



ARTICLE

Preempting Politics: State Power and Local Democracy

Joshua S. Sellers & Erin A. Scharff*

Abstract. States are increasingly responding to local governments' actions with preemptive legislation. Scholars have tracked this trend through detailed examinations of laws preempting a variety of local government regulations. This Article analyzes a distinct instantiation of state preemption: states' preemption of local governments' structural authority, which we term "structural preemption." Structural authority refers to the autonomy of local governments to design and modify their government institutions and the terms of local political participation. Structural preemption raises fundamental concerns about democratic design, political entrenchment, and political participation that directly implicate democratic outcomes.

The Article proceeds as follows. Part I provides background on local authority and state preemption generally, with a particular focus on state preemption's recent substantive manifestations. It then discusses structural preemption specifically and why it presents distinct issues. The Part closes with a brief overview of structural preemption doctrine. Part II documents recent structural preemption bills proposed in or enacted by state legislatures. Part III explicates four values as paramount when thinking about structural preemption: (1) administrative cost, (2) democratic accountability, (3) democratic deliberation, and (4) pluralism. Part IV then bolsters the normative case for these four values by considering their application in two structural preemption contexts.

* Joshua S. Sellers is an Associate Professor of Law, Arizona State University, Sandra Day O'Connor College of Law. Erin A. Scharff is an Associate Professor of Law, Arizona State University, Sandra Day O'Connor College of Law.

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Introduction

Tempe, Arizona, is a city of nearly 200,000 residents located in the Phoenix metropolitan area. In March 2018, over 90% of Tempe voters approved an ordinance requiring, with minor exceptions, any person or entity spending more than \$1,000 on local elections within an election cycle to disclose the original source of the money.¹ The aptly named “Keep Dark Money Out of Local Tempe Elections Ordinance”² is but one recent attempt by local governments to curb the influence of money on local elections: Phoenix,³ Denver,⁴ and Santa Fe⁵ have enacted similar measures.

Despite broad public support for such disclosure provisions, these local efforts have encountered resistance. Less than one month after the Tempe ordinance was adopted, the Arizona legislature passed a bill preempting it, expressly permitting § 501(c)(4) organizations—a significant conduit for so-called “dark money”⁶—to keep their donors’ identities anonymous.⁷ Arizona Governor Doug Ducey promptly signed the bill into law,⁸ and a legal fight over whether it conflicted with the state constitution followed soon thereafter.⁹

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1. See Tempe, Ariz., Ordinance No. O2017.51, § 1 (Nov. 30, 2017) (codified at TEMPE, ARIZ., CODE § 13-128(a) (2020)) (“Any person, association of persons or entity, other than a registered candidate committee, or political action committee, regardless of legal form, that makes expenditures to influence the result of a local City of Tempe election totaling more than \$1,000 within an election cycle shall disclose the original source or sources of all major contributions received during that period attributed to that expenditure, and any intermediaries through which such contributions passed.”); Jerod MacDonald-Evoy, *Landslide Vote to Curb Tempe “Dark Money” May Send Broader Message to Arizona*, AZCENTRAL (Mar. 14, 2018, 12:56 PM MT), <https://perma.cc/H7RZ-Q47N>.
 2. TEMPE, ARIZ., CODE § 13-125.
 3. See Phx., Ariz., Ordinance S-44549, § 2 (May 2, 2018) (authorizing a referendum); Lauren Castle, *Phoenix “Dark Money” Ban, OK’d by Voters in November, Becomes Law*, AZCENTRAL (July 5, 2019, 1:51 PM MT), <https://perma.cc/G7XX-ZEJF>; *Phoenix, Arizona, Proposition 419, Election Funding Disclosure Obligations Charter Amendment (November 2018)*, BALLOTPEDIA, <https://perma.cc/2XCT-LUY6> (archived May 1, 2020).
 4. Denver, Colo., Council Bill No. 17-0866, § 5 (Sept. 11, 2017) (codified at DENVER, COLO., REV. MUN. CODE § 15-35.5 (2020)).
 5. Santa Fe, N.M., Ordinance No. 2015-23, § 3 (July 29, 2015) (codified at SANTA FE, N.M., CODE § 9-2.6 (2020)).
 6. See Richard Briffault, *Nonprofits and Disclosure in the Wake of Citizens United*, 10 ELECTION L.J. 337, 338 (2011); Joshua S. Sellers, *Contributions, Bribes, and the Convergence of Political and Criminal Corruption*, 45 FLA. ST. U. L. REV. 657, 676-83 (2018).
 7. Act of Apr. 5, 2018, ch. 134, § 2, 2018 Ariz. Sess. Laws 685, 690-91 (codified at ARIZ. REV. STAT. ANN. § 16-905(E) (2019)).
 8. See *Bill History for HB2153*, ARIZ. ST. LEGISLATURE, <https://perma.cc/4MQK-MMMG> (archived Apr. 26, 2020).
 9. See OFFICE OF THE ARIZ. ATTORNEY GEN., NO. 19-001, INVESTIGATIVE REPORT: CITY OF TEMPE ORDINANCE O2017.51 (CAMPAIGN FINANCE DISCLOSURES) 5-6 (2019) (discussing a variety of state constitutional issues raised by potential conflicts between Tempe’s
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The Tempe experience exemplifies a practice that appears to be increasing in frequency: states' attempts to displace local governments' structural authority. The term "structural authority" refers to the autonomy of local governments to design and modify their government institutions and the terms of local political participation.¹⁰ Such "structural preemption" is the focus of this Article.¹¹ Its occurrence is of a piece with what one of us has labeled "hyper preemption," an aggressive and often punitive form of state preemption that "assumes that local voices should almost never take the lead in crafting substantive policy."¹² But while substantial attention has been given to the policy disagreements motivating state preemption laws, many of which have partisan overtones,¹³ structural preemption presents distinct issues that the literature has not yet fully examined. Simply put, structural preemption raises fundamental concerns about democratic design, political entrenchment, and political participation that directly implicate democratic outcomes.

