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Home Rule in an Era of Local Environmental Innovation

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The past several decades have seen cities, reinvigorated by increased growth and political will, emerging as progressive forces in a number of areas. The urban portfolio often includes measures focused on environmental protection, and environmental advocates and scholars have been vocal in their support for this new wave of local environmentalism. This trend has been countered by a rising division between state and local populations on social issues. In a number of states, however, local legislation addressing issues such as sexual orientation and gender, minimum wage, and environmental protection has provoked state legislators to pass statutes that explicitly remove certain policy options from local authority. These state measures invalidate local laws passed, in most cases, pursuant to the localities’ home rule authority.

At first glance, the framework for distribution of state and local power in the United States presents no barrier to this kind of state action. Localities have historically operated under the umbrella of the state, and are vested with only those powers specifically delegated to them. To loosen the strictures of this approach, throughout the twentieth century most states adopted home rule provisions. These provisions, although highly varied, were in general designed to allow localities to solve urban issues creatively, and avoid state determination of local matters. The home rule doctrine therefore allocates to localities a certain degree of authority. In all home rule states, however, that power is generally subject to override by the state upon assertion of a state interest, or the passage of general state legislation that conflicts with the local measure.

While the ability of the state to counteract local laws is very strong, assertions of state power have at times received pushback from courts. This is particularly the case when certain categories of local legislation, or impacts on constitutional rights, are at issue. Such checks on state power

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1 This Article uses “cities,” “localities,” and “local government,” interchangeably, and encompasses local governments of various sizes and population characteristics. See Richard Briffault, Our Localism: Part Two—Localism and Legal Theory, 90 Colum. L. Rev. 346, 346-49 (1990) (discussing the ways in which the term “city” can be used and construed in academic literature). While most of the examples of the kinds of local action discussed come from major metropolitan areas, the analysis applies equally to all subdivisions of the state.
constrain legislative allocations of burdens and benefits, and make clear that there are boundaries to state ability to take back authority from localities. These frameworks do not apply well, however, to state measures that bar certain kinds of local environmental action. The lack of fit between these approaches and environmental laws leaves local control over environmental issues unprotected from even the most basic checks on state authority. As a result, the sphere of local autonomy carved out by home rule is particularly easy to undermine in the environmental context.

There has a growing conversation about the potential for local action on environmental issues. There has also been much discussion of preemption as it relates to local lawmaking, and of the limitations on city authority in the face of state action. These two camps have not yet been fully reconciled, however; advocates for local action often fail to acknowledge the real limits on local power under the home rule framework, while local government scholars tend to accept those limits as inevitable. Because defining the proper sphere of local authority goes to the very heart of the home rule doctrine, the inapplicability of these protections to a specific kind of law warrants attention to a judicial or legislative fix. This Article attempts to bridge the gap between these positions by acknowledging the constraints of home rule while envisioning a way forward for local environmental laws.


3 To the extent that state authority over categories of local environmental laws has been discussed to date, it has generally occurred in the context of natural gas drilling, often through the lens of implied preemption. Because of the unique state role in oil and gas production, fracking regulations at the local level may require a different kind of inquiry. For that reason, this scholarship and case law, while contributing to a background understanding of state rejection of local measures, are unlikely to be directly relevant. Similarly, this Article does not discuss issues of implied preemption. At the core of this discussion is intentional, express preemption of local laws by state legislatures, and the extent to which home rule does or could offer some checks on that kind of preemption.

A potential solution may be available in the form of protections for the environment that exist in some state constitutions and the public trust doctrine. Where state constitutions protect a degree of environmental quality, that constitutional value may not be undermined by state action. And even where that right is not manifested in a specific constitutional guarantee, background public trust principles may establish the state and its localities as custodians of the environment for their citizens. Such principles could in turn inspire and enable judges to push back on reactive targeting of local measures by the state where the result is a net loss of environmental protection. This kind of judicial skepticism of state action, while open-ended in nature, is not unprecedented; a similar defense of local experimentation in support of citizens' rights has been seen in decisions by the Supreme Court and others in response to a variety of restrictive state actions that intrude on principles of local control or infringe on constitutional rights. This Article suggests ways in which judges could similarly apply environmental protections and principles in evaluating state action.

Certainly, there are many debates to be had about the merits of home rule and the decisionmaker best-suited to make policy for various topics. The trouble with many arguments that advocate for one level of government over another is that they have a tendency to take potentially short-sighted positions for the sake of an ideological victory. Fifteen years ago, many environmental advocates railed against local control as responsible for suburban sprawl and attendant environmental damage, and urged state or regional control of land use issues. Substantive principles located in state constitutional provisions and the public trust doctrine may, however, be able to offer an environmental lodestar for state and local governments alike.

Today, given the political realities of the country, and that innovative environmental protections may currently be more likely to occur at the local level than any other, preservation of the possibility for environmental action within this realm of authority is important. Whether states’ preemption authority includes an ability to dismantle local environmental and other policies through
targeted prohibitions will have potentially far-reaching consequences. If cities are to continue their important work as leaders with regard to climate change adaptation and mitigation, transportation initiatives, pollution reduction, and many other issues, the prospect of states outlawing local policy responses one at a time is concerning. Modifying the lens through which state revocation of authority over certain categories of environmental policy is viewed will advance the interests of cities in making environmental progress at the local level.

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Part I of the Article addresses recent trends toward local environmental policymaking. Part II discusses the contours of home rule authority and the power dynamic between state and local governments. Part III provides examples of how state preemption of local environmental action might be effected under this framework, looking in particular at statewide bans on local plastic bag bans. Part IV offers a description of some exceptions to the typical home rule framework, and discusses why those exceptions tend not to apply to the environmental context. This discussion suggests, however, that courts may be able to rely on other means, including underlying principles of state constitutional or common law, to provide for greater protection of local governments in the face of reactive, piecemeal state legislation targeting local environmental measures.

I. Cities and Progressive Politics

The past several decades in the United States have seen a revitalization of the urban core in many cities around the country.5 These changes have resulted in shifts in the political and cultural sphere.6 Following the suburban boom of the 1950s and 1960s, and the ensuing urban fiscal and law enforcement problems of the 1970s and 1980s,7 a number of cities have seen a resurgence in

7 For a general description of these issues, see, e.g., Gideon Kanner, Detroit and the Decline of Urban America, 2013 Mich St. L. Rev. 1547 (2013).
activity and population, complete with newly desirable real estate, investment, and employment opportunities. Along with this growth has come increased local political will, from populations that are often more progressive than their less urban counterparts, and both the need and desire for local governments to engage in extensive policymaking. Invested with the funding and political capital needed to advance major initiatives, local authorities are acting on a number of issues. This kind of urban experimentation by localities is important; local lawmaking can act as a “catalyst for change,” is well-suited to address a range of problems because of its flexible nature, and can overcome barriers to progress faced at the state or national level. The sheer number of local governments makes them an important force; “if the fifty states are laboratories for public policy formation, then surely the 3,000 counties and 15,000 municipalities provide logarithmically more opportunities for innovation, experimentation, and reform.”

Environmental issues are one area in which the trend toward local policymaking has been taking hold. “[C]ities have been at the forefront of environmental activism for a long time,” and have long innovated with regard to local solutions to environmental problems. And with the recent rise in city populations and increased political activism, local governments are now leading with respect to policymaking in the environmental realm on issues such as transit and development.

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8 See, e.g., Josh Kron, “Red State, Blue City: How the Urban-Rural Divide Is Splitting America,” The Atlantic (Nov. 30, 2012), http://www.theatlantic.com/politics/archive/2012/11/red-state-blue-city-how-the-urban-rural-divide-is-splitting-america/265686/ (noting that “virtually every major city (100,000-plus population) in the United States of America has a different outlook from the less populous areas that are closest to it”).
13 Dorceta E. Taylor, THE ENVIRONMENT AND THE PEOPLE IN AMERICAN CITIES, 1600S-1900S: DISORDER, INEQUALITY, AND SOCIAL CHANGE 502, Duke University Press: Durham (2009) (describing efforts by cities over several centuries focused on issues such as clean water, clean air, waste disposal, preservation of open space, and others).
strategies, climate mitigation and adaptation, toxics reform, and other subjects. As cities grow, ecological challenges become intertwined with urban problems, and the development of more sustainable cities is essential.

The call for local power over environmental issues is not necessarily an intuitive one. Local decisionmaking over environmental issues has often been decried as unsound policy, given cities’ at-times parochial conduct in thwarting efforts to solve environmental problems, such as sprawl development. Externalities inherent in many environmental problems have led many to advocate for centralized decisionmaking—to nationalize, or even internationalize, environmental policy. Greater resources and expertise at higher levels of government may also make environmental lawmaking more successful. There exist, however, environmental issues of uniquely local impact and importance. Moreover, given the current political climate, localities may be the only realistic

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15 See, e.g., Shannon M. Roesler, Federalism and Local Environmental Regulation, 48 U.C. Davis L. Rev. 1111, 1113 (2015); see also Sarah Krakoff, Planetary Identity Formation and the Relocalization of Environmental Law, 64 Fla. L. Rev. 87, 89 (2012) (“Local food, local work, local energy production—all are hallmarks of a resurgence of localism throughout contemporary environmental thought and action”); John Nolon, In Praise of Parochialism: the Advent of Local Environmental Law, 26 Harv. Envtl. L. Rev. 365, 365 (2002) (noting a “remarkable and unnoticed trend among local governments to adopt laws that protect natural resources”).


17 See Jim Rossi, ‘Maladaptive’ Federalism: the Structural Barriers to Coordination of State Sustainability Initiatives, 64 Case Western Res. L. Rev. 1759, 1761 (2014) (noting that local innovation and control can be suboptimal where it fails to account for coordination benefits); David J. Barron, Reclaiming Home Rule, (2003); David J. Barron, The Promise of Cooley’s City: Traces of Local Constitutionalism, 147 U. Pa. L. Rev. 487, 488-89 (1999). Recent developments in urban dynamics make these predictions less likely, however, and inform the position that on balance, vesting some power in local governments to make environmentally protective laws is warranted.


option for pursuing environmental solutions,\textsuperscript{21} and “local, multi-stakeholder involvement in environmental decision making [may be] key to effecting better environmental results.”\textsuperscript{22} Motivated by these trends, environmental law scholars and policymakers alike have started to explore “the positive potential of local governance in addressing a range of contemporary environmental problems.”\textsuperscript{23}

These urban environmental measures have taken a variety of forms, address a variety of topics, and occur in cities both large and small. For example, trash collection and recycling have long been the purview of local governments.\textsuperscript{24} As urban populations increase, and available land for trash disposal becomes scarce, the need to reduce trash flow and improve recycling efforts is clear for cities across the country.\textsuperscript{25} In response, a number of localities have developed waste reduction or recycling programs as part of their sustainability portfolios.\textsuperscript{26} Some of these efforts have taken

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\item \textsuperscript{21} See Jim Rossi, ‘Maladaptive’ Federalism: the Structural Barriers to Coordination of State Sustainability Initiatives, 64 Case Western Res. L. Rev. 1759, 1761 (2014) ( theorizing that trend toward local environmental governance is best explained by “simple pragmatism,” given the relative ease of passing laws at the local level than at the state or federal levels).
\item \textsuperscript{22} William A. Shutkin, THE LAND THAT COULD BE: ENVIRONMENTALISM AND DEMOCRACY IN THE TWENTY-FIRST CENTURY 109, MIT Press (2000).
\item \textsuperscript{23} Shannon M. Roesler, Federalism and Local Environmental Regulation, 48 U.C. Davis L. Rev. 1111, 1113 (2015).
\item \textsuperscript{24} See, e.g., United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 344 (2007) (“[w]aste disposal is both typically and traditionally a local government function.”); see also, e.g. 7 McQuillin Mun. Corp. § 24:246 (3d ed.) (“Municipal corporations ordinarily may cause, regulate, or directly perform the collection and disposal of garbage and refuse within their areas”); Ian Douglas, CITIES: AN ENVIRONMENTAL HISTORY 163-181, I.B. Tauris (2013) (describing history of local measures regarding waste disposal and recycling, from 1900s to present).
\item \textsuperscript{25} See, e.g. Megan Backsen, Jack Hornickel, Cradle-to-Cradle: The Elimination of Waste Introduction, 16 Vt. J. Envl. L. 572 (2015) (“Academics and governments alike continue to view the steady accumulation of garbage as a threat to orderly life.”); Joan Mullany, Popping the Plastics Question: Plastics Recycling and Bans on Plastics—Contacts, Resources and Legislation 2, Issue Brief, National League of Cities (1990) (noting that “[t]he management and disposal of municipal solid waste has become one of the foremost issues facing local elected officials over the past decade and unfortunately, promises to continue to demand their attention through the end of this century”).
\item \textsuperscript{26} See, e.g., City of Cleveland, “Zero Waste,” http://www.city.cleveland.oh.us/CityofCleveland/Home/Government/City Agencies/OfficeOfSustainability/WasteReductionAndRecycling (“The City saves money and natural resources by decreasing the waste generated through its own operations and within the larger city limits. This includes both residential and commercial waste reduction and recycling programs. The City diverts thousands of tons of waste from the landfill each year, saving over $1 million annually through waste disposal cost avoidance and recycling revenue”); Sustainable Santa Fe Plan 25-27 (Oct. 29, 2008), available at http://www.santafenm.gov/media/files/PublicUtilities_Environmental_Services/SustainableSFweb.pdf (describing waste reduction and recycling efforts by Santa Fe); Anna Clark, “Creative Ways Cities Are Pushing Recycling,” NextCity (Sept. 2, 2014) (describing recycling initiatives in Houston and Detroit).
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the form of bans or fees on plastic bags, Styrofoam, and other forms of disposable packaging.\textsuperscript{27} Such local initiatives may help to reduce, at least in part, the toll on municipal garbage and recycling processes, and the environment, that plastic bags exact.\textsuperscript{28} They may also serve as a gateway into broader environmental engagement for communities.\textsuperscript{29} To achieve these goals, cities will likely need to employ command and control measures, such as bans, or market incentives, such as surcharges on bag use.

