures End*

Coronavirus re-openings also raise interesting questions. Implied preemption generally prevents local governments from regulating in the same sphere as the state or in a way that undermines state objectives.[46] Although implied preemption is relevant when state mandates are in effect, it has arguable relevance after statewide restrictions end because localities are acting against the immediate backdrop of an expired order.[47] If the state desires uniformity in reopening, local action may be impliedly preempted.[48] Alternately, perhaps the absence of state regulation simply means local governments are again welcome to act. As the next section urges, state courts can play a role in resolving these thorny implied preemption questions.

IV. THE CURE: DEVELOPING A POST-PANDEMIC PREEMPTION STRATEGY

Before COVID-19, there was mounting criticism of both explicit and implied preemption.[49] It is reasonable to anticipate increased interest in home rule after COVID-19, but a push for increased local autonomy is not without its own limitations, especially when it comes to handling future public health crises.

Many public health scholars would probably agree that the pandemic of preemption threatens public health.[50] The disagreement is over what can be done about it. This Note recommends the following cure: treating COVID-19 local-state government conflicts as a prime opportunity to articulate and implement coherent *standards* of intrastate preemption that better balance local

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[45] This is because local governments derive their power from the state. *See supra* note 7 and accompanying text. The Eleventh Amendment is also a considerable roadblock. *Cf.* Vill. of Orland Park v. Pritzker, 475 F. Supp. 3d 866, 887 (N.D. Ill. 2020).

[46] *See* Diller, *Intrastate*, *supra* note 10, at 1141–42 (explaining that the federal taxonomy of "field" and "conflict" is a useful starting point).

[47] Consider New Jersey's reopening in May 2020. *See* Kevin Weber & Michael DeLoreto, *'Home Rule' Conflicts Likely as NJ Reopens*, LAW360 (May 12, 2020), https://www.law360.com/articles/1272540 [https://perma.cc/S3B5-VVEF]. Local policymakers were unsure of whether reopenings meant they could get back to the home rule status quo. *See id.*

[48] For example, Texas sued the City of Austin for keeping its mask mandate in March 2021. *See* State of Texas's Verified Original Petition and Applications for Temporary and Permanent Injunctive Relief at 1–2, Texas v. City of Austin, No. D-1-GN-001046, 2021 WL 945425 (Tex. Dist. Travis Cty. Mar. 11, 2021).

[49] *See, e.g.*, Briffault, et al., *supra* note 11, at 3–4.

[50] *See generally* Hodge, et al., *supra* note 17; Jennifer L. Pomeranz & Mark Pertschuk, *State Preemption: A Significant and Quiet Threat to Public Health in the United States*, 107 AM. J. PUB. HEALTH POL'Y 900, 902 (2017).

autonomy with state interests.[51] To that end, this Part analyzes problems with legislative fixes and health exceptions, explores reforms to intrastate preemption doctrine, and finally, considers the lingering problem of express preemption.

A. *The Shortcomings of Legislative Fixes and Special Exceptions*

Because preemption most often plays out in the political arena, it may be tempting to suggest limits on state preemptive power, especially in the public health sphere.[52] One article briefly suggests that states could (1) require themselves to replace local regulations they choose to preempt, (2) require that preemption be "narrowly tailored," or (3) provide a "safe harbor."[53] These solutions are laudable and would serve to address many of the conflicts raised by the COVID-19 pandemic. But they assume state governments are willing to cede power and that blanket restrictions won't backfire.

The same piece considers a "public health exception" that would shield public health measures from preemption, so that local governments are not "unduly limited" in promoting public health.[54] Public health "exceptionalism" has some precedent in state, federal, and international law.[55] But as the scholarship recognizes, the wisdom of public health exceptions is ultimately left up to "legislators and judges" to decide, which leaves doubt as to whether they will ever be commonplace.[56]

While public health exceptions are well-meaning, there is a practical problem in justifying and corralling the exception. Local autonomy may spur innovation,[57] but it may also fuel rampant localism, which is especially problematic for a cohesive pandemic response.[58] And although there is "growing sensitivity" that public health and safety should be treated differently,[59] there is hardly a principled reason why an exception is the right choice.

