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12-15-2017

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Recommended Citation

Sarah Fox, *Home Rule in an Era of Local Environmental Innovation*, 44 *ECOLOGY L. Q.* 575 (2017).

Link to publisher version (DOI)

<http://dx.doi.org/https://doi.org/10.15779/Z38NG4GR8K>

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Home Rule in an Era of Local Environmental Innovation

Sarah Fox*

As 2016's national election made clear, striking ideological differences between cities and their surrounding states exist in many parts of the country. One way in which this divide manifests itself is in state governments passing laws with the sole purpose of outlawing particular local conduct. For instance, recent state legislation has prohibited local governments from establishing a minimum wage, from prohibiting the use of plastic bags, and from protecting the rights of transgender individuals to use the bathroom of their identified gender. These state actions do not create substantive law; instead, they merely curtail the grant of authority—known as home rule—to municipalities.

State override of local action in this way undermines the ability of local governments to address many kinds of harm. Local efforts to combat environmental issues seem particularly vulnerable to obstruction by state legislators. The trouble is, under traditional frameworks of state and local government law, this kind of targeted removal of local authority is likely justifiable. In consequence, legal scholarship on environmental localism has generally conceded failure within the home rule framework and has looked outside it for solutions to this problem. This Article explores whether acceptance of defeat in the face of state prohibitions on particular exercises of local environmental authority is warranted, and whether there is any path forward for local environmental policy making within the traditional framework.

Very generally, this Article proposes that elements of environmental law—namely, state constitutional provisions and the public trust doctrine—may offer a substantive basis for support of local authority in the face of targeted state removals of authority. This Article uses the example of local plastic bag bans to illustrate how the judiciary might employ these concepts. By making these

DOI: <https://dx.doi.org/10.15779/Z386D5PB0H>

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* Assistant Professor, Northern Illinois University College of Law. This Article benefited immensely from comments received at the Sabin Colloquium on Innovative Environmental Law Scholarship, the University of Washington Junior Environmental Law Scholars Conference, the Vermont Colloquium on Environmental Scholarship, and the Georgetown Fellows' Collaborative. Many thanks as well to the staff of *Ecology Law Quarterly* for their hard work and thoughtful edits.

elements part of the home rule analysis, courts may be able to provide some protection against targeted removals of local authority.

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INTRODUCTION

The past several decades have seen cities,¹ 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.² This trend has been

1. This Article uses “cities,” “localities,” and “local governments” interchangeably, and encompasses local governments of various sizes and population characteristics. See Richard Briffault, *Our Localism: Part II—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.

2. See, e.g., Sarah Krakoff, *Planetarian Identity Formation and the Relocalization of Environmental Law*, 64 FLA. L. REV. 87, 106–07 (2012); John R. Nolon, *In Praise of Parochialism: The*

somewhat in tension with 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.³ 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 were vested with only those powers specifically delegated to them.⁴ To loosen the strictures of this approach, most states adopted home rule provisions throughout the twentieth century. These provisions, although highly varied, were generally designed to allow localities to solve urban issues creatively, and to avoid state determination of local matters.⁵ 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.⁶

While the ability of the state to counteract local laws is very strong, assertions of state power have at times received pushback from courts.⁷ This is particularly true in cases involving certain categories of local legislation, or impacts on constitutional rights.⁸ Such checks on state power constrain legislative allocations of burdens and benefits, and highlight the limits of a state's ability to take back authority from localities. However, these decisions do not apply well to state measures that bar local environmental action.⁹ The mismatch between these approaches and environmental laws leaves local control over environmental issues vulnerable to state authority. As a result, the

Advent of Local Environmental Law, 26 HARV. ENVTL. L. REV. 399, 413 (2002); Shannon Roesler, *Federalism and Local Environmental Regulation*, 48 U.C. DAVIS L. REV. 1111, 1113 (2015) (“[E]nvironmental law scholars have also begun exploring the positive potential of local governance in addressing a range of contemporary environmental problems.”); see also Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1113–14 (2007).

3. See RICHARD SCHRAGGER, *CITY POWER: URBAN GOVERNANCE IN A GLOBAL AGE* 87 (2016) (“State legislatures have been aggressive in overruling local decisions with which they do not agree,” including measures regarding predatory lending, minimum wage, bans on hydraulic fracturing, and anti-discrimination protections.).

4. JOSEPH F. ZIMMERMAN, *STATE-LOCAL RELATIONS: A PARTNERSHIP APPROACH* 17 (2d ed. 1995).

5. GERALD E. FRUG ET AL., *LOCAL GOVERNMENT LAW: CASES AND MATERIALS* 168 (4th ed. 2006).

6. See, e.g., GERALD E. FRUG & DAVID J. BARRON, *CITY BOUND: HOW STATES STIFLE URBAN INNOVATION* 61 (2008) (“All states . . . have one thing in common: nowhere does home rule give cities local autonomy.”); see also *infra* Part II.B.

7. See *infra* Part V.

8. *Id.*

9. *Id.*

sphere of local autonomy carved out by home rule is particularly easy to undermine in the environmental context.

There has been a growing conversation about the potential for local action on environmental issues.¹⁰ There has also been much discussion of preemption as it relates to local law making,¹¹ and of the limitations on city authority in the face of state action.¹² These two camps have not yet been fully reconciled; advocates for local action often fail to acknowledge the real limits on local power under the home rule framework,¹³ while local government scholars tend to accept those limits as inevitable.¹⁴ 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.

A potential solution may come 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.¹⁵ 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.¹⁶ 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. As noted, the Supreme Court and other courts have responded to a variety of restrictive state actions that intrude on principles of local control or infringe on constitutional rights with a similar defense of local experimentation in support

10. See, e.g., JOHN R. NOLON, PROTECTING THE ENVIRONMENT THROUGH LAND USE LAW: STANDING GROUND 261–95 (2014); BRIAN STONE, JR., THE CITY AND THE COMING CLIMATE: CLIMATE CHANGE IN THE PLACES WE LIVE 97–126 (2012); see generally SECTION OF STATE AND LOCAL GOV'T LAW, AM. BAR ASS'N, GREENING LOCAL GOVERNMENT: LEGAL STRATEGIES FOR PROMOTING SUSTAINABILITY, EFFICIENCY, AND FISCAL SAVINGS (2012).

11. 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, hydraulic fracturing (“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 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.

12. See, e.g., Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959, 987–89 (2007); Roesler, *supra* note 2, at 1155–72 (exploring the potential for federal authority to be exercised in support of local laws).

13. See, e.g., FRUG & BARRON, *supra* note 6, at ix–xiii (describing reasons why cities may not have the power to address traffic issues in certain ways, despite a mandate from the public).

14. See, e.g., GERALD E. FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS 19 (1999) (noting that “[c]ity powerlessness appears to be an inevitable . . . feature of modern life”).

15. See *infra* Part V.C.1.

16. See *infra* Part V.C.2.

of citizens' rights.¹⁷ 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 decision maker best suited to make policy for various topics. The trouble with advocating for power on the part of one level of government over another is that such arguments may be susceptible to shortsighted positions for the sake of an ideological victory. However, substantive principles located in state constitutional provisions and the public trust doctrine may be able to offer an environmental lodestar for state and local governments alike.

Today, given the political realities of the country, and given that innovative environmental protections may currently be more likely to occur at the local level than at any other, preserving a way forward for local environmental action is important. The authority of states to dismantle local environmental policies through targeted prohibitions will have potentially far-reaching consequences. If cities are to continue leading on climate change adaptation and mitigation, transportation initiatives, pollution reduction, and many other issues, the prospect of piecemeal state preemption is alarming. Modifying the lens through which state revocation of local powers is viewed will advance the interests of cities in making environmental progress at the local level.

Part I of the Article addresses recent trends toward local environmental policy making. 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 ordinances. Part IV provides an example of how the established home rule analysis is likely to play out in the case of local bans on plastic bags and state efforts to prohibit those local policies. Part V 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. Finally, Part VI illustrates how those new strategies might be applied to the plastic bag ban context, and to achieving a different outcome in the face of state prohibitions on these bans.

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.¹⁸ These changes have

17. See *infra* Part V.B.

18. See, e.g., J. Peter Byrne, *The Rebirth of the Neighborhood*, 40 *FORDHAM URB. L.J.* 1595, 1595 (2013) (recounting Washington, D.C.'s population growth after years of population decline and

resulted in shifts in political and cultural spheres.¹⁹ Following the suburban boom of the 1950s and 1960s, and the ensuing urban fiscal and law enforcement problems of the 1970s and 1980s,²⁰ a number of cities have seen a resurgence in activity and population. These revitalized cities are generally accompanied by new and 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.²¹ Invested with the funding and political capital needed to advance major initiatives, local authorities are acting on a number of issues. Local law making can act as a “catalyst for change,”²² address a range of problems because of its flexible nature,²³ and overcome barriers to progress faced at the state or national level.²⁴ The sheer number of local governments makes them an important force; “if the fifty states are laboratories for public policy formation, then surely the 3000 counties and 15,000 municipalities provide logarithmically more opportunities for innovation, experimentation, and reform.”²⁵

Environmental issues are one area in which the trend toward local policy making has been taking hold. “[C]ities have been at the forefront of environmental activism for a long time,”²⁶ and have long innovated with regard

highlighting Boston, San Diego, Seattle, and Miami’s “renewed investment in residential, retail, and business real estate”).

19. Cf. Parag Khanna, Opinion, *A New Map for America*, N.Y. TIMES (Apr. 15, 2016), https://www.nytimes.com/2016/04/17/opinion/sunday/a-new-map-for-america.html?_r=0 (positing that America is “headed toward a metropolis-first arrangement”).

20. For a general description of these issues, see, for example, Gideon Kanner, *Detroit and the Decline of Urban America*, 2013 MICH ST. L. REV. 1547, 1549–52 (2013).

21. See, e.g., Josh Kron, *Red State, Blue City: How the Urban-Rural Divide Is Splitting America*, 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”).

22. Diller, *supra* note 2, at 1113.

23. See, e.g., Nolon, *supra* note 2, at 399 (explaining Colorado’s Local Government Land Use Control Enabling Act and its goal to achieve “orderly land development within the state that maintains a balance between the basic human needs of its changing population and ‘legitimate environmental concerns’”).

24. See Krakoff, *supra* note 2, at 107–08 (“In smaller communities, affinities of value, politics, and culture can overcome the epistemological and psychological barriers that inhibit the public at large.”).

25. Richard Briffault, *Home Rule for the Twenty-First Century*, 36 URB. LAW. 253, 259 (2004). This view of local innovation is, however, not uncontested. See generally Brian Galle & Joseph Leahy, *Laboratories of Democracy? Policy Innovation in Decentralized Governments*, 58 EMORY L.J. 1333, 1398 (2009) (concluding, after empirical study, that local government may produce a lower than optimal level of innovation).

26. DORCETA E. TAYLOR, THE ENVIRONMENT AND THE PEOPLE IN AMERICAN CITIES, 1600S–1900S: DISORDER, INEQUALITY, AND SOCIAL CHANGE 502 (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).

to local solutions to environmental problems.²⁷ And with the recent rise in city populations and increased political activism, local governments have taken the lead on environmental policy making, including transit and development strategies, climate mitigation and adaptation, toxics reform, and other subjects.²⁸ As cities grow, ecological challenges become intertwined with urban problems, and the development of more sustainable cities is essential.²⁹

The call for local power over environmental issues is not necessarily an intuitive one. Scholars have often decried local decision making over environmental issues as unsound policy, given cities' at times parochial conduct.³⁰ Externalities inherent in many environmental problems have led many to advocate for centralized decision making—to nationalize, or even internationalize, environmental policy.³¹ Greater resources and expertise at higher levels of government may also make environmental law making more successful.³² Nevertheless, there exist environmental issues of uniquely local impact and importance.³³ Moreover, given the current political climate, localities may be the only realistic option for pursuing environmental solutions,³⁴ and “local, multi-stakeholder involvement in environmental

27. IAN DOUGLAS, *CITIES: AN ENVIRONMENTAL HISTORY* 305–07 (2013).

28. Roesler, *supra* note 2, at 1113; *see also* Krakoff, *supra* note 2, at 89 (“Local food, local work, local energy production—all are hallmarks of a resurgence of localism throughout contemporary environmental thought and action.”); Nolon, *supra* note 2, at 365 (noting a “remarkable and unnoticed trend among local governments to adopt laws that protect natural resources”).

