Punitive Preemption: An Unprecedented Attack on Local Democracy

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State legislative efforts to block, or, technically, "preempt" local government actions across a broad range of locally significant issues — including workplace conditions, firearms, anti-discrimination law, public health and environmental protection, the treatment of undocumented aliens — have begun to receive considerable attention. But one distinctive feature of this "new preemption" is particularly pernicious. The traditional purpose of state preemption laws was simply to nullify local measures inconsistent with state policy. But over the past several years, some states have gone further and now impose harsh penalties on local officials — civil and sometimes criminal penalties and removal from office — who implement or even simply propose or endorse local laws that may be subject to preemption. States are also penalizing the cities and counties that adopt preempted laws with loss of state aid and exposure to civil suits by hostile interest groups. The most punitive measures have focused on local efforts to regulate firearms or to pursue their own policies in dealing with undocumented aliens. But at least one state – Arizona – has taken the punitive approach to all local laws subject to state preemption.

All preemption laws are in tension with local democracy, but punitive preemption is especially threatening. Many state preemption laws are vague around the edges; some may violate the state's constitution or legal doctrines. Local officials and governments interested in advancing local policies may want to test the permissible scope of preemption by calling for or enacting measures that will lead to a judicial resolution of the issue. Even when they know their policies are subject to preemption, a city or county may still want to pass a law to express its distinctive views on a subject – like firearms safety or the rights of undocumented aliens – in order to stimulate public debate and keep the issue alive even if the local law has no legal effect. Punitive preemption, however, is likely to chill local efforts to test the legality or scope of preemption or raise a dissenting opinion because if the city or county loses not only is its law nullified but the government and local officials risk loss of state aid, fines, and, for officials, removal from office or criminal penalties.

More even than preemption itself, punitive preemption is a declaration of war against local democracy. In some cases, such as when local laws have significant external effects or burden fundamental rights or when there are real gains from statewide uniformity, preemption may be appropriate. But it will rarely if ever be appropriate for the state to go beyond preemption and punish local governments and their officials for merely adopting preempted laws. Punitive preemption goes beyond determining which level of government regulates a specific subject and threatens to undermine the ability and willingness of local governments to express their views at all.

Punitive Preemption in Practice

While punitive preemption is a fairly new practice, states have already taken a variety of approaches to punishing cities and local officials that attempt to enact preempted laws.

Personal Liability for Local Officials

Several states have adopted laws penalizing local officials who take actions inconsistent with state preemption of local firearms regulation. Kentucky appears to have gone the furthest. In 2012, the Bluegrass state made it a crime – official misconduct in either the first or second degree, depending on the circumstances – for a local official to violate the state's gun preemption law "or the spirit thereof."[1] Since 2011 Florida has provided that officials who commit "knowing and willful violations" of the state's firearms preemption statute are subject to removal from office by the governor, and are liable for civil fines up of to $5,000; moreover, those officials may not use public funds for their legal defense or to cover their fines.[2] Arizona also makes officials who violate firearms preemption subject to removal from office.[3] Mississippi makes any "elected county of municipal official under whose jurisdiction" a violation of firearms preemption has occurred civilly liable for up to $1,000 plus attorneys' fees and costs; as in Florida, public funds may not be used to defend or

[1] Ky. Rev. Stat. Ann § 65.870 (2), (3), (6).
[2] Fla. Stat. § 790.33(3) (c),(d),(e).
[3] Ariz. Rev. Stat.§ 13-3108(J).

reimburse the local officials.[4] Oklahoma makes municipal officials civilly liable to any person whose rights protected by the state's firearms preemption law have been violated by a local action.[5]

A lawsuit brought against the mayor and commissioners of the city of Tallahassee, Florida vividly demonstrates the chilling potential of these laws. In *Florida Carry, Inc. v. City of Tallahassee*,[6] gun rights organizations sued the mayor and commissioners, as well as the city itself, for failing to repeal two unenforced city gun ordinances dating to 1957 and 1984 dealing with the discharge of firearms in small lots and in city parks.[7] The ordinances had been preempted by a 1987 state law, and the city's police chief had specifically directed the police force not to enforce them. But the gun rights group wanted the ordinances formally stricken from the city's books. The city commission took up the question of whether to repeal the laws but voted to table the discussion. The gun groups then sued under the punitive preemption law. The Florida court ultimately concluded that neither the tabling of repeal nor the continued inclusion of the preempted ordinances in the city's code violated the state's punitive preemption law, which targeted the "promulgat[ion]" of local firearms ordinances. But the court also declined to consider the city officials' arguments that punitive preemption is inherently violative of local autonomy.[8]

