Defunding Cities: Reconsidering the Fiscal Sanctioning Measures of State Punitive Preemption Statutes

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ABSTRACT

In an effort to deter and punish cities for passing ordinances that conflict with state priorities, states are utilizing a new form of legislative power: punitive preemption. It is generally considered a legitimate use of state power to utilize statutes to preempt local measures and ordinances deemed inconsistent with state policy. State legislatures, however, are attaching punitive mechanisms to preemption legislation that, in the event of local noncompliance, create criminal and civil liability for local officials, provide removal mechanisms for elected officials, and allow for the fiscal sanctioning of local governments.

This Comment considers whether local governments are legally protected from state-sanctioned punitive financial penalties. In doing so, it distinguishes financial penalties from permissible forms of state preemption and analyzes existing judicial decisions that consider financial penalty arguments. After discussing the existing doctrine, this Comment develops a conceptual framework to suggest that certain punitive preemption tools are not legal. Ultimately, this Comment maintains that coercive financial mechanisms attached to preemting legislation are unconstitutionally coercive as they functionally force local governments to relinquish core elements of their sovereignty.

I. INTRODUCTION

Legal and policy conflicts between state governments and local authorities are increasing significantly.¹ These disputes result from heightening polarization, increasing urbanization, and the nationalization of state and local politics across the United States.² Hostility

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See id.; see generally Jacob Grumbach, Laboratories Against Democracy 97–148
between state and local authorities extends across many policy issues, including decisions related to the COVID-19 pandemic, the adoption of sanctuary city policies, police budgets, worker protection policies, the removal of confederate statues, and more. These policy conflicts, and their corresponding legal disputes, raise a number of questions regarding the function of local governments and the appropriate state-local division of power.

Local governments serve a number of important purposes. Politically, localities provide an important mechanism for community self-definition, democratic participation, and a venue for responding to political malfunctions at higher levels. Efficiency and responsiveness concerns also support the idea that fiscal decisions should be made at the lowest level of government. Local governments can provide collective and public goods that the market or a higher level of government cannot efficiently provide.

Despite their importance, municipalities are not mentioned in the text of the U.S. Constitution. Instead, the constitutional legitimacy of local government is grounded in the authority of the Tenth Amendment of the U.S. Constitution and the doctrine formulated by the Court in Hunter v. City of Pittsburgh. When examining the role of local governance in our federalist system, municipalities are generally considered subdivisions of the state, which “at its pleasure, may modify or withdraw all of such powers.” Consequently, it is considered a legitimate use of state power to utilize statutes to preempt local measures and ordinances deemed inconsistent with state policy.

Nevertheless, local governments retain legal authority under federalism. Local governments exist through a grant of power from the

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5 See id.


7 See JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 273–93 (1861).


9 207 U.S. 161 (1907).

10 Id. at 178–79.
state, and, once such a grant has been authorized, a figurative boundary of authority insulates municipalities vis-à-vis the state. The exact contours of a municipality’s boundary of authority are determined by the textual grant of authority in the state constitution and the state’s rules of statutory interpretation. The power to initiate legislation and the power to be insulated from state legislative overrides can act as defenses against state preemption and create a legal border around the locality.

In an effort to deter and punish cities for passing ordinances that conflict with state priorities, states are utilizing a new form of legislative power: punitive preemption. Increasingly, states are deploying their power to create privately enforced civil penalties against local officials and governments, establishing criminal penalties and removal mechanisms for elected officials, and instituting state-enforced fiscal sanctions for local governments. While the legal mechanism of preemption remains structurally unchanged, this Comment suggests that the material impact of punitive preemption on local governments functionally forces local governments to relinquish core elements of their sovereignty. The state’s infringement on local government sovereignty challenges separation of powers principles, freezes local policy experimentation, and actualizes theoretical concerns about minority rule.

This Comment considers whether local governments are legally protected from state-sanctioned punitive financial penalties; it distinguishes financial penalties from permissible forms of state preemption and analyzes existing judicial decisions that consider financial penalty arguments. After discussing the flaws in the existing doctrine, this Comment develops a conceptual framework to suggest that certain punitive preemption tools are not legal.

II. LEGAL AUTHORITY OF LOCAL GOVERNMENTS

In structural constitutionalism doctrine, localities are conceptualized on a spectrum of sovereignty. On one end are theorists who contend that localities are entities possessing an inherent right of self-government. These theorists assert that there is an inherent right to

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13 See Briffault, supra note 12, at 1997.
self-government and ground their reasoning in elements of legal history and realism: the authority of municipalities confirms existing rights that originated in English common law that were necessarily adopted in American jurisprudence. On the other end are theorists who maintain that the state has complete power over its political subdivisions. These theorists assert that because the Constitution does not directly address municipalities, states retain largely unrestricted power to determine the boundaries and manner of formation of their political subdivisions.

Two rules of statutory interpretation functionally translate these distinct conceptions of local government into practice. Dillon’s Rule embodies the idea that states have power over their political subdivisions. Invented in early nineteenth-century Iowa to address the investments of localities in fraudulent railroad schemes, Dillon’s Rule found wider purchase because courts doubted the ability of local governments to solve problems adequately. Accordingly, Dillon’s Rule of statutory interpretation functionally restricts the scope of local autonomy by requiring localities to obtain state legislative permission before they can perform desired functions. This rule precludes a locality from engaging in an activity without first receiving an express grant of authority. Once such a grant has been authorized, however, the locality can exercise the powers—and others necessarily or fairly implied in incident to the powers expressly granted—without fear of the state’s supervisory authority. While the operative presumption is against municipal power in Dillon’s Rule localities, a court can find municipal authority in express text or those powers necessarily and fairly implied.


16 See Briffault, supra note 12.


18 See DILLON, supra note 17, at 449–50.

19 See John G. Grumm & Russell D. Murphy, Dillon’s Rule Reconsidered, 416 ANNALS AM. ACADEMY POL. & SOC. SCI. 120, 127 (1974) (explaining that historically, state restrictions on localities “to curtail the at times reckless municipal investments in internal improvements, railroads included”).


21 See Grumm & Murphy, supra note 19, at 121.

22 See id.

23 See DILLON, supra note 17, at 448–49.

Conversely, in home rule systems, cities may legislate presumptively on local issues unless they are preempted by the state. Emerging in the late nineteenth century, home rule systems and other constitutional restrictions on state legislative action such as general law requirements and ripper clauses, captured a revolt against local powerlessness given the misuse of plenary authority by remote and rural-dominated legislatures. Therefore, the animating principle of home rule localities is to grant local governments a significant degree of autonomy over local affairs. Citizens of all but three states have enacted a home rule provision.