29. *See, e.g.*, GREEN CITIES: AN A-TO-Z GUIDE 1–3 (2010); *see also* JANETTE SADIK-KHAN & SETH SOLOMONOW, *STREET FIGHT: HANDBOOK FOR AN URBAN REVOLUTION* 24 (2016) (noting that the national urban population is expected to grow by 100 million people by 2050, and that “[a]dding a population nearly the equivalent of the nation’s four largest states to cities and their suburbs could easily exhaust their [ability to provide services to their populations] . . . [T]o attract, retain, and accommodate rising populations, our leaders must rapidly implement strategies that make cities more attractive places to live while making their infrastructure function more efficiently to meet the growing demand.”).

30. *See* David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2259–63 (2003) [hereinafter Barron, *Reclaiming Home Rule*]; David J. Barron, *The Promise of Cooley’s City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 488–89 (1999) [hereinafter Barron, *The Promise of Cooley’s City*]; Jim Rossi, “Maladaptive” Federalism: *The Structural Barriers to Coordination of State Sustainability Initiatives*, 64 CASE W. RES. L. REV. 1759, 1762–64 (2014) (noting that local innovation and control can be suboptimal where it fails to account for coordination benefits). 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.

31. *See, e.g.*, Jonathan B. Wiener, *Think Globally, Act Globally: The Limits of Local Climate Policies*, 155 U. PA. L. REV. 1961, 1962 (2007) (arguing that subnational action on climate change is ineffective at best, and harmful at worst).

32. *See, e.g.*, Benjamin J. Richardson, *Local Climate Change Law*, in LOCAL CLIMATE CHANGE LAW: ENVIRONMENTAL REGULATION IN CITIES AND OTHER LOCALITIES 3, 15 (2012).

33. Paul S. Weiland, *Federal and State Preemption of Environmental Law: A Critical Analysis*, 24 HARV. ENVTL. L. REV. 237, 244 (2000) (noting that the decentralization of authority over environmental issues “may be an appropriate response to the fact that environmental problems often tend to be place-specific”).

34. *See* Rossi, *supra* note 30, at 1761 (theorizing that the 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).

decision making [may be] key to effecting better environmental results.”³⁵ Motivated by these trends, environmental law scholars and policy makers alike have started to explore “the positive potential of local governance in addressing a range of contemporary environmental problems.”³⁶

These urban environmental measures take 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 in the purview of local governments.³⁷ As urban populations increase, and available land for trash disposal becomes scarce, the need to reduce trash flow and improve recycling efforts becomes clear.³⁸ In response, a number of localities have developed waste reduction or recycling programs as part of their sustainability portfolios.³⁹ Some of these efforts have taken the form of bans or fees on plastic bags, Styrofoam, and other forms of disposable packaging.⁴⁰ Such local initiatives may help to reduce the impact of plastic bags on the environment and on municipal garbage and recycling processes.⁴¹ They may also serve as a gateway into broader

35. WILLIAM A. SHUTKIN, *THE LAND THAT COULD BE: ENVIRONMENTALISM AND DEMOCRACY IN THE TWENTY-FIRST CENTURY* 109 (2000).

36. Roesler, *supra* note 2, at 1113.

37. See, e.g., *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 354 (2007) (“[W]aste disposal is both typically and traditionally a local government function.”); see also 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.”); Douglas, *supra* note 27, at 163–81 (describing the history of local measures regarding waste disposal and recycling, from the 1900s to present).

38. See, e.g., JOAN MULLANY, *POPPING THE PLASTICS QUESTION: PLASTICS RECYCLING AND BANS ON PLASTICS—CONTACTS, RESOURCES AND LEGISLATION* 2 (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”); Megan Backsen & Jack Hornickel, *Cradle-to-Cradle: The Elimination of Waste Introduction*, 16 VT. J. ENVTL. L. 572, 572 (2015) (“Academics and governments alike continue to view the steady accumulation of garbage as a threat to orderly life.”).

39. See, e.g., SUSTAINABLE SANTA FE COMM’N, *SUSTAINABLE SANTA FE PLAN: BUILDING A MORE SUSTAINABLE FUTURE BY LOOKING TO THE PAST* 25–27 (2008), http://www.santafem.gov/media/files/Public_Uilities_Environmental_Services/SustainableSFweb.pdf (describing waste reduction and recycling efforts by Santa Fe); CITY OF CLEVELAND OFFICE OF SUSTAINABILITY, *Zero Waste*, CLEVELAND, <http://www.city.cleveland.oh.us/CityofCleveland/Home/Government/CityAgencies/OfficeOfSustainability/WasteReductionAndRecycling> (last visited July 16, 2017) (“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.”); Anna Clark, *Creative Ways Cities Are Pushing Recycling*, NEXTCITY (Sept. 2, 2014), <https://nextcity.org/daily/entry/how-to-get-people-to-recycle-creative-ways> (describing recycling initiatives in Houston and Detroit).

40. See, e.g., Stephen Maxwell Reck, *The Expanding Environmental Consciousness of Local Government: Municipalities That Have Banned Styrofoam and the Legal Consequences*, 11 U. BRIDGEPORT L. REV. 127, 127 (1990) (listing cities with bans on Styrofoam packaging).

41. See Adam Sternbergh, *The Fight Over Plastic Bags is About a Lot More Than How to Get Groceries Home*, N.Y. MAG. (July 15, 2015), <http://nymag.com/daily/intelligencer/2015/07/plastic-bag-bans.html>.

environmental engagement for communities.⁴² To achieve these goals, cities will likely need to employ bans or 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.”⁴³ That is, cities account for a greatly disproportionate percentage of greenhouse gas emissions, and as city populations increase, emissions will follow.⁴⁴ 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 that long-term planning will be required in order to prepare for these changes,⁴⁵ and have begun to develop policies accordingly.⁴⁶ For example, many local governments are involved in siting renewable energy projects, offering financial incentives to encourage development of 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.⁴⁷ Cities have engaged in development of adaptation strategies to handle phenomena like sea-level rise.⁴⁸ 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.⁴⁹ New York updated PlaNYC after the damage wrought on the city in 2012 by Hurricane Sandy made even more apparent the potential

42. Carolyn Flower, *Banning the Bag, Greening the City*, NEXTCITY (July 12, 2012), <https://nextcity.org/daily/entry/banning-the-bag-greening-the-city>.

43. *Green Cities: Mayoral Initiatives to Reduce Global Warming Pollution: Hearing Before the H. Select Comm. on Energy Independence and Global Warming*, 110th Cong. 1 (June 19, 2007); see also Patricia E. Salkin, *Can You Hear Me Up There? Giving Voice to Local Communities Imperative for Achieving Sustainability*, 4 ENV'T'L & ENERGY L. & POL'Y J. 256, 258 (2009) (“[V]oices and actions of local governments are critical to achieving truly sustainable communities, especially in the climate change arena.”).

44. *Green Cities: Mayoral Initiatives to Reduce Global Warming Pollution: Hearing Before the H. Select Comm. on Energy Indep. & Glob. Warming*, 110th Cong., 1st Sess. 1 (2007) (statement of Rep. Edward J. Markey, Jr., Chairman, H. Select Comm. on Energy Indep. & Glob. Warming).

45. See, e.g., Stone, *supra* note 10, at 96 (noting the need for cities to “fundamentally remake themselves to remain viable enterprises” in advance of further shifts in climate).

46. See, e.g., Edward Hart, *8 Creative Ways Cities are Combating Rising Temperatures*, N.Y. MAG. (June 15, 2016, 8:00 AM), <http://nymag.com/daily/intelligencer/2016/06/how-cities-are-combating-rising-temperatures.html>.

47. See, e.g., Jessica Reinhardt, *Greening the Grid*, in GREENING LOCAL GOVERNMENT, *supra* note 10, at 193–209.

48. See, e.g., Richardson, *supra* note 32, at 7 (“Climate adaptation is innately suited to response at a local level.”).

49. N.Y.C. MAYOR'S OFF. OF RECOVERY & RESILIENCY, <http://www1.nyc.gov/site/orr/index.page> (last visited July 16, 2017).

dangers of extreme weather and rising seas.⁵⁰ Localities across the country are developing their own adaptation plans and policies to address the coming changes.⁵¹ These plans 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. Many cities abandoned mass transit long ago in favor of the car. Tied to that new preference, mandatory parking lots began to cover much of the urban landscape.⁵² As more people moved back into cities, and cities became increasingly interested in more efficient use of land and improvements in air quality, local governments paid increased attention to transit policies.⁵³

A renewed focus on transit can have profound benefits for urban life,⁵⁴ as well as for the environment.⁵⁵ The interest of cities in tackling the transportation needs of their citizens for the coming years can be seen in many ways. For instance, many cities competed in the United States Department of Transportation's Smart City Challenge,⁵⁶ which offered a \$40 million grant to help integrate new technology, such as self-driving cars, into urban transportation infrastructure.⁵⁷ Across the country, cities of various sizes and demographics, such as Kansas City,⁵⁸ Los Angeles,⁵⁹ Columbus,⁶⁰

50. See generally CITY OF NEW YORK, PLANYC: A STRONGER, MORE RESILIENT NEW YORK 1–2 (2013), http://www.nyc.gov/html/plany/html/resiliency/sandy_after_3_years.shtml.

51. See generally *State and Local Adaptation Plans*, GEO. CLIMATE CTR., <http://www.georgetownclimate.org/adaptation/plans.html> (last visited July 16, 2017) (providing a comprehensive set of links to local climate adaptation plans around the country).

52. DONALD SHOUP, *THE HIGH COST OF FREE PARKING* 111 (2011) (summarizing studies that show that parking requirements create underused parking lots in cities).

53. See David S. Silverman & Brent O. Denzin, *Green Transportation: Roadblocks and Avenues for Promoting Low-Impact Transportation Choices*, in *GREENING LOCAL GOVERNMENT*, *supra* note 10, at 159.

54. 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.”).

55. E.g., Phillip A. Hummel, *Next Stop - A Cleaner and Healthier Environment: Global Strategies to Promote Public Transit*, 35 *TRANSP. L.J.* 263, 263 (2008) (“Transportation demands and environmental concerns are inextricably linked.”).

56. *Smart City Challenge*, U.S. DEP’T OF TRANSP., <https://www.transportation.gov/smartcity> (last updated June 29, 2017).

57. *Id.*

58. Press Release, City of Kansas City, *Kansas City Announces Opening Date of KC Streetcar*, <http://kcmo.gov/streetcar/opening-date-of-kc-streetcar/> (last visited July 16, 2017).

59. See, e.g., SADIK-KHAN & SOLOMONOW, *supra* note 29, at 68–69.

60. Press Release, U.S. Dep’t of Transp., *U.S. Department of Transportation Announces Columbus as Winner of Unprecedented \$40 Million Smart City Challenge* (June 23, 2016), <https://www.transportation.gov/briefing-room/us-department-transportation-announces-columbus-winner-unprecedented-40-million-smart> (describing plans to use transportation technology to link parts of the city).

Providence,⁶¹ and many others, are also 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,⁶² 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. But they are critical to the health of cities, and to the ability of urban areas to adjust to shifting demands. Cities are likely to play an important role in any blueprint for a sustainable future. Therefore, it is critical to clarify the relationship between local power to implement environmental protections and state intrusions upon that power. The next Part considers the interplay between state and local actors.

II. THE 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.”⁶³ The lack of mention of local governments in the Constitution has generally been interpreted to mean that localities’ sole authority derives from the states.⁶⁴ 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,⁶⁵ localities “sometimes seek to pass laws and regulations that go beyond what their respective state governments desire.”⁶⁶ 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

61. Press Release, City of Providence: Mayor Jorge O. Elorza, Enhanced Transit Corridor in Downtown Providence (Mar. 14, 2016), <https://www.providenceri.com/mayor/enhanced-transit-corridor-in-downtown-providence>.

62. See, e.g., SADIK-KHAN & SOLOMONOW, *supra* note 29, at 30–31 (describing adoption of new urban street design guides).

63. U.S. CONST., amend. X.

64. See, e.g., FRUG & BARRON, *supra* note 6, at 2 (“Local power in the United States is derived from state law. Unless states authorize their local governments to do something, they have no power to do it.”); ZIMMERMAN, *supra* note 4, at 2.

65. Nolon, *supra* note 2, at 365.

66. Roesler, *supra* note 2, at 1115.

of home rule authority from local governments. Understanding this dynamic is important for an appreciation of the functional power that cities have to effect change at the local level.⁶⁷ Subpart A provides a summary of the origins and evolution of the home rule doctrine in local government law. Subpart B further analyzes the differences between the constitutional and statutory bases for this local authority.