While the COVID-19 response would fall within the exception, would an exception protect environmental policies? Would it shield measures that address

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[51] Prior to COVID-19, other scholars promoted the role of courts in dealing with preemption issues. *See, e.g.*, Diller, *Intrastate*, *supra* note 10, at 1168.

[52] *See, e.g.*, David Gartner, *States, Localities and Public Health*, 122 W. VA. L. REV. 965, 998 (2020).

[53] *Id.*

[54] *See id.* at 994.

[55] *Id.* at 994–96.

[56] *See id.* at 997.

[57] *See* Paul A. Diller, *Why Do Cities Innovate in Public Health – Implications of Scale and Structure*, 91 WASH. U. L. REV. 1219, 1221, 1224 (2014).

[58] *See* Jason Marisam, *Local Governance and Pandemics: Lessons from the 1918 Flu*, 85 U. DET. MERCY L. REV. 347, 376 (2008).

[59] Gartner, *supra* note 52, at 994.

systemic racism, which has led to massive health disparities?[60] It is unclear whether a public health exception would provide much meaningful cover for these critical policies. While they share a nexus with public health, their inclusion under a "public health exception" is precarious. Even then, the exception lends no support for issues that are completely divorced from public health.

B. *COVID-19 as an Opportunity to Reform Intrastate Preemption Doctrine*

COVID-19 has forced additional intrastate preemption and home rule questions into court.[61] COVID-19 thus provides a prime occasion for state courts to prioritize the development of general, workable standards for addressing preemption issues, as was suggested by other scholars long before COVID-19.[62] Those standards would apply with equal force in all areas of policymaking, long after the coronavirus is over.

Professor Paul Diller, a leading preemption scholar, has observed that state courts are best suited to resolve implied preemption issues and to formulate standards that account for the interests of individual state and local governments.[63] He criticizes those who advocate a formalist "express-only" default-rule approach to intrastate preemption because it strips judges of discretion and fails to capitalize on the judiciary's "institutional advantages" in resolving preemption disputes.[64] Diller advocates judicial intervention by way of a "substantial interference" test for cases of *implied* preemption, whereby local "[g]ood-faith policy experiments should be presumed valid" unless they "contravene the purposes of state law."[65]

A "substantial interference" standard would tip the scale toward stronger home rule by giving deference to local policymakers and imbuing judges with discretion, weighing local policymaking against state "legislative purpose rather than . . . legislative intent."[66] To assuage critics, Professor Diller suggests that

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[60] *See, e.g.*, COLUMBUS, OH, RESOLUTION DECLARING RACISM A PUBLIC HEALTH CRISIS IN COLUMBUS, Res. 0095X-2020 (2020), https://www.columbus.gov/racismresolution/ [https://perma.cc/F3NJ-WDC8]. Columbus, Ohio declared racism a "public health crisis" in mid-2020, amid nationwide protests for racial justice following the murder of George Floyd. *Id.*

[61] *See, e.g.*, 828 Mgmt. LLC v. Broward Cty., No. 20-62166-CIV-SINGHAL, 2020 WL 7635169, at *7 (S.D. Fla. Dec. 21, 2020) (granting a temporary injunction), *appeal docketed*, No. 20-14868 (11th Cir. Dec. 30, 2020); Bar Indy LLC v. City of Indianapolis, No. 1:20-cv-02482-JMS-DML, 2020 WL 7585709, at *17 (S.D. Ind. Dec. 22, 2020) (denying a preliminary injunction).

[62] *See, e.g.*, Diller, *Intrastate*, *supra* note 10, at 1168.

[63] *See id.* at 1168.

[64] *Id.* at 1159–60.

[65] *See id.* at 1168–73 & 1168 n.274.