There are generally considered to be two models of home rule that are structured through state constitutional or legislative mechanisms. The first is considered the imperium in imperio model. In the imperio model, the state constitution empowers cities to adopt charters that give localities the autonomous power to act within “local” or “municipal” affairs. The state constitution provides corresponding constitutional protection against state interference. Generally, imperio models set out spheres of permissible action by listing enumerated powers in the state constitution. The second home rule model is characterized by a default rule granting a municipality the power to act, but with the state retaining the power to override. The state power is subject to independent state constitutional constraints, such as bans on special legislation, procedural requirements, generality mandates, and so forth. Confusingly, this model also derives statutory authority from the state constitution, but it is characterized as a “legislative” home rule because the state can adjust the power balance through its legislative authority. While constitutional home rule is a limited doc-

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29 See id.


trine, it is possible that localities can enjoy broad initiation powers and some immunity from conflicting state law.\textsuperscript{32}

A. Constructing a Boundary of Local Power Through the State’s Preemption Power

Preemption is a legal principle and policy tool that a higher authority of law supersedes a lower authority of law if both address the same subject matter. States traditionally claim that preemption is necessary in order to establish statewide regulatory baselines, nullify inconsistent local rules, and control negative extraterritorial effects.\textsuperscript{33} As the sovereign power is vested with ultimate responsibility for the wellbeing of its citizens, the state can be permitted to enact uniform standards through preempting legislation.\textsuperscript{34}

Conflict between state and local law may emerge when a city passes an ordinance that the state then claims is preempted, either expressly or implicitly. A court is then tasked with determining the degree to which a local ordinance can coexist with the state’s authority.\textsuperscript{35} Express preemption occurs if a state law explicitly bars localities from enacting regulations that will prevail over any contrary local policies.\textsuperscript{36} While the implied preemption analysis varies depending on state or jurisdiction, a court must first determine whether a state statute “evinces an implicit legislative intent to displace law.”\textsuperscript{37} If there is a conflict, a court then considers whether the locality retains immunity power by interpreting the state’s limited or home-rule constitutional grant of legal authority.\textsuperscript{38}

It remains difficult for localities to prevail when challenging state laws, but it is possible for Dillon’s Rule and \textit{imperio} home rule localities to triumph in preemption conflicts. In \textit{imperio} home rule localities, conflicts between state and local law regarding municipal matters are resolved in the locality’s favor.\textsuperscript{39} In Dillon’s Rule localities, the locality has no immunity power, but if the court reconciles the local and state issue or determines that the two are not in conflict, then the locality’s ordinance can stand so long as the locality was acting pursu-

\textsuperscript{32} See Briffault, supra note 12, at 2011–14.
\textsuperscript{34} See Colum. L. Rev. Ass’n, supra note 20, at 1146 (1966).
\textsuperscript{35} See Briffault, supra note 12, at 1997.
\textsuperscript{36} See Schragger, supra note 11, at 1181–82.
\textsuperscript{37} Simon, supra note 27, at 1444.
\textsuperscript{39} See generally Amer. Fin. Serv. Ass’n v. City of Oakland, 104 P.3d 813 (Cal. 2005); see also Town of Telluride v. Lot Thirty-Four Venture, L.L.C., 3 P.3d 30, 36–37 (Colo. 2000).
ant to its initiation power.40 While state power is generally described in expansive terms, preemption challenges demonstrate that there are carveouts to this power. Judicial resolution of conflicting state and local law, therefore, provides a legal mechanism for determining the boundary between local and state power.

B. The Rise of Punitive Preemption

Towards the end of the twentieth century, state legislatures started to deploy preemption in a novel manner: to expressly preempt large swaths of local control prior to any local action.41 Instead of utilizing preemption to adopt statewide regulatory baselines, state legislatures passed legislation to prematurely strip local governments of the power to regulate in certain policy spaces.42 Working with industries such as the tobacco industry, the American Legislative Council (ALEC) provided model bill proposals to legislatures that utilized state legislative preemption to block cities from passing measures that exceeded the regulatory minimum.43 This included legislation to prevent cities from “enacting anti-smoking laws that exceeded the standards set by states,” which a majority of states had enacted by 2000.44

Following the success of the tobacco industry in enacting state preemption to remove local regulations, other business industries and ALEC copied this model to advance their own business interests.45 For example, in 2011, YUM! Foods, the parent company of fast-food companies such as Taco Bell, worked with the Wisconsin Governor to pass and enact legislation to prevent any Wisconsin locality from passing labor market regulations exceeding the state provisions.46 Practically, this meant that Wisconsin cities could not raise their minimum wage or enact their own paid sick leave program, even though the state did not have such a program. Michigan enacted a similar bill in 2015, barring local governments from “adopting, enforcing or administering local laws or policies concerning employee background checks, minimum

40 See Simon, supra note 27, at 1449–50.
42 See Briffault, supra note 12, at 2007–08.
44 Id. at 240.
45 See id. at 240–42.
46 See WIS. STAT § 103.007 (2017).
wage, fringe benefits, paid or unpaid leave, work stoppages, fair scheduling, apprenticeships, or remedies for workplace disputes.” 47

While the practice of express field preemption was first popularized in the late twentieth century, state legislatures continue to utilize this mechanism to displace local regulatory frameworks. 48 Additionally, state legislatures are now attaching punitive mechanisms to the broad preempting language. For example, the Florida Legislature first exercised express field preemption of firearm regulations in 1987 by codifying Section 790.33 of the Florida Statutes. 49 In 2011, the Florida Legislature passed House Bill 45 to more strongly express the state’s occupation of the regulatory space by striking certain provisions of the existing firearms statute that granted limited authority to counties to regulate under a ceiling and require a waiting period of up to three working days between the purchase and delivery of a handgun. 50 The bill then sets forth various penalties for any local government entity that regulates—or attempts to regulate—firearms or ammunition except as specifically authorized by Section 790.33. 51

C. Punitive Mechanisms

Punitive preemption statutes can be further classified based on the punitive mechanism described in the text of the statute. Punitive preemptive legislation can (1) create privately enforced civil penalties against local officials and governments, (2) establish criminal penalties (and removal mechanisms) for elected officials, and (3) institute state-enforced fiscal sanctions for local governments. 52 Statutes are considered punitive if they have one of these elements, although they may—and often—have all three. 53

Consider Section 790.33 of the Florida Statutes, which utilizes two punitive mechanisms. First, the statute creates a civil cause of action “against the elected or appointed local government official or administrative agency head under whose jurisdiction a violation oc-

48 See Riverstone-Newell, supra note 33, at 406; see also Hertel-Fernandez, supra note 43, at 62 (analyzing Uber and Airbnb’s lobbying to pass preemptive state legislation to “make it harder [if not impossible] for localities to pass labor market measures, including minimum wage hikes, which exceed state law.”).
52 See Schragger, supra note 11, at 1182.
53 See Briffault, supra note 12, at 2002–08.
curred” and attaches a fine of up to $5,000. Next, the statute provides for the immediate employment termination of a person acting “in an official capacity” if the violation was “knowing and willful.” This removal provision was challenged after Palm Beach County Commissioners were fired by the Governor for allegedly committing “knowing and willful violation[s] of the firearm preemption statute.” In Marcus v. Scott, Commissioners argued that the removal penalty violated a state constitutional provision that requires a majority vote of state senators to remove a county commissioner. The court held that the punitive termination provision of the statute was unconstitutional. The other punitive elements of the statute, however, remain functional.

