

**LOCALISM ALL THE WAY UP:
FEDERALISM, STATE-CITY CONFLICT, AND THE
URBAN-RURAL DIVIDE**

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INTRODUCTION

One characteristic of this age of political polarization is increasing conflict between states and their cities. Pandemic-related regulation has been a recent flashpoint, with governors and mayors at loggerheads over school openings, mask mandates, rent moratoria, and business closures.¹ But conflicts between state and city officials preceded that global emergency. In recent years, state hostility to local policymaking has become its own epidemic, with states preempting, suing, fining, and attacking local officials over a range of policies.² These conflicts harken back to an earlier era when state legislatures would adopt “ripper bills”

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1. KIM HADDOW, LOC. SOLS. SUPPORT CTR. (LSSC), UNDER THE COVER OF COVID: A SURVEY OF 2020-2021 STATE PREEMPTION TRENDS 6, 15, 21 (2021), <https://static1.squarespace.com/static/5ce4377caeb1ce00013a02fd/t/604faee2e641222b084316ff/1615834855353/LSSC-UndertheCoverofCovid-March2021.pdf> [https://perma.cc/B4QR-WXHY].

2. See Ronald Brownstein, *‘Breaking Point’: Why the Red State/Blue City Conflict Is Peaking Over Masks*, CNN (Aug. 17, 2021, 3:51 PM), <https://www.cnn.com/2021/08/17/politics/2020-census-red-states-blue-cities/index.html> [https://perma.cc/GUQ4-EKRG]; Shaila Dewan, *States Are Blocking Local Regulations, Often at Industry’s Behest*, N.Y. TIMES (Feb. 23, 2015), <https://www.nytimes.com/2015/02/24/us/govern-yourselves-state-lawmakers-tell-cities-but-not-too-much.html> [https://perma.cc/8NE9-27WY].

that stripped local officials of their offices and authority.³ At the same time, secession movements within states are gaining traction, at least rhetorically.⁴ The immigrant sanctuary city has been followed by the Second Amendment sanctuary city and, more recently, the rise of pro-life and First Amendment sanctuary cities.⁵

Popular electoral maps and our (understandable) preoccupation with the Electoral College can sometimes suggest that red state and blue state divisions are driving our current politics. But state-city conflicts are more representative of the actual political cleavages that characterize “our federalism”⁶ in the twenty-first century. States qua states are still jurisdictionally and constitutionally salient, but they are not politically so. Counties are the jurisdictions to watch as the election returns come in: Maricopa, where Phoenix is located; Fulton, the county in which Atlanta sits; and Fairfax, the largest county in Virginia, located just outside Washington, D.C.⁷ The urban-rural divide is the defining feature of early

3. Richard Briffault, *Voting Rights, Home Rule, and Metropolitan Governance: The Secession of Staten Island as a Case Study in the Dilemmas of Local Self-Determination*, 92 COLUM. L. REV. 775, 805 (1992).

4. See Kirk Johnson, *Their Own Private Idaho: Five Oregon Counties Back a Plan to Secede*, N.Y. TIMES (May 21, 2021), <https://www.nytimes.com/2021/05/21/us/oregon-idaho-secession.html> [<https://perma.cc/GY7K-NL9P>].

5. Jasmine C. Lee, Rudy Omri & Julia Preston, *What Are Sanctuary Cities?*, N.Y. TIMES (Feb. 6, 2017), <https://www.nytimes.com/interactive/2016/09/02/us/sanctuary-cities.html> [<https://perma.cc/S8WT-B4M8>] (stating there are at least 633 counties with immigrant sanctuary city policies); Glenn Thrush & Nicholas Bogel-Burroughs, *Why G.O.P.-Led States Are Banning the Police from Enforcing Federal Gun Laws*, N.Y. TIMES (Sept. 9, 2021), <https://www.nytimes.com/2021/06/18/us/missouri-federal-gun-laws.html> [<https://perma.cc/P4ZN-DVLX>] (discussing at least nine states passing Second Amendment sanctuary legislation); Shannon Najmabadi, *Lubbock Votes to Become the State’s Largest “Sanctuary City for the Unborn,”* TEX. TRIB. (May 1, 2021, 10:00 PM), <https://www.texastribune.org/2021/05/01/lubbock-abortion-vote-sanctuary-unborn/> [<https://perma.cc/5H96-5U6W>] (discussing Lubbock, Texas, becoming a pro-life sanctuary city); Margaret Menge, *Indiana Town Brands Itself as a First Amendment Sanctuary; No Town Money to Be Used to Cancel Anyone*, CTR. SQUARE (May 7, 2021), https://www.thecentersquare.com/indiana/indiana-town-brands-itself-as-a-first-amendment-sanctuary-no-town-money-to-be-used/article_7540206a-af3c-11eb-ae36-b3198ca8f74b.html [<https://perma.cc/W46E-YAVT>] (discussing Mooresville, Indiana, becoming a First Amendment and Second Amendment sanctuary city).

6. See *Younger v. Harris*, 401 U.S. 37, 44 (1971).

7. Eliza Collins & Chad Day, *The Door-to-Door Election Battle to Swing an Arizona County*, WALL ST. J. (Sept. 4, 2020, 5:00 AM), <https://www.wsj.com/graphics/biden-trump-battle-to-swing-arizona-county/> [<https://perma.cc/367G-2HRQ>]; Richard Fausset, Stephanie Saul & Jacey Fortin, *Fulton County, Which Includes Most of Atlanta, Is Expected to Finish Counting Its Ballots Overnight*, N.Y. TIMES (Nov. 4, 2020), <https://www.nytimes.com/2020/11/04/us/politics/fulton-county-which-includes-most-of-atlanta-is-expected-to-finish-counting-its-ballots-overnight.html> [<https://perma.cc/369C-XBS3>]; Michael Tackett & Jonathan Martin, *Key Takeaways from Tuesday’s Elections*, N.Y. TIMES (Nov. 8, 2017), <https://www.nytimes.com/2017/11/08/us/politics/key->

twenty-first century political life; that divide transcends both states and regions. Even as the winner-take-all electoral system suggests that state-to-state or region-to-region differences matter, the important political cleavages that drive electoral politics are occurring inside states.⁸

Federalism—the relation between states and between states and the federal government—is a central preoccupation of U.S. legal scholars. Less attention has been paid to the conflicts within states. But those conflicts are representative of the current state of American federalism, which is characterized by the decline of regional political affiliations and the rise of metropolitan ones, the broader conflict between urbanizing municipalities and rural counties, the fact of uneven economic development, and the consequent values bifurcation between low and high productivity places.⁹ State-city conflict is reflected in the stridency of national political rhetoric, the division of the country into “real” and “fake,” the demonization of the big city (and of all things “cosmopolitan”), and the invocation of “states’ rights” to oppose the exercise of municipal power.¹⁰

This form of sectional conflict is less amenable to federalism doctrines that contemplate state-by-state divergence; those doctrines can only serve as crude proxies for the political cleavages that are operating within states, not between them.¹¹ Meanwhile, the intrastate doctrines that mediate the relationship between the center and the local, such as home rule, have shown themselves to be too weak for the task.¹²

That weakness is coupled with a certain lack of respect. State constitutional doctrines that mediate between states and cities are sometimes treated as a form of baby federalism—locally interesting, but not as important to our constitutional politics as the doctrines that govern the state-federal relationship. I disagree. Whatever the doctrinal and political status of state-federal relations, they tend to be parasitic on more fundamental features of political life in the early twenty-first century. State-city conflict is not federalism writ small; it is instead what

takeaways-from-tuesdays-elections.html [https://perma.cc/KL8L-PQAB] (“Northern Virginia is the clear epicenter of the state’s political power.”).

8. As one commentator recently stated, “[W]e’re actually near a high point in the contribution of within state variation in partisan voting, in contrast to between state variation, precisely as our attention as a country has increasingly turned to the state level debate of blue states versus red states.” The Science of Politics, *Is Demographic and Geographic Polarization Overstated?*, NISKANEN CTR. (May 19, 2021), <https://www.niskanencenter.org/is-demographic-and-geographic-polarization-overstated/>.

9. See Richard C. Schragger, *Federalism, Metropolitanism, and the Problem of States*, 105 VA. L. REV. 1537, 1544 (2019).

10. See Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163, 1202, 1211–12, 1217 (2018).

11. See Schragger, *supra* note 9, at 1590–91.

12. David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2261, 2263 (2003).

federalism—albeit mediated through a pre-urban Constitution that still gives primacy to states—has become. Instead of “federalism all the way down”¹³ as a way to characterize the multiple vertical layers of authority in the United States, a better description might be “localism all the way up”: conflict at the metropolitan scale is driving important aspects of our national political life.

This Essay proceeds in four parts. Part I briefly describes recent state-city conflicts and how they reflect an abiding urban-rural polarization. Part II discusses three features of state democratic practice—anti-urban bias, state legislative capture, and metropolitanism—that contribute to this polarization, both intrastate and nationally. Part III explains why state-based federalism doctrines fail to address metropolitan-level political cleavages and why intrastate home rule doctrines have fallen short as well. And Part IV canvasses possible mechanisms for addressing the urban-rural divide, including a more robust home rule regime in the states. One leading justification for a vertical division of power is the reduction of conflict through institutions that provide room for a diversity of sub-state polities. But, as practiced, U.S.-style, state-based federalism has failed to advance that aim—in large part because it is operating at the wrong scale.

Recognizing the metropolitan origins of our polarized politics is important for two reasons. First, reorienting the conversation away from state-national conflict highlights the disadvantages of state-based federalism as a mechanism for managing ideological cleavages. And second, focusing on state-city conflict suggests the necessity of intrastate institutional reform as a way forward. The urban-rural divide has manifested in classic state-city political tensions since before industrialization.¹⁴ The states’ public law has in the past been refashioned in an effort to ameliorate those tensions, though to somewhat limited effect.¹⁵ With those tensions now having “gone national,” it is time to return to the states and look at the problem anew.