Cities are also on the front lines of climate change. Cities may be “both a cause and a solution to global warming.”\textsuperscript{30} That is, cities account for a greatly disproportionate percentage of greenhouse gas emissions, and as city populations increase, emissions will follow.\textsuperscript{31} But cities may also be able to employ a variety of strategies that can help to reduce emissions, and to address issues of sea level rise, energy efficiency, urban resiliency, water use, and others. A number of cities have realized the long-term planning that will be required in order to prepare for these changes,\textsuperscript{32} and have begun to develop policies accordingly.\textsuperscript{33} For example, many local governments are involved in siting of renewable energy projects, offering financial incentives to encourage development of


\textsuperscript{30} Green Cities: Mayoral Initiatives to Reduce Global Warming Pollution, p. 1, Hearing Before the Select Committee on Energy Independent and Global Warming, House of Representatives, One Hundred Tenth Congress, First Session (June 19, 2007); see also Patricia E. Salkin, Can You Hear Me Up There? Giving Voice to Local Communities Imperative for Achieving Sustainability, 4 Envtl & Energy L. & Pol’y J. 256, 258 (2009) (“voices and actions of local governments are critical to achieving truly sustainable communities, especially in the climate change arena”).

\textsuperscript{31} Green Cities: Mayoral Initiatives to Reduce Global Warming Pollution, p. 1, Hearing Before the Select Committee on Energy Independent and Global Warming, House of Representatives, One Hundred Tenth Congress, First Session (June 19, 2007).


renewable energy sources, promoting interconnection to the grid to allow consumers to profit from generation of their own renewable energy, and establishing local renewable portfolio standards that require a certain percentage of city power to be purchased from renewable sources. Security of the land mass for a city is also critical, and cities have engaged in development of adaptation strategies to handle phenomena like sea level rise. In 2007, New York City developed the first draft of its PlaNYC portfolio of sustainability measures. That plan is designed to make the city more resilient in the face of climate change and rising sea levels by strengthening coastline defenses, creating building standards that will better protect the built environment against severe weather, and improving urban infrastructure. PlaNYC was updated after the damage wrought on the city in 2012 by Hurricane Sandy made even more apparent the potential dangers for the city of extreme weather and rising sea levels. Localities across the country are developing their own adaptation plans and policies to address the coming changes. These plans are likely to require authority on the part of localities over a wide array of property, utilities, and many other aspects of local governance.

Finally, transit policy has long shaped cities, for better and for worse. The massive highway projects of the mid-twentieth century had lasting impacts on cities by bifurcating neighborhoods and providing a quick conduit in and out of urban areas. In many cities, mass transit was long ago abandoned in favor of the car, and parking lots cover a high percentage of valuable urban land. As more people move back into cities, and cities become increasingly interested in more efficient use of

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38 See generally Georgetown Climate Center, “State and Local Adaptation Plans,” http://www.georgetownclimate.org/adaptation/plans.html (providing comprehensive set of links to local climate adaptation plans around the country).
land as well as improvements in air quality, transit policies have received additional attention from local governments. A renewed focus on transit can have profound benefits for urban life, as well as for the environment. The interest of cities in tackling the transportation needs of their citizens for the coming years can be seen, for instance, in the competition for the United States Department of Transportation’s Smart Cities Challenge, a $40 million grant to integrate new technology, such as self-driving cars, into urban transportation infrastructure. And across the country, cities of various sizes and demographics, such as Kansas City, Los Angeles, Columbus, Providence, and many others, are using new transit policies to convert urban areas shaped by decades of focus on suburbs, highways, and the personal automobile into those that can better serve their newly invigorated urban cores. To do that, however, they must have some control over property for use in transit, the ability to raise needed funds, and the freedom to adjust street and traffic codes, among other powers.

These are merely a handful of examples of local environmental problems and solutions that occur outside the broader network of state and federal environmental regulations. They are critical to the health of cities, and to the ability of urban areas to adjust to shifting demands. Given the important role that cities are likely to play in any blueprint for a sustainable future, ensuring that local leaders are able to make needed changes is essential. Further, as mentioned, cities are, in some

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40 Vukan R. Vuchic, TRANSPORTATION FOR LIVABLE CITIES 7, Center for Urban Policy Research: Rutgers, the State University of New Jersey (1999) (“A number of elements comprising livability of an area depend, directly or indirectly, on the type and quality of its transportation system.”)
41 “Kansas City Announces Opening Date of KC Streetcar,” City of Kansas City, Missouri, http://kcmo.gov/streetcar/
43 “U.S. Department of Transportation Announces Columbus as Winner of Unprecedented $40 Million Smart City Challenge,” U.S. Department of Transportation (June 23, 2016) (describing plans to use transportation technology to link parts of the city).
parts of the country, the only level of government at which innovations in environmental protection are occurring at the moment. This is not to say that city power will always be directed toward the good of the ecosystem. But it does mean that clarifying the ways in which substantive law may offer a means of upholding local power against state intrusions is critical in terms of laying out a plan for environmental protection.

II. State and Local Relationship

The rise in urban power has been accompanied by a growing number of substantive policy conflicts between states and localities. Generally speaking, local governments operate under powers delegated to them by state governments. The Tenth Amendment of the United States Constitution says that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the States respectively, or to the people.”46 The lack of mention of local governments in the Constitution has generally been interpreted to mean that localities’ sole authority derives from the states. As described in greater detail below, the shape of power conferred upon local governments has changed over the nation’s history. Today, localities in most states have some independent sphere of authority within which they can act without express permission from or action by the state. While operating under those delegated powers, however,47 localities “sometimes seek to pass laws and regulations that go beyond what their respective state governments desire.”48 In many instances and in many different fields, this has resulted in state governments acting to remove specific policy outcomes or subject areas from local control via preemption, or in the explicit removal of certain aspects of home rule authority from local governments. Understanding

46 U.S. CONST., ART. X.
this dynamic is important for an appreciation of the functional power that cities have to effect change at the local level.\textsuperscript{49}

\textbf{A. The Evolution of Home Rule}

There is a long history of local self-governance in the United States,\textsuperscript{50} though that has never meant local independence. While a thorough recounting of state and local relations in the United States has been discussed in detail elsewhere\textsuperscript{51} and is beyond the scope of this Article, a brief description of the relationship will provide some context for the ensuing discussion. Local independence from the monarchy was a fiercely-asserted right in seventeenth-century England.\textsuperscript{52} And in colonial America, local governance was the first kind of recognized authority.\textsuperscript{53} The political status of early American cities, however, was not entirely settled. In post-revolutionary America, the question of how best to think about the authority of local governments occupied courts for much of the eighteenth and early nineteenth century, and has continued to be the subject of much debate.\textsuperscript{54}

While the American political structure has always varied from that of England, American courts seem to have imported the British tradition of thinking of cities as “corporate entit[ies] intermediate between the state and the individual.”\textsuperscript{55} As a result, “the legal system in America formulated the rights of cities in the process of establishing the general relationship between

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\item[54] Joseph F. Zimmerman, STATE-LOCAL RELATIONS: A PARTNERSHIP APPROACH 17, Westport: Praeger (1995) (“The most desirable degree to which political power should be decentralized by a state government to local governments has been a source of major controversy since the end of the Revolutionary War.”)
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corporations and the state.”

Until the early nineteenth century, American courts tended to treat cities and private corporations in the same way, and these entities often had similar powers. Then, in 1819, the United States Supreme Court issued its seminal decision in *Trustees of Dartmouth College v. Woodward*. *Trustees of Dartmouth College* created a formal distinction between private and public corporations. The former, as the province of private citizens, had property rights that had to be protected against state intrusion; the latter, founded by the government, required no such protection. Following that decision, a leading early treatise developed a theory that “public corporations . . . are invested with subordinate legislative powers . . . and such powers are subject to the control of the legislature of the state.”

The characterization of cities as public corporations subordinate to the state became widespread, retaining protections against state intrusion only for private property. This shift, which ran contrary to much of the history of state and local relations, “turned the political world as it then existed upside down.”

For some time, this theory of local subordination to state control went untested. An increase in city functions during the mid-nineteenth century, however, prompted new debates over the proper relationship of city to state. One theory of how best to allocate power between the two entities was advanced by Judge Thomas M. Cooley, who authored an 1868 treatise in which he stated that “the sovereign people had delegated only part of their sovereignty to the states,” and had “preserved the remainder for themselves in written and unwritten constitutional limitations on

56 *Id.* at 27.
57 *Id.* at 40.
58 17 U.S. 518 (1819).
62 *Id.* at 43.
governmental actions.” A formulation directly contrary to Cooley’s position, however, soon appeared in an 1872 treatise by Judge John F. Dillon. In his treatise, Dillon argued that democratic goals of governance and avoidance of special interests were best accomplished through state legislative control of cities. He stated this view in broad terms by noting that state power “is supreme and transcendent: it may erect, change, divide, and even abolish, at pleasure, as it deems the public good to require,” and that courts have a duty to require local governments to “show a plain and clear grant for the authority they assume to exercise . . . .” Dillon’s views appear to have been based on an “expectation that state and judicial control would help ensure the attainment by cities of an unselfish public good,” as well as on his own ties to corporate actors interested in state control. “Dillon’s Rule” was eventually adopted nationwide, possibly influenced by negative views of cities that painted them as “the home of mobs, foreigners, racial minorities, and sinners,” a threat to national unity, and “islands of private parochialism.” Its broad acceptance meant that localities could operate pursuant only to specific grants of power from the state legislature. The Rule did not dictate how much power should be delegated to localities, but it vested the source of that power squarely with the state.

64 Id.
66 Id. at 47.
67 Id.
69 Id. at 9.
Thus, by the end of the nineteenth century, localities were heavily dependent on the states. Local governments could take no action on any issue without an explicit grant of authority from the state legislature. The inherent limitations of this approach became apparent during the late 1800s and early 1900s, as cities began to expand rapidly for the first time in the United States. Growing urban populations gave rise to health concerns, crime, and need for land use controls, and local populations demanded action on these issues. It became increasingly clear that cities faced a number of unique problems, and that state legislatures were not well-positioned to act swiftly or knowledgeably on these issues.

Out of these conditions came an idea of governance known as “home rule.” As a general idea, home rule was intended to establish a sphere within which cities could act on their own initiative, without specific grants of authority. Home rule provides, in short, a “legal means to decentralize power to the local level.”73 Advocates for home rule were motivated by “a Progressive era concern with the limited scope and capacity of municipal governments in the state constitutional system.”74 Home rule was also designed to combat the dangers of state control that had been evidenced in targeted special legislation, which interfered with appropriate city governance.75 Thus, the two underlying goals of the home rule movement were (1) to give cities a degree of initiative in city affairs based on a more general grant of authority from the state, and (2) to “give cities an area of autonomy immune from state control, even by general legislation.”76 “In contrast to a Dillon’s

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Rule regime that presumes city powerlessness, home rule provides presumptive city authority to engage in a wide variety of governmental activities." Early conceptions of home rule took a variety of forms and justifications, and may have been motivated more by the cause of “good government” than local independence for its own sake. At a basic level, however, these ideas incorporated some of Thomas Cooley’s ideas of local power and independence. Running through all of these home rule proposals was an understanding that a degree of local decisionmaking, secure from state authority, was necessary to allow improved visions of city government to take shape.