1. State constructions of fiscal sanctions

When considering the fiscal sanctions for local governments in violation of state preempting legislation, state legislatures often rely on direct fines that either impose overwhelming fines on localities or cut off state revenue-sharing funds. Some punitive financial sanction provisions contain both elements. For example, in 2018, Iowa enacted Senate File 48, which prevents all local governments from adopting or enforcing policies that “prohibit[] or discourage[] the enforcement of immigration laws.” The punitive mechanism cuts all state funds to any local entity that violates the state’s new requirement that local law enforcement agencies cooperate with federal immigration detainer requests. Tennessee and Arizona are among the states that have

57. Id.
58. See id. at *3–4.
60. See Fla. Stat. § 790.33 (2011) (creating a $100,000 civil cause of action against “any county, agency, municipality, district or other entity . . . [that] caused the violation” of the state preemption statute); see Ariz. Rev. Stat. Ann. § 13–3108 (2017) (empowering judges to impose a $50,000 civil penalty on any locality that “knowingly and willfully violate[s]” the state’s firearm preemption statute); see Ala. Code § 41-9-230 (2017) (directing the Alabama Attorney General to impose a $25,000 fine on any local government that removes an “architecturally significant . . . monument” that is more than 40 years-old, which functionally applies to cities seeking to remove Confederate monuments).
62. See id.
enacted preempts legislation that empowers the state to cut off local revenue.

Assuming the state has its standard preemption power, the local law that is in conflict with state law would be invalid and no direct fine on the locality would be necessary. Therefore, the fining mechanism suggests two possible state constructive purposes. First, the direct fining provision may be an expressive vehicle and signal the state’s commitment to preempt. Alternatively, the fiscal sanction may implicitly signal that the state is not sure whether it has preemption power, but that defiance or judicial challenge to the State Legislature’s determination of preemption authority, will be costly. Practically, this means that a locality could be punished for lawfully enacting a valid provision. For example, in 2019, Arizona enacted House Bill 2756, which preempts any locality’s minimum wage law and requires the state to calculate the cost to Arizona’s government when cities and counties raise the minimum wage above the statewide rate. If the state has to pay more for services in those communities because of a higher minimum wage, the state “shall assess and collect from a county, city or town . . . an amount . . . attributable to the county’s, city’s or town’s establishment of a minimum wage if that minimum wage exceeds the minimum wage established by [Arizona] . . . ” In 2021, Arizona imposed a $1.1 million fine on the City of Flagstaff for its minimum wage law before a judge blocked the state’s fine.

2. State expansions of fiscal sanctioning elements

In an effort to expand the fiscal sanctions used by states against localities, state legislatures are designing new forms of sanctions to further punish cities by threatening local revenue streams. In 2021, the Texas Legislature amended the Local Government and Tax Code to punish cities with a population of more than 250,000 for reducing their police department budgets. Designed to punish progressive majority-minority cities that shifted portions of their police budgets to other public services like housing and mental health, House Bill

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64 See ARIZ. REV. STAT. ANN. § 41–194.01 (2017) (enacting legislation that provides for the cutoff of state aid to localities for any local law that the state Attorney General determines is preempted and which the local government then fails to repeal).
65 See ARIZ. REV. STAT. ANN. § 35–121.01 (2019).
66 Id.
69 See Robert Garrett, Abbott Pushing Legislation to Strip Cities of Local Sales Tax Funds if They ‘Defund the Police,’ DALL. MORNING NEWS (Jan. 14, 2021),
1900 empowers the criminal justice division of the governor’s office to identify and punish cities that reduce appropriations to its police department year-over-year.\textsuperscript{70}

House Bill 1900 contains five punitive fiscal elements. The first punitive fiscal element prevents a home-rule defunding municipality from annexing any area.\textsuperscript{71} This policy interferes with the power of a defunding municipality to grow its tax base through lawful annexation of unincorporated adjacent territory. The second punitive fiscal element requires the defunding municipality to “hold a separate election in each area annexed in the preceding 30 years by the defunding municipality on the question of disannexing the area.”\textsuperscript{72} While the requirement of an election imposes a cost on cities, disannexation and the corresponding loss of a significant tax base though a special election likely presents a more significant and existential fiscal threat. This threat is heightened as turnout in special municipal elections is low and therefore may be subject to capture by special interest groups.\textsuperscript{73} Next, H.B. 1900 prohibits the state comptroller of public accounts from “sending to a defunding municipality its share of the municipal sales and use taxes collected by the comptroller during the state fiscal year.”\textsuperscript{74} It is estimated that the total local share remitted from the Comptroller’s office is about $800 million a month.\textsuperscript{75} The defunding municipality’s share of local sales-tax funds would instead go to the Texas Department of Public Safety.\textsuperscript{76} Moreover, H.B. 1900 prevents cities from increasing utility or property tax rates, which could be used to compensate for the reapportioned sales tax.\textsuperscript{77} The Texas Legislature’s inclusion of novel punitive fiscal elements that restrain localities in responding to preempting legislation, indicates a further expansion of state power.

\begin{footnotesize}
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\item See id. at 2.
\item See generally, ZOLTAN L. HAJNAL, AMERICA’S UNEVEN DEMOCRACY: TURNOUT, RACE, & REPRESENTATION IN CITY POLITICS 70–100 (2009).
\item H.R. STATE AFF. COMM., C.S.H.B. 1900 BILL ANALYSIS, Tex. H.R. 23848 at 3.
\item See Garrett, supra note 69.
\item See H.R. STATE AFF. COMM., C.S.H.B. 1900 BILL ANALYSIS, Tex. H.R. 23848 at 3.
\item See id. at 2.
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3. Fiscal sanctions implicate the boundary between incentives and coercion

When a higher legal authority offers financial incentives to—or imposes financial penalties on—a lower legal authority, questions of coercion arise. It is important to distinguish financial sanctions from financial incentives. While there is no state doctrine regarding the distinction between financial sanctions and financial incentives, analogous doctrine at the federal level may provide theoretical guidance because the animating principles are cognate.78

In *National Federation of Independent Business v. Sebelius*,79 the Court held that while “Congress may use its spending power to create incentives for States to act in accordance with federal policies,” Congress cannot coerce states into compliance.80 Addressing Congress’s spending power within the context of the Medicaid program, the Court reasoned that while the loss of some federal funding for not participating in a federal program is not impermissibly coercive, a federal cutoff of ten percent of a state’s overall budget was “a gun to the head” that left the states “with no real option but to acquiesce.”81