In 2017, Texas expanded the targets of punitive preemption from local firearms regulation to immigration policy. Texas now provides for the removal from office of any local official who "adopt[s], enforce[s], or endorse[s] a [local] policy" that "prohibits or materially limits the enforcement of immigration laws."[9] The Florida legislature similarly considered the adoption of a measure calling for the suspension or removal from office of any local official who "willfully or knowingly fails to report a known or probable violation" of immigration laws, but the bill died in committee.[10]

[4] Miss. Code Ann. § 45-9-53(5).
[5] Okla. Stat. tit. 21, § 1289.24 (D).
[6] 212 So.3d 452 (Fla. Dist. Ct. App. 2017).
[7] Id. at 455-56.
[8] Id. at 462-66.
[9] Texas Gov't Code Ann. § 752.053.
[10] H.B. 9, 25th Leg., Spec. Sess. § 2 (Fla. 2017).

Punishing Local Governments

Local firearms regulation and immigration law enforcement have also been the focus of punitive preemption laws aimed at local governments. These measures include fines, exposure to private civil suits, and loss of state funding. Arizona's firearms preemption law targets noncompliant local governments with liability for fines up to $50,000 for knowing and willful violations.[11] Texas's anti-sanctuary city law makes local governments liable for fines of up to $1500 for a first violation and $25,500 for subsequent violations, with each day of a continuing violation treated as a separate violation.[12] Florida and Oklahoma expose their cities to lawsuits from individuals and groups that claim their rights were violated by local firearms laws; damages in Florida can run up to $100,000 plus attorneys' fees.[13] This past spring Iowa adopted a law, effective July 1, 2018, cutting off *all* state funds to any local government that "intentionally" violates the state's new requirement that local law enforcement agencies cooperate with federal immigration detainer requests and, more generally, barring local governments from adopting or enforcing policies that "prohibit[] or discourage[] the enforcement of immigration laws."[14] Similarly, this spring Tennessee adopted a law, effective January 1, 2019, making any local government entity that has adopted or enacted "a sanctuary policy" ineligible for grants from the state department of economic and community development.[15]

Bur what may be the most punitive[16] fiscal measure is Arizona's SB 1487,[17] which provides for the cutoff of state aid to localities for *any* local law the state attorney

[11] Ariz. Rev. Stat.§ 13-3108(I).
[12] Tex. Gov't Code Ann. § 752.056(a)(-(b).
[13] Fla. Stat. § 790.33(f); Okla. Stat. tit. 21, § 1289.24 (D).
[14] 2017 Iowa Senate File, No. 481, adding new sections 825.1-825.13 to the Iowa Code. Texas had previously adopted an informal policy of denying federal grants to sanctuary jurisdictions. See City of El Cenizo v. Texas, 264 F. Supp. 3d 744, 790-91 (W.D. Tex. 2017), *aff'd in part and vacated in part*, 885 F.3d 332 (5th Cir. 2018), *withdrawn and superseded by* 890 F.3d 164 (5th Cir. 2018).
[15] 2018 Tenn. Laws Pub. Ch. 973, adding new section 7-68-103 to the Tennessee Code.
[16] Other coercive fund cut-off laws include a California statute denying state construction funds to a charter city that awards a public works contract without requiring the contractor to comply with the state's prevailing wage law, Cal. Lab. Code § 1782(b), and a Michigan law reducing school aid to local districts that use funds appropriated for education to pat expenses incurred related to a suit brought by a district against the state, Mich. Comp. Laws § 388.1764g.

general determines is preempted and which the local government then fails to promptly repeal. Under SB 1487, a single state legislator from any district may request the state attorney general to investigate and report the legislator's claim that a local official action violates state law. If the attorney general concludes the local measure is preempted, he must notify the offending local government; if the local government "fail[s] to resolve the violation within thirty days," the attorney general must then notify the state treasure who must withhold "state shared monies" from the locality until the violation is resolved. If the attorney general concludes merely that the local measure "[m]ay violate" state law, the attorney general must bring a special action in state supreme court to determine the issue, but in order to contest the action, the defendant local government must "post a bond equal to the amount of state shared revenue" it received in the preceding six months. As "state shared revenue" constitutes roughly one-quarter of local revenues in Arizona, it will be virtually impossible for any local government to post the necessary bond. And no local government is likely to be able to withstand the coercive force of a complete cut-off of this shared revenue.