While the abundant scholarship examining state preemption acknowledges structural preemption, this scholarship has focused on particular policy areas, such as local fracking bans, minimum wage laws, antidiscrimination laws, firearms regulations, and plastic bag laws.¹⁴ And while the literature has

ordinance and the state statute, including whether the "Ordinance implicates a matter of purely local concern"); Howard Fischer, *AG: State Law Does Not Override Tempe "Dark Money" Ordinance*, ARIZ. CAPITOL TIMES (Apr. 11, 2019), <https://perma.cc/B77D-V6XA>.

10. See Richard Briffault et al., *The Troubling Turn in State Preemption: The Assault on Progressive Cities and How Cities Can Respond*, 11 ADVANCE: J. ACS ISSUE BRIEFS 3, 5 (2017) ("Structural authority is the power to design one's type of government, including issues such as the number of city councilors, whether elections are by district or at-large, the length of terms, and rules for how campaigns are financed."); Erin Adele Scharff, *Powerful Cities?: Limits on Municipal Taxing Authority and What to Do About Them*, 91 N.Y.U. L. REV. 292, 302 (2016) ("Structural authority allows a local government to design its own form of government. For example, structural authority gives a local government the ability to choose how to allocate power between the mayor and members of the city council." (footnote omitted)).
11. This form of structural preemption is entirely distinct from the form present in the immigration law context. See, e.g., Kerry Abrams, *Essay, Plenary Power Preemption*, 99 VA. L. REV. 601, 618 (2013); David S. Rubenstein, *Immigration Structuralism: A Return to Form*, 8 DUKE J. CONST. L. & PUB. POL'Y 81, 119 (2013).
12. Erin Adele Scharff, *Hyper Preemption: A Reordering of the State-Local Relationship?*, 106 GEO. L.J. 1469, 1473-74 (2018).
13. See, e.g., Lori Riverstone-Newell, *The Rise of State Preemption Laws in Response to Local Policy Innovation*, 47 PUBLIUS 403, 404 (2017) ("In the past few years, . . . a growing number of state officials have sponsored and supported preemption legislation with the intent to weaken local authority and to thwart local progressive policies."); Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163, 1191 (2018) ("The anti-urban bias is not direct; it is a function of a political bias that emerges because rural and suburban voters tend to vote Republican, while urban dwellers tend to vote Democratic, and increasingly so.").
14. See, e.g., Schragger, *supra* note 13, at 1170-78.

considered structural preemption,¹⁵ the practice has not received sustained scholarly attention.