In 1875, Missouri became the first state to include a home rule provision in its constitution, and it was followed by many others. Today, nearly all states have something akin to home rule, although grants of local power take many forms. Most broadly, home rule provisions come in either constitutional or statutory form, named according to the legal form in which the home rule protections are packaged. The constitutional home rule framework predominated at the turn of the twentieth century. Under this scheme, the state constitution carves out a sphere of local authority, free of state interference over matters of local significance. Because of difficulties in defining the local sphere, state legislatures began to shift in the mid-twentieth century to statutory grants that gave localities a certain degree of authority, provided that the exercise of local power did not conflict

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78 David J. Barron, *Reclaiming Home Rule*, 116 Harv. L. Rev. 2255, 2292-2320 (2003) (presenting three distinct visions of home rule that may have existed among its early proponents: the “old conservative city,” which sought to restore city governance to a smaller scale, and to narrow the authority of both the local and state governments; the “administrative city,” which sought to legitimate the exercise of a range of powers at the local level; and the “social city,” which sought to emphasize and support the public and political nature of the cities and secure freedom for local governments to undertake the kinds of big projects needed to support its public purposes).
with any state laws. While scholars have found it difficult to calculate with precision the number of constitutional versus legislative home rule states, the majority of states now employ the legislative approach. For purposes of this Article, it is sufficient to say that, under any system, the most relevant inquiries for the home rule framework when it comes to state override of local authority are the extent of the state versus local interest, and the existence of “general,” versus “special,” conflicting state laws.

Certainly, the grant of home rule powers to cities around the country did not result in their independence; while “local governments may have gained some measure of power and formal autonomy in the state-local relationship,” they remain largely subject to the control of the state legislature. But the various home rule provisions did result in the conferral of a certain range of powers upon localities under which they could operate. This power encompasses both self-governance and police powers, the latter of which includes the authority to address environmental harms. Vesting local governments with this sphere of authority reflected the broader goals of providing greater freedom to local governments, eliminating particularized state control over

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85 Id. at 1125 n.61 (discussing differences in calculating numbers of home rule states in the work of leading scholars).
87 Richard Briffault & Laurie Reynolds, STATE AND LOCAL GOVERNMENT LAW (6th ed.) 235-236, American Casebook Series, Thomson/West (2004) (“Absent any specific limitation in the state constitution, the state can amend, abridge or retract any power it has delegated, much as it can impose new duties or take away old privileges.”).
89 See, e.g., Ross Crow, Municipal Regulation of Groundwater and Takings, 44 Tex. Envtl. L.J. 1, 24 (2014) (citing Baldwin v. City of Tehama, 36 Cal. Rptr. 2d 886, 891 (1994) for the proposition that the city or county has “police power equal to that of the state so long as the local regulations do not conflict with general laws”). Exercise of police power versus home rule authority may have implications for how and when a local law is preempted by state action. See, e.g., Cleveland v. State, 2010-Ohio-6318, ¶ 10, 128 Ohio St. 3d 135, 137 (“Traditionally, we have used a three-part test to evaluate conflicts under the Home Rule Amendment. A state statute takes precedence over a local ordinance when (1) the ordinance is an exercise of the police power, rather than of local self-government, (2) the statute is a general law, and (3) the ordinance is in conflict with the statute”) (internal quotations omitted).
localities, and creating greater accountability in the state legislature for the relationship between state and local governments.

B. Home Rule Analysis

As noted, the extent of state powers varies under different home rule frameworks. While there may be as many formulations of home rule as there are states that employ it, it can be broken down generally into the aforementioned two categories, based on whether home rule powers are created by state constitution or statute. Under either framework, state legislators desiring to preempt local action have a great deal of authority to do so.

a. Constitutional Grants and State Interest

Early state constitutional grants are often characterized as taking an “imperium in imperio”—state within a state—approach to home rule authority. These early grants were typified by the creation of a separate sphere of local authority within which cities could legislate, free from state interference. In some states, the determination of this sphere took the form of a list of items deemed to be of “local” interest; in others, there was not a specific list, but a more general grant of

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92 See David J. Barron, Reclaiming Home Rule, 116 Harv. L. Rev. 2255, 2335 (2003) (noting that early urban reformers “all agreed that the state creature idea of local power—in which the scope of local power was determined by particularized state legislative commands—was not home rule and was not desirable”); cf. Howard Lee McBain, Home Rule for Cities, Proceedings of the Academy of Political Science in the City of New York, Vol. 5, No. 2 (Jan. 1915), at 264, 298-99 (advocating for the adoption of more specific home rule powers in New York, and stating that “I take it, in the first place, that historical events have conclusively demonstrated the vanity of the hope that legislatures will, when subject to no specific constitutional mandates, always refrain from interfering with the affairs of cities for political or sinister purposes; or that they will, even in the absence of ulterior motives, give sufficient attention to special laws relating to the government of cities to accomplish an end that is highly to be desired, namely, that city governments should be founded upon some understandable principles of political organization, and once founded upon such principles, should not be subjected to fragmentary additions and alterations that take no account of the original design of the structure.”)


96 Id.

97 Id.
power to local governments over all issues of local concern. Thus, in such states, the definition of a “state interest” is crucial to any determination of the proper scope of home rule authority. The boundary lines between state and local interests were not easily drawn, however. And even when grants of authority were specific, the extent of local authority in the face of conflicting state laws remained in flux. When state and local laws conflict, courts may permit the state legislature to “enact a law in a functional area provided there is a substantial state concern,” even where it intrudes on the sphere carved out for local authority. Home rule authority under this framework is therefore subject to case-by-case determinations that make it difficult for cities to know the precise extent of their powers. Ultimately, courts in most major state-local disputes tend to find “a state concern and upheld the state action.” In consequence, the so-called imperio approach has been “relatively ineffective” in carving out a protected sphere of local authority.

b. Legislative Grants and General Legislation

The difficulties in drawing clear boundaries around a local sphere led many states to begin to adopt a form of home rule that “provided local government with an area in which to operate freely, subject to the ultimate purview of the state legislature.” This grant of authority, also known as the “devolution of powers” or the “residual powers” approach, is typical in statutory delegations of home rule authority to local governments. Under this framework, local governments are

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99 Id.
empowered to act in any area, unless explicitly prohibited by state law.\textsuperscript{106} This approach differs from Dillon’s Rule, which prevents a local government from exercising a power unless specifically authorized to do so by the legislature.\textsuperscript{107} Local authority may still be altered, however, by general laws passed by the state.

The use of “general laws” as a limit on state preemption authority incorporates prohibitions on special legislation found in most state constitutions.\textsuperscript{108} Under provisions that generally predate home rule,\textsuperscript{109} legislatures in most states are required to preference general legislation over special legislation.\textsuperscript{110} Special legislation refers to the bestowing of particular benefits or prohibitions on individual cities. Broadly speaking, laws are “general” when they apply to all cities in a state, or all cities within a particular classification based on size or other characteristics.\textsuperscript{111} Whatever the classification, a general law must “apply equally to each member” of the class, and cannot exempt specific members.\textsuperscript{112} The widespread prohibition on special legislation arose out of concerns around the turn of the twentieth century regarding the dominance of state legislative authority and the targeting of legislation toward individual municipalities and persons. Arguments against special legislation ranged from legislative meddling in local affairs to facilitation of corruption.\textsuperscript{113} These special legislation clauses were designed to inhibit the ability of state governments to reward or penalize specific entities, and to strengthen local governments.\textsuperscript{114} The statutory home rule approach

\begin{footnotesize}
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\item[112] Id. at 104.
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incorporates these prohibitions by stating that local laws are preempted only by general laws at the state level. In this way, negative measures designed to prevent arbitrary interference by the state legislature were woven into more positive grants of local authority.115 Under this framework, the proper scope of local authority in the face of a state enactment may therefore depend in large part on whether that state law is deemed “general” or “special.”

III. State Override of Local Environmental Measures

This organizational structure means that local governments generally derive sufficient authority from either home rule grants or underlying police power to allow them to take action to protect the local environment.116 Thus, the question of whether local governments have the authority to act in the first instance is fairly settled. As cities assert their independence in a variety of policy spheres,117 however, the exercise of that power has caused a number of localities to come into conflict with the state. This is particularly evident in the environmental context; “states, in addition to being sites of innovation and flexibility and pragmatism, are sites of environmental conflicts quite as intense as those at the federal level.”118

One example of localities taking different stances on environmental issues than their states is in the area of climate change. Cities have taken an active role in advocating for action in this arena. For instance, the U.S. Mayors Climate Protection Agreement was launched on February 16, 2005, the day that the Kyoto Protocol went into effect, and was intended as a response to federal inaction

116 Michelle Bryan Mudd, “A ‘Constant and Difficult Task’: Making Local Land Use Decisions in States with a Constitutional Right to a Healthful Environment,” 38 Ecol. L.Q. 1, 5-6 (2011) (noting that many courts have found that grants of the police power and other authority to local governments encompasses an authority to address environmental harms). Some courts, however, may find this exercise of authority to be beyond the scope of local authority even in the absence of state action. See Paul Diller, Intrastate Preemption, 87 B.U. L. Rev. 1113, 1142-44 (2007) (describing range of laws found improper under a “prohibit/permit” test of preemption that holds that state silence on an issue permits the conduct in question, and that localities cannot go beyond that regulatory floor to prohibit behavior).
on climate change and failure to ratify the Protocol.\footnote{McKendry, and Mekendry, C (2010) Mayors climate protection agreement. [Online]. In N Cohen (ed.). Green cities: An A-to-Z guide. Thousand Oaks, CA: Sage Publications. Available from: https://proxy.library.georgetown.edu/login?url=http://search.credoreference.com/content/entry/greencities/mayors_climate_protection_agreement/0 [Accessed 14 June 2016].} That Agreement specifically lists a number of actions that mayors may take to meet or exceed the Protocol goals in their cities.\footnote{Id.} Similar views have given rise to a conflict between state and local governments over the Environmental Protection Agency’s (EPA) Clean Power Plan, where 26 state attorneys general have filed suit against EPA, but the National League of Cities, U.S. Conference of Mayors, and numerous individual cities are participating as \textit{amici} in support of EPA’s plan.\footnote{Julian Spector, \textit{Cities and States are Split Over Obama’s Clean Power Plan}, CityLab (Dec. 18, 2015), available at http://www.citylab.com/weather/2015/12/clean-power-plan-epa-cities-states/421896/} On these issues, some cities have staked out policy and litigation stances independent of their parent states. Such actions do not constitute local laws, and they may be less susceptible to undermining via state intervention. But in response to similar conflicts that have manifested in environmental lawmaking on the part of local governments,\footnote{Similar conflicts are also playing out between states and localities in areas such as minimum wage laws, gay and transgender policies, menu-labeling requirements, and others. \textit{See, e.g.}, Paul A. Diller, \textit{The City and the Private Right of Action}, 64 Stan L. Rev. 1109, 1139 (2012).} states have acted to revoke authority from localities on the issues in question.

One explanation for the rise of these state and local dynamics may be the intertwining of conservative politics and animus toward environmental protections.\footnote{See, e.g., David W. Case, \textit{The Lost Generation: Environmental Regulatory Reform in the Era of Congressional Abdication},” 25 Duke Envtl. L. & Pol’y F. 49, 71 (2014) (“Legislative gridlock and partisan polarization on environmental and most other issues not only intensified following the election of President Obama in 2008, but has since reached historically high levels.”); \textit{see also}, \textit{e.g.}, Edward Flattau, \textit{FROM GREEN TO MEAN: THE GOP’S DOWNWARD ENVIRONMENTAL SPIRAL}, Los Angeles: The Way Things Are Publications 31, 34, 68, 73, 107-11 (2016) (describing the conservative base of Republican voters as “consider[ing] environmental regulation a governmental intrusion on individual freedom,” and detailing the rise of anti-environmental sentiment in the Republican party); \textit{cf.}, Jeanette Sadik-Khan & Seth Solomon, \textit{Street Fight: Handbook for an Urban Revolution} 4, New York: Viking Press (2016) (noting that transit initiatives in New York City proposed by the administration of Mayor Michael Bloomberg were opposed by people “skeptical of any government action that was environmental, healthy, or ‘vaguely French’”); Natural Resources Defense Council, \textit{“2015 Anti-Environmental Budget Riders,”} https://www.nrdc.org/resources/2015-anti-environmental-budget-riders (listing numerous riders in the United States Congress designed to keep aspects of environmental rules from being funded or operational); Shi-Ling Hsu, \textit{The Accidental Postmodernists: A New Era of Skepticism in Environmental Policy}, 39 Vt. L. Rev. 27, 29 (2015) (“the complexity of some new environmental challenges has partisans coping with their ignorance with reflexive skepticism and instinctive hostility to proxy enemies. Arguments over climate change, hydraulic fracturing, and the genetic modification of foods have each generated a good deal more heat than light, in part because solid conclusions have remained elusive.”).} The influence of partisan
politics on the state and local relationship has long been an American reality.\textsuperscript{124} In parts of the country with a more conservative statewide bent, cities are often more amenable—and potentially more in need—of environmental regulation. When cities attempt to act out those goals of the urban populace, state lawmakers may work to reject this kind of policymaking in their states. Another explanation is the success of business interests at the state level, and corporate interests that value uniform standards over local innovation.\textsuperscript{125}

Whatever the motivation, removal of local authority to act on environmental issues has become a risk for local governments acting to exercise independent authority. Unlike conflicts between the federal and state governments, strongly articulated principles of federalism do not advocate in favor of one body versus another. Instead, states can accomplish the alteration of local power in a number of ways, without implicating in most cases larger principles of allocation of power. States may, for instance, pass their own regulatory schemes that take over the field. In such cases, even when a state legislature does not explicitly state its intent to do away with local laws, passage of the state scheme will often be sufficient to impliedly preempt any separate local action. States may also expressly declare their intent to preempt local laws when establishing a comprehensive—or quasi-comprehensive—set of rules governing an issue. Finally, and most relevant here, states can pass a law that does nothing more than remove local power over a certain

\textsuperscript{124} Frank J. Goodnow, \textit{Municipal Home Rule}, 21 Political Science Quarterly 1, 88 (1906) (“[t]he legislature, which under the American system exercises the state control over cities, is, and must of necessity be, the most distinctly political body in the state. It is in the legislature that questions of state policy must be determined. In the elections to the state legislature, party influences must be controlling. It is almost futile to expect that a body whose members are selected as a result of a distinctly political struggle and whose functions are so exclusively political in character, shall, when it comes to exercise its control over cities, cease to be governed by partisan political considerations. That a large portion of the legislation of the American commonwealths with regard to city affairs has been and is actuated by such considerations is a fact so well known that neither evidence nor illustration is needed; it is a fact of which public opinion takes judicial notice.”)