As of early 2018, SB 1487 had resulted in ten investigations into local practices or laws, with two findings of violations and two "may violate" determinations. The most significant case involved Tucson's practice of destroying firearms it had obtained through forfeitures or as unclaimed property. Responding to a complaint from a state legislator from outside Tucson, the attorney general concluded that Tucson's action was preempted by a state law prohibiting municipalities from destroying firearms. The city suspended enforcement but declined to repeal its ordinance and instead brought suit, challenging both SB 1487 and the attorney general's preemption finding; it lost on both counts. The Arizona Supreme Court rejected the city's arguments that enabling a single legislator to trigger an investigation and authorizing the attorney general to determine that a local measure is preempted, with the resulting loss of state shared revenue, violate state separation of powers principles.[18] 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," but as the state had not sought a bond from Tucson the court declined to rule explicitly on the

[17] Ariz. Rev. Stat. Ann. § 41-194-01(A).
[18] State ex rel Brnovich v. City of Tucson, 399 P.3d 663, 667-71 (Ariz. 2017).

constitutionality of the provision.[19] In the other case in which the attorney general deemed a local measure preempted, 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. More than the Tucson case, the Bisbee ruling demonstrates how punitive preemption laws can bludgeon a town into submission as Bisbee was forced to treat its law as preempted without even receiving a judicial hearing for its position that it had the right under Arizona law to protect the local environment by banning plastic bags.

Challenging Punitive Preemption

Punitive preemption is relatively new phenomenon, with few court decisions interpreting these laws. As the Tallahassee and Tucson cases indicate, courts have so far been reluctant to tackle these laws head on, although they may be willing in an appropriate case like Tallahassee to give the law a narrow interpretation.[20] There are, however, substantial legal arguments for challenging punitive laws aimed at local officials. Attacking laws that penalize local governments directly will be more difficult but the state constitutional concern that gave rise to home rule provide a basis for challenging the more extreme punitive measures

Protecting local officials from punitive preemption

There are two theories for attacking laws penalizing local officials for their support for preempted laws or policies.

The First Amendment. These laws may violate the First Amendment, which surely protects the speech of local officials, even on preempted issues. As the Supreme Court has found, "Legislators have an obligation to take positions on controversial

[19] Id. at 672.
[20] See also Marcus v Scott, 2014 WL 3797314 (Fla. Cir. Ct. 2014) (application of removal provision of punitive firearms preemption law to county commissioner unconstitutional because state constitution provides the exclusive procedure for the removal of county commissioners).

political questions so that their constituents can be fully informed by them . . . ."[21] In *Spallone v. United States,*[22] the Court expressed its concern over a district court's order imposing fines on city council members who failed to vote for the remedy the district court had determined was necessary to cure the city's civil rights violation. The fines were "designed to cause them to vote, not with a view to the interest of their constituents or of the city, but with a view solely to their own personal interest[]" in not paying the fines, which the Court found was a "perversion of the normal legislative process" and far more troublesome than the sanctions imposed on the city government.[23] *Spallone* turned on the equitable powers of the federal district court rather than the First Amendment rights of the city officials, but it underscores the constitutional interest in protecting the ability of local officials to vote for what they think is in the best interests of their community. To be sure, in *Nevada Commission on Ethics v. Carrigan*,[24] the Supreme Court held that a legislator has "no personal right"[25] protected by the First Amendment to vote in his or her legislative body, but that case involved an ethics requirement that a legislator abstain from voting on a matter presenting a conflict of interest. As the Court noted, legislators have long been subject to conflict of interest requirements and recusal rules in appropriate cases. Punitive preemption laws punishing a legislator for the content of his or her vote is something unprecedented and surely trigger First Amendment concern. The First Amendment concern is even clearer for laws that punish expressions other than voting. Indeed, in *City of El Cenizo v. Texas*, a federal district court enjoined on First Amendment grounds the section of Texas's anti-sanctuary-city law that provided for the removal from office of local officials who "endorse" sanctuary policies; the Fifth Circuit affirmed, although it narrowed the injunction to provide relief only for elected officials.[26]