We believe a more comprehensive inquiry into structural preemption is warranted for two reasons. First, the arguments both for and against structural preemption differ from the arguments advanced in debates about regulatory preemption.¹⁶ Second, some structural preemption issues (such as whether to permit municipal public financing systems) have substantive implications that are underappreciated (such as whether a municipality increases its minimum wage).¹⁷ This connection raises the stakes of structural preemption disputes. In short, structural preemption warrants analysis both because of its unique character and because of its relationship to numerous substantive matters. For these reasons, we believe that legislators, judges, and scholars would benefit from scrutinizing structural preemption apart from the more contentious realm of substantive preemption.

Accordingly, this Article analyzes the wide array of structural preemption issues arising throughout the country. Our inquiry privileges four values that, we argue, should guide state officials, courts, and scholars when evaluating structural preemption disputes: (1) administrative cost, (2) democratic accountability, (3) democratic deliberation, and (4) pluralism. These values, perhaps unsurprisingly, already impel many of the normative arguments found within preemption scholarship. But again, the import of these values in the context of structural preemption is unique. At present, these four values either are absent from or are not a meaningful component of structural preemption decisions. This absence undermines the ability to best organize our state and local governments in a manner that enhances democracy.

Consider the following illustration: States conventionally unify their elections.¹⁸ That is, the majority of states hold elections for state offices (such as governor) at the same time as federal elections. Local government elections, however, are much less unified, with the majority of localities holding elections

15. See, e.g., Richard Briffault, Essay, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 1998 (2018) (“Extreme new preemption measures that strike directly at the capacity for local self-government are inconsistent with the central place of local governments in our democracy.”); Paul A. Diller, *Reorienting Home Rule: Part 2—Remedying the Urban Disadvantage Through Federalism and Localism*, 77 LA. L. REV. 1045, 1072 (2017) (referring to “the approach of many states in immunizing local structural decisions from state override”).

16. See *infra* Part I.C.

17. See, e.g., DEMOS, *DESIGNING PUBLIC FINANCING SYSTEMS TO ADVANCE EQUITY AND INDEPENDENT POLITICAL POWER* 1-2 (2016), <https://perma.cc/LX5H-6FGE>; Gareth Fowler & Daniel I. Weiner, Brennan Ctr. for Justice, *Understanding H.R.1’s Public Financing Provisions 2-4* (2019), <https://perma.cc/SE75-BDGU>.

18. *But cf.* Paul Braun et al., *Why These 5 States Hold Odd-Year Elections, Bucking the Trend*, NPR (Nov. 4, 2019, 5:00 AM ET), <https://perma.cc/N7D7-GVQC>.

off-cycle—that is, on an off-year or off-day.¹⁹ How should we think about a state law preempting a locality’s decision to hold an off-cycle election?

Looking to our first value, administrative cost, in this context, one might at first blush see a strong argument for election consolidation. After all, holding fewer elections would seem to necessarily result in cost savings for state election administrators. But administrative cost is more nuanced than might be assumed. For one thing, we need to know which costs are borne by the state itself, as opposed to by counties and local governments.²⁰ Further, if election resources, like voting machines,²¹ are shared within a county, municipalities may wish to hold off-cycle elections when such resources are more readily accessible. As explained in more detail in Part IV, whether appeals to administrative cost justify a state’s efforts to consolidate elections will depend on a range of contextual factors that render imprudent any prejudgment about which level of government—state or local—offers superior administrative competence. As we discuss throughout, similar contingencies apply with regard to other structural authority matters.

The second value, democratic accountability, would intuitively seem to warrant giving greater autonomy to local governments and would therefore militate in favor of letting local governments hold off-cycle elections. Local politicians are, of course, accountable for local matters and may be credited or blamed by their constituents for such matters, even when the relevant decisions are not theirs.²² Yet democratic accountability has many dimensions.

19. See Sarah F. Anzia, *Election Timing and the Electoral Influence of Interest Groups*, 73 J. POL. 412, 412 (2011) (“Close to 80% of American cities hold elections on days other than presidential and congressional elections. More than half of all American school district elections are held separately from state and national elections.” (citations omitted)).