[66] *See id.* at 1169–70.

the local policy be in "good faith" to combat "parochial and exclusionary local ordinances," with the courts helping to "minimiz[e] interlocal expropriation."[67]

This balancing act provides a viable path to addressing implied preemption in a post-COVID world. By using "purpose" rather than specific "intent," state courts could protect against the abuses of implied preemption we have seen throughout the coronavirus pandemic, while the "good faith" requirement would protect against the types of rogue jurisdictions that contributed to the pandemic woes of their neighbors.[68]

Indeed, Professor Diller's approach to implied intrastate preemption should be seriously considered by state courts in wake of the COVID-19 pandemic. The COVID-19 scenarios presented in this Note demonstrate the critical tensions between "good-faith policy experiments," state law, and "interlocal expropriation."[69] And while express preemption was problematic for local policymakers throughout the pandemic, the uncertainty of implied preemption was arguably worse because it forced local policymakers to spend precious time speculating on whether their policies were—or would be—preempted.[70]

While a perfectly uniform approach to implied preemption is likely not possible,[71] COVID-19 presents a unique opportunity to standardize state implied preemption doctrine. COVID-19 policies all came into existence within a few short months in nearly every jurisdiction. But without a uniform approach to home rule, the outcomes of challenges to these policies will necessarily vary, despite similar fact patterns and requests for relief.[72] Thus, whether for their institutional prowess or as a matter of practical necessity, it would make a great deal of sense for courts to treat COVID-19-related home rule cases as an opportunity to adopt a "substantial interference"-like standard.

Of course, encouraging a state court to reevaluate or refine its approach to implied preemption still carries risks. A court may adopt a more-restrictive test, thereby narrowing the scope of local policymaking. If so, the practical result could be a *less* uniform preemption regime across home rule states, with courts (state-by-state) taking divergent approaches. Perhaps even more likely,

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[67] *Id.* at 1170. Prof. Diller defines a "good-faith policy experiment" as "a city's reasonable attempt to solve a social problem in a way that fairly internalizes the costs of the policy experiment, at least vis-à-vis other cities." *Id.* at 1170–71 (citation omitted).

[68] I assume that a "good-faith policy experiment" in context of COVID-19 would be necessarily *protective* of public health. A local mask mandate would be a "good faith policy experiment," but a mask *ban* would not be. A more difficult question is a local policy experiment that addresses the spread of COVID-19 but simultaneously imposes negative externalities (e.g., a stay-at-home order that reduces local sales tax revenue in a neighboring town).

[69] *See supra* text accompanying note 67.

[70] *See generally* LOC. SOLUTIONS, *supra* note 29.

[71] *See* Diller, *Intrastate*, *supra* note 10, at 1175–76 (acknowledging the practical limits of a uniform approach).

[72] *See generally supra* note 61 (citing cases from Florida and Indiana).

encouraging judges to formulate new standards in implied preemption disputes would give rise to counterarguments of judicial activism.[73]

Professor Diller's analysis sufficiently addresses why the judiciary may intervene,[74] so this Note does not take up the judicial activism argument in earnest, other than to concur that state courts can—and should—protect local policy experimentation through implied preemption doctrine. But as to concerns about states taking divergent paths in wake of COVID-19, the desire for uniformity across home rule states is far less important than formulating standards that yield predictable outcomes for all localities within a given state.

Any standard that allows for substantial local policymaking, while also setting reasonable outer bounds of that authority, is better than no standard at all. And even if opportunities for policymaking are to be limited by a state's implied preemption doctrine, predictability must be the goal. Had there been more predictable standards prior to COVID-19, localities may have been better able to address the crisis, or at the very least, would not have wasted time and resources implementing policies that were ultimately preempted by their respective state governments.

C. *Addressing Lingering Express Preemption Problems*

While Part IV.B suggests the importance of judicial standards of implied preemption, a "substantial interference" standard does little to combat the punitive use of express preemption. Where there is explicit preemption, a local regulation would always "contravene" the purpose of state law, even if it was enacted in good faith by the locality.[75] This presents a problem, because adopting the standard may inadvertently incentivize express preemption, which is an undesirable outcome. If a court adopts a "substantial interference" test for implied preemption, it should consider setting bounds on express preemption as well.[76]

In a recent *University of Michigan Journal of Law Reform* Note, Emily Baxter provided several recommendations centered on modifying state constitutions in an effort to bolster home rule and local autonomy.[77] Indeed, constitutional reform is likely necessary to meaningful change and would undoubtedly have bearing on judicial interpretation of home rule provisions.[78]

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[73] For a history of judicial activism and restraint, see generally Jack M. Balkin, *Why Liberals and Conservatives Flipped on Judicial Restraint: Judicial Review in the Cycles of Constitutional Time*, 98 TEX. L. REV. 215 (2019).