State legal doctrines. There are also state law arguments for invalidating punitive preemption measures aimed at local officials. The vast majority of state constitutions include a provision, analogous to the federal constitution's Speech or Debate Clause, immunizing state legislators from being sued because of their votes, statements

[21] Bond v. Floyd, 385 U.S. 116, 136 (1966).
[22] 493 U.S. 265 (1990).
[23] Id. at 279-80.
[24] 564 U.S. 117 (2011).
[25] Id. at 136.
[26] 890 F.3d 164, 182-85 (5th Cor. 2018).

during legislative debate, and other actions connected to their legislative work.[27] These provisions do not explicitly protect local legislators, but several state supreme court have extended legislative immunity to local legislators, either through interpretations of these speech or debate clause equivalents or as a matter of the common law legislative immunities that predated and inspired the Speech or Debate Clause.[28] As the Washington Supreme Court explained, although the state clause "on its face applies only to the State Legislature . . ., the necessity for free and vigorous debate in all legislative bodies is part of the essence of representative self-government" and thus extends to city councils.[29] A Tennessee appeals court put the matter particularly well: City councils "make important social and economic decisions that many times affect our lives to a greater degree than do decisions made by our state legislators and congressmen. If the utterances of members of the legislative bodies such as city councils are not cloaked with an absolute privilege, an unwarranted consideration — personal monetary liability — will be interjected into a councilman's decision making process. This, we feel, would have the unavoidable effect of inhibiting the independent and forceful debate out of which decisions which best serve the interests of the populace are borne."[30] A number of states have also extended legislative immunity to local legislators by statute.[31] To be sure, these cases generally involved private suits against local legislators rather than formal efforts by a state to penalize local legislators for their views or votes, and statutory protections can be repealed or amended. Nonetheless, these cases and laws signal that respect for local democracy requires that local officials should not be personally punished for their official acts.

[27] See Steven F. Huefner, The Neglected Value of the Legislative Privilege in State Legislatures, 45 Wm. & Mary L. Rev. 221 (2003).
[28] See, e.g., Hillman v. Yarbrough, 936 Sp.2d 1056, 1062 (Ala. 2006); Sanchez v. Coxon, 854 P.2d 126, 128-21 (Ariz. 1993); Waste Mgmt of Louisiana, LLC v. Consol. Garbage Dist. No. 1 of Parish of Jefferson, 113 So.3d 243, 250 (La. App. 2013); State v. Holton, 997 A.2d 828, 833-34 (Md. Ct Spec. App. 2010); Pierson v. Hubbard 802 A.2d 1162, 1166 (N.H. 2002); Issa v. Benson. 420 S.W.3d 23, 27 (Tenn. Ct. App. 2013); Moore v. Call (In re Recall of Call), 749 P.2d 674, 677 (Wash. 1988).
[29] Moore v. Call (In re Recall of Call), 749 P.2d 674, 677 (Wash. 1988).
[30] Cornett v. Fetzer, 604 S.W.2d 62, 63-64 (Tenn. Ct. App. 1980).
[31] See, e.g., Cal. Civ. Code § 47; Ky. Rev. Stat. Ann. § 83A.060(15); Utah Code Ann. § 45-2-3.

Protecting local governments

It will be more difficult to challenge measures penalizing local governments for pursuing preempted programs. The First Amendment is probably not an option for them. To be sure, several lower federal courts have suggested that local governments have First Amendment rights, either for themselves or as associations of their residents.[32] As Judge Richard Posner put it, "There is at least an argument that the marketplace of ideas would be unduly curtailed if municipalities could not express themselves on matters of public concern . . . ."[33] Judge Posner also pointed out that a local government can serve as "a megaphone amplifying voices that might not otherwise audible" so that "a curtailment of its right to speak might be thought a curtailment of the unquestioned First Amendment rights of [its] residents."[34] However, the Supreme Court has rejected the idea that municipal corporations can be treated like business corporations for First Amendment purposes,[35] so any argument based on local government speech or association rights must await future development.