A. The Evolution of Home Rule

Today, the relationship between state and local governments is controlled in large part by grants of home rule authority, which allocate certain powers to localities from the state. The home rule doctrine emerged as a result of local governments pushing for greater autonomy. The long history of local self-governance in the United States,⁶⁸ however, has never meant local independence. While a thorough recounting of state and local relations has been discussed in detail elsewhere⁶⁹ 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.⁷⁰ And in colonial America, local governance was the first kind of recognized authority.⁷¹ 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 centuries, and has continued to be the subject of much debate.⁷²

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.”⁷³ As a result, “the legal system in America formulated the rights of cities in the process of establishing the general relationship between corporations and the state.”⁷⁴ 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.⁷⁵ Then, in 1819, the United States Supreme

67. See, e.g., Joan C. Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law*, 1986 WIS. L. REV. 83, 152 (1986).

68. See John R. Nolon, *The Erosion of Home Rule Through the Emergence of State-Interests in Land Use Control*, 10 PACE ENVTL. L. REV. 497, 506 (1993).

69. See, e.g., FRUG, *supra* note 14, at 26–53 (providing detailed discussion of the legal history of cities).

70. *Id.* at 34–35.

71. DALE KRANE ET AL., *HOME RULE IN AMERICA: A FIFTY-STATE HANDBOOK* 8 (2001).

72. ZIMMERMAN, *supra* note 4, at 17 (“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.”).

73. FRUG, *supra* note 14, at 26.

74. *Id.* at 27.

75. *Id.* at 40.

Court issued its seminal decision in *Trustees of Dartmouth College v. Woodward*.⁷⁶ *Trustees of Dartmouth College* created a formal distinction between private and public corporations.⁷⁷ 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.⁷⁸ Following that decision, an 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.”⁷⁹ The characterization of cities as public corporations subordinate to the state became widespread, retaining protections against state intrusion only for private property.⁸⁰ 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.”⁸¹

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. Judge Thomas M. Cooley advanced one early theory of how best to allocate power between the two entities. In an 1868 treatise, Judge Cooley 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 governmental actions.”⁸² One of those important limitations was “the people’s right to local self-government.”⁸³

Not long thereafter, an 1872 treatise by Judge John F. Dillon developed a competing formulation directly contrary to Cooley’s position. Dillon argued that democratic goals of governance and avoidance of special interests were best accomplished through state legislative control of cities.⁸⁴ 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.”⁸⁵ 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,”⁸⁶ as well as on his own ties to corporate actors interested in state

76. *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518 (1819).

77. See Barron, *The Promise of Cooley’s City*, *supra* note 30, at 498–505.

78. See FRUG, *supra* note 14, at 41.

79. KRANE ET AL., *supra* note 71, at 8–9 (citing James Kent, *Commentaries on American Law* (1836)).

80. FRUG, *supra* note 14, at 42.

81. *Id.* at 43.

82. Williams, *supra* note 67, at 88.

83. *Id.*

84. FRUG, *supra* note 14, at 46–47.

85. *Id.* at 47.

86. *Id.*

control.⁸⁷ “Dillon’s Rule” was eventually adopted nationwide, possibly motivated by negative views of cities that painted them as “the home of mobs, foreigners, racial minorities, and sinners,”⁸⁸ a threat to national unity,⁸⁹ and “islands of private parochialism.”⁹⁰ 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.⁹¹

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. That growth was simultaneous with a rise in influence of local delegates at the state level, who engaged in widespread abuse of power that culminated in an “explosion of ‘local privilege’ or ‘special privilege’ legislation and the general practice of enacting innumerable and detailed state laws on every aspect of local government activity.”⁹² Concern about this interference in local affairs led to a call for increased power at the local level, a push that was reinforced by the Progressive movement for more businesslike government at the turn of the twentieth century.⁹³ 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.”⁹⁴ 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.”⁹⁵ Home rule was also designed to combat the dangers of state control that had been evidenced in targeted special legislation,

87. Williams, *supra* note 67, at 91–99, 148–49.

88. KRANE ET AL., *supra* note 71, at 9.

89. FRUG, *supra* note 14, at 43–44.

90. Barron, *The Promise of Cooley’s City*, *supra* note 30, at 488.

91. See KRANE ET AL., *supra* note 71, at 10.

92. *Id.* at 11; see also SCHRAGGER, *supra* note 3, at 63 (noting that “[h]ome rule was not an effort to shift power to the representatives of the local government; it was oftentimes instead an effort to limit the law-making role of the city’s state legislative delegation, which was (according to reformers) responding too readily to every costly demand of their urban constituents”).

93. KRANE ET AL., *supra* note 71, at 11; see also SCHRAGGER, *supra* note 3, at 64 (“These reforms were of a piece with the Progressive Era emphasis on technical and expert administration, data collection, and efficiency.”).

94. Briffault, *supra* note 25, at 260.

95. Lynn A. Baker & Daniel B. Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, 86 DENV. U. L. REV. 1337, 1340 (2009).

which interfered with appropriate city governance.⁹⁶ 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.”⁹⁷ “In contrast to a Dillon’s Rule regime that presumes city powerlessness, home rule provides presumptive city authority to engage in a wide variety of governmental activities.”⁹⁸ Early conceptions of home rule took a variety of forms and justifications,⁹⁹ and may have been motivated more by the cause of “good government” than by local independence for its own sake.¹⁰⁰ At a basic level, however, these ideas incorporated some of Thomas Cooley’s ideas of local power and independence.¹⁰¹ Running through all of these home rule proposals was an understanding of the importance of local decision making, secure from state authority, 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,¹⁰² and many others followed.¹⁰³ Today, nearly all states have something akin to home rule, although grants of local power take many forms.¹⁰⁴ Most broadly, home rule provisions come in either constitutional or statutory form.¹⁰⁵ 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.¹⁰⁶ Because of difficulties in defining the local sphere, state

96. FRUG & BARRON, *supra* note 6, at 37.

97. FRUG ET AL., *supra* note 5, at 168; *see also* Brian W. Ohm, *Some Modern Day Musings on the Police Power*, 47 URB. LAW. 625, 636 (2015) (noting “[t]he home rule movement resulted in amendments to state constitutions and statutory changes that granted local governments some level of autonomy over certain local issues”); COMM. ON THE N.Y. STATE CONSTITUTION, REPORT AND RECOMMENDATIONS CONCERNING CONSTITUTIONAL HOME RULE 6 (2016) (“Beginning in the 19th Century, the home rule movement represented a determined effort to provide local governments with autonomy over local affairs and freedom from State legislative interference.”).

98. Paul A. Diller, *The City and the Private Right of Action*, 64 STAN. L. REV. 1109, 1134 (2012).

99. Barron, *Reclaiming Home Rule*, *supra* note 30, at 2292–2320 (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 legitimize 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).

100. *Id.* at 2291.

101. Ohm, *supra* note 97, at 636.

102. FRUG ET AL., *supra* note 5, at 169.

103. KRANE ET AL., *supra* note 71, at 11 (listing states that followed Missouri in adding positive grants of authority to municipalities, including California, Washington State, Minnesota, Colorado, Virginia, Oregon, Oklahoma, Michigan, Arizona, Ohio, Nebraska, and Texas).

104. *See id.* at 14; *see also* Uma Outka, *Intrastate Preemption in the Shifting Energy Sector*, 86 U. COLO. L. REV. 927, 944 (2015) (noting the “diversity and distribution of shared governance structures that obtain under the umbrella term ‘home rule’”).

105. Weiland, *supra* note 33, at 263.

106. *See* Diller, *supra* note 2, at 1125.

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 with any state laws.¹⁰⁷ 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.¹⁰⁸ 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.¹⁰⁹

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,”¹¹⁰ they remain largely subject to the control of the state legislature.¹¹¹ But the various home rule provisions did result in the conferral of a certain range of powers upon localities under which they could operate.¹¹² This power encompasses both self-governance and police powers,¹¹³ the latter of which includes the authority to address environmental harms.¹¹⁴ Vesting local governments with this sphere of authority reflected the broader goals of providing greater freedom to local governments,¹¹⁵ eliminating particularized

107. ZIMMERMAN, *supra* note 4, at 29–34 (explaining this legislative, or “devolution of powers,” approach, and citing state statutes including those of Wisconsin, Oregon, Connecticut, and Massachusetts that have adopted versions of this doctrine).

108. Diller, *supra* note 2, at 1126–27 n.65 (discussing differences in calculating numbers of home rule states in the work of leading scholars).

109. See *infra* Parts II.B.1, II.B.2.

110. Davidson, *supra* note 12, at 977.

111. RICHARD BRIFFAULT & LAURIE REYNOLDS, *STATE AND LOCAL GOVERNMENT LAW* 235–36 (6th ed. 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.”).

112. Weiland, *supra* note 33, at 264–65.

113. See, e.g., Ross Crow, *Municipal Regulation of Groundwater and Takings*, 44 TEX. ENVTL. L.J. 1, 24 (2014) (citing *Baldwin v. County of Tehama*, 36 Cal. Rptr. 2d 886, 891 (Ct. App. 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*, 942 N.E.2d 370, 374 (Ohio 2010) (“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).

114. See, e.g., Kristen van de Biezenbos, *Where Oil is King*, 85 FORDHAM L. REV. 1631, 1659 (2017) (“The incorporation of state environmental laws at the local level is one way in which municipalities can exercise their police power to protect citizens where they cannot directly regulate oil and gas.”); Michelle Bryan Mudd, *A “Constant and Difficult Task”: Making Local Land Use Decisions in States with a Constitutional Right to a Healthful Environment*, 38 ECOLOGY L.Q. 1, 5–6 (2011) (noting that in the 1970s, “courts began ruling that local governments had implied authority to regulate environmental harms under their existing police powers”).

115. See Ohm, *supra* note 97, at 636.

state control over localities,¹¹⁶ and creating greater accountability in the state legislature for the relationship between state and local governments.¹¹⁷

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,¹¹⁸ it can be broken down generally into two categories: home rule powers created by state constitution and those created by statute. Under either framework, state legislators seeking to preempt local action have a great deal of authority to do so.

1. 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.¹¹⁹ These early grants were typified by the creation of a separate sphere of local authority within which cities could legislate, free from state interference.¹²⁰ In some states, the determination of this sphere took the form of a list of items deemed to be of “local interest.”¹²¹ In other states, there was not a specific list, but a more general grant of power to local governments over all issues of local concern.¹²² Thus, in such states, the definition of a “state interest” is crucial to any determination of the proper scope of home rule authority.¹²³ The boundary lines between state and local interests were not easily drawn, however. Furthermore, even when grants of authority were specific, the extent of local authority in the face of conflicting state laws

116. See Barron, *Reclaiming Home Rule*, *supra* note 30, at 2335 (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*, *PROC. OF THE ACAD. OF POL. SCI. IN THE CITY OF N.Y.*, Jan. 1915, at 1, 1–2 (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 restriction, 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 principle of political organization, and once founded upon such principle, should not be subjected to fragmentary additions and alterations that take no account of the original design of the structure”).

117. Note, *Philadelphia Home Rule and City-County Consolidation Under the Pennsylvania Constitution*, 106 U. PA. L. REV. 84, 96–97 (1957).

118. See, e.g., KRANE ET AL., *supra* note 71, at 4, 12 (“[T]he degree of independence possessed by local governments varies from state to state.”).

119. ZIMMERMAN, *supra* note 4, at 27.

120. KRANE ET AL., *supra* note 71, at 12.

121. *Id.*

122. See, e.g., BRIFFAULT & REYNOLDS, *supra* note 111, at 282 (noting that the *imperio* home rule provisions often left terms like “local” and “municipal” undefined).

123. *Id.* at 282–83.

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.¹²⁴ 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.¹²⁵ Ultimately, courts in most major state-local disputes tend to find “a state concern and uph[o]ld the state action.”¹²⁶ In consequence, the so-called *imperio* approach has been “relatively ineffective” in carving out a protected sphere of local authority.¹²⁷

2. 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.”¹²⁸ This grant of authority, also known as the “devolution of powers” or the “residual powers” approach,¹²⁹ is typical in statutory delegations of home rule authority to local governments. Under this framework, local governments are empowered to act in any area, unless explicitly prohibited by state law.¹³⁰ 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.¹³¹ However, local authority may still be altered 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.¹³² Under provisions that generally predate home rule,¹³³ legislatures in most states are required to prefer general legislation over special legislation.¹³⁴ 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.¹³⁵ Whatever the classification, a general

124. ZIMMERMAN, *supra* note 4, at 28.

125. U.S. ADVISORY COMM’N ON INTERGOVERNMENTAL RELATIONS, A-127, LOCAL GOVERNMENT AUTONOMY: NEEDS FOR STATE CONSTITUTIONAL, STATUTORY, AND JUDICIAL CLARIFICATION 44 (1993).