\textsuperscript{125} See, e.g., Paul Diller, \textit{Intrastate Preemption}, 87 B.U. L. Rev. 1113, 1134 (2007) (“The most common opponents of the assertion of local authority for regulatory purposes are businesses.”)
issue. All of these state actions reflect attempts to alter the authority that would otherwise be enjoyed by local governments under the home rule framework.

A. Types of State Action

1. Implied Removal of Local Authority

Much of the discussion on state control over local environmental authority to date has focused on the ways in which courts assess whether a local regulation conflicts with, and is preempted by, state law.\textsuperscript{126} Such preemption can occur in several ways. First, it may be an implied consequence of state action on a particular subject. The Supreme Court and others have recognized two forms of implied preemption: field preemption and conflict preemption.\textsuperscript{127} In the former, judges may see state occupancy of a field as eliminating local authority to act on related issues. "The more pervasively and thoroughly the legislature has regulated a field, the argument goes, the more likely it is that the state legislature ‘intended’ to completely occupy that field and not allow for local regulation, even if the legislature never expressly declared such an intent."\textsuperscript{128}

The other kind of implied preemption is known as conflict preemption. The conflict preemption analysis can be further divided into “physical impossibility” and “obstacle” categories.\textsuperscript{129} The physical impossibility test is limited to those cases “in which it would be literally impossible for someone to comply with both statutes;”\textsuperscript{130} stated another way, the question is whether a local ordinance “permits an act prohibited by a statute or prohibits an act permitted by a statute.”\textsuperscript{131} If state law is construed to permit everything not prohibited, then the possibility for preemption of

\textsuperscript{128} Paul Diller, Intrastate Preemption, 87 B.U. L. Rev. 1113, 1153 (2007).
local measures under this theory is very strong. Even without such a strong interpretation of conflict, preemption may occur where a state or local measure presents an “obstacle” to achieving the purposes and objectives of, respectively, the federal or state statute.

In the environmental context, implied preemption has come up in a number of cases involving local limits on natural gas extraction accomplished via hydraulic fracturing, or “fracking.” For instance, in West Virginia, a local fracking ban was found to be preempted by provisions in the West Virginia Code. The court relied on “the State’s interest in oil and gas development and production throughout the State” to find that the Code should be interpreted to provide for exclusive control of oil and gas development by the West Virginia Department of Environmental Protection. Colorado courts have also employed an implied preemption analysis to assess whether local regulations pose “operational conflicts with state objectives.” Other courts, including those in New York and Pennsylvania, have considered local fracking regulations within the context of existing state oil and gas law, and found that such state laws could not be read to imply total preemption of the field. As a result, local measures regulating some aspects of fracking were permitted. This kind of implied preemption analysis may be employed whenever arguably relevant state law operates as a backdrop to a local activity; the precise analysis will vary by state.

2. Express Removal of Local Authority

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132 Id.
134 Id. at 968 (citing Northeast Natural Energy LLC v. City of Morgantown, No. 11-C-411, 2011 WL 3584376, at * 9 (W. Va. Cir. Ct. Aug. 12, 2011)).
State removal of local authority may also come much more directly, in two different ways. First, express preemption of local authority may be accomplished through state legislation on a subject that includes a clause expressly preemption local authority to regulate in the area. Although courts may again engage in various interpretations of legislative intent when confronted with apparently express preemption, “it is well established that within constitutional limits Congress may pre-empt state authority by so stating in express terms.” The same is true of state legislatures. Thus, a state may preempt local laws by regulating in the same field as a local government, and noting its intent to preempt local authority. Second, and distinctly, states may enact legislation explicitly aimed at circumscribing the grant of home rule power with regard to a particular issue. Such laws do not establish state law in the area, but instead function only to remove local authority to regulate on the topic in question. This kind of removal of local authority does not implicate preemption doctrine, but rather gets to the heart of home rule authority. Express removal of authority can take either of these forms, or may be a hybrid of the two.

The focus of this Article is on those instances where the explicit removal of local authority is the sole or primary function of the state legislation. It therefore does not undermine the analysis here to concede that where a state has a long history of regulation in an area that would rise to the

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137 Indeed, some state courts require an express statement of intent to preempt before any such preemption will be found. See, e.g., Uma Outka, Intra-State Preemption in the Shifting Energy Sector, 86 U. Colo. L. Rev. 927, 968, 983 (2015) (describing New York and Kansas state courts as “avoiding intrastate preemption absent express legislative intent”).


140 See, e.g., Kristen van de Biezenbos, Where Oil is King, Fordham Law Review (2016) (describing examples of targeted preemption of local authority to regulate natural gas extraction).

141 See, e.g., Texas House Bill 40 (2014) (House Bill 40 cites the state framework for regulation of oil and gas activities and notes that “[i]t is in the interest of this state to explicitly confirm the authority to regulate oil and gas operations in this state. The legislature intends that this Act expressly preempt the regulation of oil and gas operations by municipalities and other political subdivisions, which is impliedly preempted by the statutes already in effect.” H.B. 40 goes on to more explicitly remove the authority of local governments to “enact or enforce an ordinance or other measure, or an amendment or revision of an ordinance or other measure, that bans, limits, or otherwise regulates an oil and gas operation within the boundaries or extraterritorial jurisdiction of the municipality or political subdivision.”).
level of occupation of the field, or passes new, comprehensive regulations, a state law that also
includes an express preemption clause may not be governed by the discussion below. State actors
are generally sophisticated, however, and removal of local authority is almost universally
accompanied by statements of state interest in and occupation of a particular field. Thus, expressly
carving out the framework in this Article from those instances where a state asserts its interest, or
gestures to state laws that do not truly occupy a field, would create an artificial and unhelpful
distinction. We are talking here about explicit removal of local lawmaking authority over particular
matters, where the rules of preemption are inapplicable because of the lack of substantive state
regulation on the subject.

Reactive, targeted elimination of local authority by state legislatures goes beyond the more
typical move of state legislatures that would preempt local laws by establishing statewide schemes of
maximum, minimum, or non-discretionary standards. At the core of the new elimination of local
authority appears to be “state decision makers’ suspicions about local decision making,” and the
growing prevalence of these state actions may give the lie to arguments advanced by some local
government scholars that “direct state efforts to overturn local governmental decisions are relatively
rare.” As partisan splits and views on environmental policy continue to divide the state and local
levels of government, such attempts to stop local action frowned upon by the state may become
more frequent. These state efforts may operate to limit local involvement in environmental law and
policy, and to thereby ensure that certain environmental issues are left unaddressed.

144 Id. at 33 (characterizing literature of local government scholars such as Richard Briffault that attribute a considerable amount of power to local governments).
While far from a new trend, the targeted removal of local authority over environmental and other matters has negative consequences. Such state action can pose a threat to local innovation and ideals of governance, as it “suppresses the interest of municipal citizens to participate directly in decisionmaking which affects them.” Moreover, this state behavior is contrary to the very goals of the home rule movement. That movement was designed to get away from piecemeal grants of authorities to localities, and the influence of special interests at the state level. Systematic removal of local authority because states dislike or disagree with local policy solutions undermines the intention of home rule, as well as citizen involvement and the ability to work toward a clean environment. Using plastic bag bans as an example, the discussion below will show how the current state of the law may fail to protect against targeted state removal of local authority over environmental measures.

B. Case Study—Banning Bag Bans

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146 Gerald E. Frug, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS 53, Princeton University Press: Princeton (1999) (“it seems ironic that city powerlessness became firmly established as a legal principle during the last few decades of the nineteenth century, the period described in Arthur Schlesinger’s seminal history of cities entitled The Rise of the City. On the other hand, it may not be ironic at all. As Schlesinger argues, urbanization reinforced the felt need for controls over city power.”)


148 George D. Vaubel, Toward Principles of State Restraint Upon the Exercise of Municipal Power in Home Rule, 22 Stetson L. Rev. 643, 644 (1993); see also Rita Barnett-Rose, Judicially Modified Democracy: Court and State Pre-Emption of Local GMO Regulation in Hawaii and Beyond, 26 Duke Envtl. L. & Pol’y F. 71, 105 (2015) (“by finding that the local ordinances were pre-empted by state and federal law, the district court did make the radical decision to remove local citizen participation in the democratic process”); David B. Spence, The Political Economy of Local Vetoes, 93 Tex. L. Rev. 351 (Dec. 2014)(describing the “long tradition in economics, positive theory, and other quasi-utilitarian traditions of examining jurisdictional conflicts . . . using the matching principle, which would house regulatory authority at the lowest level of government that encompasses (geographically) the costs and benefits of the regulated activity”).


A more specific example may help to elucidate the type of state action at issue. Plastic bag bans, and bans on those bag bans, provide a straightforward instance of targeted state preemption of local measures. This Article will provide a brief background on the ways in which these bans have been implemented in a number of states. It will then assess how challenges to such state laws would proceed under a typical home rule analysis.

Briefly, common practice throughout the United States has long been to distribute plastic bags freely along with any purchase. The waste and pollution that results from the production and disposal of all of these plastic bags is a matter of concern for many localities. In an effort to discourage use of these bags, a number of municipalities have passed laws mandating that retailers charge a fee for any plastic bags they hand out; some have banned the use of plastic bags entirely. These laws are intended to remedy the pollution of landscape and water attributable to disposal of plastic bags, prevent that waste from ending up in a landfill, and correct for the difficulty of recycling this type of material. Although there are currently robust debates being had about whether such bans result in net positive environmental impacts, it appears uncontroverted that cities that have instituted such fines and bans have seen a significant drop in plastic bag use. In many instances, these fees or bans form part of a larger environmental and sustainability portfolio for cities.

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152 Comprehensive information on these kinds of bans and charges nationwide is available via Novolex, a packaging company. To use mapping tool to find information on all 50 states, see, e.g., http://www.bagtheban.com/in-your-state.
153 See, e.g., Elisabeth Rosenthal, “Is It Time to Bag the Plastic?,” THE NEW YORK TIMES, Sunday Review (May 18, 2013) (“plastic bags are the bane of recycling programs;” the bags themselves are very difficult to recycle, and, when placed into bins with general plastic, the plastic bags “jam and damage expensive sorting machines, which cost huge amounts to repair.”)
Bans on plastic are not a new solution, nor are they limited to the United States. Within this country, however, some states have responded to local measures by, in essence, banning bag bans. State action to date has not involved explicit regulation of plastic bags or containers, but has instead contained only a prohibition on local action. For instance, following a local measure in Tucson, Arizona that banned the use of plastic bags by local businesses, the state of Arizona passed a law in 2015 stating that cities and counties may neither “regulate the sale, use, or disposition of auxiliary containers,” nor “impose a tax, fee, assessment, charge or return deposit” for auxiliary containers. Similarly, after Columbia, Missouri enacted a ban on plastic bags, the state legislature enacted a measure to prohibit these kinds of local laws. Missouri’s version of a ban on bag bans—passed over a governor’s veto—states that all merchants doing business in the state “must have the option to provide customers with a paper or plastic bag for any item or good purchased. A political subdivision cannot impose any ban, fee, or tax upon the use of paper or plastic bags for packaging any item or good purchased or prohibit a consumer from using a reusable bag.” And Indiana has passed a law revoking from its grant of home rule “the power to . . . ‘regulate, or adopt or enforce an ordinance to regulate’ the manufacture, distribution, sale, provision, use, or disposition or

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157 Arizona SB 1241 (2015). After a lawsuit was filed challenging the legitimacy of SB 1241 for, among other things, violating the title and single-subject mandates in the state constitution, a revised version of the bill was passed in 2016. See HB 2131, House Summary 3.14.16.