[74] *See* Diller, *Intrastate*, *supra* note 10, at 1157–76.

[75] *See supra* text accompanying note 65.

[76] For sake of argument, I assume that our hypothetical court has the authority to adopt such a test or standard. But as others have argued, this may require constitutional protection. *See* Emily S. P. Baxter, Note, *Protecting Local Authority in State Constitutions and Challenging Intrastate Preemption*, 52 U. MICH. J.L. REFORM 947, 974 (2019).

[77] *See generally id.*

[78] *See id.* at 974–79.

But, given the time-sensitivity of the home rule questions presented by COVID-19, such reform is beyond the scope of the current Note.

Nevertheless, Baxter makes a critical observation near the outset of her piece: State legislatures "go too far" when intrastate preemption becomes "a thinly-veiled tool to thwart opposing political interests or appease political stakeholders[]" because it no longer "serv[es] its purpose as a systemic mechanism of governance."[79] She further suggests a burden-shifting mechanism of sorts, reforming constitutional language so that legislatures must have a "legitimate state interest" before preempting, which also addresses the "policy vacuum" issue.[80]

But even in the absence of constitutional reform, Baxter's work may suggest how courts can address express preemption now, assuming the state has an extant home rule provision in its constitution. A court could use a litmus test or threshold of sorts, such that punitive express preemption of local health policies would be invalid. Extending Baxter's logic, this type of preemption serves no purpose to advance any state objective in the context of a pandemic response. Where a local jurisdiction's policy is supported by science, and the state preemption has no basis in scientific fact, preemption would almost certainly qualify as a "thinly-veiled tool" that is invalid as a "systemic mechanism of governance."

Realistically, such a test would still be easy to pass. While it might weed out cases where preemption is solely used to target local policies, if the state can make a conceivable argument that its action is valid, the threshold would not be especially effective.[81] In the context of COVID-19, for example, this could be accomplished by arguing that invalidating a local travel restriction would further state economic interests. And perhaps more problematic, asking courts to set a threshold would necessarily involve weighing in on emerging (and often, politicized) scientific issues, and to some extent, passing on the wisdom of local and state policies.

Perhaps judges might instead seek to identify a factor test, or even a means-ends test, to determine when a piece of state preemption improperly impinges on local authority. But the challenge here, as compared with setting a floor that eliminates obviously punitive preemption, is formulating a functional test, so long as localities get their authority from the states and not the other way around. Because local governments are not co-equal with state governments, the weighing of state and local interests must occur on an uneven scale. This suggests the lingering practical limits of judicial intervention on issues of express preemption, in the absence of constitutional reform that sets the balance.

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[79] *Id.* at 956.

[80] *Id.* at 977. While this solution has obvious appeal, shifting the burden might also hamper a state's unified response to a crisis, while giving too much latitude to local governments.

[81] This is analogous to what a colleague described as the "*Trump v. Hawaii* problem." *See generally* Trump v. Hawaii, 138 S. Ct. 2392 (2018) (upholding the Trump Administration's self-described "Muslim ban").

V. CONCLUSION

The synergy between COVID-19 and preemption has been palpable. Yet, unlike the early response to COVID-19, a response to the pandemic of preemption involves tools that are already at our disposal. Albeit small, this Note's contribution—through the scenarios in Part III and approaches examined in Part IV—is suggesting the ways that pre-pandemic scholarship should guide the short-term and long-term response, particularly through the implementation of judicially manageable standards. These might include Professor Diller's "substantial interference" test for implied preemption and a litmus test for express preemption. The COVID-19 pandemic presents a prime opportunity to reset the balance between local and state authority, and the impetus for reevaluating home rule and preemption doctrine. Not only would it help prepare for future health emergencies, but it would clarify the scope of local policymaking more broadly.