126. ZIMMERMAN, *supra* note 4, at 28.

127. *Id.* at 28–29; *see also* KRANE ET AL., *supra* note 71, at 12 (noting the role state courts have in determining the scope of local authority despite the *imperio* approach).

128. U.S. ADVISORY COMM’N ON INTERGOVERNMENTAL RELATIONS, *supra* note 125, at 44.

129. ZIMMERMAN, *supra* note 4, at 29–30.

130. KRANE ET AL., *supra* note 71, at 12.

131. *See, e.g.*, ZIMMERMAN, *supra* note 4, at 19.

132. Weiland, *supra* note 33, at 264–65.

133. NEIL LITTLEFIELD, METROPOLITAN AREA PROBLEMS AND MUNICIPAL HOME RULE 9 (1962).

134. JOHN M. WINTERS, STATE CONSTITUTIONAL LIMITATIONS ON SOLUTIONS OF METROPOLITAN AREA PROBLEMS 85 (1961); Nadav Shoked, *Quasi-Cities*, 93 B.U. L. REV. 1971, 1983 (2013).

135. WINTERS, *supra* note 134.

law must “apply equally to each member” of the class, and cannot exempt specific members.¹³⁶ 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.¹³⁷ These special legislation clauses aimed to strengthen local governments and to inhibit state governments from rewarding or penalizing specific entities.¹³⁸ The statutory home rule approach 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.¹³⁹ Under this framework, the proper scope of local authority in the face of a state enactment may depend in large part on whether that state law is deemed “general” or “special.” Part III considers the home rule framework in the context of local environmental laws and the ability of states to divest localities of their power.

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.¹⁴⁰ 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,¹⁴¹ 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.”¹⁴²

136. *Id.* at 104.

137. FRUG ET AL., *supra* note 5, at 159–160.

138. Weiland, *supra* note 33, at 265.

139. See ZIMMERMAN, *supra* note 4, at 25.

140. Mudd, *supra* note 114, at 5–6 (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 Diller, *supra* note 2, at 1142–44 (describing the 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).

141. See, e.g., David J. Barron, *Why (and When) Cities Have a Stake in Enforcing the Constitution*, 115 YALE L.J. 2218 (2006) (focusing on San Francisco’s challenge to California’s ban on same-sex marriage).

142. CHRISTOPHER MCGRORY KLYZA & DAVID J. SOUSA, AMERICAN ENVIRONMENTAL POLICY, 1990–2006: BEYOND GRIDLOCK 248 (2008).

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 on climate change and failure to ratify the Protocol.¹⁴³ That agreement specifically lists a number of actions that mayors may take to meet or exceed the Protocol goals in their cities.¹⁴⁴ Similar views gave rise to a conflict between state and local governments over the Environmental Protection Agency's (EPA) Clean Power Plan. Twenty-six state attorneys general filed suit against EPA, but the National League of Cities, U.S. Conference of Mayors, and numerous individual cities participated as *amici* in support of EPA's plan.¹⁴⁵ 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 state efforts to undermine them. But in response to similar conflicts that have manifested in environmental law making on the part of local governments,¹⁴⁶ 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.¹⁴⁷ The influence of partisan politics on the state and local

143. Corina McKendry, *Mayors Climate Protection Agreement*, in GREEN CITIES: AN A-TO-Z GUIDE, *supra* note 29, at 318.

144. *Id.*

145. Julian Spector, *Cities and States are Split Over Obama's Clean Power Plan*, CITYLAB (Dec. 28, 2015), <http://www.citylab.com/weather/2015/12/clean-power-plan-epa-cities-states/421896/>. In April 2017, the D.C. Circuit granted EPA's request to hold the litigation regarding the Clean Power Plan in abeyance pending EPA's review of the legislation.

146. 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. *See, e.g.*, Diller, *supra* note 98, at 1138–39, 1143.

147. *See, e.g.*, David W. Case, *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.”); *see also* EDWARD FLATTAU, FROM GREEN TO MEAN: THE GOP'S DOWNWARD ENVIRONMENTAL SPIRAL, 31, 34, 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); *cf.* SADIK-KHAN & SOLOMONOW, *supra* note 29, at 4 (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’”); Shi-Ling Hsu, *The Accidental Postmodernists: A New Era of Skepticism in Environmental Policy*, 39 VT. L. REV. 27, 29–30 (2015) (“[T]he 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.”); 2015 *Anti-Environmental Budget Riders*, NRDC (Mar. 7, 2016), <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).

relationship has long been an American reality.¹⁴⁸ In parts of the country with a more conservative statewide bent, cities are often more amenable to—and potentially more in need of—environmental regulation than the surrounding areas.¹⁴⁹ When cities attempt to act out those goals of the urban populace, state law makers may work to reject this kind of policy making 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.¹⁵⁰

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 cases of conflicts between the federal and state governments, strongly articulated principles of federalism do not apply to the relationship between localities and states. 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.¹⁵¹ 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 may be sufficient to impliedly preempt any separate local action.¹⁵² States may also expressly declare their intent to preempt local laws when establishing a comprehensive—or quasi-comprehensive—set of rules governing an issue.¹⁵³ Finally, and most relevant here, states can pass laws that do nothing more than remove local power over certain issues.¹⁵⁴ All of these state actions reflect attempts to alter the authority that would otherwise be enjoyed by local governments under the home rule framework. Subpart A considers each of these three types of state action to remove local authority.

148. Frank J. Goodnow, *Municipal Home Rule*, 21 POL. SCI. Q. 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.”).

149. See, e.g., Patrick Sisson, *Why Cities May Save Our Climate*, CURBED (Oct. 31, 2016, 1:48 PM), <http://www.curbed.com/2016/10/31/13479172/climate-change-urban-planning-cities-sustainable-infrastructure>.

150. See, e.g., Diller, *supra* note 2, at 1134 (“The most common opponents of the assertion of local authority for regulatory purposes are businesses.”).

151. See *infra* Part III.A.1.

152. *Id.*

153. See *infra* Part III.A.2.

154. *Id.*

A. 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.¹⁵⁵ Such preemption can occur in several ways. The Supreme Court and others have recognized two forms of implied preemption: field preemption and conflict preemption.¹⁵⁶ In the former, judges may see state occupancy of a field as eliminating local authority to act on related issues.¹⁵⁷ The latter, conflict preemption, is generally analyzed in terms of “physical impossibilit[ies]” and “obstacle[s].”¹⁵⁸ Courts look, respectively, to whether it would be literally impossible for someone to comply with the state and local statutes,¹⁵⁹ or whether a local measure presents an “obstacle” to achieving the purposes and objectives of the state statute.¹⁶⁰

In the environmental context, implied preemption has come up in a number of cases involving local limits on natural gas extraction via hydraulic fracturing, or “fracking.” For instance, a court found that provisions of the West Virginia Code preempted a local fracking ban. 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.¹⁶¹ Colorado courts have also employed an implied preemption analysis to assess whether local regulations pose “operational conflicts with state objectives.”¹⁶² 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.¹⁶³ As a result, local measures regulating some aspects of fracking were permitted.¹⁶⁴ This kind of implied

155. See, e.g., Diller, *supra* note 2, at 1126; Outka, *supra* note 104, at 966–75.

156. Gade v. Nat’l Solid Wastes Mgmt. Ass’n, 505 U.S. 88, 98 (1992).

157. Diller, *supra* note 2, at 1153 (“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.”).

158. Christopher H. Schroeder, *Supreme Court Preemption Doctrine*, in PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM’S CORE QUESTION 131 (2009).

159. 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.” Diller, *supra* note 2, at 1142.

160. Schroeder, *supra* note 158, at 132.

161. Outka, *supra* note 104, at 968 (citing *Ne. Nat. Energy, LLC v. City of Morgantown*, No. 11-C-411, 2011 WL 3584376, at *9 (W. Va. Cir. Ct. Aug. 12, 2011)).

162. *Id.* at 969; *City of Longmont v. Colo. Oil & Gas Ass’n*, 369 P.3d 573, 577 (Colo. 2016) (finding an “operational conflict” between city fracking bans and applicable state law, and therefore finding city ban preempted and unenforceable).

163. Outka, *supra* note 104, at 966–68, 970–71 (discussing *Wallach v. Town of Dryden*, 16 N.E.3d 1188 (N.Y. 2014) and *Huntley & Huntley v. Borough of Oakmont*, 964 A.2d 855 (Pa. 2009)).

164. *Id.*

preemption analysis may be employed whenever an arguably relevant state law operates as a backdrop to a local activity; the precise analysis varies by state.

B. Express Removal of Local Authority

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 preempting local authority to regulate in the area.¹⁶⁵ Although courts may again engage in various interpretations of legislative intent when confronted with apparently express preemption,¹⁶⁶ “[i]t is well-established that within Constitutional limits Congress may preempt state authority by so stating in express terms.”¹⁶⁷ 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 by noting its intent to preempt local authority.¹⁶⁸ Second, 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.¹⁶⁹ 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.¹⁷⁰

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. Where a state has a long history of regulation in an area that would rise to the 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. At the same time, statements of interest in a particular field,

165. Indeed, some state courts require an express statement of intent to preempt before any such preemption will be found. *See, e.g.*, Outka, *supra* note 104, at 968, 983 (describing New York and Kansas state courts as “avoiding intrastate preemption absent express legislative intent”).

166. Schroeder, *supra* note 158, at 122–24 (describing interpretive principles related to express preemption).

167. *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 203 (1983) (citing *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)).

168. *See, e.g.*, Diller, *supra* note 2, at 1138 (noting that, in most states, “the legislature is free to expressly preempt any city ordinance”).

169. *See, e.g.*, van de Biezenbos, *supra* note 114, at 1656–57 (describing examples of targeted preemption of local authority to regulate natural gas extraction).

170. *See, e.g.*, H.R. 40, 84th Leg., Reg. Sess. (Tex. 2015) (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.”).

without more, should not be controlling. This Article hones in on instances 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 typical move of state legislatures to preempt local laws by establishing statewide schemes of maximum, minimum, or non-discretionary standards.¹⁷¹ At the core of the new elimination of local authority appears to be “state decision makers’ suspicions about local decision making,”¹⁷² and the growing prevalence of these state actions may undermine arguments advanced by some local government scholars that “direct state efforts to overturn local governmental decisions are relatively rare.”¹⁷³ As partisan splits on environmental policy continue to divide the state and local levels of government, such attempts by the state to stop local action may become more frequent. These state efforts may operate to limit local involvement in environmental law and policy,¹⁷⁴ and to thereby ensure that certain environmental issues are left unaddressed.

While far from a new trend,¹⁷⁵ the targeted removal of local authority over environmental and other matters has negative consequences. Such state action can pose a threat to local innovation¹⁷⁶ and ideals of governance, as it “suppresses the interest of municipal citizens to participate directly in decisionmaking which affects them.”¹⁷⁷ Moreover, this state behavior is contrary to the very goals of the home rule movement. That movement was

171. See, e.g., Weiland, *supra* note 33, at 268 (describing state preemption of local laws exclusively in terms of standard setting).

172. FRUG & BARRON, *supra* note 6, at 143.

173. *Id.* at 33 (characterizing literature of local government scholars, such as Richard Briffault, that attribute a considerable amount of power to local governments).

174. Weiland, *supra* note 33, at 238.

175. FRUG, *supra* note 14, at 53 (“[I]t 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.”).

176. Diller, *supra* note 2, at 1114 (“[T]he primary threat to local innovation is the charge of intrastate preemption.”); cf. KRANE ET AL., *supra* note 71, at 2 (noting that “possessing substantial freedom from state government control is vital for the development of dynamic communities”).

177. 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) (“[B]y 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, 377 (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”).

designed to get away from piecemeal grants of authorities to localities,¹⁷⁸ 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.¹⁷⁹ 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.

IV. CASE STUDY: BANNING BAG BANS UNDER THE TRADITIONAL FRAMEWORK

Plastic bag bans, and bans on those bag bans, provide a straightforward instance of targeted state preemption of local measures. This Part will provide a brief background on the ways these prohibitions 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.