158 Missouri HB 722.
disposal of auxiliary containers, or impose any prohibition, restriction, fee, or tax with respect to auxiliary containers.” Similar actions have been taken in Wisconsin, Idaho, and Michigan.

In Arizona, the statewide ban on plastic bag bans has been challenged in court on a number of bases, including violation of the state’s home rule doctrine. The plaintiff in that lawsuit is a member of the City Council in Tempe, Arizona; she alleges that the Council in Tempe was prepared to move forward on a local bag ban, but the process was disrupted by SB 1241. No decision has yet been issued in this case. It may be possible, however, to predict the likelihood of success of this claim under a traditional home rule analysis. The analysis below will discuss the possible ways that a court might rule on this issue. Arizona is a constitutional home rule state, and the claim against the state’s ban on bag bans based on home rule grounds was styled as an infringement on an area of local interest. Discussion of the state and local spheres relevant to this issue is therefore warranted. Further, this Article will take the liberty of projecting what might happen if the same kind of ban were passed in a legislative home rule state, where determinations of home rule authority depend more on an assessment of the state action as general legislation. While both analyses will necessarily vary by state, and by the language of the state and local legislation at issue, Arizona’s example may provide a helpful demonstration of the barriers that local environmental measures face when confronted with targeted state action.

1. Constitutional Home Rule

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159 House Enrolled Act No. 1053, State of Indiana, Second Regular Session of the 119th General Assembly (2016) (amending Section IC 36-1-3-8). Far from being a typical course of action by the state government, the only other example of this kind of removal of local power in Indiana’s home rule statute is directed at local measures requiring participation in a Section 8 housing program or similar programs. IC 36-1-3-8; 36-1-3-8.5.
161 2016 House Bill No. 372.
164 Id.
As noted, in states with constitutional home rule provisions, localities are generally granted authority over all topics of local concern. The determination of whether something is of local concern is left to the courts, conferring a great deal of power upon the judiciary. Judicial assessment of the “local” nature of an issue generally comes down to a multi-factored analysis,\(^\text{165}\) and it is often difficult to predict whether a court will characterize a particular topic as a matter of state or local interest.\(^\text{166}\) Historically, however, courts have given broad constructions to state interests and narrower interpretations to their local counterparts.

In Arizona, the state constitution establishes the right of cities to frame a charter for their own government.\(^\text{167}\) There are nineteen different charter cities in Arizona, each with unique charters.\(^\text{168}\) These cities must act according to the powers laid out in their charters; thus, they must be able to point to specific grants of authority that either directly or impliedly provide authority for any action taken.\(^\text{169}\) In general, the charter power includes “all that is necessary or incident to the government of the municipality[].”\(^\text{170}\) Arizona courts have read grants of charter authority to impliedly include the police power, which can be used to address things like regulation of billboard lighting\(^\text{171}\) and fencing requirements.\(^\text{172}\) In other circumstances, however, such as the tax power,\(^\text{173}\) courts have found local action improper absent a more specific grant of authority.

“[W]here a home rule city has power by its charter it may act in conformity with such power not only in matters of local concern, but also in matters of state-wide concern, within its territorial

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\(^{167}\) Ariz. Const. art. XIII, § 2.


limits,” provided there are no conflicting state rules.\footnote{City of Tucson v. Tucson Sunshine Climate Club, 64 Ariz. 1, 6, 164 P.2d 598, 601 (1945).} There appears to be no bright-line test for establishing whether something is of state or local concern. Instead, courts engage in highly fact-intensive inquiries, looking at the characteristics of the action and its relative impacts at the state or local level.\footnote{Strode v. Sullivan, 72 Ariz. 360, 366, 236 P.2d 48, 52 (1951) (detailing the “court’s views on different fact situations” with regard to whether the subject matter of a local law “was of local concern or statewide interest.”); see also, e.g., City of Tucson v. State, 235 Ariz. 434, 440 (Ct. App. 2014) (finding that rules governing local elections are solely of local interest); City of Phoenix v. Harnish, 214 Ariz. 158, 164 (Ct. App. 2006) (eminent domain is a matter of state interest).} The state is barred from regulating the conduct of local governments on purely local issues. Assuming proper authority on the part of the city, however, both cities and states “may legislate on the same subject when that subject is of local concern or when, though the subject is not of local concern, the charter or particular state legislation confers on the city express power to legislate thereon.”\footnote{City of Tucson v. Rineer, 193 Ariz. 160, 162, 971 P.2d 207, 209 (Ct. App. 1998).} But where “the subject is of statewide concern, and the legislature has appropriated the field by enacting a statute pertaining thereto, that statute governs throughout the state, and local ordinances contrary thereto are invalid.”\footnote{Id.}

In the context of the challenge to bag bans as applied in Tempe, there seems to be a good argument that regulation of bags would be a proper exercise of local power in Arizona. Bag pollution has a localized impact on environmental health, and cities are granted police powers to address such issues.\footnote{See Tempe, Arizona City Charter, available at http://www.tempe.gov/home/showdocument?id=8594 (“The municipal corporation now existing and known as the ‘City of Tempe’ shall remain and continue to be a body politic and corporate under the name of the ‘City of Tempe’ with all powers, functions, rights, privileges and immunities possible under the Constitution and general laws of Arizona as fully as though they were specifically enumerated in this Charter, and all of the powers, functions, rights, privileges and immunities granted or to be granted to charter cities and to cities and towns incorporated under the provisions of Title 9, Arizona Revised Statutes, not in conflict herewith. The enumeration of the powers, functions, rights, privileges and immunities made in this Charter shall never be construed to preclude, by implication, or otherwise, the city from doing any and all things not inhibited by the constitution and laws of Arizona.”).} The state may still, however, be able to regulate in the area if it establishes a simultaneous state interest. Senate Bill 1241 certainly attempts to do this, stating plainly that “[t]he regulation of the sale, use and disposition of auxiliary containers is a matter of statewide concern.”\footnote{SB 1241.}
The precise question of whether such regulations, or, more broadly, uniform business or environmental standards, constitute a state interest has not been decided in Arizona. Given the general latitude in assessing whether something of state interest, however, it appears likely that regulation of auxiliary containers would be deemed of state interest, and that the state would be permitted to override local bans.\textsuperscript{180} Home rule challenges to the ban on bag bans would therefore likely be unsuccessful under a traditional analysis that ends at this point.

### 2. Legislative Home Rule

As noted, Arizona employs a system of constitutional home rule through charter grants. To make the discussion more nationally applicable, however, this Article will also take the liberty of extrapolating similar facts to a legislative home rule system to see how local bag bans would fare in that situation. Generally speaking, in states using legislative grants of home rule authority, that authority is expressly limited by conflicting general state laws.\textsuperscript{181} Thus, local authority is permitted only as long as the state has not issued a contrary statement.\textsuperscript{182} Any flexibility that courts may have to preserve local autonomy using flexible interpretations of state and local interests therefore does not apply in such systems.\textsuperscript{183} “When a state legislature in a legislative home rule state does expressly deny localities the power to act in a field, the state denial of local power is conclusive and successfully preempts the local ordinance, unless that prohibition itself is wrongful.”\textsuperscript{184}

\textsuperscript{180} See, e.g., \textit{City of Tucson v. State}, 957 P.2d 341, 344 (Ct. App. 1997) (noting that, in deciding whether something is of statewide concern, legislative declarations to that effect are entitled to deference, and that the court must engage in a balancing test to evaluate whether local or state interests are paramount).

\textsuperscript{181} See, e.g., Alaska Const. art. X, § 11 (2009) (“A home rule borough or city may exercise all legislative powers not prohibited by law or by charter.”).

\textsuperscript{182} Cf. Gerald E. Frug & David J. Barron, CITY BOUND: HOW STATES STIFLE URBAN INNOVATION 69, Cornell University Press: Ithaca (2008) (noting that, in Massachusetts, the home rule grant permits cities “to act when the state legislature has not said [they] cannot act”).


One of the only real limitations on this kind of denial of local power is the prohibition against special legislation. As noted, special legislation is legislation that treats cities, or classes of cities, within a state differently. Functionally, prohibitions on special legislation have not presented a great barrier to state action. Generally speaking, “it is not what a law includes that makes it unconstitutional as a special law, but what it excludes.”

While states apply a variety of tests, the formulation generally looks only to whether the law “applies alike to all local governments in terms and in effect.” If that is the case—and even if it is not, where certain exceptions apply—the prohibition on special legislation will not block a state’s ability to act. Arizona’s bag ban applies to all cities and counties in the state; therefore, it is likely to be found to be a general law under a traditional analysis.

The analysis for a variety of environmental initiatives by localities would likely look similar to that for bag bans in both constitutional and statutory home rule states. In consequence, the narrative to date has been that little can be done in terms of the home rule framework to combat state measures that target local action. The historic deference to state action, and legal ambiguity of localities, makes it possible for states to chill the experimentation of their local governments on a number of policy issues. For this reason, conventional wisdom to date appears to have been that there is little to be done to combat reactive state legislation in the environmental context, at least within the confines of the home rule analysis.

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186 2 McQuillin Mun. Corp. § 4:43 (3d ed.)
189 See, e.g., *Arizona Downs v. Arizona Horsemen's Found.*, 637 P.2d 1053, 1061 (1981) (“a law will be general if it applies to all cases and to all members of the specified class to which the law is made applicable”).
IV. Judicial Allocation of State and Local Power

Thus, if the protection of local progressivism from reactive state laws is going to occur, it is likely to require answers beyond the home rule framework as traditionally applied. That does not mean, however, that those who wish to advance local environmental policies are necessarily without recourse. Running parallel to the strict formulations of home rule are a number of cases in which judges, under a variety of rationales, decide questions of power allocation in favor of the locality. Where judges are asked to assess actions by a higher level of government that appear designed principally to eliminate authority at a lower level, they may alter their analysis of state and local relations to reveal and halt these state goals. This tendency for judges to assume an active role in allocating authority between state and local has a long history in local government law, dating back to the debates between Judges Dillon and Cooley. Courts have long been a powerful influence in determining the proper allocation of state and local authority and how best to interpret the strictures of home rule in a given situation.191

The willingness of judges in some instances to step outside the more formal, rigid subordination of the local to the state has been deemed the “shadow doctrine” of local government law.192 Elements of the Supreme Court’s line of so-called “animus” cases related to the Equal Protection Clause may form another part of this shadowy element of local government law. Both kinds of cases, described in greater detail below, have provided bulwarks in some instances against state incursions on local authority, and they illustrate a longstanding truth about home rule: given the lack of constitutional language governing the distribution of power between state and local governments, judge-made doctrine and assumptions play a sizable role in the final outcome of home

191 Cf. Neil Littlefield, Metropolitan Area Problems and Municipal Home Rule 18, Buffalo: William S. Hein & Co., Inc. (1985) (“The doctrine of an exclusive power of a city with respect to its municipal affairs is entirely a judicial invention in aid of the underlying principles of municipal home rule having no basis in the constitutional language of most home rule provisions.”).
rule determinations. Neither the “shadow doctrine” as it currently stands, nor the equal protection doctrine, are likely to be easily applied in the environmental context. But their ability to preserve local policymaking may point to other means of forging a path forward. To the extent that applicable substantive protections can be found, courts may be empowered to push back against reactive state action in the face of local environmental policymaking.

A. The “Shadow Doctrine” of Local Government Law

In discussing the legacy of Dillon’s Rule and the modern realities of home rule, a number of scholars have made the case that there exists a protected sphere of judicially recognized local authority. While this sphere is bound by no explicit rules, its presence has nonetheless been posited as an explanation for why certain cases come out differently in the home rule framework. Courts may decide conflicts in favor of localities under this “shadow doctrine” of local government law where they are motivated to find “that communities should be empowered to choose policies consonant with local values.”193 Thus, in fields such as zoning, land use, and school financing and districting, courts have often upheld local authority against intrusions by the state.194

While these cases point to a means by which judges have elected to escape the strict outcomes of the home rule analysis, they are unlikely to apply well to environmental law cases across the board. Although land use and zoning have been recognized as matters predominantly of local authority, the same kinds of cases do not appear to exist more generally for environmental law. That result is perhaps not unusual; as noted, many environmental issues and impacts bleed beyond local boundaries. Thus, unlike some fields involving entirely local impacts,195 the opposite principles

193 Id. at 409.
are often in play in the environmental context, where there has long been a push toward lawmaking at increasingly higher levels of government. An argument could, of course, be advanced for looking at environmental issues on a case by case basis. But without a principle as to why local laws should govern on such topics, and without a more specific grounding principle, environmental law as a uniquely local endeavor is a hard case to make. In consequence, while the “shadow doctrine” may provide an exception to the home rule analysis for certain kinds of cases, it is unlikely to offer any particular relief in the bag ban example, or in other kinds of reactive, targeted state legislation aimed at local environmental measures.