I. PREEMPTION AND SECESSION

I start with the explosion in state-city conflict, which legal scholars have begun to document in a burgeoning literature that catalogs the rapid rise and aggressive use of state law preemption.¹⁶ The targets of state

13. See Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 10 (2010).

14. JON C. TEAFORD, *THE UNHERALDED TRIUMPH: CITY GOVERNMENT IN AMERICA, 1870–1900*, at 105 (1984).

15. *Id.*

16. See, e.g., Joshua S. Sellers & Erin A. Scharff, *Preempting Politics: State Power and Local Democracy*, 72 STAN. L. REV. 1361 (2020); Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995 (2018); Erin Adele Scharff, *Hyper Preemption: A Reordering of the State–Local Relationship?*, 106 GEO. L.J. 1469,

preemptive laws (which have been characterized along a continuum, from “deregulatory” to “punitive” to “nuclear”¹⁷) are generally the larger and more progressive cities in their respective states. The politics of preemption are usually apparent: red state legislators deploy their plenary authority over local governments to override and punish blue cities.¹⁸ But even in states with Democratic legislatures, preemption is rampant.¹⁹ In many ways, the recent trend has been a return to the early twentieth century, when the cities were governed from state capitols and urban machines were merely adjuncts to state political machines.²⁰

The range of preemptive laws has been cataloged previously,²¹ but it is worth noting some recent examples, for they indicate how readily state legislatures are willing to quash even the most anodyne and local-specific municipal policymaking. Most obviously, the pandemic has given rise to clashes between cities and states over mask mandates and other public health responses to COVID-19. Recently, the Texas governor ordered that no local government, including school districts, may enforce any kind of mask mandate.²² Local government officials can be fined \$1,000 for implementing such a rule.²³ Governors repeatedly have overridden local closure laws and have asserted their authority over local school openings and school mask mandates as well.²⁴

State legislators appear increasingly ready with preemptive legislation, whatever the issue of the day. In Florida, the governor recently signed legislation that permits the cabinet and governor to override local

1473 (2018); Kenneth A. Stahl, *Preemption, Federalism, and Local Democracy*, 44 *FORDHAM URB. L.J.* 133, 134 (2017). My own contribution is *The Attack on American Cities*. See Schragger, *supra* note 10.

17. Briffault, *supra* note 16, at 1997, 2014.

18. Emily Badger, *Blue Cities Want to Make Their Own Rules. Red States Won't Let Them.*, N.Y. TIMES (July 6, 2017), <https://www.nytimes.com/2017/07/06/upshot/blue-cities-want-to-make-their-own-rules-red-states-wont-let-them.html> [<https://perma.cc/WL62-MNZC>].

19. Lydia Bean & Maresa Strano, *Punching Down: How States Are Suppressing Local Democracy*, NEW AM. (July 11, 2019), <https://www.newamerica.org/political-reform/reports/punching-down/> [<https://perma.cc/9KEM-ZN7Q>].

20. R. C. Brooks, *Metropolitan Free Cities*, 30 *POL. SCI. Q.* 222, 226 (1915); Barron, *supra* note 12, at 2290; TEAFORD, *supra* note 14, at 83–84.

21. See HADDOW, *supra* note 1.

22. Daniel E. Slotnik, Adeel Hassan & Bryan Pietsch, *Texas Governor Will Bar Local Governments from Requiring Masks.*, N.Y. TIMES (Aug. 14, 2021), <https://www.nytimes.com/2021/05/18/world/texas-governor-local-mask-mandates.html> [<https://perma.cc/6XF8-WKK7>].

23. *Id.*

24. Kate Taylor, *Fed Up with Remote Learning, Governors Make a Push to Reopen Schools.*, N.Y. TIMES (Apr. 28, 2021), <https://www.nytimes.com/2021/04/03/us/covid-schools-governors-reopening.html> [<https://perma.cc/UAZ9-EK2U>]; Brownstein, *supra* note 2 (discussing state restrictions on local school district mask mandates).

budgeting decisions that reduce or redirect funds away from the police—a direct response to the “defund the police” movement championed in the aftermath of the Black Lives Matter protests.²⁵

Preemptive voter suppression bills have also proliferated. In Georgia, a state law aimed at Fulton County outlaws mobile voting or accepting outside grants to run elections.²⁶ In classic “ripper” bill fashion, the law also allows the State Election Board, controlled by the state legislature, to replace local election boards.²⁷ In Texas, legislation that targets Harris County prevents counties from expanding voting hours or mailing absentee ballots absent a request and limits how local election boards allocate their budgets.²⁸ Iowa, Michigan, Arizona, and other state legislatures have adopted or are considering similar bills.²⁹ In all these states, voter suppression efforts take the form of eliminating the authority of local election officials.³⁰

These are examples of a widespread phenomenon, targeting local laws across the spectrum, from plastic bag bans³¹ to the minimum wage.³² The new preemption is not confined to areas of policy that require

25. H.B. 1, 2021 Leg. (Fla. 2021); Kirby Wilson, *Ron DeSantis: Any Municipality that ‘Defunds’ Police Will Lose State Funding*, TAMPA BAY TIMES (Sept. 21, 2020), <https://www.tampabay.com/news/florida-politics/2020/09/21/ron-desantis-any-municipality-that-defunds-police-will-lose-state-funding/> [https://perma.cc/A6TV-CAHF].

26. S.B. 202, 2021 Leg., 2021–22 Reg. Sess. (Ga. 2021); Nick Corasaniti & Reid J. Epstein, *What Georgia’s Voting Law Really Does*, N.Y. TIMES (Apr. 18, 2021), <https://www.nytimes.com/2021/04/02/us/politics/georgia-voting-law-annotated.html> [https://perma.cc/N472-V8Z3].

27. Corasaniti & Epstein, *supra* note 26.

28. Nick Corasaniti, *Republicans Target Voter Access in Texas, but Not Rural Areas*, N.Y. TIMES (May 30, 2021), <https://www.nytimes.com/2021/04/24/us/politics/texas-republicans-voting.html> [https://perma.cc/3CRM-Z2KL].

29. Paul Waldman, *This Isn’t Just Voter Suppression. It’s a War on Local Control*, WASH. POST (Apr. 9, 2021, 1:32 PM), <https://www.washingtonpost.com/opinions/2021/04/09/this-isnt-just-voter-suppression-its-war-local-control/>.

30. *See id.*

31. Cassandra Pollock, *Report: Austin to End Its Bag Ban After Texas Supreme Court Ruling*, TEX. TRIB. (July 3, 2018, 6:00 PM), <https://www.texastribune.org/2018/07/03/report-austin-end-its-bag-ban-after-texas-supreme-court-ruling/> [https://perma.cc/4RFQ-KB2R]; Chelsea Harvey, *Yes, This Is Real: Michigan Just Banned Banning Plastic Bags*, WASH. POST (Dec. 30, 2016), <https://www.washingtonpost.com/news/energy-environment/wp/2016/12/30/yes-this-is-real-michigan-just-banned-banning-plastic-bags/>.

32. The Associated Press, *Alabama: Law Bans Cities from Setting Minimum Wage*, N.Y. TIMES (Feb. 25, 2016), <https://www.nytimes.com/2016/02/26/us/alabama-law-bans-cities-from-setting-minimum-wage.html> [https://perma.cc/ZB5C-JHNB]; Yuki Noguchi, *As Cities Raise Minimum Wages, Many States Are Rolling Them Back*, NPR (July 18, 2017, 4:39 PM), <https://www.npr.org/2017/07/18/537901833/as-cities-raise-minimum-wages-many-states-are-rolling-them-back> [https://perma.cc/5JPY-4CE7].

uniformity or a comprehensive state-wide response. Instead, it is being used to overturn laws with which the legislature disagrees, often in areas of traditional local concern. In Montana, for example, the legislature recently outlawed local inclusionary zoning ordinances, effectively undercutting the City of Bozeman's attempt to advance affordable housing.³³ In Iowa, the legislature recently outlawed "source of income ordinances" meant to prevent landlords from discriminating against Section 8 housing voucher recipients.³⁴ Only Des Moines, Iowa City, and Marion had such ordinances.³⁵

State legislative efforts to control, disempower, and remove or punish local officials are obviously intended to hobble local democratic institutions, mainly in large cities or in heavily minority counties. The anti-democratic thrust of recent preemption efforts is impossible to ignore.³⁶

Yet this attack on cities is of a piece with the larger culture war, much of it not so subtly cast as a battle between "us" and "them." Consider Texas Governor Greg Abbott's treatment of Austin as a hostile country,³⁷ echoed more generally by Donald Trump, as a candidate and then president, in his repeated attacks on "burning and crime-infested" cities.³⁸ Another example of symbolic politics is the proliferation of state laws that bar local governments from removing Confederate monuments or renaming streets and schools.³⁹ Statewide bans on local gun regulation are mostly symbolic,

33. H.R. 259, 67th Leg., Reg. Sess. (Mont. 2021); Nora Shelly, *Bill to Ban Inclusionary Zoning Heard by Montana Senate Committee*, BOZEMAN DAILY CHRON. (Mar. 12, 2021), https://www.bozemandailychronicle.com/news/city/bill-to-ban-inclusionary-zoning-heard-by-montana-senate-committee/article_9cf6ed36-c428-58cd-bd0d-871e3c01d4c2.html [https://perma.cc/HVM4-US5M].

34. S.B. 252, 89th Gen. Assemb., Reg. Sess. (Iowa 2021); Ian Richardson, *Gov. Kim Reynolds Signs Law to Let Iowa Landlords Refuse Section 8 Vouchers*, DES MOINES REG. (Apr. 30, 2021), <https://www.desmoinesregister.com/story/news/politics/2021/04/30/gov-kim-reynolds-signs-bill-letting-landlords-reject-section-8-housing-hud-tenants/4748580001/> [https://perma.cc/3E5S-RAZ9].

35. Richardson, *supra* note 34.

36. See James A. Gardner, *Illiberalism and Authoritarianism in the American States*, 70 AM. U. L. REV. 829 (2021) (on rising authoritarianism in the states).

37. Governor Greg Abbott stated, "As you leave Austin and start heading north, you start feeling different. Once you cross the Travis County line, it starts smelling different. And you know what that fragrance is? Freedom. It's the smell of freedom that does not exist in Austin, Texas." Jonathan Tilove, *Gov. Abbott: Austin Stinks and So Does 'Sanctuary Sally'*, STATESMAN (Dec. 12, 2018, 10:42 AM), <https://www.statesman.com/news/state--regional-govt--politics/shorter-gov-abbott-austin-stinks-and-does-sanctuary-sally/goq6JEihda4PzADg2IOMgO/> [https://perma.cc/3FDK-HQRZ].

38. Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 14, 2017, 6:22 PM).

39. Alan Blinder & Audra D. S. Burch, *Fate of Confederate Monuments Is Stalled by Competing Legal Battles*, N.Y. TIMES (Jan. 20, 2019), <https://www.nytimes.com/2019/01/20/us/confederate-monuments-legal-battles.html> [https://perma.cc/CQ98-UW92]; Jaweed Kaleem, *In Some States, It's Illegal to Take Down*

too; local restrictive gun ordinances do not affect the bulk of gun owners who live elsewhere in the state.⁴⁰ So are preemptive laws that bar localities from adopting LGBTQ or other anti-discrimination ordinances.⁴¹ These kinds of local ordinances do not have significant extraterritorial effects; preempting them seems therefore mainly expressive—to emphasize a threat that is not actually imminent or to signal legislators’ defense of the “right” values.