Common practice throughout the United States has long involved freely distributing plastic bags to customers along with any purchase. However, production and disposal of these plastic bags can lead to waste and pollution¹⁸⁰ that in turn has a number of negative impacts, including harms to wildlife,¹⁸¹ space in landfills,¹⁸² and others.¹⁸³ 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.¹⁸⁴ These laws are intended to remedy the pollution of landscape and

178. Cf. Joni Armstrong Coffey, *The Case for Fiscal Home Rule*, FLA. B.J., April 1997, at 54–55; Christopher W. Hammons, *State Constitutional Reform: Is It Necessary?*, 64 ALB. L. REV. 1327, 1346 n.122 (2001) (noting that, in New York, “[t]he Citizen’s Union argued for greater home rule for cities, and suggested that the piecemeal amendments adopted between 1894 and 1938 had created much obsolete or partially inapplicable matter in the state Constitution, which needed to be excised”).

179. Cf. SHUTKIN, *supra* note 35, at 128 (noting the importance of “meaningful, informed participation in the decision-making procedures that affect the quality of people’s lives” for civic democratic practice and, in turn, civic environmentalism).

180. See, e.g., John Roach, *Are Plastic Grocery Bags Sacking the Environment?*, NAT. GEOGRAPHIC NEWS (Sept. 2, 2003), http://news.nationalgeographic.com/news/2003/09/0902_030902_plasticbags.html (noting that millions of plastic bags end up as litter each year, and that “[o]nce in the environment, it takes months to hundreds of years for plastic bags to breakdown. As they decompose, tiny toxic bits seep into soils, lakes, rivers, and the oceans.”).

181. See, e.g., *Ocean Plastics Pollution: A Global Tragedy for Our Oceans and Sea Life*, CENT. FOR BIOLOGICAL DIVERSITY, http://www.biologicaldiversity.org/campaigns/ocean_plastics/ (last visited July 20, 2017) (describing the harms to sea turtles from ingesting plastic bags).

182. See, e.g., Daniella Dimitrova Russo & Todd Myers, *Should Cities Ban Plastic Bags?*, WALL ST. J. (Oct. 8, 2012), <https://www.wsj.com/articles/SB10000872396390444165804578006832478712400> (discussing the cost of putting plastic bags in landfill).

183. See, e.g., CHRIS GIBSON ET AL., HOUSEHOLD SUSTAINABILITY: CHALLENGES AND DILEMMAS IN EVERYDAY LIFE 91–92 (2013) (noting plastic bags significantly impact “fossil fuel use”).

184. Comprehensive information on these kinds of bans and charges nationwide is available via Novolex, a packaging company. For a mapping tool to find information on all 50 states, see BAG THE BAN, <http://www.bagtheban.com/in-your-state> (last visited July 20, 2017).

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.¹⁸⁵ Although there are currently robust debates being had about whether such bans result in net positive environmental impacts,¹⁸⁶ 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.¹⁸⁷

Bans on plastic bags are not a new solution to plastic pollution,¹⁸⁸ nor are they limited to the United States.¹⁸⁹ Within this country, however, some states have responded to local measures by essentially banning bag bans.¹⁹⁰ State action to date has not involved explicit regulation of plastic bags or containers, but has instead contained only a prohibition on local action.¹⁹¹ 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.¹⁹² As Columbia, Missouri debated a local ban on plastic bags, the state legislature enacted a measure to prohibit these kinds of local laws.¹⁹³ Missouri’s version of a ban on bag bans—passed over a governor’s veto—states that all merchants doing business in the state “shall have the option to provide customers either a paper or a plastic bag for the packing of any item or good purchased,” and prohibits political subdivisions

185. See, e.g., Elisabeth Rosenthal, *Is It Time to Bag the Plastic?*, N.Y. TIMES (May 18, 2013), <http://www.nytimes.com/2013/05/19/sunday-review/should-america-bag-the-plastic-bag.html> (“[P]lastic bags are the bane of recycling programs” as 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.”).

186. See, e.g., GIBSON ET AL., *supra* note 183, at 94–95, 97–98 (noting that reusable bag impact heavily depends on the number of times the bag is used).

187. *Supra* notes 39–43 (describing anti-pollution measures including reduction of plastic bags).

188. See, e.g., MULLANY, *supra* note 38, at 8–12 (describing bans on plastic, Styrofoam, and other plastic products in states and cities around the country).

189. See, e.g., Émilie Clavel, *Think You Can’t Live Without Plastic Bags? Consider This: Rwanda Did It*, GUARDIAN (Feb. 15, 2014, 7:30 AM), <https://www.theguardian.com/commentisfree/2014/feb/15/rwanda-banned-plastic-bags-so-can-we>.

190. See *infra* notes 194–200.

191. In contrast to the state-level actions in many parts of the country, in November 2016, voters in California approved Proposition 67, a statewide single-use carryout bag ban. As a result, specified grocery stores, retail stores, and liquor stores will no longer be able to provide single-use plastic carryout bags to their customers. See *Single-Use Carryout Bag Ban (SB 270)*, CALRECYCLE, <http://www.calrecycle.ca.gov/Plastics/CarryOutBags/> (last updated Nov. 9, 2016).

192. S. 1241, 52nd Leg., 1st Reg. Sess. (Ariz. 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 H.R. 2131, 52nd Leg., 2nd Reg. Sess. (Ariz. 2016).

193. Ray Howze, *Legislature Says Missouri Cities Can’t Ban Plastic Bags or Set ‘Living Wage,’* ST. LOUIS PUB. RADIO (May 6, 2015), <http://news.stpublicradio.org/post/legislature-says-missouri-cities-cant-ban-plastic-bags-or-set-living-wage#stream/0>.

from imposing “any ban, fee, or tax upon the use of either paper or plastic bags for packaging of any item or good purchased.”¹⁹⁴ 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, disposition or disposal of auxiliary containers, or impose any prohibition, restriction, fee, or tax with respect to auxiliary containers.¹⁹⁵ Similar actions have been taken in Wisconsin,¹⁹⁶ Idaho,¹⁹⁷ and Michigan.¹⁹⁸

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.¹⁹⁹ The plaintiff in that lawsuit, a member of the City Council in Tempe, Arizona, alleges that SB 1241 prevented the Council in Tempe from moving forward on a local bag ban.²⁰⁰ No decision has yet been issued in this case. However, it may be possible to predict the likelihood of success of this claim under a traditional home rule analysis. The analysis below discusses the possible ways that a court might rule on this issue. Arizona is a constitutional home rule state, and the plaintiffs styled the claim against the state’s prohibition on home rule bag bans as an infringement on an area of local interest. Further, another subpart assesses the likely fate of the same kind of ban in a legislative home rule state. While both analyses will necessarily vary by state, and by the language of the constitution 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.

A. Constitutional Home Rule

As noted, in states with constitutional home rule provisions, localities are generally granted authority over all topics of local concern. Courts determine whether something is of local concern, meaning that the judiciary wields a great deal of power. Judicial assessment of the “local” nature of an issue generally comes down to a multi-factored analysis,²⁰¹ and it is often difficult to predict whether a court will characterize a particular topic as a matter of state or

194. H.R. 722, 89th Gen. Assemb., 1st Reg. Sess. (Mo. 2015).

195. H.R. 1053, 119th Gen. Assemb., 2nd Reg. Sess. (Ind. 2016) (amending Section I.C. § 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. *See* I.C. §§ 36-1-3-8; 36-1-3-8.5 (2016).

196. *See* WIS. STAT. § 66.0419 (2017).

197. *See* H.R. 372, 63rd Leg., 2nd Reg. Sess. (Idaho 2016).

198. *See* MICH. COMP. LAWS § 445.592 (2016).

199. Complaint at 7-8, *Kuby v. Arizona*, No. CV2015-011434 (Ariz. Super. Sept. 30, 2015).

200. *Id.*

201. *Baker & Rodriguez, supra* note 95, at 1351.

local interest.²⁰² Historically, however, courts have given broad constructions to state interests and narrower interpretations to their local counterparts.²⁰³

In Arizona, the state constitution establishes the right of cities to frame a charter for their own government.²⁰⁴ There are nineteen different charter cities in Arizona, each with unique charters.²⁰⁵ 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.²⁰⁶ In general, the charter power includes “all that is necessary or incident to the government of the municipality.”²⁰⁷ 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 lighting²⁰⁸ and fencing requirements.²⁰⁹ In other circumstances, however, such as the tax power,²¹⁰ 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 limits,” provided there are no conflicting state rules.²¹¹ 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.²¹² The state is barred from regulating the conduct of local governments on purely local issues.²¹³ However, assuming proper authority on the part of the city, both cities and states “may legislate on the same subject when that subject is of local concern or when . . . the charter or particular state legislation confers on the city express

202. See Darin M. Dalmat, *Bringing Economic Justice Closer to Home: The Legal Viability of Local Minimum Wage Laws Under Home Rule*, 39 COLUM. J.L. & SOC. PROBS. 93, 105 (2005).

203. KRANE ET AL., *supra* note 71, at 13; Schragger, *supra* note 3, at 70 (“[C]ourts tend to defer to legislatures in large part because of the judges’ inability to settle on nonpolitical principles for dividing up authority.”).

204. ARIZ. CONST. art. XIII, § 2.

205. *City of Tucson v. State*, 273 P.3d 624, 626 (Ariz. 2012).

206. See, e.g., *Shaffer v. Allt*, 545 P.2d 76, 81 (Ariz. Ct. App. 1976) (holding a city’s ordinance authorizing the purchase of liquor was a “municipal concern” in which the state may not interfere”).

207. *City of Tucson v. Walker*, 135 P.2d 223, 226 (Ariz. 1943).

208. See *Whiteco Outdoor Advert. v. City of Tucson*, 972 P.2d 647, 651 (Ariz. Ct. App. 1998).

209. *Arizona Fence Contractors Ass’n v. City of Phoenix Advisory & Appeals Bd.*, 436 P.2d 641, 643 (Ariz. Ct. App. 1968).

210. *Home Builders Ass’n of Cent. Ariz., Inc. v. Riddel*, 510 P.2d 376, 378 (Ariz. 1973).

211. *City of Tucson v. Tucson Sunshine Climate Club*, 164 P.2d 598, 601 (Ariz. 1945).

212. *Strode v. Sullivan*, 236 P.2d 48, 52 (Ariz. 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 *City of Tucson v. State*, 333 P.3d 761, 767 (Ariz. Ct. App. 2014) (finding that rules governing local elections are solely of local interest); *City of Phoenix v. Harnish*, 150 P.3d 245, 251 (Ariz. Ct. App. 2006) (holding that eminent domain is a matter of state interest).

213. *Strode*, 236 P.2d at 52; see also *City of Tucson*, 333 P.3d at 765.

power to legislate thereon.”²¹⁴ 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.”²¹⁵ Contrary local ordinances within the state are therefore invalid.²¹⁶

The regulation of plastic bags by Tempe is arguably 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.²¹⁷ Nonetheless, the state may still be able to regulate in the area if it establishes a simultaneous state interest. Senate Bill 1241 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.”²¹⁸ The precise question of whether such uniform business or environmental standards constitute a state interest has not been decided in Arizona. Given the general latitude in assessing whether something triggers a state interest, it appears likely that regulation of auxiliary containers would qualify as such an interest. The state would then be permitted to override local bans.²¹⁹ Therefore, home rule challenges to the ban on bag bans would likely be unsuccessful under a traditional analysis.

B. 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 extrapolate 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.²²⁰ Thus, local authority is permitted

214. *City of Tucson v. Rineer*, 971 P.2d 207, 209 (Ariz. Ct. App. 1998) (quoting *Flagstaff Vending Co. v. City of Flagstaff*, 578 P.2d 985, 988 (Ariz. 1978)).

215. *Id.*

216. *Id.*

217. *See* TEMPE, ARIZ., CHARTER OF THE CITY art. 1, § 1.01 (1964), <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.”).

218. S. 1241, 52nd Leg., 1st Reg. Sess. (Ariz. 2015).

219. *See, e.g., City of Tucson v. State*, 957 P.2d 341, 344 (Ariz. 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).

220. *See, e.g., ALASKA CONST.* art. X, § 11 (“A home rule borough or city may exercise all legislative powers not prohibited by law or by charter.”).

only as long as the state has not issued a contrary statement.²²¹ 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.²²²

One of the only real limitations on this kind of denial of local power is the prohibition against special legislation.²²³ As noted, special legislation is legislation that treats cities, or classes of cities, differently than other cities or classes of cities within the state. 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.”²²⁴ 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.”²²⁵ If that is the case, the prohibition on special legislation will not block a state’s ability to act.²²⁶ Even if the statute does discriminate against some cities, certain exceptions can save the law.²²⁷ Arizona’s bag ban applies to all cities and counties in the state; therefore, it is likely to be found to be a valid general law under a traditional analysis.²²⁸

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.²²⁹ The historic deference to state action and legal ambiguity of localities make it possible for states to chill the experimentation of their local governments on a number of policy issues. It is therefore necessary to move beyond the traditional confines of the home rule analysis. Part V considers legal tools to supplement the home rule analysis and aid local efforts to combat reactive state legislation in the environmental context.