Coercion is concerning to the Supreme Court because “the legitimacy of Congress’s exercise of the spending power ‘rests on whether the State voluntarily and knowingly accepts the terms of the ‘contract.’”82 Protecting this limitation on federal power is “critical to ensuring that Spending Clause legislation does not undermine the status of the States as independent sovereigns in our federal system.”83 In addition to respecting state rights, the Court has recognized a number of other reasons to limit coercive spending. First, when Congress compels states to regulate or spend, it frustrates political accountability.84 When state officials cease to act in their political capacity and instead carry out the orders of Congress, “voters may . . . blame or credit state officials.”85 Additionally, coercion may incentivize political abuse and generate a moral hazard problem because federal officials can shift responsibility and its inherent burdens to the state.86

As such, the spending power of Congress is subject to five general restrictions: (1) it must be in the pursuit of the general welfare; (2) the

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80 *Id.* at 577–78.
81 *Id.* at 581–82.
82 *Id.* at 577.
83 *Id.*
86 See *id.*
conditions for receipt of the funds must be unambiguous; (3) the conditions on the funds must be related to the federal interest; (4) other constitutional provisions cannot bar the conditional grant of the funds; and (5) the financial inducement cannot be so coercive that it becomes a compulsion.\textsuperscript{87} When a dominant organ of government enacts spending power legislation that meets those conditions, it incentivizes a subordinate organ of government to legislate: it does not force acquiescence.

Nonetheless, it remains difficult for a judge to assess the point “where persuasion gives way to coercion.”\textsuperscript{88} In \textit{NFIB}, Chief Justice Roberts confronted the issue of coercion by contrasting the funding at issue in proportion to the overall state expenditures.\textsuperscript{89} This reasoning seems to indicate that a certain percentage of “economic dragooning” results in coercion.\textsuperscript{90} While the plurality opinion does not draw a bright-line rule, the Chief Justice’s reasoning suggests that the line between persuasion and coercion is crossed somewhere between the federal government conditioning one\textsuperscript{91} and ten percent of an average state’s budget.\textsuperscript{92} The Chief Justice also indicated that a retroactive condition on funding is unconstitutional. In his view, the Affordable Care Act’s Medicaid expansion requirement—which required states to expand Medicaid to nearly all uninsured individuals with incomes at or below 133\% of the federal poverty level—achieved a “shift in kind, not merely in degree.”\textsuperscript{93} By enacting a shift in kind, Congress imposed new conditions on Medicaid that state did not anticipate when they opted into the federal program.\textsuperscript{94}

The dissenting opinion of Justices Scalia, Kennedy, Thomas, and Alito mirrored much of Chief Justice Robert’s coercion analysis. To demonstrate state reliance on Medicaid funding, their opinion contrasted federal funding for Medicaid with elementary and secondary education. They indicated that federal funding for elementary and secondary education constituted only 6.6\% of total state spending, while the figure was close to 22\% for Medicaid.\textsuperscript{95} As such, “the sheer size of this federal spending program in relation to state expenditures means that a State would be very hard pressed to compensate for the

\textsuperscript{88} \textit{NFIB}, 567 U.S. at 584–85.
\textsuperscript{89} See id. at 581–82.
\textsuperscript{90} Id.
\textsuperscript{91} See id. at 580–81.
\textsuperscript{92} See id.
\textsuperscript{93} Haney, supra note 85, at 586–87.
\textsuperscript{94} See \textit{NFIB}, 567 U.S. at 584 (2012).
\textsuperscript{95} See id. at 682–83 (Scalia, Kennedy, Thomas, and Alito, J.J., dissenting).
loss of federal funds by cutting other spending or raising additional revenue.”\textsuperscript{96} Therefore, any “State that refuses to expand its Medicaid programs . . . is threatened with a severe sanction: the loss of all its federal Medicaid funds.”\textsuperscript{97}

The dissenting Justices argued that it would be impractical for the state to replace federal funds because “withdrawal would likely force the State to impose a huge tax increase on its residents, and this new state tax would come on top of the federal taxes already paid by residents to support subsidies to participating States.”\textsuperscript{98} In essence, “coercion [should be] measured by a State’s ability to withstand the loss of the inducement at state.”\textsuperscript{99}

Justice Ginsburg’s opinion, joined by Justice Sotomayor, concurred in part with the Chief Justice’s majority opinion regarding the validity of the minimum coverage provision.\textsuperscript{100} However, Justices Ginsburg and Sotomayor dissented in part as they would have upheld the decision that Medicaid expansion is within Congress’s spending power.\textsuperscript{101} Attacking the majority’s shift-in-kind premise, Justice Ginsburg argued that Medicaid, which included the ACA’s expansion, was a single program.\textsuperscript{102} Given that Congress had amended the Medicaid program more than fifty times, Justice Ginsburg argued that the Act’s Medicaid expansion did not significantly differ from past expansions.\textsuperscript{103} Justice Ginsburg did not engage in the coercion analysis. She simply stated that the analysis set forth in the majority opinion “appears to involve judgments that defy judicial calculation.”\textsuperscript{104}

When a higher legal authority offers financial incentives to—or imposes financial penalties on—a lower legal authority, questions of coercion arise. \textit{NFIB}’s reasoning, however, places significant pressure on courts to resolve this question without legally cognizable standards.\textsuperscript{105} Instead, lower courts must generally inquire whether changed funding conditions result in a loss of significant funds and if new funding conditions constitute a “shift in kind.”\textsuperscript{106}

\textsuperscript{96} \textit{Id.}
\textsuperscript{97} \textit{Id.} at 682.
\textsuperscript{98} \textit{Id.} at 680.
\textsuperscript{100} See \textit{NFIB}, 567 U.S. at 644–45 (Ginsburg, J., concurring in part and dissenting in part).
\textsuperscript{101} See \textit{id.}
\textsuperscript{102} See Haney, \textit{supra} note 85, at 589–90.
\textsuperscript{103} See \textit{id.}
\textsuperscript{104} \textit{NFIB}, 567 U.S. at 643–44 (Ginsburg, J., concurring in part and dissenting in part).
\textsuperscript{106} \textit{NFIB}, 567 U.S. at 627–28 (Ginsburg, J., concurring in part and dissenting in part).
D. Challenges to Punitive Preemption Measures

Municipalities do not frequently sue states. However, local governments are challenging elements of punitive preemption statutes and finding some success in confronting the statutory provisions that create civil causes of action against local officials and governments, as well as the criminal penalties and removal mechanisms for elected officials. Challenges to measures that threaten individuals with sanctions are often grounded in the First Amendment and corresponding state analogs. Most state constitutions include a provision, “analogous to the federal Speech or Debate Clause, immunizing state legislators from suit for their votes, statements made during legislative debate, or other actions connected to their legislative work.” The underlying premise is that local lawmaking entails various kinds of speech that may be constitutionally protected. Textually, these provisions do not protect local legislators, but some courts seem willing to extend these state provisions. Other state judges have concluded that rationales for legislative immunity apply to local legislators.