Stokers of the culture wars have long contrasted the “true” Americans of small towns and rural places with “big city” cosmopolitans.⁴² Historically, urbanity was associated with immigrants, Blacks, Jews, and Catholics, all of whom were associated with immorality, crime, and disease.⁴³ Trumpian anti-urban rhetoric has revived those associations, with the addition of some new deviant groups—Muslims, undocumented aliens, and LGBTQ persons.⁴⁴

The escalating conflict over urban versus rural values has given rise to recent secessionist movements. In states with more dominant urban populations, like Virginia and Oregon, the calls by rural communities to secede—again mostly symbolic—are becoming louder.⁴⁵ The related Second Amendment sanctuary movement also invokes the language of secession, with the doctrines of interposition and nullification regularly

Monuments or Change Street Names Honoring the Confederacy, L.A. TIMES (Aug. 16, 2017, 1:05 PM), <https://www.latimes.com/nation/la-na-confederate-monument-laws-20170815-htmistory.html> [<https://perma.cc/P738-K8NH>]; see generally Richard Schragger & C. Alex Retzliff, *Confederate Monuments and Punitive Preemption: The Latest Assault on Local Democracy*, U. VA. L. SCH. PUB. L. & LEGAL THEORY RSCH. PAPER SERIES, Oct. 2019, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3462746.

40. See *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/X8JS-J7F6>] (last visited Oct. 3, 2021).

41. Dave Philipps, *North Carolina Bans Local Anti-Discrimination Policies*, N.Y. TIMES (Mar. 23, 2016), <https://www.nytimes.com/2016/03/24/us/north-carolina-to-limit-bathroom-use-by-birth-gender.html> [<https://perma.cc/7N8Y-M5LJ>].

42. See generally STEVEN CONN, *AMERICANS AGAINST THE CITY: ANTI-URBANISM IN THE TWENTIETH CENTURY* (2014) (describing the history of cultural anti-urbanism). See, e.g., Paul Krugman, *Opinion, The Durable Myth of Urban Hellholes*, N.Y. TIMES (July 12, 2021), <https://www.nytimes.com/2021/07/12/opinion/covid-big-cities.html> [<https://perma.cc/AKG4-5XUV>] (arguing that politicians fuel the mythical contrast between big cities and small towns).

43. See CONN, *supra* note 42, at 15.

44. See Schragger, *supra* note 10, at 1211–16 (discussing contemporary populist anti-urbanism).

45. See Johnson, *supra* note 4; Julie Zauzmer Wil, *West Virginia’s Governor to Virginia Counties: Leave Your Blue State and Join West Virginia*, WASH. POST (Jan. 28, 2020), <https://www.washingtonpost.com/dc-md-va/2020/01/28/west-virginias-governor-virginia-counties-leave-your-blue-state-join-west-virginia/> [<https://perma.cc/EQ4P-FFTF>].

making rhetorical appearances.⁴⁶ Often aligned with the burgeoning militia movement, Second Amendment sanctuary advocates are not making localist claims, but universal ones, asserting their own power and authority to interpret the Constitution and implicitly threatening violence should the state seek to enforce its law.⁴⁷

The geographical location of the Second Amendment sanctuaries is as predictable as the locations of the immigrant sanctuaries that emerged before them: rural communities have embraced the Second Amendment;⁴⁸ cities and college towns and large, more diverse counties are more hospitable to immigrants and gun control.⁴⁹ Vaccine hesitancy also tracks these geographical divides fairly accurately.⁵⁰ Trump-voting states predictably have lower vaccination rates than Biden-voting ones, seemingly a direct result of policy driven by ideology.⁵¹ But these state-to-state differences mask the intrastate divide that is driving those wider disparities. The vaccination rate for Travis County, Texas, where Austin sits, is double that of the rural counties that make up large portions of the state.⁵²

II. THREE FEATURES OF STATE DEMOCRATIC PRACTICE

The tug-of-war between the metropolis and the hinterlands is not new. Prior to the Supreme Court's one person, one vote decisions,⁵³ rural state legislators protected their dominance by refusing to apportion legislative seats according to population, thereby shutting out growing

46. Richard Schragger, *Second Amendment Sanctuaries and the Difference Between Home Rule, Local Recalcitrance, and Interposition*, DUKE CTR. FOR FIREARMS L.: SECOND THOUGHTS BLOG (May 5, 2020), <https://sites.law.duke.edu/secondthoughts/2020/05/05/second-amendment-sanctuaries-and-the-difference-between-home-rule-local-recalcitrance-and-interposition/> [https://perma.cc/99LY-Y4TY]. For a discussion, see Shawn E. Fields, *Second Amendment Sanctuaries*, 115 NW. U. L. REV. 437 (2020).

47. There is more than a tinge of white supremacy in these efforts, as well as an undercurrent of violent insurrection. Both were made manifest by the January 6 invasion of the Capitol and previously in events like the violent and deadly August 2017 "Unite the Right" rally in Charlottesville. Richard C. Schragger, *When White Supremacists Invade a City*, 104 VA. L. REV. ONLINE 58 (2018); see, e.g., Gardner, *supra* note 36, at 857–58.

48. Fields, *supra* note 46, at 457–60.

49. *Id.*

50. Danielle Ivory, Lauren Leatherby & Robert Gebeloff, *Least Vaccinated U.S. Counties Have Something in Common: Trump Voters*, N.Y. TIMES (Apr. 17, 2021), <https://www.nytimes.com/interactive/2021/04/17/us/vaccine-hesitancy-politics.html> [https://perma.cc/B49C-Z4Q5].

51. *Id.*

52. *Texas COVID-19 Vaccine Tracker*, AUSTIN AM.-STATESMAN, <https://data.statesman.com/covid-19-vaccine-tracker/texas/48/> (last visited Oct. 3, 2021).

53. See *Baker v. Carr*, 369 U.S. 186 (1962); *Reynolds v. Sims*, 377 U.S. 533 (1964).

urban constituencies.⁵⁴ There is some evidence that the state legislature could be a place where deals between city and country could be struck,⁵⁵ but in the main, cities complained bitterly about being governed from state capitols and sought equal representation, mostly to limited effect.⁵⁶

An early institutional response to the rural/urban conflict was the adoption of state constitutional provisions, mainly home rule and bans on special legislation, that were designed to ensure cities some protection from overweening legislatures.⁵⁷ The one person, one vote revolution was also meant to address the problem of rural overrepresentation, though it arrived in the 1960s and '70s at a moment when the suburbs were in their ascendancy.⁵⁸ Those decisions thus did less to enhance city power than some advocates may have hoped. Indeed, three current features of state democratic practice suggest continuity rather than discontinuity; the urban-rural divide appears to be as entrenched as ever.⁵⁹

The first feature is structural anti-urbanism, which continues despite successive waves of electoral and state constitutional reform. The underrepresentation of urban (and Democratic) interests in state legislatures has been repeatedly observed, blamed in large measure on the effectiveness of partisan gerrymandering.⁶⁰ The commonly told story is that gerrymandering replaced malapportionment as the tool for entrenching non-representative majorities in state legislatures.⁶¹

But as political scientist Jonathan Rodden has described (in a recent book aptly titled *Why Cities Lose*), the roots of left-leaning (labor or

54. See STEPHEN ANSOLABEHRE & JAMES M. SNYDER, JR., *THE END OF INEQUALITY: ONE PERSON, ONE VOTE AND THE TRANSFORMATION OF AMERICAN POLITICS* 58–59 (2008).

55. See, e.g., Roy A. Schotland, Commentary, *The Limits of Being “Present at the Creation,”* 80 N.C. L. REV. 1505, 1505 (2002). Schotland reports that in the aftermath of *Baker v. Carr*, Jesse Unruh, the legendary California Democratic politician, berated him, stating,

[Y]ou think you’re helping the cities. The cities were taking care of themselves; we can work things out with the agricultural areas—because they don’t care what we do so long as it doesn’t interfere with them. But now you’ve shifted power to the suburbs—all they care about is keeping taxes down, and that means real trouble.

Id.

56. *Id.* at 1505–06; see also FREDERIC C. HOWE, *THE CITY: THE HOPE OF DEMOCRACY* 99–100 (1905).

57. See ANSOLABEHRE & SNYDER, *supra* note 54, at 229.

58. *Id.* at 230.

59. See, e.g., Kirk Siegler, *Biden’s Win Shows Urban-Rural Divide Has Grown Since 2016*, NPR (Nov. 18, 2020, 5:00 AM), <https://www.npr.org/2020/11/18/934631994/bidens-win-shows-rural-urban-divide-has-grown-since-2016> [https://perma.cc/7Y32-5WX3].

60. Paul A. Diller, *Reorienting Home Rule: Part 1—The Urban Disadvantage in National and State Lawmaking*, 77 LA. L. REV. 287, 326–27 (2016).

61. See *id.* at 305; see also ANSOLABEHRE & SNYDER, *supra* note 54, at 217.

Democratic Party) underrepresentation run deep and appear to be common to Western democracies that use winner-take-all, single-member electoral districts.⁶² Under such conditions, if a party's voters are geographically clustered—as Democratic voters are in urban districts—the electoral system itself (regardless of gerrymandering) can create a skew that “lead[s] to outright minority-party control of state legislatures,”⁶³ as Miriam Seifter has written. At a minimum, clustering combined with winner-take-all districts “exaggerate[s] majority control, giving bare majorities an inflated margin”⁶⁴—especially once gerrymandering is factored in. Echoing Rodden, Seifter argues that state legislatures are increasingly not representative at all: they are in fact “countermajoritarian.”⁶⁵

A result of these spatial dynamics is political polarization that tracks and reinforces geographical polarization, a phenomenon Rodden traces back to the rise of urban workers' parties at the beginning of the twentieth century and even earlier to the labor agitation that began in the late nineteenth century.⁶⁶ Pro-labor concentration occurred in the early industrializing cities of Europe as well, but in those countries, labor leaders advocated for proportional representation.⁶⁷ As Rodden observes, continental democracies with systems of proportional representation do not exhibit an anti-urban bias; European right and center-right parties cannot possibly assemble a governing coalition that entirely ignores or attacks cities.⁶⁸ By contrast, in the United States, the Republican Party can write off cities almost entirely. In U.S. elections, the political fights focus on an increasingly narrow slice of the electorate: the elusive suburban voter.⁶⁹ Indeed, even if the suburban voter is the “median” voter, Rodden notes that biased state legislatures will adopt policies significantly to the right of the median voter's preference—a feature, he again argues, of single-member, winner-take-all-districts and the geographical concentration of Democratic votes in cities.⁷⁰

62. JONATHAN RODDEN, *WHY CITIES LOSE: THE DEEP ROOTS OF THE URBAN-RURAL POLITICAL DIVIDE* 1–9 (2019).

63. Miriam Seifter, *Countermajoritarian Legislatures*, 121 *COLUM. L. REV.* 1733, 1762 (2021); *see also* Paul A. Diller, *The Political Process of Preemption*, 54 *U. RICH. L. REV.* 343, 381 (2020) (arguing that extreme gerrymandering results in state legislatures that are anti-majoritarian).