221. Cf. FRUG & BARRON, *supra* note 6, at 69 (noting that, in Massachusetts, the home rule grant permits cities “to act when the state legislature has not said [they] cannot act”).

222. Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 16–17 (1999) (suggesting possible ways in which courts can avoid head-to-head conflicts between state and local laws); see also Dalmat, *supra* note 202, at 93, 107.

223. See BRIFFAULT & REYNOLDS, *supra* note 111, at 244–46.

224. 2 MCQUILLIN MUN. CORP. § 4:43 (3d ed.).

225. See, e.g., *Patrolmen’s Benevolent Ass’n of N.Y., Inc. v. N.Y. State Pub. Emp. Relations Bd.*, 728 N.Y.S.2d 875, 879 (App. Div. 2001), *aff’d sub nom.* *Patrolmen’s Benevolent Ass’n of N.Y. Inc. v. City of New York*, 729 N.Y.S.2d 789 (App. Div.), *aff’d as modified*, 767 N.E.2d 116 (N.Y. 2001).

226. *Id.*

227. See, e.g., *Kelley v. McGee*, 443 N.E.2d 908, 913 (N.Y. 1982) (noting that matters of state concern constitute an exception to the special legislation bar).

228. See, e.g., *Ariz. Downs v. Ariz. Horsemen’s Found.*, 637 P.2d 1053, 1061 (Ariz. 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.”).

229. See, e.g., Jacob Alderdice, *Impeding Local Laboratories: Obstacles to Urban Policy Diffusion in Local Government Law*, 7 HARV. L. & POL’Y REV. 459, 473 (2013) (noting that the “existing legal structure facing local government currently privileges state, executive, and business interests over the innovation and spread of urban policy”).

V. JUDICIAL ALLOCATION OF STATE AND LOCAL POWER

In order to protect progressive local policies from reactive state laws, localities must pursue solutions beyond the traditional home rule framework. Running parallel to the strict formulations of home rule are a number of cases in which judges, under a variety of rationales, allocate power in favor of the locality. Some judges alter their analyses to identify state goals to divest local authority and thwart these efforts. Judges have a tendency to assume an active role in allocating authority between state and local governments. This phenomenon, what some have called the “shadow doctrine,”²³⁰ has a long history in local government law, dating back to the debates between Judges Dillon and Cooley.²³¹ 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.²³²

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 rule determinations.²³³ Neither the “shadow doctrine” as it currently stands, nor the equal protection doctrine, are easy to apply in the environmental context. But these doctrines’ ability to preserve local policy making may point to other means of forging a path forward. To the extent that applicable substantive protections can be found, courts may push back against reactive state action in the face of local environmental policy making.

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, which may explain why certain

230. Richard C. Schragger, *Reclaiming the Canvassing Board: Bush v. Gore and the Political Currency of Local Government*, 50 BUFF. L. REV. 393, 408 (2002).

231. See, e.g., Baker & Rodriguez, *supra* note 95, at 1349 (describing the substantive choices by judges that home rule decisions involve); Williams, *supra* note 67, at 85–86 (noting that, since 1870, judges have “incorporat[ed] their attitudes toward governmental power (inseparable from their political beliefs) into municipal law”).

232. Cf. LITTLEFIELD, *supra* note 133, at 18 (“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.”).

233. Williams, *supra* note 67, at 85–86.

cases come out differently in the home rule framework.²³⁴ 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.”²³⁵ Thus, in fields such as zoning, land use, and school financing and districting, courts have often upheld local authority against intrusions by the state.²³⁶

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 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 rationale do not appear to apply more generally to environmental law. That result is perhaps not unusual; as noted, many environmental issues and impacts bleed beyond local boundaries.²³⁷ Thus, unlike some fields involving entirely local impacts,²³⁸ the opposite principles are often in play in the environmental context, where there has long been a push toward law making at increasingly higher levels of government. An argument could, of course, be advanced for looking at environmental issues on a local, 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, it is hard to make a case that environmental law is a uniquely local endeavor. 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.

B. Federal Constitutional Provisions

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’ abilities to eliminate local power to enact laws that advance the

234. See, e.g., Briffault, *supra* note 222, at 18–19 (“[L]itigations have had only a limited effect in displacing the structure of decentralized responsibility for education finance and unfettered local control over land use. Indeed, they demonstrate the extent of the state commitment to preserving a strong local role in these areas.”); Carol M. Rose, *The Ancient Constitution vs. The Federalist Empire: Anti-Federalism from the Attack on “Monarchism” to Modern Localism*, 84 NW. U.L. REV. 74, 99 (1990); Schragger, *supra* note 230, at 409.

235. Schragger, *supra* note 230, at 409.

236. See *id.* at 235; see also Briffault, *supra* note 222, at 18; Rose, *supra* note 234, at 99.

237. Wiener, *supra*, note 31, at 1962.

238. See, e.g., Michael Libonati, *Home Rule: An Essay on Pluralism*, 64 WASH. L. REV. 51, 69 (1989) (critiquing California’s overturning of local criminal policies on implied preemption grounds and noting that “nearly every significant aspect of criminal law enforcement reflects a norm [of] decentralization”).

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.²³⁹

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."²⁴⁰ The Equal Protection Clause vindicates individual rights, not rights of geographic areas or communities.²⁴¹ However, those "[i]ndividual rights in the Constitution constrain state power over municipalities."²⁴² 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."²⁴³ 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.²⁴⁴

239. See Marc R. Poirier, "Whiffs of Federalism" in *United States v. Windsor: Power, Localism, and Kulturkampf*, 85 U. COLO. L. REV. 935, 964–65, 979 (2014) ("[T]he Court step[ped] in to protect the evolving understanding of human dignity as it is investigated locally by the people."); see also William D. Araiza, *Irrationality and Animus in Class-of-One Equal Protection Cases*, 34 *ECOLOGY L.Q.* 493, 502–03 (2007) (arguing that an "'exhibition' of animus triggered more searching judicial review"); Barron, *supra* note 30, at 562; Lawrence Rosenthal, *Romer v. Evans as the Transformation of Local Government Law*, 31 *URB. LAW.* 257, 260, 268–69 (1999) (stating that *Romer* stands for the proposition that "it is irrational to deny local governments the power to address local problems").

240. WILLIAM D. ARAIZA, *ENFORCING THE EQUAL PROTECTION CLAUSE: CONGRESSIONAL POWER, JUDICIAL DOCTRINE, AND CONSTITUTIONAL LAW* 10 (2015).

241. David F. Coursen, *Equal Protection, Strict Scrutiny, and Actions to Promote Environmental Justice*, 39 *Envtl. L. Rep. (Envtl. L. Rep.)* 10,201, 10,205 (2009).

242. Josh Bendor, Note, *Municipal Constitutional Rights: A New Approach*, 31 *YALE L. & POL'Y REV.* 389, 419 (2013).

243. *Id.*; see also *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 467 (1982) (announcing that the Fourteenth Amendment forbids "plac[ing] special burdens on the ability of minority groups to achieve beneficial legislation").

244. See, e.g., Weiland, *supra* note 33, at 262–63 (discussing how the Supreme Court has used the Fifteenth Amendment and the Equal Protection Clause of the Fourteenth Amendment to strike down state statutes that altered local powers to the detriment of individual rights). Localities themselves, however, may not have constitutional rights that can be invoked against the state. Doctrine from *Hunter v. City of Pittsburgh* "bars localities from invoking the Constitution against their own states;" although not strictly followed by courts, it remains precedential. See Kathleen S. Morris, *The Case for Local Constitutional Enforcement*, 47 *HARV. C.R.-C.L. L. REV.* 1, 6 (2012). But see Richard Briffault, *Who Rules at Home? One Person/One Vote and Local Governments*, 60 *U. CHI. L. REV.* 339, 347–48 (1993) (theorizing that *Avery v. Midland County*, 390 U.S. 474 (1968) and progeny stand for the proposition that "[s]tates that provide for elective local governments must abide by the constitutional rules for representative democracies").

The Supreme Court made this point explicit in *Romer v. Evans*.²⁴⁵ In *Romer*, the Supreme Court considered another reaction at the state level against local progressivism: a state effort to prohibit laws barring discrimination on the basis of sexual orientation.²⁴⁶ From the late 1970s to 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.²⁴⁷ 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”—a class which the court referred to as “homosexual persons or gays and lesbians.”²⁴⁸ The *Romer* plaintiffs challenged Amendment 2 as unconstitutional on equal protection grounds.²⁴⁹ The case then came before the Supreme Court.

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.²⁵⁰ Colorado state courts found that Amendment 2 was subject to strict scrutiny because it infringed on the fundamental rights of those affected; therefore, the courts enjoined its enforcement.²⁵¹ On appeal, the Supreme 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.²⁵² Instead, it found that, because the law was rooted in legislative animus, it was not supported by a rational basis.²⁵³ 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.²⁵⁴

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 model of affording deference to legislatures under the rational basis framework. The decision offered a means

245. *Romer v. Evans*, 517 U.S. 620 (1996).

246. *Id.* at 623–24.

247. *Id.*

248. *Id.* at 624.

249. *Id.* at 625.

250. *Id.* at 631.

251. *Id.* at 626.

252. *Id.* at 631–32.

253. *Id.* at 634 (“[L]aws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.”).

254. *Id.* at 635.

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 Department of Agriculture v. Moreno*²⁵⁵ and *City of Cleburne v. Cleburne Living Center*.²⁵⁶ Together, these cases provide a foundation for the Court's "anti-animus methodology."²⁵⁷ The foundation of this 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."²⁵⁸ 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.'"²⁵⁹ 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 they do disallow legislative process motivated by a desire to harm a disadvantaged group.²⁶⁰ Of course, critics of the animus cases may characterize these opinions as impermissible judicial determination of substantive policy that overrides popular will.²⁶¹ In this light, the willingness to step outside the bounds of traditional rational basis review and peer into legislative motivations is outcome-driven and outcome-determinative. Nevertheless, the animus cases have made clear the impermissibility of legislation that has as its primary

255. 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 any other 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 governmental interest," and that the exclusion therefore lacked a rational basis. *Id.* at 534, 538.

256. 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 those with intellectual disabilities. *Id.* at 435. The Court rejected a formulation that the intellectually disabled were a quasi-suspect class. *Id.* at 442-47. Nevertheless, the Court found the denial improper because it lacked a rational basis and was motivated instead by "negative attitudes" or "fear." *Id.* at 448-50.

257. Dale Carpenter, *Windsor Products: Equal Protection from Animus*, 2013 SUP. CT. REV. 183, 204-05 (2014) (describing "*Moreno*, *Cleburne*, and *Romer*" as the "[a]nimus [p]recedents," and quoting Cass Sunstein as calling them a "trilogy").

258. *Id.* at 185.

259. *Id.* at 230.

260. *Id.* at 230-31.

261. *Id.* at 185; see also *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting) (stating that "[t]he Court has mistaken a Kulturkampf for a fit of spite," and arguing that the constitutional amendment at issue was an attempt by Coloradans to "preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws. That objective, and the means chosen to achieve it, are not only unimpeachable under any constitutional doctrine hitherto pronounced (hence the opinion's heavy reliance upon principles of righteousness rather than judicial holdings); they have been specifically approved by the Congress of the United States and by this Court."); cf. Daniel O. Conkle, *Evolving Values, Animus, and Same-Sex Marriage*, 89 IND. L. J. 27, 38-42 (2014) (criticizing the use of an animus justification to strike down state barriers to same-sex marriage).

purpose the infliction of injury or indignity.²⁶² In the same way as the special legislation doctrine protects against the singling out of particular cities for favorable or unfavorable treatment, the Equal Protection Clause protects against such singling out of individuals.²⁶³ Thus, the “core anti-animus requirement” of the Equal Protection Clause²⁶⁴ 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. Scholars have characterized *Romer*, *Windsor*, and similar cases as containing “whiffs of federalism,”²⁶⁵ “traces of local constitutionalism,”²⁶⁶ or, more explicitly, a prohibition on state preemption of unpopular local political processes.²⁶⁷ While these theories vary, the arguments all 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.²⁶⁸ 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].”²⁶⁹ This kind of support of local constitutional enforcement may uphold parochial policies as well as progressive ones.²⁷⁰ But it also ensures that “states may not preclude their local

262. Carpenter, *supra* note 257, at 243.

263. See Araiza, *supra* note 239, at 504.

264. William D. Araiza, *After the Tiers: Windsor, Congressional Power to Enforce Equal Protection, and the Challenge of Pointillist Constitutionalism*, 94 B. U. L. REV. 367, 412–13 (2014).