Another example of local government-friendly outcomes in assessing state and local conflicts comes from a series of decisions by the United States Supreme Court. These cases have considered scenarios that, like bans on bag bans, are targeted state removals of local authority to carry out what might be characterized as progressive policies. In these cases, the Court has questioned states’ ability to eliminate local power to enact laws that advance the individual liberties of citizens. The analysis in these cases has not proceeded along the lines of typical equal protection doctrine analysis. While many explanations for this deviation have been proffered, one that a number of scholars have adopted is a view of the animus cases as a protection of local experimentation, a desire to weed out state behavior motivated by animus, or both.196

The Equal Protection Clause of the United States Constitution protects against state legislation that improperly creates classes of persons and treats like classes differently. At the core of the Clause’s protections is an insistence that “government classifications be both rational and free

of illegitimate motivations such as simple dislike of the burdened group.”

The Equal Protection Clause vindicates individual rights, not rights of geographic areas or communities. However, those “[i]ndividual rights in the Constitution constrain state power over municipalities.” Thus, “if a state violates the constitutional rights of individuals, the fact that it does so by changing municipal powers . . . does not insulate it from suit.”

Equal protection doctrine therefore provides an additional layer of consideration to the typical home rule analysis. In addition to the factors already discussed, the state cannot make changes to local powers that violate the constitutional rights of its citizens.

The Supreme Court made this point explicit in Romer v. Evans, 517 U.S. 620 (1996). In Romer, the Supreme Court considered another reaction at the state level against local progressivism. In the early 1990s, several cities in Colorado passed laws banning discrimination based on sexual orientation in housing, employment, education, public accommodations, health and welfare services, and other transactions and activities. In response, voters in Colorado adopted by referendum Amendment 2, which “prohibit[ed] all legislative, executive or judicial action at any level of state or local government designed to protect the named class”—that is, “homosexual persons or gays and lesbians.” The Romer plaintiffs challenged Amendment 2 as unconstitutional on equal protection

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200 Id.; see also Seattle School District No. 1 (announcing that “the Fourteenth Amendment forbids ‘placing special burdens on the ability of minority groups to achieve beneficial legislation’”).
grounds. Colorado state courts found that Amendment 2 was subject to strict scrutiny because it infringed the fundamental rights of those affected, and therefore enjoined its enforcement. The case then came before the Supreme Court.

The Court’s equal protection analysis typically looks first to the persons affected by the challenged action. If the affected persons are part of a protected class, the Court will apply strict scrutiny to the law; if they are not, then the Court will look only for whether there is a rational basis for the legislation. The Romer Court did not find that the affected groups constituted a protected class. Nor did it engage in traditional rational basis review, which would have provided for substantial deference to be given to the state’s proffered explanation for the legislation. Instead, it engaged in what it called rational basis review of the Amendment, but found that, because the law was rooted in legislative animus, it was not supported by a rational basis. Finding no “identifiable legitimate purpose or discrete objective” to the law other than discrimination against a certain class, the Court deemed it impermissible class legislation in violation of the Equal Protection Clause.

Thus, the Romer Court did not apply a traditional suspect class formulation to the question of whether Amendment 2 was permissible. Instead, it employed a rational basis analysis, and found that animus on the part of the legislature cannot form a rational basis for a law. In this way, the case represented a step outside the traditional deference afforded legislatures under the rational basis framework, and offered a means by which the Court could peer behind the law to more closely examine its motivations. The perception of animus on the part of the state in Romer appears to have been the driving factor in this analysis; the same could potentially also be said of United States

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203 Id. at 626.
204 Id. at 631 (1996).
205 Id. at 634 (“laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected”).
206 Id. at 635.
Department of Agriculture v. Moreno and City of Cleburne v. Cleburne Living Center. Together, these cases provide a foundation for the Court’s “anti-animus methodology” that was expanded in Windsor. The foundation of such an anti-animus bent is “that just as individuals have a moral and sometimes legal duty not to act maliciously toward others, the group of people elected as representatives . . . has a moral and sometimes constitutional duty not to act maliciously toward a person or group of people. Therefore, “legislation must have some substantial justification beyond ‘we don’t like you,’ ‘we couldn’t care less about you, or ‘we just want it that way.’” Viewed through this lens, the animus cases focus more on “legislative process than [on] legislative results;” they do not declare a fundamental right to certain benefits, but disallow legislative process motivated by a desire to harm a disadvantaged group. Of course, critics of the animus cases may characterize these opinions as impermissible judicial determination of substantive policy that overrides popular will. In this light, the willingness to step outside the bounds of traditional rational basis review and peer behind the curtain to examine legislative motivations is outcome-driven and outcome-determinative. Nevertheless, the animus cases have made clear the impermissibility of legislation that has as its primary purpose the infliction of injury or indignity. In the same way as the special legislation doctrine protects against the singling out of particular cities for favorable or unfavorable

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207 413 U.S. 528 (1973). At issue in Moreno was the exclusion from the federal Food Stamp Act of any household that contained a person not related to another person in the household. Id. at 529. In examining the rationale for the exclusion, the Court found that it had been enacted to prevent the participation of “hippies” or those in “hippie communes.” Id. at 534. The Court concluded that “a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate government interest,” id., and that the exclusion therefore lacked a rational basis. Id. at 538.

208 473 U.S. 432 (1985). In Cleburne, the Court considered the denial of a special use permit for the operation of a group home for the mentally retarded. Id. at 435. The Court rejected a formulation that mental retardation was a quasi-suspect class, id. at 442-47, but nevertheless found the denial improper because it lacked a rational basis and was motivated instead by “negative attitudes” and “fear.” Id. at 448-50.


210 Id. at 185 (emphasis in original).

211 Id. at 230.

212 Id. at 230-31.

213 Id. at 243.
treatment, the Equal Protection clause protects against such singling out of individuals.\textsuperscript{214} Thus, the “core antianimus requirement” of the Equal Protection Clause\textsuperscript{215} provides a check on state action outside of the home rule framework.

Several scholars have drawn a more explicit connection between the animus cases and home rule. Romer, Windsor, and others have been characterized as containing “whiffs of federalism,”\textsuperscript{216} “traces of local constitutionalism,”\textsuperscript{217} or, more explicitly, a prohibition on state preemption of unpopular local political processes.\textsuperscript{218} While theories of these decisions as having an element of localism vary, the arguments boil down to a rejection of a higher level of government’s interference with policy experimentation that will further the rights of citizens at a lower level.\textsuperscript{219} This process-based explanation means that the cases establish no substantive guarantees of benefits, but simply force the federal or state government to “back off of . . . particular intrusion[s].”\textsuperscript{220} This kind of support of local constitutional enforcement may uphold parochial policies as well as progressive

\textsuperscript{219} See Marc R. Poirier, “Whiffs of Federalism” in United States v. Windsor: Power, Localism, and Kulturkampf, 85 U. Colo. L. Rev. 935, 976-77 (2014) (explaining Justice Kennedy’s decision in Windsor as motivated by the Defense of Marriage Act’s blocking of “the piecemeal, checkerboard transitional process of states responding to citizens’ evolving perceptions of human need and dignity,” and that the “whiffs of federalism” in Windsor are rooted in the Court rejecting “the federal government’s intr[usion] on the historic role of the states”); Lawrence Rosenthal, Romer v. Evans as the Transformation of Local Government Law, 31 Urb. Law. 257, 268-69 (1999) (positing that Romer stands for the proposition that “it is irrational to deny local governments the power to address local problems, especially when it leaves a discrete class in jeopardy of having their right to invoke generally applicable legal protections rendered illusory”); David J. Barron, The Promise of Cooley’s City: Traces of Local Constitutionalism, 147 U. Pa. L. Rev. 487, 495 (1999) (“Constitutional freedom can be secured only if diverse communities, organized in various towns and cities across the Nation, are encouraged (and permitted) to govern themselves in accordance with a set of common principles that they know to be more enduring than the preferences of any temporary majority.
ones. But it also ensures that “states may not preclude their local political institutions from promoting a norm of constitutional equality that lies beyond direct judicial enforcement.”

These cases therefore provide several different ways to think about and challenge state action that burdens the ability of localities to protect the constitutional rights of their citizens. The added layer of protection against state incursion on local authority is unlikely to come into play with regard to bag bans or other environmental issues, however. To be sure, targeted laws at the state level that bar certain local actions may be motivated by animus or industry interests. As in many other areas, local regulations on environmental issues such as plastic bag bans are likely to pique the interest of industries that may be affected by the regulation, and encourage those industries to seek redress at the state level. In these fights, localities often lose out to special interests at the state level, as they have much weaker relative lobbying influence. But while environmental harms endanger humans, restrictions on environmental protections do not touch on recognized individual liberties. Any inquiry under the Equal Protection Clause, even under the slightly modified animus analysis, will require definition of the burdened group, and the rights being burdened.

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221 David J. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. Pa. L. Rev. 487, 548-49 (1999) (“If this framework accords local governments a measure of freedom from intrusive judicial remedies that would impose burdensome positive constitutional obligations upon them, it also accords them constitutional protection against state attempts to prevent them from assuming such obligations when they believe it necessary to do so.”)
222 *Id.* at 571.
223 *Id.* at 548-49 (explaining that the defense of local constitutionalism “proceeds . . . from a structural conclusion that substantive constitutional rights sometimes presuppose the existence of a local decision-making process capable of ensuring the protection of those rights.”)
224 *Cf.* Shannon M. Roesler, *Federalism and Local Environmental Regulation*, 48 U.C. Davis L. Rev. 1111, 1137 (2015) (“Because the benefits of environmental regulation are diffuse . . . but the costs are concentrated in a given industry or group of industries, the political and administrative processes are often dominated by industry interests.”)
225 *Cf.* Paul Diller, *Intrastate Preemption*, 87 B.U. L. Rev. 1113, 1114 (2007) (noting that “[b]usiness and industry groups are the litigants who most commonly assert preemption to block local policies that may impose additional costs and regulatory burdens.”)
227 See, e.g., Paul A. Diller, *The Partly Fulfilled Promise of Home Rule in Oregon*, 87 Or. L. Rev. 939, 966-67 (2008) (noting that “[t]he interest groups pushing for express preemption provisions are often well-funded and well-organized,” while advocates for local authority may be less well-funded and/or more susceptible to bargaining away local authority as part of legislative negotiations).
Carving out a special class of persons is difficult in the environmental context, where there is not a class of persons being singled out. Instead, the harm is acted upon a natural resource, or, viewed another way, on the right of citizens to develop policy solutions for a particular problem. In consequence, claims invoking the federal Equal Protection Clause to guard against state revocation of local authority to act on environmental issues would likely be rejected before any kind of analysis of state animus could be reached. Thus, while the Equal Protection Clause provides some avenues around the home rule analysis, it is likely to be difficult to apply in the context of local environmental laws.

C. State Environmental Protections

Both the “shadow doctrine” of local government law and the animus line of cases and their possibly localist underpinnings illustrate the ways in which judges are involved in sorting out state and local power. They also provide a good example of how judges react when uncomfortable with the result of the typical division of power. To date, similar kinds of reasoning have not occurred in the environmental law context. Both courts and scholars have been stymied in combatting the targeted preemption of local environmental efforts by the seemingly implacable nature of the distribution of state and local power. The kinds of reactive state legislation currently being seen, however, may offer an impetus for judges to examine more carefully possible bases for protection of a local right to innovate in support of environmental protections. Outside of the home rule context,

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229 Equal protection claims focused on harm to resources have been discussed, but have a low likelihood of success. See, e.g., William D. Araiza, Democracy, Distrust, and the Public Trust: Process-Based Constitutional Theory, the Public Trust Doctrine, and the Search for A Substantive Environmental Value, 45 UCLA L. Rev. 385, 407 (1997).

230 Where equal protection claims have arisen in the environmental context, it is generally in the form of disparate impact claims. Disparate impact claims are highly fact-specific, however, and require proof that a policy has worked a disproportionate harm upon a class of persons. While those impacts, if manifested as a result of a ban on plastic bag bans, could potentially offer a means of challenging the state action, such a strategy is unlikely to be available for a number of years, and is outside the discussion of the home rule framework.

231 See, e.g., David B. Spence, The Political Economy of Local Vetoes, 93 Tex. L. Rev. 351, 376 (2014) (noting that courts’ consideration of preemption questions in the fracking context have, to date, buried considerations involving the extent of home rule powers “behind an ostensibly mechanical application of the statutory (and, where applicable, constitutional) rules”).
scholars have recognized that where state constitutions establish a right to a clean environment, state ability to forestall local action on an environmental issue may be called into question.\textsuperscript{232} And even where state constitutional protections do not exist, it has been suggested that the public trust doctrine could potentially be used as a kind of canon of construction in interpreting state action, thereby providing a basis for environmental protection, or at least a barrier to environmental degradation.\textsuperscript{233}

The goal of the discussion below is to incorporate these ideas into the realm of state and local government relations. Again using bans on bag bans as an example, it argues that state constitutional protections and the public trust doctrine may provide justification for judicial support of local innovation on environmental protection. Home rule precedent leaves open the door for judges to construe state power liberally, and nothing proposed herein is likely to provide absolute support for local autonomy. But there may also be a path open to judges who, confronted with reactive, targeted incursions on local solutions, see fit to infuse the traditional analysis of state action with layers of environmental protection. To the extent they exist, state constitutional provisions may provide a basis for finding state laws improper at the outset. And even where such provisions are not as straightforward or easily applied, permutations of the public trust doctrine may establish a basis for courts to bring a more environmentally friendly home rule analysis out of the shadows.