64. Seifter, *supra* note 63, at 1762.

65. *Id.*

66. RODDEN, *supra* note 62, at 15–17.

67. *Id.* at 27.

68. *Id.* at 233.

69. *See id.*

70. *Id.* at 198; *see, e.g.*, Edgar Sandoval, David Montgomery & Manny Fernandez, ‘Contested, Heated Culture Wars’ Mark Ultraconservative Texas Session, *N.Y. TIMES* (June 1, 2021), <https://www.nytimes.com/2021/06/01/us/texas-republicans.html>

The counter-majoritarianism of state legislatures is accompanied by a second salient feature of state democratic practice: the influence of highly motivated and well-funded cross-state corporate interest groups. Alexander Hertel-Fernandez, another political scientist, has done important work on state legislative capture.⁷¹ He documents how a number of powerful conservative, business-backed organizations led by the American Legislative Exchange Council (ALEC) have successfully targeted state legislatures, especially since the 1990s.⁷² Notably, ALEC does not restrict itself to the predictable deregulatory and anti-union reforms often favored by big business but has a broadly conservative agenda that includes such items as education reform, voter ID, and stand-your-ground laws.⁷³

State legislative capture is not new, of course.⁷⁴ In particular, extractive industries in states dependent on them for jobs and economic development have long exercised significant influence in state capitols.⁷⁵ ALEC introduced a one-stop shop for legislative assistance, however, across multiple policy areas. It provides all manner of model bills, hundreds of which are proposed in state legislative chambers each year.⁷⁶ For part-time, underpaid, and often under-resourced legislators, ALEC serves as lobbyist, researcher, legislative aide, and legislative drafting service all in one.

The story of ALEC's influence is in part the story of the rise of post-war conservative politics in the United States; whether ALEC has moved the electorate or is taking advantage of underlying shifts in Americans' policy preferences is likely not knowable. What is notable is that both ALEC's pro-business deregulatory push and its culturally conservative agenda have targeted city policymaking. ALEC has provided legislation

[<https://perma.cc/4793-66QX>] (observing that even as the state has become younger and less Republican, the Texas legislature is moving to the right).

71. Henry Farrell, *Conservatives Remade American State Politics. Here's How They Did It.*, WASH. POST (Aug. 29, 2019), <https://www.washingtonpost.com/politics/2019/08/29/conservatives-remade-american-state-politics-heres-how-they-did-it/> [<https://perma.cc/T6HQ-4YJT>].

72. ALEXANDER HERTEL-FERNANDEZ, *STATE CAPTURE: HOW CONSERVATIVE ACTIVISTS, BIG BUSINESSES, AND WEALTHY DONORS RESHAPE THE AMERICAN STATES—AND THE NATION* 2–5 (2019).

73. *Id.* at 2–3, 55, 76.

74. See Richard L. McCormick, *The Discovery that Business Corrupts Politics: A Reappraisal of the Origins of Progressivism*, 18 AM. HIST. REV. 247, 260–64 (1981) (describing legislative lobbying and bribery in the early twentieth century by insurance, railroad, and utility corporations).

75. *Id.* at 264. “In his systematic study of American legislative practices, published in 1907, Paul S. Reinsch . . . describ[ed] how business interests had developed a new and ‘far more efficient system of dealing with legislatures than [the old methods of] haphazard corruption.’” *Id.* (quoting PAUL S. REINSCH, *AMERICAN LEGISLATURES AND LEGISLATIVE METHODS* 231 (1907)).

76. HERTEL-FERNANDEZ, *supra* note 72, at 69, 72.

that overrides municipal laws across a whole range of issues, including—not surprisingly—in the field of labor and employment law.⁷⁷ The legislative logrolling that could provide cities with some room to maneuver in exchange for supporting rural policy preferences does not seem to be operative. Indeed, ALEC’s cross-state strategy seems designed to override parochial intrastate relationships.

In any case, as Hertel-Fernandez observes, statewide preemptive legislation is one of ALEC’s staples. He notes that in 2000, less than two percent of the U.S. population lived in a state with local minimum wage preemption, but by 2016, almost sixty percent did; a similar trend applies to preemption of local paid sick leave.⁷⁸ City policymaking is regularly shut down. Hertel-Fernandez writes that “the combination of state power over preemption, coupled with [ALEC’s] cross-state reach, severely curtails the ability of blue cities located within red states to take action on their own.”⁷⁹

It is significant—though perhaps predictable—that cities are being aggressively curtailed at the moment that they are also enjoying a resurgence.⁸⁰ Newly industrializing cities at the turn of the twentieth century, too, were ripe targets for state intervention because they had become so economically important.⁸¹ State politicians were attracted to the spoils available in the growing city, while reformers were eager to address the social and political problems induced by massive and rapid urbanization.⁸²

This observation points toward a third feature of state democratic practice in the first quarter of the twenty-first century: metropolitanization. In recent decades, wealth, population, and productive enterprise have slowly and now more rapidly flowed into large urban agglomerations—cities and urbanizing counties—reprising in a form the economic growth that attracted state legislators’ attention during industrialization.⁸³ Urbanization has also contributed to cultural sorting, increasing the values

77. *Id.* at 240–41.

78. *Id.*

79. *Id.* at 241.

80. See Michael Storper & Michael Manville, *Behaviour, Preferences and Cities: Urban Theory and Urban Resurgence*, 43 URB. STUD. 1247 (2006) (discussing urban resurgence).

81. DAVID R. BERMAN, LOCAL GOVERNMENT AND THE STATES: AUTONOMY, POLITICS, AND POLICY 57–61 (2003) (“State legislatures, in effect, became ‘spasmodic city councils.’”) (quoting RODNEY L. MOTT, HOME RULE: FOR AMERICA’S CITIES 11 (1940)).

82. See *id.* at 57–59.

83. RODDEN, *supra* note 62, at 253. Recent findings from the 2020 Census reaffirm the continued growth of metropolitan areas. See *2020 Census Statistics Highlight Local Population Changes and Nation’s Racial and Ethnic Diversity*, U.S. CENSUS BUREAU (Aug. 12, 2021), <https://www.census.gov/newsroom/press-releases/2021/population-changes-nations-diversity.html> [<https://perma.cc/342D-C4HP>] (reporting that metropolitan areas grew by nine percent between 2010 and 2020).

bifurcation between high and low productivity places—a phenomenon that has been accelerating over the course of the twentieth century.⁸⁴

Rodden argues that the rural/urban divide can be understood as pitting more progressive and diverse urban constituencies against conservative-leaning and whiter rural communities.⁸⁵ At its inception, however, the rural/urban divide was driven by fears of concentrated municipal or corporate power.⁸⁶ The “problem of a great city within [a state’s] borders” could be solved—as New York’s future U.S. senator, Elihu Root, observed in 1894—by providing “that the small and widely scattered communities, with their feeble power comparatively . . . shall, by the distribution of representation, be put upon an even footing . . . with the concentrated power of the great cities.”⁸⁷ Doing so entailed amending state constitutions to enshrine geographic-based, as opposed to population-based, representation—which the New York constitutional convention of 1894 essentially did.⁸⁸ Other states followed, adopting county-based representation systems, coupled in some cases with limits on the number of representatives that could come from one county—a mechanism used by Pennsylvania, for instance, to limit the legislative delegation representing Philadelphia.⁸⁹ Indeed, the threat of urbanization regularly induced action on the part of incumbent rural legislators whenever that urbanization occurred. Nevada amended its constitution to limit the electoral power of Reno and Las Vegas as late as 1950.⁹⁰ *Reynolds v. Sims*,⁹¹ which invalidated such strategies, was not decided until 1964.⁹²

The actual political implications of malapportioned, anti-urban state constitutions differed depending on the region. Republicans benefited from malapportionment in the North, where cities were Democratic strongholds.⁹³ But in the South, white Democrats dominated rural areas and so were advantaged by anti-city malapportionment.⁹⁴ Urban residents in the West, by contrast, were often Republicans.⁹⁵ Progressive Era and New Deal politics, dominated in the latter period by the unholy alliance between Dixiecrats and Northern Democrats, meant that national political

84. RODDEN, *supra* note 62, at 87–91, 200.

85. *Id.* at 15–18.

86. See ANSOLABEHRE & SNYDER, *supra* note 54, at 57.

87. See *id.* at 58 (quoting 3 REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK 1226 (1894)).

88. *Id.* 58–59.

89. *Id.* at 59.

90. *Id.*

91. 377 U.S. 533 (1964).

92. See *id.* at 581.

93. See ANSOLABEHRE & SNYDER, *supra* note 54, at 74–75.

94. *Id.* at 77.

95. *Id.* at 81.

cleavages did not necessarily track the urban-rural divide.⁹⁶ Farmers and the small towns that relied on them and rural laborers in extractive industries welcomed cooperatives, electrification, road-building, and other progressive (and populist) efforts in Appalachia and across the rural South and West.⁹⁷ The urban-rural political coalition that characterized the New Deal was sustained until the Civil Rights Era.⁹⁸

The urban-rural divide nevertheless permeates state politics—in some cases since the late nineteenth century.⁹⁹ And it appears to start tracking party affiliation in the 1920s,¹⁰⁰ when more densely populated counties begin to exhibit a consistent trend in favor of Democrats.¹⁰¹ In other words, urban-rural conflicts existed well before the present-day knowledge economy contributed to high concentrations of college graduates in cities.¹⁰² Urbanization has long produced a backlash from rural representatives fearful of concentrated economic power or jealous of their legislative prerogatives.¹⁰³ And it has long produced a cultural backlash from whichever political party happened to be dominant in the countryside.¹⁰⁴

The present urban-rural divide—which seems to prevent cross-cutting agreement on otherwise popular economic and regulatory legislation¹⁰⁵—may be exacerbated by dramatically uneven economic development. The decline of the industrial city has been occurring at least since the 1950s. What is perhaps new is the whitening and depopulating of large swaths of the periphery and a new concentration of wealth in the greater metropolis¹⁰⁶—which in the Sunbelt has always included the

96. *See id.* at 82.

97. *See id.*

98. *See id.* at 80.

99. *See id.* at 57.