265. Poirier, *supra* note 239, at 977. The phrase “whiffs of federalism” used in this title comes from Justice Alito’s dissenting opinion in *United States v. Windsor*, 133 S. Ct. 2675, 2720 (2013) (Alito, J., dissenting).

266. Barron, *The Promise of Cooley’s City*, *supra* note 30, at 494, 496.

267. Rosenthal, *supra* note 239, at 258. The federalist support for the Court’s *Windsor* decision, for instance, posits that the federal government lacked authority for the Defense of Marriage Act, “an unprecedented expansion of federal authority into a domain traditionally controlled by the states.” Carpenter, *supra* note 257, at 198.

268. See Barron, *The Promise of Cooley’s City*, *supra* note 30, at 495 (“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.”); Poirier, *supra* note 239, at 976–77 (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] intru[sion] on the historic role of the states”); Rosenthal, *supra* note 239, at 268–69 (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”).

269. Poirier, *supra* note 239, at 977–78.

270. Barron, *The Promise of Cooley’s City*, *supra* note 30, at 548–49 (“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.”).

political institutions from promoting a norm of constitutional equality that lies beyond direct judicial enforcement.²⁷¹

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.²⁷² However, 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. To be sure, laws at the state level that target certain local actions may be motivated by animus or industry interests.²⁷³ 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,²⁷⁴ and encourage those industries to seek redress at the state level.²⁷⁵ In these fights, localities often lose out to special interests at the state level, as they have much weaker lobbying influence.²⁷⁶ But while environmental harms endanger humans,²⁷⁷ 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. 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,²⁷⁸ or, viewed another way, on the right of citizens to develop policy solutions for a particular problem.²⁷⁹ In consequence, claims invoking the Federal Equal Protection Clause to guard against state

271. *Id.* at 571.

272. *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”).

273. *Cf.* Roesler, *supra* note 2, at 1137 (“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.”).

274. Diller, *supra* note 2, at 1114 (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”).

275. *See, e.g.*, *Cleveland v. State*, 989 N.E.2d 1072, 1085 (Ohio Ct. App. 2013) (describing restaurant industry influence that led to passage of a state ban on local regulation of trans fats).

276. *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).

277. SHUTKIN, *supra* note 35, at 17.

278. 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).

279. 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 produced 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.

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 difficult to apply in the context of local environmental laws.²⁸⁰

C. State Environmental Protections

The possibly localist underpinnings of both the “shadow doctrine” of local government law and the animus line of cases illustrate the ways in which judges are involved in allocating state and local power. They also provide a good example of how judges react when they are uncomfortable with the result of the typical division of power. To date, similar kinds of reasoning have not occurred in environmental law. The seemingly implacable nature of the distribution of state and local power has stymied both courts and scholars from combatting the targeted preemption of local environmental efforts.²⁸¹ Nevertheless, the recent emergence of reactive state legislation may offer an impetus for judges to more carefully examine possible bases for defending local environmental protections. Outside of the home rule context, 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.²⁸² Even where state constitutional protections do not exist, the public trust doctrine could potentially serve 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.²⁸³

1. State Constitutional Provisions

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.²⁸⁴ In general, these provisions do not impose

280. For many of the reasons described here, most attempts to use the Equal Protection Clause to advance environmental justice have been similarly unsuccessful. *See, e.g.,* Carlton Waterhouse, *Abandon All Hope Ye That Enter? Equal Protection, Title VI, and the Divine Comedy of Environmental Justice*, 20 *FORDHAM ENVTL. L. REV.* 51, 63–69 (2009).

281. *See, e.g.,* Spence, *supra* note 177, at 376 (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”).

282. *See, e.g.,* Araiza, *supra* note 278, at 438.

283. *See* William D. Araiza, *The Public Trust Doctrine as an Interpretive Canon*, 45 *U.C. DAVIS L. REV.* 693, 703 (2012).

284. *See, e.g.,* Araiza, *supra* note 278, at 439 (“[A]pproximately two-thirds of state constitutions . . . speak in some way to environmental concerns.”); Barton H. Thompson, Jr., *Environmental Policy and State Constitutions: The Potential Role of Substantive Guidance*, 27

affirmative duties on a state,²⁸⁵ but establish limits on government action.²⁸⁶ 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*.²⁸⁷ 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.²⁸⁸

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.²⁸⁹ But it also acknowledged that “constitutional commands regarding municipalities’ obligations and duties to their citizens cannot be abrogated by statute.”²⁹⁰ The court found that the state scheme of voiding all local regulations 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.”²⁹¹ Thus, the court held that the portion of the state legislation preempting local law making was improper. In the limited states like Pennsylvania that enshrine environmental protection in the constitution, local governments may therefore have a powerful tool to push back against state override.

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.”).

285. Thompson, *supra* note 284, at 896 (“[S]tate 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.”).

286. See Araiza, *supra* note 278, at 446.

287. *Robinson Twp. v. Commonwealth*, 83 A.3d 901 (Pa. 2013).

288. PA. CONST. art. I, § 27.

289. *Robinson Twp.*, 83 A.3d at 977.

290. *Id.*

291. *Id.* at 978.

2. Public Trust Doctrine

Of course, not all state constitutions incorporate explicit protections of environmental values. Even where these textual protections do not exist,²⁹² 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.²⁹³ Both the precise scope and the legal foundation of the doctrine are still very much in flux, and heavily debated.²⁹⁴ In short, the concept of the public trust states that certain environmental and natural resources are held in trust for citizens by the government.²⁹⁵ The principal trustee of those resources is the state legislature,²⁹⁶ although trust responsibilities may in some states be delegated to local governments. Originally focused on aquatic resources, some courts have extended the modern public trust doctrine to a wider range of natural assets.²⁹⁷

Like the legal status of local government, the public trust doctrine is a creation largely of the judiciary.²⁹⁸ 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 instead must always be held ‘in trust’ for the public.”²⁹⁹ 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,³⁰⁰ “courts have decided hundreds of cases involving the public trust doctrine.”³⁰¹ Nonetheless, its legal

292. 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 Subpart, as a set of background principles that could lend different meaning to the home rule analysis.

293. Cf. Alexandra B. Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 NOTRE DAME L. REV. 699, 713 (2006).

294. Joseph Sax famously revived the doctrine in 1970. See Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970). It has since been the subject of lively debates over its foundation and scope.

295. See, e.g., *id.* at 485–87.

296. MICHAEL C. BLUMM & MARY CHRISTINA WOOD, *THE PUBLIC TRUST DOCTRINE IN ENVIRONMENTAL AND NATURAL RESOURCES LAW* 5–6 (2d ed. 2015).

297. See, e.g., Charles F. Wilkinson, *The Headwaters of the Public Trust: Some of the Traditional Doctrine*, 19 ENVTL. L. 425, 466 (1989).

298. See Sax, *supra* note 294, at 521 (“The ‘public trust’ has no life of its own and no intrinsic content. It is no more—and no less—than a name courts give to their concerns about the insufficiencies of the democratic process.”); see also Hope M. Babcock, *The Public Trust Doctrine: What A Tall Tale They Tell*, 61 S.C. L. REV. 393, 394 (2009); James L. Huffman, *Speaking of Inconvenient Truths—A History of the Public Trust Doctrine*, 18 DUKE ENVTL. L. & POL’Y F. 1, 1–2 (2007); Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 656 (1986).

299. See Klass, *supra* note 293, at 703.

300. Sax, *supra* note 294, at 471.

301. Klass, *supra* note 293, at 707.

foundations remain unsettled and the doctrine has long been subject to debate as to how far its limits extend, and how and when it should be applied.³⁰² Indeed, the popularity of the doctrine among environmental advocates may be due in large part to its malleability.³⁰³ 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 broad public benefit” and to “consider the public trust before taking action that may adversely affect trust resources.”³⁰⁴

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 violating the public trust doctrine, and under either a constitutional or legislative home rule framework, an invalid state law would not override local law-making abilities. However, given the lack of concrete public trust principles in most states, it seems likely that the doctrine is more appropriately used as an aid in understanding competing state and local authority in the home rule system.³⁰⁵ This conception of the public trust may leave open the 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.³⁰⁶ 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

302. *Id.* at 699 (“Throughout its existence, the public trust doctrine has been pulled in different directions and assigned different meanings.”); *see, e.g.*, BLUMM & WOOD, *supra* note 296, at 3–10 (discussing who the trustees and beneficiaries of the public trust doctrine should be, and different applications of the doctrine); Lazarus, *supra* note 298, at 631.

303. John D. Echeverria, *The Public Trust Doctrine as a Background Principles Defense in Takings Litigation*, 45 U.C. DAVIS L. REV. 931, 951 (2012).

304. *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).

305. *Cf.* Araiza, *supra* note 283, at 699 (explaining that “[m]uch of the justification for suggesting that we understand the [public trust] doctrine as a canon of construction rests on the lack of a steady legal foundation for an ‘amphibian’ public trust doctrine”); Sax, *supra* note 294, at 521 (“The ‘public trust’ has no life of its own and no intrinsic content. It is no more—and no less—than a name courts give to their concerns about the insufficiencies of the democratic process.”).

306. *See generally* Araiza, *supra* note 283, at 697.

legislation and administrative actions are construed and reviewed.”³⁰⁷ 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.”³⁰⁸

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.³⁰⁹ 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 policy making. The use of the public trust doctrine as an interpretive mechanism may, however, offer support to 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 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.³¹⁰ The next Part incorporates these ideas into the realm of state and local government relations. Using bans on bag bans as an example, it argues that state constitutional protections and the public trust doctrine may justify judicial support of local innovation on environmental protection.

VI. CASE STUDY: RETHINKING BANS ON BAG BANS

This Article has previously made clear both that (1) the environmental harms of plastic bags may lead to local bans, and (2) home rule precedent leaves open the door for judges to construe state power liberally. Nothing proposed herein can be said to provide absolute support for local autonomy. But this Part employs the above analysis to propose a path forward for judges

307. *Id.*

308. *Id.* at 714.

309. FRUG, *supra* note 14, at 51 (“[T]he immunization of city decision making from state control is possible only if courts have a strong sense that the local values being advanced outweigh the state’s determination to protect the individual interests involved.”).

310. Araiza, *supra* note 283, at 720.

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. Application of State Constitutional Provisions

Where they exist, state constitutional provisions 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. As noted, bag bans are intended to address environmental harms like impaired water and landscape pollution. Any locality claiming protection under the state constitution would likely need to demonstrate the extent of those harms. For instance, under the Pennsylvania Constitution, local governments would have to show that overriding state prohibitions on bag bans undermines the “natural, scenic, historic and esthetic values of the environment.”³¹¹ To do this, local governments could potentially draw on studies of localized impacts of bag pollution, like one in Washington, D.C. that illustrated the extent of trash pollution from disposable plastic bags in the Anacostia River, and served as the justification for passage of the D.C. bag tax.³¹² Upon such a showing, a ban on the ability of localities to combat pollution might be seen as a constitutional violation by the state.³¹³ 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 policy making in support of trust resources. Regardless of whether a state has a legislative or constitutional home rule system, or even a home rule

311. PA. CONST. art 1, § 27. The showing required will necessarily vary by state and by constitutional language.

312. See *Purpose and Impact of the Bag Law*, D.C. DEP'T OF ENERGY & ENV'T, <https://doee.dc.gov/service/purpose-and-impact-bag-law> (last visited July 3, 2017); see also ANACOSTIA WATERSHED SOC'Y, ANACOSTIA WATERSHED TRASH REDUCTION PLAN xv (2008), https://doee.dc.gov/sites/default/files/dc/sites/ddoe/publication/attachments/2009.01.29_Trash_Report_1.pdf (noting that “[t]he single largest component of trash in the streams, and most likely in the river, [was] plastic bags,” and that legislation eliminating the use of free plastic bags would “effectively remove 47% of the trash from the tributaries and 21% from the main stem of the river”).