1. Municipal challenges to fiscal sanctions

While challenges to statutes that institute state-enforced fiscal sanctions are brought less frequently than other punitive mechanism challenges, some municipalities are arguing that these statutory elements are unconstitutional. The City of Tucson, Arizona, advanced a challenge to fiscal sanctioning measures on state separation-of-powers doctrines. In *State ex rel. Brnovich v. City of Tucson*, the State Supreme Court considered whether Arizona could constitutionally prohibit a city ordinance that allowed Tucson to destroy firearms that it obtained through forfeiture or as unclaimed property. The Attorney General of Arizona challenged Tucson under A.R.S. § 41-194.01, which provides a framework under which, “[a]t the request of one of more members of the legislature, the attorney general shall investigate any ordinance, regulation, order or other official action adopted or taken by the governing body of a county, city, or town that the member al-

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107 See Goth & Alexander, supra note 3.
110 City of Tallahassee, 212 So. 3d at 456; see Briffault, supra note 12, at 2014–15.
111 See Simon, supra note 27, at 1501–3.
112 See Proctor May, supra note 38.
113 See Simon, supra note 27, at 1504.
114 399 P.3d 663, 666 (Ariz. 2017).
leges violates state law or the Constitution of Arizona.”115 Tucson argued that this provision undermined the judicial role in determining whether a municipal law violates state law.116 Arizona’s Supreme Court rejected Tucson’s separation-of-powers argument upon determining that the statute does not “coerce, control, or interfere with executive powers or prerogatives.”117

In California, a small number of localities contended that fiscal sanction measures were unconstitutional coercive funding conditions. In City of El Centro v. Lanier,118 a California Appeals Court considered whether the adoption of a state statute requiring charter cities to pay prevailing wages to receive financial assistance for public construction projects violated California’s home rule doctrine. California’s home rule doctrine reserves to charter cities the right to adopt and enforce ordinances that conflict with general state laws, provided that the subject of the regulation is a municipal affair rather than one of statewide concern. Five charter cities challenged Section 1782 of the California Labor Code, which sets out that “a charter city shall not receive or use state funding or financial assistance for a construction project if the city has a charter provision or ordinance that authorizes a contractor to not comply with the provisions of this article on any public works contract.”119

The plaintiffs advanced their case on two main arguments. First, the cities asserted a traditional preemption argument: California is an imperio home rule state and therefore grants charter cities the right to adopt and enforce ordinances that conflict with general state laws, so long as the local law addresses a municipal issue.120 Plaintiffs argued that the city’s policy of paying a lower wage should not result in the loss of state financial assistance for public construction projects because wages are a municipal issue.121 The City of El Centro court rejected the argument that Section 1782 created an actual conflict between general state law and a field governed exclusively by a charter city’s plenary authority.122 As such, the home rule provision of the California Constitution did not bar the application of Section 1782 to charter cities.123

117 State ex rel. Brnovich, 399 P.3d at 668.
118 200 Cal. Rptr. 3d 376 (2016).
120 See City of El Centro, 200 Cal. Rptr. at 383–84.
121 See id.
122 See id. at 389.
123 See id.
Plaintiff cities also advanced the argument that Section 1782 “amounts to unconstitutional financial coercion as it forces charter cities to relinquish their sovereignty and use their local funds to further the state goal of prevailing wages.”\textsuperscript{124} The court looked to \textit{NFIB} to help determine if the line between financial incentives and coercion had been crossed.\textsuperscript{125} The court determined that the Legislature intended to create a financial incentive for cities and that “state funding or financial assistance for charter city construction projects is a small portion of charter city budgets that can be addressed by other revenue sources.”\textsuperscript{126}

In order to sustain a claim of financial coercion, the court sought evidence from cities that could demonstrate that the financial inducement offered by the state had become coercive. The majority opinion provided that such a claim may be sustained depending on the city’s budget, “the amount of local funding available to them to fund municipal projects without state funding or financial assistance, their ability to raise new revenues to offset the loss of state funding . . . [and] their past reliance on state funding or financial assistance for municipal construction project[s].”\textsuperscript{127} However, the cities “presented no evidence to support their claim of financial coercion.”\textsuperscript{128}

The dissenting judge argued that even without the evidence that the majority sought, the statute constituted coercion because it “plainly robs municipalities” of any real choice other than to apply the prevailing wage law to purely municipal projects.\textsuperscript{129} The majority acknowledged that the legislative history of the statute demonstrates a desire “to provide a financial incentive . . . to require contractors on their municipal construction projects to comply with state prevailing wage law.”\textsuperscript{130} The court, however, reasoned that the state can provide financial incentives to localities, which is distinct from financial coercion.\textsuperscript{131} As localities did not demonstrate that Section 1782 created coercive financial conditions, the statute only provided municipalities with financial incentives.\textsuperscript{132}

A growing number of state courts have sidestepped the question of whether punitive preemptive financial penalties are constitutional.
Instead, courts tend to rest their decisions on procedural grounds. For example, in *City of Toledo v. State*.,\(^{133}\) the Ohio Supreme Court considered whether the Ohio General Assembly could condition a municipality’s receipt of certain state funds on compliance with traffic law photo monitoring provisions.\(^{134}\) In *House Bill 64*, Ohio’s General Assembly conditioned receipt of certain state funds on compliance with Senate Bill 342. Since 1999, “the city of Toledo had used traffic cameras to civilly enforce traffic laws,”\(^{135}\) but in 2014, the General Assembly enacted Senate Bill 324, which required, among other provisions, that a law enforcement officer be present whenever a red-light camera is in operation.\(^{136}\)

In 2015, a trial court enjoined the enforcement of certain provisions of S.B. 342. While the state’s appeal was pending, the General Assembly passed House Bill 64, the state’s biennial budget bill, which conditioned “a municipality’s receipt of certain state funds on compliance with the traffic law photo-monitoring provisions in S.B. 342 that the trial court found to be unconstitutional.”\(^{137}\) The punitive financial provision required that the city file a report with the Auditor of the State indicating whether its program was in compliance. If not, the city must inform the auditor of the “civil fines the locality has billed to drivers.”\(^{138}\) The Ohio Tax Commissioner was then required to reduce payments of local government funds to the city by the amount billed to drivers.\(^{139}\)

While the Supreme Court of Ohio ultimately held that the trial court lacked the authority to enjoin the H.B. 64 spending provisions, the Ohio Court of Appeals considered a number of financial coercion arguments when first upholding the trial court’s injunction. Particularly, the state argued, “that the budget bill provisions merely set up financial incentives using discretionary state funds to encourage municipalities to comply with S.B. 342.”\(^{140}\) In its brief, the City of Toledo responded by analogizing the penalty provisions to the restriction on the spending power of Congress. The city argued that the penalty provisions were ambiguous, unrelated to the state interest, barred by the home rule amendment, and coercive.\(^{141}\) When setting forth the coer-
cation argument, the City of Toledo argued that it had no real option but to shut down its automated traffic program as the penalty provisions were “based on reducing local government funds by the amount of fines billed, not the amounts collected. Therefore, from a purely economic standpoint, Toledo [would lose] money if it continue[d] to have any kind of automated-traffic camera program.”142 Choosing to sidestep the constitutionality of the punitive financial mechanism, the court instead held that H.B. 64 interfered with the trial court’s power to enforce its injunction when enacting S.B. 342.143