100. *See* DAVID DARMOFAL & RYAN STRICKLER, DEMOGRAPHY, POLITICS, AND PARTISAN POLARIZATION IN THE U.S., 1828–2016, at 120–21 (2019). For a discussion, see generally *The Science of Politics*, *supra* note 8.

101. *The Science of Politics*, *supra* note 8.

102. *See* RODDEN, *supra* note 62, at 109; *see also* Richard Florida, *The Talent Dividend in Urban and Rural Areas*, BLOOMBERG: CITYLAB (Oct. 31, 2018, 10:58 AM), <https://www.bloomberg.com/news/articles/2018-10-31/the-place-of-college-grads-in-the-urban-rural-divide> [<https://perma.cc/N49Y-HVFB>].

103. *See* BERMAN, *supra* note 81, at 60–61.

104. *See* ANSOLABEHERE & SNYDER, *supra* note 54, at 82.

105. *See, e.g.*, Seifter, *supra* note 63, 1793–94 (describing the popularity of increasing the minimum wage).

106. *See* KIM PARKER, JULIANA HOROWITZ, ANNA BROWN, RICHARD FRY, D'VERA COHN & RUTH IGIELNIK, PEW RSCH. CTR., WHAT UNITES AND DIVIDES URBAN, SUBURBAN AND RURAL COMMUNITIES 16–21, 24 (2018), <https://www.pewresearch.org/social-trends/wp-content/uploads/sites/3/2018/05/Pew-Research-Center-Community-Type-Full-Report-FINAL.pdf>.

suburbs.¹⁰⁷ The urban resurgence (or, for some, the “great inversion”¹⁰⁸) of the last few decades is a feature of this metropolitanization of the economy. On this account, the salient political divide is between metropolitan and non-metropolitan areas—those attached to the global economy through growing urban regions and those unattached to such regions and thus isolated from the global economy.¹⁰⁹

This observation has been made before,¹¹⁰ but what does it mean for state democratic practice? First, and most obviously, metropolitanization means that population and economic activity in many states increasingly reside in one or two large, heavily populated counties. Consider that the Denver metropolitan area constitutes almost sixty percent of Colorado’s total population.¹¹¹ Atlanta and Phoenix are similarly dominant in Georgia and Arizona, respectively, as are Houston and Dallas in Texas.¹¹² These metros not only provide the bulk of a state’s population, but also most of the state’s employment and economic activity.¹¹³ Battles to control those metro regions and reduce or shape the power of its leading cities are thus predictable. The degree of state officials’ political power might in fact turn on how much influence those officials wield in the state’s leading cities or metro regions (which may be why Austin’s independence is so galling to Texas state officials). Call this the centripetal force of state political economy.

Second, despite their economic dominance, leaders in urban regions face significant challenges of political coordination. The regional urban polity is heterogeneous, raising barriers to unified action; urban constituencies act in their own interests and rarely in the interest of the city qua city.¹¹⁴ Making matters more complicated is the fact that metropolitan regions tend to be highly fragmented, consisting of scores of local

107. Becky M. Nicolaides, *Suburbia and the Sunbelt*, MAG. HIST., Oct. 2003, at 21.

108. See ALAN EHRENHALT, *THE GREAT INVERSION AND THE FUTURE OF THE AMERICAN CITY* 1–8 (Vintage Books 2013) (2012).

109. See Brownstein, *supra* note 2.

110. See RICHARD FLORIDA, *THE NEW URBAN CRISIS: HOW OUR CITIES ARE INCREASING INEQUALITY, DEEPENING SEGREGATION, AND FAILING THE MIDDLE CLASS—AND WHAT WE CAN DO ABOUT IT* 190 (2017); BRUCE KATZ & JENNIFER BRADLEY, *THE METROPOLITAN REVOLUTION: HOW CITIES AND METROS ARE FIXING OUR BROKEN POLITICS AND FRAGILE ECONOMY* 1–6 (2013).

111. See *QuickFacts Colorado*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/CO> [<https://perma.cc/RLQ9-LQZU>] (last visited Sept. 21, 2021).

112. See Brownstein, *supra* note 2.

113. *Id.*

114. Gerald Gamm & Thad Kousser, *No Strength in Numbers: The Failure of Big-City Bills in American State Legislatures, 1880–2000*, 107 AM. POL. SCI. REV. 663, 663 (2013) (“[S]ize leads to damaging divisions . . .”).

government entities.¹¹⁵ Regional institutions are often non-existent or extremely weak.¹¹⁶ Coordination is further hampered by the fact that the various communities making up a metropolitan region are not monolithic; central cities in these regions are often still home to significant groups of economically isolated citizens, and inner-ring suburbs are differently situated from outlying commuter towns. Competitive intergovernmental pressures, for residents and development, can undercut meaningful cross-border or cross-city cooperation.¹¹⁷

In this political environment, and under a regime in which states exercise almost plenary authority over local governments, Democratic control of statewide political institutions seems to be a necessary precondition for the meaningful exercise of municipal power. It is not nearly sufficient, however; the intra-party conflicts between Mayor Bill de Blasio, former Governor Andrew Cuomo, and New York's Democratic-controlled legislature are ample evidence of that.¹¹⁸ And again, those conflicts are unsurprising; if state officials stop meddling in the affairs of their state's largest municipalities or counties, it might mean they have little to do at all. In red states, the winner of these battles is normally a foregone conclusion because of the application of overwhelming legislative or gubernatorial force. Cities simply lose.

III. THE FAILURE OF LOCAL-PROTECTING DOCTRINES

The targeting of cities has occurred before. As noted, at the turn of the twentieth century and later at mid-century, reformers responded to attacks on city autonomy with institutional changes designed to protect local authority.¹¹⁹ Those efforts were of limited success.¹²⁰ Nevertheless, umpiring the state-local relationship was one way to counter the power of statewide political machines.¹²¹ State constitutional home rule grants and constitutional bans on special legislation are two examples that originated in the Progressive Era.¹²²

115. *See id.* at 672.

116. *See* Nestor M. Davidson & Sheila R. Foster, *The Mobility Case for Regionalism*, 47 U.C. DAVIS L. REV. 63, 68 (2013).

117. *See, e.g.*, ANSOLABEHERE & SNYDER, *supra* note 54, at 65–67 (describing the rivalry between Los Angeles and San Francisco in the 1920s).

118. *See* Shane Goldmacher & J. David Goodman, *Inside One of America's Ugliest Political Feuds: Cuomo vs. de Blasio*, N.Y. TIMES (Apr. 22, 2018), <https://www.nytimes.com/2018/04/22/nyregion/cuomo-deblasio-feud-nyc.html> [<https://perma.cc/SFN3-UFAW>].

119. BERMAN, *supra* note 81, at 62.

120. *See id.* at 62–63.

121. *See id.* at 61–62.

122. *Id.* at 62.

Local-protecting doctrines are justified for all the reasons that the vertical distribution of power is seen as advisable: deconcentrating power and protecting liberty, encouraging innovation and experimentation, preventing unequal treatment, fostering democratic engagement and teaching civic skills, lowering the costs of failure, promoting choice and a diversity of policy responses, increasing accountability, taking advantage of local knowledge, and providing political out-groups with opportunities to govern.¹²³ These are, of course, conventional justifications for any multi-tiered governance regime.

In the case of the state-city relationship, however, these doctrines have mostly buckled under the forces of centralization. To be fair, it is not at all clear that constitutional structures, however entrenched, can “stick” in the face of severe political and values disagreement.¹²⁴ Nevertheless, it is worth considering how supposedly devolutionary state-based federalism doctrines and supposedly local-protecting state constitutional doctrines have both undercut actual political decentralization.

As to the former, state-based federalism cuts against the exercise of decentralized municipal power.¹²⁵ Cities can gain protection from federal law through federalism doctrines, but only incidentally. Constitutional anti-commandeering and anti-coercion doctrines protect locals only insofar as there is no daylight between them and their states. Once disagreement arises, the constitutional principle of state sovereignty takes over, leaving little room under federalism doctrines for protecting cities from contrary state commands.¹²⁶ That is because a state’s legislative supremacy over its political subdivisions has seemingly become a federal constitutional rule, though never quite explicitly stated as such.¹²⁷

Indeed, state legislative supremacy over cities need not be baked into federal constitutional law, even as the federal courts might generally defer to a state’s decisions regarding its internal political and jurisdictional organization.¹²⁸ It has been repeatedly argued that it is not a logically necessary adjunct of state-based federalism to treat cities as mere instrumentalities of their states, as the *Hunter v. Pittsburgh*¹²⁹ doctrine is regularly understood to do.

123. Schragger, *supra* note 9, at 1550, 1586, 1589, 1603.

124. See Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 128 (2001).

125. See, e.g., Yishai Blank, *Federalism, Subsidiarity, and the Role of Local Governments in an Age of Global Multilevel Governance*, 37 FORDHAM URB. L.J. 509, 512 (2010) (arguing against a state-based concept of federalism and in favor of a city-based concept of subsidiarity).

126. See Kathleen S. Morris, *The Case for Local Constitutional Enforcement*, 47 HARV. C.R.-C.L. L. REV. 1, 13 (2012).

127. See *id.*

128. See *id.*

129. 207 U.S. 161 (1907).

Consider, for instance, Kathleen Morris’s urging that the federal courts not take any position on the constitutional status of cities, but instead defer to the states, which regularly treat municipalities as constitutionally salient, mainly through home rule doctrines.¹³⁰ Federal courts, on this account, should adopt a very narrow reading of *Hunter v. Pittsburgh*, applying state protective doctrines when available instead.¹³¹ Another option is to recognize a local right of self-government that runs to the people, bringing to the surface the “shadow doctrine” of local government status that has long been lurking.¹³² Sufficient doctrinal data points exist to make out a limited federal claim of local autonomy, as David Barron and I argued in separate articles some years ago.¹³³ More recently, I have suggested an anti-commandeering principle that prevents states from requiring local compliance with federal law in areas in which the state is otherwise forbidden to regulate and locals would otherwise be shielded from federal commandeering.¹³⁴

These are workarounds, to be sure. The bottom line is that state-based federalism doctrines generally do little to protect cities from state law preemption except when federal law empowers cities or provides funds to them directly.¹³⁵ This is why the existence of states and the corresponding constitutional doctrine of state supremacy generally impede devolution. A middle or “regional” tier of government tends to fill the policy and political space that would otherwise be occupied by cities or other local institutions in a non-federal system.¹³⁶ If those states are constitutionally privileged, their dominance is even more entrenched. It may be for this

130. Morris, *supra* note 126, at 34, 43–44.

131. *Id.* at 44.

132. On this “shadow doctrine,” see Richard C. Schragger, *Reclaiming the Canvassing Board: Bush v. Gore and the Political Currency of Local Government*, 50 BUFF. L. REV. 393, 395–96, 407–09 (2002).