A number of state constitutions include provisions that establish environmental protections for their citizens. These provisions vary widely in form and scope, and, like home rule provisions, their precise number and parameters are difficult to assess.\textsuperscript{234} In general, these provisions do not


\textsuperscript{234} See, e.g., William D. Araiza, \textit{Democracy, Distrust, and the Public Trust: Process-Based Constitutional Theory, the Public Trust Doctrine, and the Search for a Substantive Environmental Value}, 45 U.C.L.A. L. Rev. 385, 439 (1997) (“approximately two-thirds of state constitutions . . . speak in some way to environmental concerns”); Barton H. Thompson, Jr., \textit{Environmental...
impose affirmative duties on a state, but establish limits on government action. Where these protections exist, the home rule analysis may be fairly simple. Under either a constitutional or legislative home rule framework—or whether looking for a state interest or general legislation—state actions may not contravene the constitution. A constitutional right to a clean environment, or whatever form the provision may take, therefore provides an extra layer of protection for local action in support of that right.

This kind of protection was responsible for the result in the Pennsylvania Supreme Court’s 2013 decision in Robinson Township v. Commonwealth. At issue in that case was state legislation on natural gas drilling that included a clause explicitly preempting all local ordinances governing such drilling. In considering challenges to the state law, the court engaged in a thorough discussion of Pennsylvania’s Environmental Rights Amendment, which states that:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

The court recognized that localities had no inherent powers, and that the Commonwealth had the authority to alter or remove power granted to local governments. But it also acknowledged that “constitutional commands regarding municipalities’ obligations and duties to their citizens cannot be abrogated by statute.” The court found that the state scheme of voiding all local regulations

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Policy and State Constitutions: the Potential Role of Substantive Guidance, 27 Rutgers L.J. 863, 867 (1996) (“Virtually all state constitutions contain one or more provisions specifying environmental or natural resource policies; most include multiple provisions”).

Barton H. Thompson, Jr., Environmental Policy and State Constitutions: the Potential Role of Substantive Guidance, 27 Rutgers L.J. 863, 896 (1996) (“state courts have never ordered a legislature to adopt a particular environmental policy or program based on an environmental policy provision, even in those states where the constitution appears to mandate legislative action”).


83 A.3d 901 (2013).


Id.
regarding fracking, and instead requiring local governments to take measures to accommodate
fracking as needed, forced localities to act in contravention of the constitutional mandate. It further
stated that “[t]he [state] police power, broad as it may be, does not encompass [the] authority to . . .
fundamentally disrupt . . . expectations respecting the environment.” Thus, the portion of the
state legislation preempting local lawmaking was found to be improper.

In the same way, a constitutional provision protecting a right to a clean environment could
support a locality’s power to develop initiatives—such as bans on bag bans—in support of that
right. And a ban on the ability of localities to combat pollution might be seen as a constitutional
violation by the state. While these provisions would not impose any kind of affirmative obligation
on the part of the state, they could potentially protect the right to local policymaking in support of
trust resources. Regardless of whether a state has a legislative or constitutional home rule system, or
even a home rule system at all, state laws may not contravene the state constitution. As seen in
Robinson Township, and, to some degree in Romer and Windsor, state limits on local experimentation in
support of a constitutional goal may be found to be unconstitutional. If so, there would be no need
to address the home rule framework. Under such an analysis, state bans on bag bans would fail as a
matter of constitutional law.

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241 Id. at 978.
242 The exact parameters of this analysis will necessarily differ based on the grant of authority, as the types of
constitutional grants of environmental protection vary widely. See William D. Araiza, Democracy, Distrust, and the Public
Trust: Process-Based Constitutional Theory, the Public Trust Doctrine, and the Search for A Substantive Environmental Value, 45
UCLA L. Rev. 385, 439 (1997) (describing seven types of state constitutional provisions that speak to environmental
concerns, in order from weakest to strongest protection afforded the environment: “(1) authorizations for legislative
action (normally for preservation activities or the contracting of indebtedness to pay for preservation); (2) creation of a
decision-making body charged with resource preservation; (3) creation of a trust fund or other funding mechanism for
preservation purposes; (4) broad statements of a state’s pro-preservation policy or directions to the legislature to protect
certain resources; (5) restrictions on the legislature’s power to alienate certain resources; (6) establishment of certain
resources as the public domain; and (7) conferrals of a right to a clean environment on individuals.”).
2. Public Trust Doctrine

Of course, not all state constitutions incorporate explicit protections of environmental values. Even where these textual protections do not exist, however,243 there may be a path forward for courts to uphold local environmental innovation in the face of contrary state authority. The public trust doctrine is a much-discussed concept that may allow judges to push back on actions by the state that undermine environmental values.244 Both the precise scope and the legal foundation of the doctrine are still very much in flux, and heavily debated.245 In short, however, the concept of the public trust stands for the principle that certain environmental and natural resources are held in trust for citizens by the government. The principal trustee of those resources is the state legislature,246 although trust responsibilities may in some states be delegated to local governments. Originally focused on aquatic resources, the more modern public trust doctrine has proven itself to be much more amphibious, and has been applied to a wider range of natural assets.

Like the legal status of local government, the public trust doctrine is a creation largely of the judiciary.247 Its more modern use is often tied to Illinois Central Railroad Co. v. Illinois, an 1892 case in which the Supreme Court confirmed “that the historic public trust doctrine was an independent limitation on the state’s power to sell or otherwise relinquish control over submerged lands that

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243 As noted, state constitutional protections for the environment vary widely. Where such protections exist, but are insufficient to support a finding of unconstitutionality, those provisions could also operate in the ways suggested for the public trust doctrine in this section, as a set of background principles that could lend different meaning to the home rule analysis.


instead must always be held ‘in trust’ for the public.”\textsuperscript{248} Following that case, and after the more recent revival of the doctrine by Professor Joseph Sax’s seminal 1970 law review article on the subject,\textsuperscript{249} “courts have decided hundreds of cases involving the public trust doctrine.”\textsuperscript{250} Its legal foundations remain unsettled, however, and the doctrine has long been subject to debate as to how far its limits extend, and how and when it should be applied.\textsuperscript{251} Indeed, the popularity of the doctrine among environmental advocates may be due in large part to its malleability.\textsuperscript{252} What many theories regarding the public trust have in common, however, is the recognition of a duty on the part of the state to “manage trust resources for the public benefit” and to “consider the public trust before taking action that may adversely affect trust resources.”\textsuperscript{253}

At the outset, it should be noted that in states with well-defined, enforceable public trust doctrines that expand beyond the traditional scope of navigable waters, an analysis could potentially proceed in much the same way as it would in the instance of constitutional protections. That is, a party could potentially challenge a state law as violative of the public trust doctrine; under either a constitutional or legislative home rule framework, an invalid state law would not override local lawmaking abilities. It seems more likely, however, given the lack of concrete public trust principles, that its more helpful and proper use in many states is as an aid in understanding competing state and local authority in the home rule system. This conception of the public trust may leave open the

\textsuperscript{251} Id. at 699 (“Throughout its existence, the public trust doctrine has been pulled in different directions and assigned different meanings.”); see also generally, e.g., Michael C. Blumm & Mary Christina Wood, THE PUBLIC TRUST DOCTRINE IN ENVIRONMENTAL AND NATURAL RESOURCES LAW (2d ed.) 3-10, Carolina Academic Press (2015); Richard J. Lazarus, Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine, 71 Iowa L. Rev. 631 (1986).
\textsuperscript{253} Id.; see also J. Peter Byrne, The Public Trust Doctrine, Legislation, and Green Property: A Future Convergence?, 45 U.C. Davis L. Rev. 915, 916 (2012) (describing the public trust doctrine as protecting public use and public interest).
possibility for a judge to overturn reactive state legislation that eliminates local ability to advance environmental values.

Scholars have advanced a range of proposals for how the public trust obligation might manifest itself. These proposals run the gamut from calls for the public trust to impose an affirmative duty on the state, to those viewing the public trust as more of a background principle of property law. Operating at the latter end of that spectrum, Professor William Araiza has suggested a means by which the public trust doctrine might move beyond its historic aquatic underpinnings while circumventing criticism that such an expansion lacks doctrinal foundation and inappropriately upsets the separation of powers between branches. 254 Professor Araiza suggests that the public trust doctrine may be available to judges not as a doctrine with legally binding effects, but as a canon of construction, or a “background principle against which positive legislation and administrative actions are construed and reviewed.” 255 Under this theory, courts could construe state legislative action that threatened values of the public trust “against the backdrop of a commitment to the protection of those values.” 256

As noted, courts in a number of cases have, where motivated by principles that support local control of an issue, created a sort of “shadow doctrine” upholding local authority in the face of state assertions of control. 257 It is difficult—and, as noted, contrary to much of environmental law and advocacy—to advance an argument that localities deserve deference in general for environmental policymaking. The use of the public trust doctrine as an interpretive mechanism may, however, offer support of localities where state action would undermine or run contrary to advancement of the public trust. Under such a theory, the public trust doctrine would not itself alter the home rule

255 Id. at 697.
256 Id. at 714.
257 Gerald E. Frug, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS 51, Princeton University Press: Princeton (1999) (“the immunization of city decision making from state control is possible only if courts have a strong sense that the local values being advanced outweigh [those of the state]”).
analysis. Instead, it could provide a basis for a judicial finding of protected local values in need of vindication. Targeted elimination of local authority unaccompanied by action at the state level creates obstacles to action on environmental issues and impedes actions in furtherance of the trust resources of the state. Courts reviewing state action that invalidates local ability to act on environmental matters may find that public trust principles support a right to local innovation on such issues. This kind of application of the public trust doctrine would not dictate a substantive outcome, or require affirmative action by the state. But it would find that public trust principles operate as a check on state authority, and that a state cannot put up a wall against advancement of public trust values by localities.

The suggested use of the public trust in this manner does not yet appear to have been applied; nevertheless, courts may be able to “act creatively” to vindicate public trust principles. Taking Arizona’s treatment of bag bans again as a case study, this Article will make a first attempt at envisioning what this kind of approach would look like. Arizona recognizes the public trust doctrine, and the scope of that doctrine is determined by the judiciary. Most formally, the public trust doctrine in Arizona “restricts the sovereign’s ability to dispose of resources held in public trust.” Arizona courts have expressly stated, however, that the public trust is not necessarily limited to a state’s traditional interest in land under water. It is possible, therefore, to consider how the public trust may come into play where the state legislature attempts to halt local environmental efforts.

262 Id. at *6.
As noted, where a state bans local ability to ban bag bans, or to impose fees on bags, the analysis of whether this elimination of local authority was in line with the state’s home rule delegation would typically look only to whether the ban was a general law, or was one impacting state concern. Under either analysis, the ban would likely be upheld. Where the public trust doctrine acts as a “thumb on the scale in favor of the public trust value,” however, the outcome could potentially be different. By incorporating public trust values into the home rule framework, courts may have a legitimate role in balancing politics between city and state, and maintaining environmental protection as the constant. In this way, the use of the doctrine is consistent with Joseph Sax’s original statement that “public trust law is not so much a substantive set of standards for dealing with the public domain as it is a technique by which courts may mend perceived imperfections in the legislative and administrative process.”

This approach may be vulnerable to the same kinds of critiques that have long been aimed at expansions of the public trust doctrine beyond its historic roots. For instance, the public trust is often criticized as a countermajoritarian measure by courts overriding the will of the people, or as a judge-made doctrine lacking in legal foundation. But where, as in the approach suggested here, judges are merely weighing whether one branch of government should have the ability to put an end to experimentation by another, concerns about override of the popular will may be less substantial. And while it is perhaps not a satisfying answer to critics of the legitimacy of the public trust’s foundations to say that the use of the public trust doctrine in this capacity is merely another example of judicial willingness to uphold local authority in certain instances, it is nonetheless true. Upholding local experimentation in support of the environmental resources of citizens is in keeping with the

263 Id. at 719.
264 See Joseph L. Sax, The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention, 68 Mich. L. Rev. 471, 509 (1970). Notably, Professor Sax thought that one of these imperfections was decisionmaking at too local a level in matters of statewide concern. But Sax’s general idea that the public trust doctrine serves to correct for imbalances that would result in environmentally harmful outcomes may argue in favor of using the doctrine to uphold local action that results in net environmental protection.
long tradition of the judiciary sorting out the extent of the power of the state; the ideas surrounding
the public trust provide a reasoned basis on which that tradition may continue in environmental law.