The Arizona Supreme Court similarly sidestepped the constitutionality of the punitive mechanism of A.R.S. § 41-194.01. The punitive mechanism of the statute terminates the transfer of state funding to localities for any local law that the attorney general determines is preempted and which the local government fails to promptly repeal.144 As Arizona is a shared revenue state, state funding constitutes approximately one-quarter of local revenues.145 The court criticized the law’s bond-posting requirement as so onerous that it would “likely dissuade if not absolutely deter a city from disputing” the Attorney General’s opinion.146 However, as the state had not sought a bond from Tucson, the court declined to rule explicitly on the constitutionality of the provision.147

III. LOCALITIES RETAIN AN INHERENT BOUNDARY OF LEGAL AUTHORITY

Existing legal doctrine does not provide a strong defense of local boundaries. Nevertheless, there are doctrinal tools and arguments that create a boundary of local authority and may protect governments from fiscal sanctions. Broader protection will require new approaches to state-local relations, for which this Comment argues.

A. Federalism Endows Localities with a Boundary of Local Authority

Municipal rights can be found in existing state law. Under Hunter,148 cities are generally considered creatures of the state and have only those powers delegated to them by the state government.149
While the basic legal principles that states may exercise complete dominion over local governments remains unchanged, individual states have long altered the state-local government relationship through state constitutions and standards of judicial review. No state reserves all local power to itself. All states constitutionalize local grants of authority and by doing so, restrict their own power to control localities. Of course, a formalist may contend that implicit in a delegation of power is an acknowledgment that state power supersedes the locality. Functionally, however, the state places a limit on its own power. Altering the structural dynamics between a state and its locality requires amending the state constitution, which state officials cannot do through their own power alone. Almost all state constitutions require citizens to ratify any amendment to the document. As such, state constitutions permanently convey power to localities and their citizens.

Municipalities also find rights in federal law that are entirely distinct from state authority. The line of doctrine that utilizes “the Fourteenth Amendment and the Commerce Clause . . . to limit city power” undermines the Hunter proposition that a city derives its constitutional authority solely from states. If cities were solely creatures of the state, then at its most broad textualist interpretation, the Federal Constitution should apply only to states. Following this reasoning, cities would be unable to claim constitutional protection vis-à-vis the state. Similarly, this reasoning would necessarily imply that the state should be the relevant entity for all legal disputes. In the years since the Court faced Alabama’s blatantly racial gerrymandering of Tuskegee in Gomillion v. Lightfoot, municipalities have been authorized to participate in constitutional litigation against the state. When localities participate in constitutional litigation against the

COLUM. L. REV. 1, 88–91 (1990); but see, Kathleen S. Morris, The Case for Local Constitutional Enforcement, 47 HARV. C.R. C.L. L. REV. 1 (2012) (arguing that as a doctrine of substantive constitutional law, Hunter is incompatible with the modern rule against general federal common law that the Court articulated in Erie v. Tompkins, 304 U.S. 64, 78–79 (1938), and that Hunter is functionally overruled as the Court has repeatedly and silently departed from its holding).

150 See Briffault, supra note 15, at 9.


152 See J.B. Whitfield, Amending State Constitutions, 11 MICH. L. REV. 302–07 (1913); Brennan, supra note 151.

153 Frug, supra note 15, at 1063.


156 See Bendor supra note 154, at 391.
state, they declare themselves to be full members of the national community with the right to be part of the decision-making process.

Federal law recognizes that municipalities have some constitutional rights vis-à-vis the state. In *Romer v. Evans*, the Court held that an amendment to the Colorado Constitution designed to preempt local ordinances protecting individuals from discrimination based on sexual orientation violated the Fourteenth Amendment because the amendment was “inexplicable by anything but animus.” Therefore, while state law creates the municipality, it does not mean that the state retains plenary power over municipalities to the exclusion of federal law. Similarly, *United States v. 50 Acres of Land* established that the Takings Clause of the Fifth Amendment requires compensation when “the United States condemns a local public facility,” as “the loss to the public entity, to the persons served by it, and to the local taxpayers may be no less acute than the loss in a taking of private property.” If municipalities were simply creatures of the state, then any Takings compensation would flow only to the state. *50 Acres* directly rebuts this proposition, as the Takings compensation flows directly from the federal government to the municipality.

The Supremacy Clause also constrains state power. In *Lawrence County v. Lead-Deadwood School District No. 40-1*, the Court held that state law cannot interfere with already existing federal funding streams to localities. Therefore, if state law violates federal law, the fact that the state law only operates over municipalities does not somehow render the law valid.

While there is no cohesive doctrine establishing the precise contours of the constitutional rights of municipalities vis-à-vis states, case law confirms that municipalities can exercise constitutional rights as entities distinct from their states. Moreover, Congress also interprets *Hunter* regularly: implementing federal policy through cooperative

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158 *Id.*
159 See *Bendor*, *supra* note 154, at 418.
160 469 U.S. 24 (1984); *but see* Equal. Found. of Greater Cincinnati v. City of Cincinnati, 128 F.3d 239 (6th Cir. 1997) (holding that purely local measures that simply refuse special privileges under local law for a non-suspect group of citizens isn’t barred under *Romer* unless it fails the rational basis test. The court distinguished *City of Cincinnati* from *Romer* on the grounds that *Romer* involved an issue of state controlling localities, whereas *City of Cincinnati* involved a local decision that was rationally related to a valid city interest).
161 *50 Acres*, 469 U.S. at 455.
162 See *id.* at 454–58.
163 See *Briffault*, *supra* note 149.
165 See *id.*
166 See *Bendor*, *supra* note 154, at 422–23.
federal-local initiatives and funding cities directly through intergovernmental transfers. Congress therefore conceptualizes localities as distinct from states. Vague claims of state sovereignty supported by Hunter’s “seemingly unconfined dicta,” ignore the doctrine that the Court and Congress have endorsed in years since. As such, it seems more accurate to adopt the theory that Hunter “stands for a presumption against municipal rights that would burden the state’s authority to grant powers to its municipalities by setting such grants in stone.” This theory suggests that where municipal rights would not substantially limit state policymaking flexibility, municipalities have the ability to define an independent view of public goods and values to pursue.

IV. PUNITIVE PREEMPTIVE FINANCIAL SANCTIONS ARE DISTINCT FROM OTHER FORMS OF PREEMPTION

States enjoy the right of preemption to ensure state policy supremacy. State legislative actions are constrained by (1) federal constitutional protections for municipalities per se, (2) general state provisions that constrain lawmaking, such as single-subject rules and restrictions on special legislation, and (3) grants of power to localities. As states can enact broad express preemption statutes, attaching financial sanctions to preemption mechanisms is unnecessary to ensure state policy supremacy. Instead, punitive financial mechanisms transform the preempting legislation into a mechanism that infringes on the local capacity for self-governance. State interference in local democracy is particularly concerning as preemption is more prevalent in the South, where state law is passed by majority-white legislatures to target cities whose residents are majority people of color. No democratic principle can provide grounding for this transformation of power.