20. We should note that, in emphasizing administrative cost, we presume the existence of administrative *capacity*. Obviously, the inability of a local government to perform a particular function would undermine an argument for local autonomy. Our colleague Justin Weinstein-Tull has written extensively on how state governments routinely abdicate their election-law-related administrative obligations. See, e.g., Justin Weinstein-Tull, *Abdication and Federalism*, 117 COLUM. L. REV. 839, 859-61, 865-66, 866 n.173 (2017); Justin Weinstein-Tull, *Election Law Federalism*, 114 MICH. L. REV. 747, 778-79 (2016). Some of this abdication is cost-related. See, e.g., Weinstein-Tull, *Election Law Federalism*, *supra*, at 778-79.

21. See Beth Musgrave, “Our Machines Stink.” *Blevins Seeking Millions for New Voting Machines in Lexington*, LEXINGTON HERALD-LEADER (Jan. 15, 2019, 3:35 PM), <https://perma.cc/U8B7-6J5F>.

22. Indeed, a focus on democratic accountability has informed the Supreme Court’s federalism jurisprudence. See, e.g., *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1477 (2018) (“[T]he anticommandeering rule promotes political accountability. When Congress itself regulates, the responsibility for the benefits and burdens of the regulation is apparent. Voters who like or dislike the effects of the regulation know who to credit or blame.”); cf. Scharff, *supra* note 10, at 312 (“[L]imits on local revenue authority hamper democratic accountability, as the state’s role in limiting local fiscal

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A useful illustration here might involve the debate over whether school districts are best run by mayors or elected school boards. There is significant debate about which structure is better for ensuring accountability.²³

In 2015, Chicagoans voted overwhelmingly in favor of returning control of the city's schools to an elected school board,²⁴ and more recently, Chicago Mayor Lori Lightfoot campaigned on the promise of relinquishing mayoral control over schools.²⁵ But doing so requires a change in state law,²⁶ which means that legislators unaccountable to Chicago voters are deciding this issue for the city's residents. On the other hand, education policy is typically within the purview of the Illinois state government, about 30% of Chicago's education budget comes from state sources, and the state has a valid interest in the way that local governments interact with each other.²⁷ In short, democratic accountability is more multifaceted than many appreciate or acknowledge.

Democratic deliberation, the third value, is similarly rich in complexity. At a basic level, this value privileges governing arrangements that foster public participation. Therefore, laws that make it less likely that citizens will engage with politics should be met with skepticism. Which laws are likely to discourage public participation, including participation in off-cycle elections, is of course an empirical question. But in general we should reject laws that impose onerous requirements on prospective voters, exacerbate existing inequalities in participation rates, or produce political "lockups."²⁸

Democratic deliberation does not necessarily follow from giving structural authority to local governments.²⁹ In fact, it is quite possible that structural

options may be obscure to voters, or at least less salient than the decisions local officials make within the parameters offered under state law.").

23. See Juliana Herman, *Top 5 Things to Know About Mayoral Control of Schools*, CTR. FOR AM. PROGRESS (Mar. 22, 2013, 10:00 AM), <https://perma.cc/76BF-J5KH>.
24. See Nick Blumberg, *Voters Support an Elected School Board*, WTTW (Feb. 25, 2015, 10:45 AM), <https://perma.cc/35BF-9T5W>.
25. Adeshina Emmanuel et al., *Lori Lightfoot Is Chicago's Next Mayor—Which Means Big Changes Are Coming to Schools*, CHALKBEAT (Apr. 2, 2019), <https://perma.cc/E76D-DQL3>.
26. See Blumberg, *supra* note 24; see also Pranathi Posa, *What Does an Elected School Board Mean for Chicago?*, CHI. MAROON (updated Apr. 30, 2019, 3:37 PM CDT), <https://perma.cc/RMN6-UAD3>.
27. See CHI. PUB. SCH., RESIDENT'S GUIDE TO THE BUDGET: FY 2019, at 1-2 (2018), <https://perma.cc/TK69-QP7L>; see also, e.g., DAVID R. BERMAN, LOCAL GOVERNMENT AND THE STATES: AUTONOMY, POLITICS, AND POLICY 123-26 (2003) (describing allegations of corruption in Jersey City, New Jersey, schools and the ensuing state takeover).
28. See Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 646, 649 (1998) (drawing an analogy between democratic politics and a "robustly competitive market").
29. Cf. Daniel B. Rodriguez, *Localism and Lawmaking*, 32 RUTGERS L.J. 627, 632-36 (2001) (summarizing arguments in favor of localism, including "fostering citizen participation and in improving local self-government," and possible arguments against it).