A. Constitutional Home Rule

As discussed, Arizona’s home rule system is based on a constitutional grant of authority. The validity of any state law’s infringement on local authority under a constitutional home rule framework is likely to turn on whether the subject of the law in question is of “genuine state concern.” If it is, the law is likely to be upheld. Courts tend to give a liberal construction to what constitutes a “genuine state concern,” and often allow state laws to override local lawmaking. Thus, for instance, Arizona courts could find that the question of how best to conduct pollution control, or creation of uniform business standards, is a matter of statewide concern. If that is the case, then a ban on bag bans would be an appropriate subject for state legislation and the state statute would be upheld. While the extent to which state and local provisions conflict is often a subject of rich debate, in this example of the ban on bag bans, there is no question—local prohibition on bags directly conflicts with the state revocation of authority. And in that circumstance, the state law prevails. Local bag bans would therefore be invalidated.

The public trust doctrine could, however, potentially act as a “thumb on the scale” in favor of local authority that is generally absent from this analysis. The need for uniform business regulations, and mere state assertions of this interest, would likely be sufficient in a typical analysis to support a finding of the validity of the state statute. Bringing in the public trust doctrine, however, both the state and local governments also have a genuine interest in the furtherance of values of the public trust. Those values cannot be abrogated by or rejected in favor of competing interests. A

266 See, e.g., Humphrey v. City of Phoenix, 55 Ariz. 374, 388, 102 P.2d 82, 88 (1940) (noting that keeping cities “in sanitary and safe condition is essential to the health, morals and general welfare of the whole state”).
judge assessing whether the state deserves deference in the question of how best to conduct pollution control may view that question differently where the state is under an obligation to uphold public trust values. Viewing the public trust as a canon that counsels against the undermining of trust resources, a court could decide to give more weight to the outcome that would not do so. A judge reviewing the state statute could potentially find that there is no genuine state interest in action that would undermine the trust, or that would prevent localities from policy experimentation that would advance their interest in preserving and maintaining trust resources.

Without public trust principles, or a reason to uphold local action, such a finding is unlikely; with them, judges may find a legal basis on which to premise a decision in support of local authority. Such a construction would allow for emphasis on the local interest in maintaining the quality of local waterways and surrounding lands, and avoid state elimination of the ability to advance that preservation that was unaccompanied by state action on the issue. In this way, the home rule doctrine itself could be infused with public trust, or environmental protection, principles. Nothing in this analysis would create an affirmative obligation on the part of the state to take action to prevent pollution of the resources at issue here—in the bag ban context, state land and waterways. It may, however, prevent targeted removals by the state of a locality’s ability to uphold the environmental interests of its citizens.

This proposal and analysis is admittedly general, and open to many kinds of ad hoc determinations. That unbounded analysis is characteristic of both the home rule and public trust doctrines. Judges have substantial leeway in defining cognizable state interests, and in allocating power between state and local governments. The principles behind the public trust doctrine could similarly play a background role in justifying the judiciary’s action in halting state legislation that targets local authority. That could make a critical distinction in the way that courts think about local authority, and may provide an avenue for expression of judicial skepticism about state action that
undermines environmental values or that is motivated by animus toward a set of progressive policies. In this way, it could provide a way out from otherwise potentially inescapable deference to state authority in instances of explicit removal of local authority over environmental issues. The approach set out here would likely not apply where the state itself has advanced a competing regulatory system for handling an environmental issue; it also would not support local authority on parochial policies that undermine public trust values. The doctrine’s use here would instead be in highlighting the legal significance of state elimination of the opportunity for progress in support of environmental goals. While the vagueness of this theory means that the analysis employed would necessarily vary by state, it also means that it is broad enough to encompass many sets of circumstances.269

B. Legislative Home Rule

The public trust as modifier of what constitutes a genuine state concern is unlikely to have an impact for cities operating under grants of legislative home rule. For these cities, the operative question is instead whether or not the state law at issue constitutes general legislation. If so, it may be upheld without employing any analysis of the state interest involved. The public trust doctrine may have a role to play in the determination of general versus special legislation as well. Typically, as noted, a general law is simply defined as one that impacts all cities within a class equally. Infusing this analysis with public trust principles may create an opportunity for a different outcome in the case of environmental goals undermined by state action.

In Cleveland v. State, an Ohio Court of Appeals considered a challenge by a city to the constitutionality of a state statute disallowing municipal bans on certain foods such as transfats.270

269 See William D. Araiza, The Public Trust Doctrine as an Interpretive Canon, 45 U.C. Davis L. Rev. 693, 719 (2012) (noting that “[t]he very idea of a penumbral canon protecting a broad but vague underlying legal value necessarily implies some vagueness with regard to the canon’s operational scope”).
Ohio appears to have one of the most precise definitions in the country regarding what constitutes a general law, and employs a four-part test. As part of the court’s assessment of the validity of the state statute, one of the factors it had to consider was whether the state ban had uniform application throughout the state.\textsuperscript{271} The statute in question applied on its face to all parts of the state, but addressed only food service operations and not retail food establishments. The difference in coverage led the court to find that the law did not have uniform application. While the court decided the question of uniformity on that basis, it also described an argument from \textit{amici} participants that “any state law which prevents individual municipalities from acting to address food based health disparities resulting from local social, demographic, environmental and geographic attributes inevitably impacts different parts of the state in a non-uniform manner.”\textsuperscript{272} The parties did not address this issue, and it did not form the basis of the court’s decision, but the court nevertheless “f[ound] some merit in this argument.”\textsuperscript{273}

The public trust doctrine may be able to encourage a similar kind of analysis even in states that do not employ Ohio’s test for general legislation. Under a typical analysis, a court’s determination of whether something constitutes a general law is limited to identifying the class to which the law applies, and assessing whether the application is uniform within the class. As in \textit{Cleveland}, the exemption of a large category of actors may prevent a finding of uniform application. But where, as in the case of Arizona’s ban on bag bans, the law applies to all cities and counties in the state, the law on its face is likely to be found uniform. If the state and local governments are viewed through the lens of being holders of the public trust, however, the disparate impacts of state

\textsuperscript{271} Much of the court’s analysis was shaped by the fact that, under Ohio law, “[a] statute does not qualify as a general law if it merely restricts the ability of a municipality to enact legislation[.]” \textit{Cleveland v. State}, 2013-Ohio-1186, ¶ 29, 989 N.E.2d 1072, 1082 (2013). This rule does not appear to have been adopted anywhere else in the country. If adopted widely, however, such a standard would create a much clearer limit on the ability of state legislatures to pass reactive laws targeting local governments.

\textsuperscript{272} \textit{Cleveland}, 989 N.E.2d at 1082 n.1.

\textsuperscript{273} \textit{Id.} at 1082.
prohibitions on local action may come into greater relief. Removal of local authority to advance the environmental needs of their communities, without action on the state level to address those needs, means that some local governments will be able to uphold their public trust obligations while others will not. Such a law therefore disadvantages cities who are attempting to protect trust resources through bag bans; it may also be viewed as conferring a special advantage in terms of advancing public trust values upon those localities who may be in less need of such a ban.\textsuperscript{274} While the public trust doctrine is unlikely to create affirmative obligations with regard to environmental protections, it may help to give the lie to purportedly uniform actions by the state that instead target actions by certain cities. In this way, the public trust doctrine may empower courts to push back against reactive state legislation.

V. Conclusion

As noted, the home rule system took a variety of forms as it spread across the nation. At its core, though, is recognition that piecemeal local governance undermines the ability of cities to respond to the needs of their citizens. Targeted state removal of local authority to act to protect the environment undermines democratic ideals and prevents useful experimentation.\textsuperscript{275} It also has the potential to reduce participation in local government, as citizens feel that their choices are not valued.\textsuperscript{276} In this way, state revocation of local authority may “not only preven[t] cities from experimenting in democratic forms of organization,” but may “make experiments seem less

\textsuperscript{274} Arizona Downs v. Arizona Horsemen’s Found., 130 Ariz. 550, 557, 637 P.2d 1053, 1060 (1981) (“Equal protection is denied when the state unreasonably discriminates against a person or class. Prohibited special legislation, on the other hand, unreasonably and arbitrarily discriminates in favor of a person or class by granting them a special or exclusive immunity, privilege, or franchise.”)

\textsuperscript{275} Cf. Dale Krane, et al., HOME RULE IN AMERICA: A FIFTY-STATE HANDBOOK 7, Congressional Quarterly Press: Washington, DC (2001) (noting that the public choice model of federalism rests on several assumptions, including that “local government officials are responsive to the preferences of the local citizenry, local governments possess adequate powers by which to respond to citizen preferences, and local government activities are the product of local citizen choices as reflected through the policy decisions of local officials and do not reflect the policy decisions of some other body of government (that is, state government).”)

\textsuperscript{276} See, e.g., Kristen von de Biezenbos, Where Oil is King, Fordham Law Review (2016).
appealing.” There is important environmental work currently being done by cities, and a great need for that work to continue into the future. The ability of states to remove the authority to act on issues at the city level while perpetuating inaction at the state level is therefore concerning.

It is not the intent of this Article to send to the courts what is more properly the job of the legislature. The public trust doctrine or other judge-made doctrines should not be a substitute for the hard work of governance and creating good rules at the legislative level. An approach more desirable than the one proposed here may be for state legislatures to amend home rule provisions to prevent reactionary revocation of local authority by the state legislature. By carving out a more certain piece of authority for localities, states could help prepare their communities for the coming decades in which cities are likely to confront a new set of environmental issues. Until that occurs, however, upholding local ability to act will likely be the purview of the courts. It is easy for environmental issues to be undervalued in the political process, and for movement on those issues to be undermined by the state legislature. There is likely something of folly in suggesting that the same legislatures seen to be undermining environmental values make changes that would curtail their authority over local action, and there is a real potential for harm to environmental progress to be done if courts take no action in support of cities.

279 See, e.g., Gerald E. Frug and David J. Barron, CITY BOUND: HOW STATES STIFLE URBAN INNOVATION 23, Cornell University Press: Ithaca (2008) (noting that it is likely that “[r]eformation of the state legal structure must . . . be the primary means by which city power is enhanced.”). A potential model for such an amendment is the test created by Ohio courts that requires, as part of the test as to whether something is “general” or “special” legislation
280 The challenges of such legislative change may be seen by a recent initiative in Colorado. In Colorado, Initiative 89 proposed, among other things, an amendment to the state constitution that “authorizes local governments to enact laws, regulations, ordinances, and charter provisions that are more restrictive and protective of the environment’ than the laws enacted by the state. This proposed subsection also state[d] that if a local law conflicts with state law, the more restrictive and protective law governs.” Matter of Title, Ballot Title, & Submission Clause for 2013-2014 #89, 328 P.3d 172, 175 (2014). In a development that may show the difficulty in passing such legislation, the Initiative was later dropped as part of a settlement with the governor and oil and gas companies. See, e.g., “Colorado Ballot Initiatives 88, 89 Pulled Today,” Oil & Gas 360 (Aug. 4, 2014), http://www.oilandgas360.com/colorado-ballot-initiatives-88-89-pulled-today/
There may of course be other ways for localities and private parties to achieve environmental progress within the constraints of home rule. On the plastic bag front, retailers could choose not to stock plastic bags, or to offer incentives to customers for using reusable containers. For instance, Whole Foods stores give customers a 10 cent credit for each reusable bag brought for grocery shopping. More generally, it has been suggested that cities may also be able to incorporate existing state environmental protections instead of fashioning their own restrictions on use, or to employ Business Improvement Districts or other special districts that are outside the reach of traditional home rule laws. These options do not, however, get at the heart of the question of when and how state lawmakers may strike down local environmental legislation. State constitutional protections, and the public trust doctrine, could justify a clearer judicial doctrine on state removal of local authority on environmental issues.

To be sure, local power over environmental issues is not an unalloyed good. Cities, or neighborhoods, may act in parochial ways that prevent progress on environmental topics. In the past, however, cities have experimented with governance in ways that have eventually created positive change at the state and national level. In this way, “[c]ities have served and might again serve as vehicles for the achievement of purposes that have been frustrated in modern American life,” and might provide the ability “to participate actively in the basic societal decisions that affect one’s life.” It is the hope of many that they can play the same role in responding to a number of pressing environmental needs. The home rule framework was designed to ensure that cities would have the ability to respond to their rapidly changing needs; by infusing home rule with an updated

282 See Kristen van de Biezenbos, Where Oil is King, Fordham Law Review (2016).
283 See Barron, Reclaiming Home Rule (connecting local power to perpetuation of suburban sprawl); Richard Briffault, Our Localism (associating local control with parochial behaviors)
284 See, e.g., Richard Briffault, Our Localism; see also, e.g., Detroit suburb rejection of new Detroit transit plan (June 2016).
understanding of government obligations toward the environment, it may be brought a bit closer to achieving that goal.