167 See, e.g., Consolidated Appropriations Act of 2023, H.R. 2617, 117th Cong. (2023) (codifying State and Local Fiscal Relief Funds in scattered sections); Coronavirus State and Local Fiscal Recovery Funds, 86 FR 26786 (May 17, 2021) (adopting a rule that implements funding to provide state, local, and Tribal governments with financial resources); Erin Durkin, Federal spending bill to include $800M in grants for cities dealing with migrant crisis, POLITICO (Dec. 20, 2022), https://www.politico.com/news/2022/12/20/omnibus-spending-bill-migrants-00074785 [https://perma.cc/FP6K-ULLM].


169 Bendor, supra note 154, at 425.

170 See id.

171 See Hunter Blair et al., Preempting Progress, ECON. POL’Y INST. (Sept. 30, 2020).
A. Fiscal Sanctions Pierce the Boundary of Authority by Reordering Municipal Budgets

The material impact of fiscal sanctions functionally forces local governments to reorder their municipal budgets. Except for extreme circumstances, a state is not involved in local budget decisions, likely reflecting the principle that when possible, fiscal decisions should be made at the lowest level of government. In the limited instances in which a state is actively involved in reordering municipal budgets, there are a number of procedural barriers to ensure that local interests are reflected in budgetary decisions. The heightened prevalence and enormity of the fiscal sanctions functionally threaten a state reordering of municipal budgets without any procedural checks that could preserve the capacity of localities to realize the self-definition of goods and values to pursue.

In order to illustrate the conventional behavior of states on issues of municipal budgeting, consider state takeover boards of financially distressed cities. Takeover boards are created at the state level, and their members are typically appointed by state officials. Takeover boards assume responsibility for municipal budgeting and governance when municipalities file for bankruptcy. While “states routinely monitor and provide assistance to localities in order to avoid fiscal distress in ways that do not formally interfere with the substantive fiscal decisions made by local elected officials,” states rarely deploy takeover boards and usually only do so after graduated intervention. States “do not exercise substantial authority over municipal affairs without first using a series of tools to detect, deter, and resolve distress.” The point at which states turn from providing monitoring and advice to more invasive measures may occur if graduated interventions prove

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173 See Richard Briffault, Town of Telluride v. San Miguel Valley Corp.: Extraterritoriality and Local Autonomy, 86 DENV. U. L. REV. 1311, 1322 (2009). Briffault explains that when externalities spill across jurisdictions, it is “less troublesome” from a local democracy perspective for a higher level of government to intervene in local decisions.
174 See id.
175 See Gillette, supra note 172, at 1397–400.
177 Gillette, supra note 172, at 1383–85.
178 Id. at 1383–85
insufficient to resolve financial distress.\textsuperscript{179} Even if all interventions have been exhausted, the state must determine that the municipality is in sufficient financial distress to trigger a takeover board.\textsuperscript{180}

Clayton Gillette’s seminal article provides a descriptive account of the behavior of financially distressed cities and suggests an analytical framework to explain the state’s cautious pattern of behavior. First, the state’s prudent behavior likely reflects the fact that takeover boards impose fiscal regimes not selected by residents.\textsuperscript{181} The state takeover threatens the capacity of local residents to use their voice in the creation and implementation of fiscal policy.\textsuperscript{182} Second, the state’s prudent behavior is likely a reflection of the long history of “state seizure of the financial functions of municipalities.”\textsuperscript{183} Finally, state intervention in municipal governance is generally premised on the negative externalities that are generated by financially distressed municipalities.\textsuperscript{184} These externalities may include increased service burdens on other cities and towns, as well as difficulty for surrounding areas to finance projects.\textsuperscript{185} The “degree of concern” and “external consequences of local action” in municipal fiscal distress situations is often considered “sufficient to justify the state’s trump of local policies.”\textsuperscript{186}

Now, consider that the state’s punitive fiscal sanctions for local governments often operate to impose overwhelming fines on localities or cut off state revenue-sharing fines. At the most extreme, states threaten to cut \textit{all} state funds to any local entity.\textsuperscript{187} While funding schemes vary, it is estimated that thirty-five percent of local government general revenue comes from state governments.\textsuperscript{188} Therefore, fiscal sanctions would leave localities with no choice but to reorder their budgets in order to respond to the state sanctions.

The animating principles that may empower state takeover boards to pierce the boundary of local authority to reorganize munici-

\textsuperscript{179} Id. at 1391–92.
\textsuperscript{180} Id. at 1391–92.
\textsuperscript{181} Id. at 1398.
\textsuperscript{182} Gillette, \textit{supra} note 172, at 1399.
\textsuperscript{183} Id. at 1379; \textit{see also} Michelle Wilde Anderson, \textit{Democratic Dissolution: Radical Experimentation in State Takeovers of Local Governments}, 39 \textit{Fordham Urb. L.J.} 577, 606 (2012); \textit{see also} Richard C. Schragger, \textit{Democracy and Debt}, 121 \textit{Yale L.J.} 860, 879 (2012).
\textsuperscript{185} See Weiner, \textit{supra} note 176.
\textsuperscript{186} Gillette, \textit{supra} note 172, at 1412.
\textsuperscript{188} \textit{See Pratheepan Gulasekaram et al., Anti-Sanctuary and Immigration Localism}, 119 \textit{Colum. L. Rev.} 837, 854 (2019).
pal budgets do not apply to the punitive fiscal sanctions on preempting legislation. Formally, punitive fiscal sanctions do not strip localities of their ability to set their budgets. Functionally, however, the locality faces significant budget cuts. The locality is therefore unable to pursue policy and service priorities that it would have otherwise been able to do, if not for the state sanctions. This frustrates the ability of residents to select the true range of goods and services that they wish to pursue. Moreover, the state interests in preventing the state’s “degree of concern” and the “external consequences of local action” do not rise to the level “sufficient to justify the state’s trump of local policies.”189 If nonresidents are significantly disadvantaged by local conduct, then allowing local policies to supersede state policies would generate an antidemocratic and inefficient result. While the state’s interest in protecting localities from financial distress is sufficient to justify state takeover boards, it is hard to imagine that the state has a sufficient interest in ensuring uniform policies across every policy issue, including preventing a locality from raising its minimum wage190 or stripping the locality of the power to ban plastic bags.191 The rarity of state takeover boards and their cautious policies towards taking over municipal budgets, indicate that the state should carefully consider the scale of negative externalities before reordering municipal budgets.