133. See *id.* at 397; David J. Barron, *The Promise of Cooley’s City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 489 (1999); see also Nikolas Bowie, *The Constitutional Right of Self-Government*, 130 YALE L.J. 1652, 1662–63 (2021).

134. Schragger, *supra* note 10, at 1218 (discussing potential challenges to SB4, the Texas anti-sanctuary-city law).

135. See, e.g., *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958); *Lawrence City v. Lead-Deadwood Sch. Dist.*, 469 U.S. 256 (1985). How it provides funds, however, is subject to certain limitations. See *Nixon v. Missouri Mun. League*, 541 U.S. 125, 140 (2004); see also Thrush & Bogel-Burroughs, *supra* note 5; Andrew Atterbury, *Biden Administration Offers Financial Help to Florida School Leaders Defying DeSantis*, POLITICO (Aug. 13, 2021, 7:25 PM), <https://www.politico.com/states/florida/story/2021/08/13/biden-administration-offers-financial-help-to-florida-school-leaders-defying-desantis-1390026> [<https://perma.cc/3E79-2C2P>].

136. See Frank B. Cross, *The Folly of Federalism*, 24 CARDOZO L. REV. 1, 20 (2002); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 914 (1994).

reason that cross-national studies show that federal systems of government are often less decentralized than unitary ones.¹³⁷

Moving “inside” states, we see a similar failure of local-protecting constitutional doctrines. Home rule, bans on special legislation, and other constitutional reforms—initially adopted during eras of urban resistance and reform—have also not prevented centralization. Like state-based federalism doctrines, these intrastate local-protecting doctrines are biased toward state supremacy.

That is in part because of a problem that I have elsewhere called “selective localism.”¹³⁸ It is not that state legislatures do not devolve significant responsibilities to local governments. They do, which is why measurements of local fiscal and regulatory autonomy often do not track whether a state formally embraces Dillon’s Rule or home rule.¹³⁹ The formal constitutional status of cities does not often predict cities’ actual ambit of responsibility.

But constitutional restrictions provide limited constraints on state legislatures, which may provide broad statutory grants of authority to cities but can also readily alter those grants. Indeed, state legislatures are very willing to override local laws that are politically salient and with which they disagree.¹⁴⁰ But they are much less inclined to take on fiscal and social welfare responsibilities that can be easily off-loaded onto local governments.¹⁴¹ Tax cuts are popular among state legislators in part because they do not have to make up for the shortfalls in education, infrastructure, and other services that often fall first to local governments.¹⁴² And because of the highly decentralized system of government, who is accountable for tax and spending policy is often fairly opaque.¹⁴³

There are also no internal anti-commandeering or coercive spending doctrines in the states—though some states have adopted restrictions on unfunded mandates.¹⁴⁴ Home rule is the main bulwark against state overreach, but it has always provided limited protection against state

137. See studies in Cross, *supra* note 136, at 47–49.

138. RICHARD SCHRAGGER, *CITY POWER: URBAN GOVERNANCE IN A GLOBAL AGE* 72 (2016).

139. Jesse J. Richardson, *Dillon’s Rule Is from Mars, Home Rule Is from Venus: Local Government Autonomy and the Rules of Statutory Construction*, 41 *PUBLIUS: J. FEDERALISM* 662, 675–76 (2011).

140. See Cross, *supra* 136, at 36.

141. See, e.g., Yunji Kim, *Limits of Fiscal Federalism: How Narratives of Local Government Inefficiency Facilitate Scalar Dumping in New York State*, 51 *ENV’T & PLAN. A: ECON. & SPACE* 636, 637 (2019).

142. *Id.* at 640.

143. See *id.* at 639.

144. See, e.g., ALA. CONST. amend. 621(a); FLA. CONST. art. VII, § 18; COLO. REV. STAT. § 29-1-304.5(1) (2021).

preemption and other forms of legislative intervention.¹⁴⁵ Moreover, even in home rule states, the fiscal constraints on local governments can be severe. States' "fiscal constitutions," for instance, often impose draconian limitations on local revenue-raising and spending authority.¹⁴⁶ California's Proposition 13 arguably has had more impact on the structure, authority, and autonomy of local governments in California than any protective grant of power contained in the California Constitution.¹⁴⁷

Vertical separation of powers doctrines—like home rule—are also difficult to enforce judicially. Courts are loath to block state legislative enactments, especially in areas that are of heightened public policy concern.¹⁴⁸ Almost by definition, those areas—voting, anti-discrimination law, labor law, environmental protection, employment, and housing—are "matters of statewide concern,"¹⁴⁹ with sufficient extraterritorial effects to justify state regulation. When courts adjudicate home rule disputes, they generally consider the local versus statewide effects of a particular policy area; the appropriate distribution of authority between the state and its subdivisions often turns on whether the enactment affects outsiders.¹⁵⁰

That inquiry presupposes that state enactments enjoy a certain democratic pedigree; it tends to approach the question of local authority on the assumption that the state legislature is more broadly representative than local councils.¹⁵¹ If locals are indeed parochial in this democratic sense, they have the burden to show that their ordinances only affect their own citizens, who have had a say in their enactment. Extraterritorial effects need to be managed and internalized by the larger unit—the state.

But what if the state legislature is structurally parochial or is acting parochially—which is to say, for the benefit of special interests? If Seifter, Rodden, and the other critics of state democratic institutions are right, then the presumption of state legislative representativeness is badly misplaced.¹⁵² Because of their counter-majoritarian character, the

145. Richard C. Schragger, *The Political Economy of City Power*, 44 *FORDHAM URB. L.J.* 91, 105 (2017).

146. See Richard Briffault, *Foreword: The Disfavored Constitution: State Fiscal Limits and Constitutional Law*, 34 *RUTGERS L.J.* 907, 927–29 (2003); Richard C. Schragger, *Democracy and Debt*, 121 *YALE L.J.* 860, 866 (2012).

147. See Briffault, *supra* note 146, at 929–30; Jonathan Schwartz, Note, *Prisoners of Proposition 13: Sales Taxes, Property Taxes, and the Fiscalization of Municipal Land Use Decisions*, 71 *S. CAL. L. REV.* 183, 201–04 (1997).

148. See, e.g., Kenneth Stahl, *Home Rule and State Preemption of Local Land Use Control*, 50 *URB. LAW.* 179, 182 (2021).

149. See *id.* at 186, 188–90; see Schragger, *supra* note 145, at 105; see, e.g., *Arlington County v. White*, 528 S.E.2d 706, 708 (Va. 2000) (discussing employee health insurance benefits as a matter of statewide concern).

150. Stahl, *supra* note 148, at 188–89.

151. Seifter, *supra* note 63, at 1733–34.

152. See, e.g., *id.* at 54.

assumption that state legislatures deserve our democratic respect may be incorrect.

In fact, it may be more appropriate to bestow that respect on the largest cities or counties in the state, which are likely more representative along a number of dimensions, especially racially and ethnically but also socioeconomically.¹⁵³ This is especially so if the city is less susceptible than state legislatures to special interest capture, which Hertel-Fernandez's work suggests.¹⁵⁴ In cases where state legislative processes are prone to capture, city policymaking may better reflect majoritarian preferences, both in the city and statewide. Seifter observes, for instance, that raising the minimum wage is broadly popular in many red states where the legislature has preempted local minimum wage hikes.¹⁵⁵ “[I]t is the cities,” she notes, “not the states, that appear to be conveying the popular will.”¹⁵⁶

The three features of state democratic practice previously discussed—structural anti-urbanism, state legislative capture, and the problem of metropolitan fragmentation—complicate the caricature of parochial cities and beneficent (cost-internalizing) state legislatures. If state institutions are deeply flawed and locals are democratically disadvantaged, then perhaps the home rule inquiry should be reversed. Instead of presuming that local lawmaking is a departure from the baseline of state legislative accountability, courts should adopt the reverse presumption and treat local-invading state legislative acts as presumptively anti-democratic unless justified.¹⁵⁷

The early home rule reformers thought as much; their goal was to cabin state legislatures as much as to empower municipal officials, who were, they fully recognized, no saints.¹⁵⁸ The idea, at least among some Progressive Era reformers, was to break the state political machines in order to give good government a chance at the municipal level, without any misconceptions about the quality of local rulers.¹⁵⁹ Protective doctrines like home rule were meant to be democracy-enforcing; they were not understood as providing exceptions to an already-perfected state

153. See, e.g., Kim Parker, Juliana Menasce Horowitz, Anna Brown, Richard Fry, D’Vera Cohn & Ruth Igielnik, *What Unites and Divides Urban, Suburban and Rural Communities*, PEW RSCH. CTR. (May 22, 2018), <https://www.pewresearch.org/social-trends/2018/05/22/what-unites-and-divides-urban-suburban-and-rural-communities/> [https://perma.cc/E396-3U8U].

154. See generally HERTEL-FERNANDEZ, *supra* note 72.

155. See Seifter, *supra* note 63, at 1793–94.

156. *Id.* at 1793.

157. Complications arise in cases of preemption by voter initiative, and Paul Diller offers some observations about how to distinguish majoritarian preemption from counter-majoritarian preemption. See Diller, *supra* note 60, at 346.

158. See SCHRAGGER, *supra* note 138, at 62–63.

159. HOWE, *supra* note 56, at 174.

democratic practice.¹⁶⁰ Such protective doctrines were meant to address state political dysfunction.¹⁶¹

That states are too centralized or impede decentralization flips the usual critique. Skepticism of states and state administration has a long history, though it has been mostly voiced by proponents of national power—less by proponents of city power.¹⁶² Nationalists have been rightly skeptical of the reactionary and racist state regimes shielded by the invocation of “states’ rights,” intended as a defensive doctrine to prevent federal intervention.¹⁶³

But decentralists should worry about states, too. Consider that “states’ rights” has more recently been invoked as an offensive doctrine to justify across-the-board preemption of any local law with which the legislature disagrees.¹⁶⁴ The outcome is again often reactionary. Majority Black cities have been common targets of state law preemption.¹⁶⁵ Recent voter suppression efforts, for instance, tend to be based on a view of city voters as inherently corrupt—an attitude that leads some to assert that urban voters should count less than those voters who are more authentically members of the state’s political community.¹⁶⁶

The scorched-earth politics that these kinds of laws represent reflect, in many cases, national political parties pursuing national political and

160. See SCHRAGGER, *supra* note 138, at 62–63.

161. See *id.*

162. See, e.g., JON C. TEAFORD, *THE RISE OF THE STATES: EVOLUTION OF AMERICAN STATE GOVERNMENT 1–3* (2002).

163. GEORGE LEWIS, *MASSIVE RESISTANCE: THE WHITE RESPONSE TO THE CIVIL RIGHTS MOVEMENT 8* (2006) (explaining “legislative committees and subcommittees that hid their racist agendas under the banner of ‘state sovereignty’”).