313. 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 Araiza, *supra* note 278, at 439 (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”).

system at all, state laws may not contravene the state constitution. As demonstrated in *Robinson Township*, and, to some degree in *Romer* and *Windsor*, state limits on local experimentation in support of a constitutional goal may be deemed unconstitutional.³¹⁴ 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.

B. Application of the Public Trust Doctrine

Taking Arizona's treatment of bag bans as a case study, this Article makes a first attempt at applying the public trust doctrine as an interpretive tool for defending local environmental measures from state legislation. Arizona recognizes the public trust doctrine,³¹⁵ and the scope of that doctrine is determined by the judiciary.³¹⁶ Most formally, the public trust doctrine in Arizona "restricts the sovereign's ability to dispose of resources held in public trust."³¹⁷ Arizona courts have expressly stated, however, that the public trust is not necessarily limited to a state's traditional interest in land under water.³¹⁸ It is therefore possible to consider how the public trust may come into play where the state legislature attempts to halt local environmental efforts.

Where a state restricts local ability to ban bag ordinances, 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 state prohibition was a general law, or one impacting state concern. Under either analysis, the state prohibition would likely be upheld. Where the public trust doctrine acts as a "thumb on the scale in favor of the public trust value,"³¹⁹ 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."³²⁰

314. See *supra* Parts V.B, V.C.1.

315. See, e.g., *Klass*, *supra* note 293, at 732–33 (discussing *Ariz. Ctr. for Law in the Pub. Interest v. Hassell*, 837 P.2d 158 (Ariz. Ct. App. 1991) and *San Carlos Apache Tribe v. Super. Ct. ex rel. Cnty. of Maricopa*, 972 P.2d 179 (Ariz. 1999)).

316. *Butler ex rel. Peshlakai v. Brewer*, No. 1 CA-CV 12-0347, 2013 WL 1091209, at *5 (Ariz. Ct. App. Mar. 14, 2013) (It is "within the power of the judiciary to determine the threshold question of whether a particular resource is a part of the public trust subject to the [d]octrine.").

317. *Id.* at *3.

318. *Id.* at *6.

319. *Araiza*, *supra* note 283, at 719.

320. See *Sax*, *supra* note 294, at 509. Notably, Professor Sax thought that one of these imperfections was decision making 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

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 counter-majoritarian 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 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.

1. *Public Trust in Constitutional Home Rule States*

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 "substantial state concern."³²¹ 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 law making. Thus, for instance, Arizona courts could find that the question of how best to conduct pollution control, or to create uniform business standards, is a matter of statewide concern.³²² If that were 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 debate, in this example there is no question—local prohibition on bags directly conflicts with the state revocation of authority. And in that circumstance, the state law prevails.³²³ 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.³²⁴ The need for uniform business regulations, and mere state

environmentally harmful outcomes may argue in favor of using the doctrine to uphold local action that results in net environmental protection.

321. Zimmerman, *supra* note 4, at 28.

322. See, e.g., *Humphrey v. City of Phoenix*, 102 P.2d 82, 88 (Ariz. 1940) (noting that keeping cities "in sanitary and safe condition is essential to the health, morals and general welfare of the whole state").

323. *Prendergast v. City of Tempe*, 691 P.2d 726, 729 (Ariz. Ct. App. 1984).

324. See Araiza, *supra* note 283, at 719.

assertions of this interest, would likely be sufficient in a typical analysis to uphold the state statute. However, both state and local governments in many states have a genuine interest in the furtherance of values of the public trust.³²⁵ Those values cannot be abrogated by or rejected in favor of competing interests. A judge assessing whether the state deserves deference on pollution control strategies 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 better protect these resources. 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. For instance, advocates in South Carolina pushing for local control over bag bans have noted that plastic bags inappropriately recycled can destroy machinery at municipal recycling facilities or contaminate municipal compost, and those otherwise discarded can strangle marine life and degrade into tiny fragments that pollute waterways.³²⁶ As discussed previously, cities like Washington, D.C. have also engaged in detailed studies of plastic bag pollution that clearly demonstrate the localized impact of bags, and the potential benefits of a bag ban.³²⁷ And other cities have documented the huge cost involved in cleaning up, recycling, and disposing of plastic bags.³²⁸ While these harms are not undisputed,³²⁹ the concrete,

325. The scope of the public trust doctrine is a matter of state law. See Thomas W. Merrill, *The Public Trust Doctrine: Some Jurisprudential Variations and Their Implications*, 38 U. HAW. L. REV. 261, 261 (2016). Thus, the extent to which local governments have an ability to exercise authority in the interest of the public trust will depend on state law. See, e.g., Sid Ansbacher & Susan Cobb Grandin, *Local Government Riparian Rights and Authority*, FLA. B.J., June 1996, at 87 (describing public trust duty of local governments in Florida); Lee A. Kaplan, *Whose Coast Is It Anyway? Climate Change, Shoreline Armoring, and the Public's Right to Access the California Coast*, 46 ENVTL. L. REP. (Envtl. Law Inst.) 10,971, 10,979 (2016) (describing a unique feature of North Carolina state law that "forbids municipalities from asserting the public trust doctrine," and distinguishing California state law, where local governments are responsible for implementing various aspects of the public trust doctrine); John Quick, Comment, *The Public Trust Doctrine in Wisconsin*, 1 WIS. ENVTL. L.J. 105, 111 (1994) (describing limitations on the ability of local governments to act under the public trust umbrella pursuant to Wisconsin state law).

326. See *Project: Plastic Pollution*, COASTAL CONSERVATION LEAGUE, <http://coastalconservationalleague.org/projects/plastic-pollution/> (last visited July 3, 2017).

327. See *supra* note 312.

328. See, e.g., Russo & Myers, *supra* note 182 (citing a San Jose report that "estimates that to clean up, recycle and landfill" plastic bags costs 17 cents per bag).

329. *Id.*

localized pollution that plastic bags contribute to water and land would support a finding of a local interest in regulating those bags.

A judge employing the public trust doctrine could take a more skeptical eye to any claim by the state to having a countervailing interest in a lack of regulation of this issue. Without that state interest, there would be no justification for superseding local regulations. The public trust approach could therefore avoid state elimination of the ability to advance environmental protections 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, including, in the bag ban context, clean water for irrigation, recreation, and drinking, as well as enjoyment of unpolluted landscapes and wildlife. In other contexts, such interests could extend to clean air, protection from flooding, and a variety of others.

This proposal and analysis is admittedly general, and open to *ad hoc* determinations in the way that individual judges weigh state and local interests. 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. It could also provide an avenue for challenging state action that undermines environmental values or that is motivated by animus toward a set of progressive policies. In this way, this strategy could provide a way out from the typical 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. Instead, the doctrine would highlight the legal significance of state divestment of local authority to pursue 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.³³⁰

330. See Araiza, *supra* note 283, at 718 (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”).

2. Public Trust in Legislative Home Rule States

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 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, a general law is simply defined as one that equally impacts all cities within a class. Infusing this analysis with public trust principles may create an opportunity for a different outcome where state action undermines environmental goals.

In *Cleveland v. State*, an Ohio Court of Appeals struck down a state statute disallowing municipal bans on certain foods such as those containing trans fats.³³¹ 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.³³² 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.³³³ 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.³³⁴ The difference in coverage led the court to find that the law did not have uniform application and, for this and other reasons, was therefore invalid.³³⁵ While the court decided the question of uniformity on that basis, it also described an argument from *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."³³⁶ 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."³³⁷

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

331. *Cleveland v. State*, 989 N.E.2d 1072, 1087 (Ohio Ct. App. 2013).

332. *Id.* at 1080.

333. 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." *Id.* at 1082. 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.

334. *Id.* at 1082.

335. *Id.* at 1082–83.

336. *Id.* at 1082 n.1.

337. *Id.*

applies, and assessing whether the application is uniform within the class. As in *Cleveland*, the exemption of a large category of actors may prevent a finding of uniform application.³³⁸ 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 is likely to be found facially uniform. A public trust lens may help the disparate impacts of state prohibitions on local action come into sharp relief. If states remove local authority without taking action on the state level to address the environmental needs of concerned communities, then some local governments may not be able to uphold their public trust obligations. A state law such as Arizona's prohibition on bag bans therefore disadvantages cities that 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 that may be in less need of such a ban.³³⁹ 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.

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 concerns of their citizens. Targeted state removal of local authority to act to protect the environment undermines democratic ideals and prevents useful experimentation.³⁴⁰ It also has the potential to reduce participation in local government, as citizens feel that their choices are not valued.³⁴¹ In this way, state revocation of local authority may "not only prevent cities from experimenting in democratic forms of organization," but may "make experiments seem less appealing."³⁴² There is important environmental work currently being done by cities,³⁴³ and a great

338. *See id.* at 1082.

339. *Ariz. Downs v. Ariz. Horsemen's Found.*, 637 P.2d 1053, 1060 (Ariz. 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.").

340. *Cf. KRANE ET AL.*, *supra* note 71, at 7 (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)").

341. *See, e.g., van de Biezenbos*, *supra* note 114, at 1670 ("The overuse of state preemption to overrule local authority undermines citizens' faith in the democratic process.").

342. *FRUG*, *supra* note 14, at 23.

343. *Supra* Part I.

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.

This Article does not intend 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 replace the hard work of governance and creation of good rules at the legislative level.³⁴⁴ 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.³⁴⁵ 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,³⁴⁶ 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,³⁴⁷ and for movement on those issues to be undermined by the state legislature. It is unlikely that the same legislatures that are undermining environmental values will make changes that would curtail their authority over local action. If courts do not take action in support of cities, there is a real potential for harm to environmental progress.

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 they could choose to offer incentives to customers for using reusable containers. For instance, Whole Foods stores give customers up to a ten-cent discount for each reusable bag brought for grocery shopping.³⁴⁸ 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

344. See generally Richard J. Lazarus, *Judicial Missteps, Legislative Dysfunction, and the Public Trust Doctrine: Can Two Wrongs Make It Right?*, 45 ENVTL. L. 1139 (2015).

345. See, e.g., FRUG & BARRON, *supra* note 6, at 23 (noting that it is likely that “[r]eformation of the state legal structure must . . . be the primary means by which city power is enhanced”). The test created by Ohio courts for determining whether something is “general” or “special” legislation could serve as a potential model for such an amendment. See, e.g., *Cleveland v. State*, 989 N.E.2d 1072 (Ohio Ct. App. 2013).

346. A recent ballot initiative in Colorado illustrates the challenges of such legislative change. In Colorado, Initiative 89 proposed, among other things, an amendment to the state constitution that “authorize[d] local governments to enact ‘laws, regulations, ordinances, and charter provisions that [we]re 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 conflict[ed] with state law, the more restrictive and protective law govern[ed].” *In re Title, Ballot Title, & Submission Clause for 2013–2014 #89*, 328 P.3d 172, 175 (Colo. 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/>.

347. See Araiza, *supra* note 283, at 717.

348. Joseph Pisani, *Retailers Paying Customers to Bring Their Own Bags*, CNBC (Oct. 23, 2009, 2:31 PM).

use,³⁴⁹ 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 law makers 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 reiterate, local power over environmental issues is unlikely to be an unalloyed good.³⁵⁰ Cities, or neighborhoods, may act in parochial ways that prevent progress on environmental topics.³⁵¹ But, in the past, cities have experimented with governance in ways that have eventually created positive change at the state and national level.³⁵² 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.”³⁵³ It is the hope of many that they can play the same role in responding to a number of pressing environmental needs.³⁵⁴ 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 understanding of government obligations toward the environment, it may come a bit closer to achieving that goal.

349. See van de Biezenbos, *supra* note 114, at 1659–63 (“Contracting with the state environmental agency is an option with several advantages over creating a local enforcement program.”).

350. See Barron, *supra* note 30, at 2268–70 (explaining the theory that local power leads to perpetuation of suburban sprawl); Briffault, *supra* note 222, at 1–2 (associating local control with parochial behaviors).

351. See, e.g., *id.*; see also Frank Witsil & Eric D. Lawrence, *RTA Millage Rejected by Metro Detroit Voters*, DETROIT FREE PRESS (Nov. 9, 2016, 9:15 AM), <http://www.freep.com/story/news/local/michigan/detroit/2016/11/09/rta-regional-transit-authority-millage/93535602/> (noting how voters in the Detroit suburbs rejected the city’s new transit plan).

352. See Michèle Finck, *The Role of Localism in Constitutional Change: A Case Study*, 30 J.L. & POL. 53, 54 (2014).

353. FRUG, *supra* note 14, at 20.

354. DOUGLAS, *supra* note 27, at 308.

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