Potentially more promising in the near term would be an argument, based on the Supreme Court's decision in the Obamacare case, *National Federation of independent Business v. Sebelius*, ("*NFIB*")[36] that a coercive threat to cut off *all* federal Medicaid funds to states that do not expand their Medicaid programs, is unconstitutional. The Court reasoned that although "Congress may use its spending power to create incentives for States to act in accordance with federal policies," it cannot use the threat of a drastic funding cut-off to compel compliance.[37] The loss of some federal funding for not participating in a federal program is not impermissibly coercive, but a cutoff of over 10% of a state's overall budget, as the Obamacare law would have imposed on non-compliant states was "a gun to the head" that left the states "with no real option but to acquiesce."[38] Surely, the threat built into Arizona's SB 1487 to

[32] See, e.g., Creek v. Village of Westhaven, 80 F.3d 186, 192-93 (7th Cor. 1996); County of Suffolk v. Long Island Lighting Co., 710 F. Supp. 1387, 1390 (E.D.N.Y, 1989).
[33] Creek, supra, 80 F.3d at 193.
[34] Id.
[35] Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 362-64 (2009).
[36] 567 U.S. 519 (2012).
[37] Id. at 577-82.
[38] Id.

cut off one-fourth of local revenues and the comparable threat in Iowa's new anti-sanctuary law to cut off all state aid are guns to the head as well.

To be sure, local governments generally do not enjoy the same constitutional status within the states that the states enjoy under the federal constitution. Nonetheless, the widespread adoption of home rule confers a degree of autonomy on local governments comparable, even if not identical, to the position of the states in the federal system. So far, very few state cases have considered the *NFIB* analogy in challenges to state funding cut-offs, and where the argument was raised, it did not succeed.[39] But that was because in one case the size of the aid cut-off was not big enough to be coercive,[40] and in another case because of the procedural posture in which the argument was raised.[41] In neither case did the court reject the idea that coercive financial penalties could be inconsistent with home rule. So this approach may ultimately prove to be a useful line of attack against punitive measures aimed at local governments.

Rejecting Punitive Preemption

Punitive preemption is fundamentally inconsistent with local self-government. Home rule requires that local officials be able to propose and vote for, and local governments be able to enact, measures that reflect their views of the best policies for their communities. To be sure, in many, if not most, cases states will be able to displace local policies that impose burdens on other communities or the state as a whole, that interfere with the free movement of people and commerce within a state, or that burden fundamental rights. But punitive preemption goes beyond vindicating the state government's power to set policy for the state as a whole. Instead, it threatens the capacity of local communities to govern themselves. It also undermines the policy debate that is appropriate for any subject of state-local conflict. A Palm Beach County, Florida official noted that the county had been exploring possible gun

[39] See, e.g., City of El Centro v. Lanier, 200 Cal. Rptr.3d 376 (Cal. Ct. App. 2016); City of Toledo v. State, 72 N.E.3d 692 (Ohio Ct. App. 2017), rev'd 2018 WL 3062477 (Ohio. Sup. Ct., 6/20/2018).
[40] City of El Centro, supra, 200 Cal. Rptr. At 385.
[41] City of Toledo, supra.

regulatory measures but that Florida's statute providing for the removal of officials who approved firearms laws "stopped [them] in [their] tracks." "Once our jobs were at stake," he continued, "we dropped the plan entirely."[42]

Similarly, excessive penalties for local governments—like the withdrawal of state shared revenue and bond posting requirements of Arizona's SB 1487 or the imposition of large civil fines go beyond protecting state policy supremacy and undermine the ability, if not the very willingness, of local governments to undertake the lawmaking vouchsafed to them by home rule. As the mayor of Bisbee, Arizona pointed out in explaining his town's decision not to fight the state attorney general's determination that its plastic bag ban was preempted, "The state was ready to pass a death sentence on a city over a plastic bag. . . . This is a draconian measure when they can bankrupt you. We would have gone belly up."[43]

It is one thing for cities to lose the legal battle over whether they have authority to adopt certain regulations, but it is far worse if financial threats make them unable to defend their own measures or unwilling even to try to probe the line of what is legally permissible for them. States can tie funding for specific programs to compliance with otherwise legally permissible conditions. But financial penalties that go beyond any misuse of earmarked state funds or any actual harm from preempted local conduct penalize local lawmaking, and that is inconsistent with the local autonomy that is crucial to our government.

[42] *See, e.g.*, Joe Palazzolo et al., *City Gun Laws Hit Roadblock*, WALL ST. J. (Feb. 5, 2013).
[43] *See, e.g.*, Dustin Gardiner, *Bisbee Repealing Plastic-Bag Ban to Dodge State Budget Hit*, ARIZ. REPUBLIC (Oct. 31, 2017).