164. Seifter, *supra* note 63, at 1750; see also Daniel Vock, *The End of Local Laws? War on Cities Intensifies in Texas*, *GOVERNING* (Apr. 3, 2017), <https://www.governing.com/archive/gov-texas-abbott-preemption.html> [<https://perma.cc/W3KX-CLJ5>].

165. HUNTER BLAIR, DAVID COOPER, JULIA WOLFE & JAIMIE WORKER, *ECON. POL’Y INST., PREEMPTING PROGRESS: STATE INTERFERENCE IN LOCAL POLICYMAKING PREVENTS PEOPLE OF COLOR, WOMEN, AND LOW-INCOME WORKERS FROM MAKING ENDS MEET IN THE SOUTH 1* (2020), <https://files.epi.org/pdf/206974.pdf> [<https://perma.cc/9E5S-JYFJ>] (“Preemption laws in the South are passed by majority-white legislatures and tend to create barriers to economic security in cities whose residents are majority people of color.”); see Richard Fausset, Nick Corasaniti & Mark Leibovich, *Why the Georgia G.O.P.’s Voting Rollbacks Will Hit Black People Hard*, *N.Y. TIMES* (Mar. 25, 2021), <https://www.nytimes.com/2021/03/25/us/politics/georgia-black-voters.html> [<https://perma.cc/38JF-8WWK>]; Corasaniti, *supra* note 28.

166. Emily Badger, *Are Rural Voters the ‘Real’ Voters? Wisconsin Republicans Seem to Think So*, *N.Y. TIMES* (Dec. 6, 2018), <https://www.nytimes.com/2018/12/06/upshot/wisconsin-republicans-rural-urban-voters.html> [<https://perma.cc/P73A-MHV6>] (Robin Vos, the Republican Speaker of the Wisconsin State Assembly stated, “If you took Madison and Milwaukee out of the state election formula, we would have a clear majority.”).

culture war strategies in the states.¹⁶⁷ Those national interests, however, are taking advantage of an existing geographical divide in the states that state institutions could be designed to mute.¹⁶⁸ I am not talking about some free-floating, undifferentiated localism. Insulating city power through constitutional local-protecting rules has always been an attempt to solve the problem of urban underrepresentation against a backdrop of continual up-state/down-state tensions.

The urban-rural divide is not a product of such rules but the impetus for them. Perennial intrastate conflict can be mediated by limiting the power of state legislatures to govern where they are not wanted. But more importantly, effective local-protecting rules can invite bargaining, giving both sides an incentive to stay out of each other's way. Enforcing a presumption of local control through robust restrictions on special legislation or home rule grants requires state legislatures to make a case for their broad representativeness and not merely assume it.

IV. STATE CONSTITUTIONAL HOME RULE REFORM

The urban-rural divide may doom us, especially if it becomes further entrenched through political sorting. Flight out of red states to blue states or vice versa reduces intrastate political diversity.¹⁶⁹ It is not unheard of for elected officials to induce such sorting by way of making a more congenial electorate and thereby solidifying their own control.¹⁷⁰ If the Texas legislature makes it impossible for Austin citizens to achieve their preferred policy goals, then those folks might move elsewhere. The migration of diverse college graduates into urban places while smaller, rural places lose their graduates alters the electorate in obvious ways in both places.¹⁷¹

What to do? For institutional reformers, electoral reform is an obvious place to start. Indeed, there is precedent for such reform. In a prior

167. See Kevin R. McNamara, *The Republican War on Cities*, CAMBRIDGE UNIV. PRESS: FIFTEEN EIGHTYFOUR (July 21, 2021), <https://www.cambridgeblog.org/2021/07/the-republican-war-on-cities/> [https://perma.cc/X2UB-MNVL].

168. See Ciara Torres-Spelliscy, Opinion, *Red State Lawmakers Preempt Campaign Finance Laws in Blue Cities*, REGUL. REV. (Sept. 23, 2021), <https://www.theregview.org/2021/09/23/torres-spelliscy-preempting-campaign-finance-laws/> [https://perma.cc/Q6HQ-PMSK].

169. See Harry Enten & Nate Silver, *Migration Isn't Turning Red States Blue*, FIVETHIRTYEIGHT (Aug. 29, 2014, 10:41 AM), <https://fivethirtyeight.com/features/migration-isnt-turning-red-states-blue/>.

170. See, e.g., Edward L. Glaeser & Andrei Shleifer, *The Curley Effect: The Economics of Shaping the Electorate*, 21 J.L. ECON. & ORG. 1, 9 (2005).

171. See Adam Harris, *The Education Deserts of Rural America*, ATLANTIC (July 1, 2019), <https://www.theatlantic.com/education/archive/2019/07/education-deserts-across-rural-america/593071/> [https://perma.cc/7TVT-PAXE].

era of malapportionment, the one person, one vote revolution substantially rewired the states' political geography¹⁷²—though not in ways some had anticipated, and certainly not in ways that solved the problem of the concentration of Democratic votes in urban places.¹⁷³

The next frontier is proportional representation, a solution that Rodden favors,¹⁷⁴ as it provides small parties at least some say in the government and forces larger parties to broaden their appeal.¹⁷⁵ As already noted, anti-urban bias is largely avoided under proportional voting systems.¹⁷⁶ Redistricting reform to counter extreme partisan gerrymanders also seems obviously necessary to prevent minoritarian government,¹⁷⁷ though in light of the concentration of Democratic voters, “corrective” gerrymandering may be necessary to fix state legislatures’ bias.¹⁷⁸ Addressing extreme partisan gerrymandering seems possible; some states have non-partisan districting commissions, and some state courts have been more amenable to policing the districting process than the U.S. Supreme Court.¹⁷⁹ The likelihood of the large-scale adoption of proportional representation, however, is much smaller, as Rodden recognizes.¹⁸⁰ Ranked-choice voting has received some good press, and a few cities have adopted it.¹⁸¹ But most states seem far from considering such a substantial change to their electoral systems.¹⁸²

A different “coping mechanism” for urban-rural polarization is federalism or decentralization¹⁸³—institutional structures that divide authority between levels of government. This solution focuses on the intrastate vertical separation of powers, which has a long history in the public law of the states.¹⁸⁴ That history suggests that state-level constitutional reform may be possible.

172. ANSOLABEHRE & SNYDER, *supra* note 54, at 12.

173. *See generally id.*

174. *See* RODDEN, *supra* note 62, at 230.

175. *See id.* at 230–31.

176. *Id.* at 230–33.

177. *See* Diller, *supra* note 60, at 326–27.

178. RODDEN, *supra* note 62, at 267.

179. *See Gill v. Whitford*, 138 S. Ct. 1916 (2018) (declining to address partisan gerrymandering).

180. RODDEN, *supra* note 62, at 228–29, 265.

181. David Leonhardt, *A Guide to Ranked-Choice Voting*, N.Y. TIMES (June 21, 2021), <https://www.nytimes.com/2021/06/16/briefing/a-guide-to-ranked-choice-voting.html> [<https://perma.cc/L65N-5K2G>] (stating that over fifty cities use ranked-choice voting).

182. *See* Jacey Fortin, *Why Ranked-Choice Voting Is Having a Moment*, N.Y. TIMES (Apr. 23, 2021), <https://www.nytimes.com/2020/02/10/us/politics/ranked-choice-voting.html> [<https://perma.cc/W7G7-ZFR2>] (describing critics’ concerns about voter turnout).

183. RODDEN, *supra* note 62, at 255.

184. *See id.* at 273–74.

One place to start would be the replacement of weak home rule with strong home rule—the ambition of the National League of Cities’ recently published *Principles of Home Rule for the Twenty-First Century (Principles)*.¹⁸⁵ The *Principles* updates the model home rule constitutional provisions promulgated by the American Municipal Association (AMA) (which became the National League of Cities in 1964) over sixty years ago.¹⁸⁶ The previous AMA model was influential and sparked the so-called “second wave” of municipal home rule reform in the states.¹⁸⁷ (The first wave had occurred in the Progressive Era with the adoption of the first home rule charters.)¹⁸⁸

The *Principles* is an emphatically pro-local, pro-democracy document, but in ways that should be uncontroversial: it primarily seeks to address and limit the use of state power to intimidate, punish, delegitimize, and defund local government.¹⁸⁹ That basic idea is not new, though it has recently come under severe strain.¹⁹⁰ The *Principles*, therefore, reaffirms the proposition, embraced by the AMA in 1953, that cities should be able to initiate legislation on all matters so long as the legislation is consistent with state law.¹⁹¹ Permission from the legislature is not a prerequisite for municipal action. And it further reaffirms the right and capacity for local citizens to elect their rulers and manage their own democratic process and structure of governance. Many of these principles are already embodied in state constitutions,¹⁹² even if they have gone underenforced in recent years.¹⁹³

The *Principles* also seeks to rebalance state-local power, which has skewed strongly in favor of the legislature. The 1953 AMA model sought to insulate cities from state control of local matters.¹⁹⁴ In the words of the Executive Director of the AMA at the time, “Municipal governments can be neither free nor responsible unless they are guaranteed the right (and

185. NAT’L LEAGUE OF CITIES, CTR. FOR CITY SOLS., *PRINCIPLES OF HOME RULE FOR THE 21ST CENTURY* (2020), <https://www.nlc.org/wp-content/uploads/2020/02/Home-Rule-Principles-ReportWEB-2-1.pdf> [<https://perma.cc/S6D5-SMP8>]. I participated in the drafting of the *Principles* as part of a working group led by Professor Nestor Davidson, a group which also included Professors Richard Briffault, Paul Diller, Sarah Fox, Laurie Reynolds, Erin Adele Scharff, and Rick Su. *Id.* at 2.

186. *Id.* at 4–5.

187. *Id.* at 12.

188. *Id.* at 11.

189. *Id.* at 8, 17–19.

190. *Id.* at 12.

191. *Id.* at 34, 40–41.

192. *Id.* at 13; *see, e.g.*, Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 859, 861–62 (2021) (discussing state constitutions’ strong protections of democratic principles).

193. *See* Bulman-Pozen & Seifter, *supra* note 192, at 908.