The behavior of states when their municipalities face fiscal distress suggests that the state should not re秩序 municipal budgets through legislation while there are other tools available. If the goal of broad express preempting legislation is to ensure that there is regulatory uniformity (or in some cases, no regulation at all), then the state has no need to re秩序 the finances of cities in order to attain this desired result. Judicial review provides procedures for appropriate resolutions of any conflict arising from preemption. Moreover, “there is no evidence to suggest that local governments have ever defied a judicial declaration of state preemption.”192 If there were documented instances where ex post resolution by the courts proved unsuitable for resolving conflict, then perhaps there would be a reason for state fiscal sanctioning.

V. LEGAL CHALLENGES TO PUNITIVE PREEMPTIVE FISCAL SANCTIONS

189 Gilette, supra note 172, at 1412.
192 Davidson & Reynolds, supra note 41, at 22.
Nullifying state provisions that financially penalize local governments for preemption violations is a difficult task. Nonetheless, it is a legal endeavor that is worth pursuing given theories of fiscal federalism and the political virtues of local governments. Fiscal federalism arguments support the idea that fiscal decisions should be made at the lowest level of government due to responsiveness and efficiency concerns. While “localities may be allowed to mismanage their own interests,” they cannot “prejudice those of others.” When externalities spill across jurisdictions, it is appropriate for a higher level of government to intervene.

Among the many localism arguments advanced is the political account that localities are more responsive to their residents as they are “closer to [their] voters.” Therefore, local officials can craft policies that better reflect political conditions within their border. This is of particular importance in states that must balance diverging interests in divided urban and rural populations. Of course, when there is such a high degree of urban-rural conflict or policy divergence, state legislatures may need to step in and create regulatory consistency through some sort of compromise.

Additionally, the devolution of authority to smaller government units creates more opportunities for policy experimentation and effective problem-solving. In essence, localities may serve as laboratories of democracy. Of course, local governments are not always virtuous nor capable. Local governments can be abusive and responsiveness to local concerns can result in exclusionary zoning and interlocal inequality. If those results occur, then the state’s preemption power allows the higher government to address these negative externalities and override localities on some policy issues. However, the state’s preemption power should not sanction coercing localities into reordering municipal budgets under the guise of regulatory preemption.

Fiscal sanctions do little more than serve as an expressive function for state governments. Despite offering limited benefits, fiscal

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193 See Oats, supra note 6.
195 See Gillette, supra note 184.
199 See New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“[A] single courageous State may . . . serve as a laboratory; and try novel social and economic experiments risk to the rest of the country.”).
sanctions serve to frustrate principles of government responsiveness and policy tailoring. Excessive penalties for local governments, such as the withdrawal of state shared revenue and bond posting requirements, undermine the ability and willingness of local governments to undertake the lawmaking powers granted in home rule systems. In some cases, these outcomes can also apply to Dillon’s Rule localities if the state policy implicates those lawmaking powers specifically granted to the locality through the Constitution.

A. Conditioning General Revenue Coerces Local Governments

Functionally, states are utilizing financial sanctions in punitive preemption statutes to condition the receipt of general revenue state funds on compliance with broad deregulatory preemptive statutes. The punitive fiscal sanctions force localities to either comply with the entire field of preempting state legislation or to relinquish funds.

Consider the punitive mechanism of Section 41–194.01 of the Arizona Revised Statutes, which terminates state aid to localities for any local law that the state attorney general determines is preempted and which the local government fails to repeal. The threat of cutting one-quarter of all state funding to a locality for any local law that the state attorney general determines is preempted and which the local government then fails to promptly repeal, has a chilling effect on challenging preemption legislation. The small town of Bisbee declined even to challenge the ruling that its plastic bag ban was barred by state law because it could not afford to contest the issue. The complaint against Bisbee’s city ordinance banning plastic bags was referred to the Attorney General, not by a Bisbee representative, but by a Mesa representative—a city over 200 miles away from the small town—implicating localism concerns.

As the Court articulated in NFIB, intergovernmental coercion arises when a subordinate organ of government is not able to make a knowing and voluntary choice with respect to the benefits being offered by the more dominant organ of government. Just as a cutoff of over 10% of a state’s overall budget—as the Affordable Care Act would have imposed on states unwilling to expand Medicaid—was a “gun to

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200 See ARIZ. REV. STAT. ANN. § 41-194.01 (2017).
201 See Briffault, supra note 12, at 2006–07.
the head” that left states “with no real option but to acquiesce,” so is the conditional funding mechanism built into A.R.S. § 41-194.01.204

Cities rely on states for funding. An estimated thirty-five percent of cities’ total revenue comes from state governments, while only four percent comes from the federal government.205 Local governments need reliable revenues to deliver services, and state aid plays a vital role in ensuring that there is adequate revenue, particularly in the context of primary and secondary education.206 Therefore, cities may feel “just as, if not more coerced when the state conditions funding on the repeal of . . . policies.”207

Many of the animating principles that restrict federal coercion of states through spending power can apply to localities. Unlike states, municipalities do not enjoy their own status as independent sovereigns in the federal system. Nonetheless, as previously discussed, localities do enjoy some independent legal status that remains distinct from states. Moreover, citizens conceptualize municipalities and states as distinct polities. When the state penalizes localities through fiscal sanctions, the state frustrates political accountability. The practice of attaching fiscal sanctions to state preempting statutes results in local officials forced to respond entirely to state manufactured policy choices. In doing so, local officials cease to act in their political capacity and instead carry out the orders of the state legislature. As a result, voters do not know which political body or official to hold accountable. Voters may credit or blame local officials for decisions made by state officials.208

VI. CONCLUSION

Fiscal sanctions are an inappropriate remedy to an imaginary problem. States that are enacting these statutes seek to punish localities from subverting preemption statutes. Yet, this problem does not exist because judicial review provides an adequate check on any conflict. If the purpose of express preempting legislation is to ensure that there is regulatory uniformity across the state, then the state has no need to financially sanction cities in order to achieve this objective. Assuming the state has its standard preemption power, the local law that is in conflict with state law is invalid and no direct fine on the locality would be necessary.

204 Briffault, supra note 12, at 2016–17.
205 See Gulasekaram et al., supra note 188.
206 See David E. Wildasin, Intergovernmental Transfers to Local Governments, in MUNICIPAL REVENUES AND LAND POLICIES 89 (Gregory K. Ingram & Yu-Hung Hong ed., 2009).
207 Id.
The punitive financial sanction mechanism, therefore, suggests only two possible state purposes. First, the direct fining provision may be an expressive vehicle and signal the state’s commitment to preempt. Alternatively, the fiscal sanction may implicitly signal that the state is not sure whether it has preemption power, but that defiance or judicial challenge to the State Legislature’s determination of preemption authority, will be costly. As such, these punitive financial sanctions do nothing more than punish cities for policy experimentation and freeze judicial review. While the legal mechanism of preemption remains structurally unchanged, these punitive preemption statutes serve to enlarge state power by stripping localities of an inherent local authority. Coercive financial mechanisms that are attached to preempting legislation are therefore unconstitutionally coercive as they functionally force local governments to relinquish core elements of their sovereignty.