194. NAT’L LEAGUE OF CITIES, *supra* note 185, at 4.

the compulsion) to decide purely local matters for themselves.”¹⁹⁵ The new *Principles* does not adopt the “local matters” language; judicial determinations of what is a matter of local concern and what is a matter of state concern are challenging and highly contentious or (more often) lead to mostly confirming state legislative authority.¹⁹⁶ Instead, the model adopts a general “presumption against preemption” on the theory that cities and states are equivalently competent to exercise authority across the whole range of policy matters.¹⁹⁷ This presumption consists of a requirement that the state provide a clear statement of its intent to preempt and can do so “only if necessary to serve a substantial state interest, only if narrowly tailored to that interest, and only by general law.”¹⁹⁸

These requirements are not alien to state and federal law; they are cribbed from existing state and federal practice.¹⁹⁹ Clear statement rules have been part and parcel of preemption inquiries in both federal and state law.²⁰⁰ The substantial state interest and narrow tailoring tests have been applied by state courts making home rule determinations already.²⁰¹ So, too, the general law requirement is simply a version of the ban on special legislation, written into many state constitutions during the first wave of home rule reform and also applied by state courts.²⁰²

Notably, the *Principles* does not provide for municipal “immunity” from contrary state commands but rather requires that the state justify preemptive legislation, a standard that is high but not insurmountable.²⁰³ The model seeks to buttress home rule by shifting the default in favor of local authority, not immunize a sphere of municipal action altogether.²⁰⁴

A different approach to state-local relations could be taken. Some states currently provide local governments with a defined protected sphere of governance.²⁰⁵ Other states demand that certain kinds of preemptive legislation be adopted by a legislative supermajority or pass through other procedural hurdles before becoming law.²⁰⁶ To be sure, judicial enforcement of these requirements can be quite spotty; another purpose of

195. *Id.*

196. *Id.* at 55.

197. *Id.* at 57.

198. *Id.* at 35.

199. See *id.* at 52 for discussion.

200. *Id.* at 54–55; see, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1990) (adopting a clear-statement rule for federal preemption of state law).

201. See NAT’L LEAGUE OF CITIES, *supra* note 185, at 56.

202. *Id.* at 58–59.

203. *Id.* at 53, 56.

204. *Id.* at 53.

205. See *id.* at 54; see, e.g., *Sonoma Cnty. Org. of Pub. Emps. v. County of Sonoma*, 591 P.2d 1, 12–13 (Cal. 1979).

206. NAT’L LEAGUE OF CITIES, *supra* note 185, at 55; see, e.g., ILL. CONST. art. VII, § 6(g); *City of Rockford v. Gill*, 388 N.E.2d 384, 387 (Ill. 1979).

the revised *Principles* is to call attention to the gap between existing constitutional home rule grants and their enforcement.²⁰⁷ The *Principles* is in many ways an act of recovery and reassertion of constitutional provisions that have experienced serious institutional decay over time.

Any given mechanism for enforcing a vertical division of authority within the state has costs and benefits. The important point is that state constitutions are fecund with provisions that seek to maintain an appropriate division of authority between the state and the city.²⁰⁸ The states' public law of "intrastate federalism"²⁰⁹ is already quite rich and varied. And the concerns animating the different approaches to intrastate decentralization are long-standing. The current *Principles* seeks to adapt those concerns in an increasingly metropolitan age when political polarization is at an extreme.²¹⁰ In this way, the approach is fairly conventional and consistent with the reasons one would adopt any form of constitutional federalism. If we cannot get along, let us each at least go along—through mechanisms that provide some space for self-government, reduce the stakes for losers, and moderate the effects of winner-take-all politics.

Is this more robust version of home rule sufficient to counterbalance state legislatures' counter-majoritarianism? Can state constitutional reforms mediate the urban-rural divide? There are, of course, reasons to be skeptical of the judicial enforcement of the vertical separation of powers, as one might be skeptical of all judicial efforts to mediate power relationships when judges are obviously interested parties.²¹¹ At the same time, constitutions cannot be entirely ignored and thus may induce political bargaining in the shadow of the law.

At the very least, state constitutions are more easily amended. The U.S. Constitution seems practically unamendable at this point in history,²¹² and so addressing the deep and abiding anti-urban bias in the Senate and the Electoral College is going to be near impossible. And while state constitutional politics is just that—a version of state politics—there comes a time when an existing regime is so entrenched and so non-responsive to majority preferences that institutional reform becomes possible.²¹³ The momentum for electoral reform in the states in the period just preceding

207. NAT'L LEAGUE OF CITIES, *supra* note 185, at 16–17.

208. Fred O. Smith, Jr., *Federalism in the States: What States Can Teach About Commandeering*, 2021 WIS. L. REV. 1257.

209. *See id.* at pt. I.

210. NAT'L LEAGUE OF CITIES, *supra* note 185, at 15–16.

211. Baker & Young, *supra* note 124, at 100–02.

212. Thomas W. Merrill, *Interpreting an Unamendable Text*, 71 VAND. L. REV. 547, 549 (2018) (“The U.S. Constitution . . . is now widely declared to be virtually impossible to amend . . .”).

213. *See* Brownstein, *supra* note 2 (arguing that the breaking point for blue cities is the passing of no-mask mandates).

the Court's one person, one vote decisions may be an example;²¹⁴ so, too, the impetus for home rule reform in previous eras was extreme dissatisfaction with unrepresentative state institutions.²¹⁵

Consider shifts in state electoral power that invite decentralization. In Colorado, a new Democratic legislature modified the state's preemptive oil and gas laws to permit the local regulation of fracking.²¹⁶ In Virginia, Democrats took over the General Assembly and lifted the statewide ban on local governments removing their Confederate monuments.²¹⁷ Notice that the Colorado Democrats did not ban fracking statewide, nor did the Virginia Democrats order cities to remove their Confederate statuary. Local control may have its own political equilibrium, attractive to both parties when the electorate is closely divided.

In the current economic and political climate, decentralization of power to cities may be responsive to more than just the felt need to mute or reduce political conflict. Central governments are under increasing strain, riven by factions, seemingly incapable of addressing the citizenry's basic needs and failing to provide even a baseline of safety and security that the modern social welfare state has promised.²¹⁸ The pandemic has exposed the significant limitations of the centralizing impulse—both in the United States and abroad—and raised the possibility that we are too reliant on large-scale, central governments that—when governed incompetently—become enormously destructive.²¹⁹ Think of local power as much-needed redundancy—as providing for institutional resilience even if it is sometimes inefficient.

214. See ANSOLABEHRE & SNYDER, *supra* note 54, at 11–12.

215. See HOWE, *supra* note 56, at 174.

216. *City of Longmont v. Colo. Oil & Gas Ass'n*, 369 P.3d 573, 585 (Colo. 2016); *City of Fort Collins v. Colo. Oil & Gas Ass'n*, 369 P.3d 586, 593–94 (Colo. 2016); S.B. 19–181, 72d Gen. Assemb., 1st Reg. Sess. (Colo. 2019).

217. S.B. 183, 2020 Gen. Assemb., Reg. Sess. (Va. 2020); Gregory S. Schneider, *Virginia House of Delegates Votes to Make It Easier for Cities to Take Down Confederate Statues*, WASH. POST (Sept. 8, 2020), https://www.washingtonpost.com/local/virginia-politics/virginia-house-confederate-statue-bill/2020/09/08/9a9bf9ca-f20d-11ea-bc45-e5d48ab44b9f_story.html [<https://perma.cc/Z748-7VYV>].

218. See Schragger, *supra* note 9, at 1583–84 nn.206 & 208–12; Tassilo Herrschel, *Metropolitanization of the State: Towards Inequality in Democratic "Voice"?*, 45 *FORDHAM URB. L.J.* 1197, 1200–01 (2018) (describing mismatch between nation-states and metropolitan growth); Mica Panić, *Transnational Corporations and the Nation State*, in *TRANSNATIONAL CORPORATIONS AND THE GLOBAL ECONOMY* 244 (Richard Kozul-Wright & Robert Rowthorn eds., 1998) (explaining that some transnational corporations "have achieved such a command over global resources, and with it such an impact on the international economy, as to raise serious doubts about the long-term survival of the nation state").

219. See generally ALFRED C. AMAN, JR., *THE DEMOCRACY DEFICIT: TAMING GLOBALIZATION THROUGH LAW REFORM* (2004) (describing the adverse effects of globalization on democracy).

To be sure, these kinds of structural arguments do not usually move voters or even institutional reformers. Decentralization qua decentralization has no constituency. Citizens and interest groups seek their policy aims at the level of government that is most amenable to them; federal or divided government structures tend to be a (“tragic”) compromise borne of necessity and frustration, not the first-best choice of those who can or believe they can win elections.²²⁰ But hope springs eternal for the law reformer. And that law reformer would do well to look to state constitutions for solutions to the problem of our now-metastasized urban-rural divide.

CONCLUSION

Political polarization is a defining feature of our age, but not along sectional or regional lines, or even policy ones. State-to-state differences still obtain, to be sure. But the leading political cleavages are occurring within states, not between them. And the rise of Trumpism indicates that traditional left-right policy positions are not particularly fixed.²²¹ “Left” and “Right” have lost much of their meaning; it is increasingly more accurate to refer to the main features of political conflict in the United States as urban and rural.²²²

As population and economic output increasingly concentrate in metro areas, one possibility is a global revolt of the “left-behinds,” a sharpening of the urban-rural divide to the point of a knife. Another revolt could be brewing as well. As cities and their surrounding metro areas become more populous and productive, a significant gap arises between the prevailing sites of productive economic activity and the location of the regulation and redistribution of that economic output.

Call this the mismatch thesis: the increased prominence of cities and metro areas has not in recent decades been accompanied by enhanced policymaking authority.²²³ State governments (and sometimes the federal government) are instead increasingly overriding, defunding, and constraining cities. The state law preemption epidemic is one result; the deepening of the urban-rural political divide is another.

A common justification for a federal regime is that it aligns decision-makers with the costs and benefits of their decisions. But under the current regime, the most populous and productive places in the country are highly constrained and unable to respond to emerging threats. State-based federalism is failing to mute political conflict because it is not responsive

220. MALCOLM M. FEELEY & EDWARD RUBIN, *FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE* 39 (2008).

221. RODDEN, *supra* note 62, at 83.

222. *Id.* at 9.

223. *See* Schragger, *supra* note 9, at 1541.

to the primary political cleavage of this age. The doctrine of state legislative supremacy provides no political space for metropolitans and non-metropolitans to govern in their respective spheres.

Intrastate local-protecting doctrines have wrestled with this challenge for over one hundred years. The response to perennial state-city conflict has been to try to cabin it by providing an institutional space for its resolution: the state legislature acting against the backdrop of constitutional rules that establish a workable vertical division of authority. As legislatures ignore those rules and courts fail to enforce them, however, the geographical and political distance between the city and the state widens. Democratic practice in the states and the nation becomes a winner-take-all battle for control accompanied by the demonization of “inauthentic” places and voters. This is “localism all the way up”: the problem of the city in the state has become the problem of the city in the nation.