preemption may spark increased levels of democratic deliberation as city officials and residents express frustration over their loss of authority. The story of Tempe's dark money ordinance elucidates the point. The state's effort to preempt the ordinance has bolstered an effort to enact a statewide ban on dark money via Arizona's initiative process.³⁰ On the other hand, many political organizations—both liberal and conservative—oppose dark money ordinances like Tempe's largely because their donors value anonymity. These groups claim that democratic deliberation will suffer if anonymity is lost and the resources they provide are scaled back.³¹

Lastly, attention should be given to the fourth value, pluralism, which emphasizes the value of diversity across jurisdictions. Pluralism would clearly favor localism, including off-cycle local elections. The potential benefits of local diversity are manifold. For one, it may be the case that policies that enjoy only minority support at the state level are preferred by a majority of city residents. A pluralist regime gives such municipal majorities voice in democratic affairs that they would otherwise lack.³² Second, a pluralist regime holds the promise of innovation that can then be exported to the state or federal levels. Seattle's recent "Democracy Voucher" program is an example of such experimentation,³³ as are local efforts to expand the franchise to noncitizens and nonresidents.³⁴ Alternatively, we may learn through pluralism what does *not* work well. Finally, pluralism offers the flexibility to engage in local tailoring.³⁵ We further explicate these four values in Part III.

30. See Howard Fischer, *Former AG Revs Up Initiative to End "Dark Money,"* ARIZ. CAPITOL TIMES (Mar. 26, 2019), <https://perma.cc/MX5K-Q9QV>.

31. See, e.g., Benjamin Barr & Stephen R. Klein, *Publius Was Not a PAC: Reconciling Anonymous Political Speech, the First Amendment, and Campaign Finance Disclosure*, 14 WYO. L. REV. 253, 253-55 (2014) ("Today's zealous push for all-encompassing disclosure—which replaces political anonymity with complex, detailed reporting—injures our system of self-government and is highly burdensome for average speakers."); Maggie Severns, *Dark-Money Groups Were Ordered to Reveal Their Donors. They Didn't*, POLITICO (updated Oct. 16, 2018, 5:01 PM EDT), <https://perma.cc/T7ZQ-XT2E>.

32. See Heather K. Gerken, *A New Progressive Federalism*, DEMOCRACY, Spring 2012, at 37, 38 ("[W]hile minorities cannot dictate policy outcomes at the national level, they can *rule* at the state and local level.").

33. See *Democracy Voucher Program*, SEATTLE.GOV, <https://perma.cc/J8QC-7VBJ> (archived Mar. 24, 2020). On democratic experimentalism more broadly, see generally Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998) (theorizing about and promoting a form of government in which power is decentralized yet subnational units of government are obligated to share their knowledge).

34. See *infra* Part IV.B.4.

35. For one such argument, see generally Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82 (2013) (arguing that localism would allow firearm regulations to respect differences between urban and rural views on gun ownership).

Ultimately, we conclude that consolidating elections provides enough benefits that states may be justified in requiring such consolidation despite local opposition.³⁶ What we hope, however, is that the discussion exhibits the complexity of the issue as well as the benefits of applying our values-based framework.

We should make clear that our analysis is meant to complement rather than replace the traditional factors used to resolve structural preemption disputes. State constitutional provisions, “home-rule” laws, and judicial precedent all inform the resolution of such disputes.³⁷ Nonetheless, we believe a values-based approach to thinking about structural preemption is important for three reasons. First, it encourages relevant actors to enunciate what is really at stake and to consider the actual consequences of structural preemption for democratic governance. Second, it builds upon the lessons of the past: The values we emphasize are at the heart of the debate over state preemption disputes and have been since the Progressive Era.³⁸ Third, courts have traditionally resolved structural preemption disputes through the use of either balancing tests or ill-defined, common-law-based approaches.³⁹ By contrast, a privileging of our values would, again, require direct attention to the political consequences, as experienced by the citizenry, of preemption.⁴⁰ To that end, we

36. See *infra* Part IV.A.

37. For a summary of some of the issues that arise in the interaction between state and local governments, see generally Diller, *supra* note 15, at 1064-77.

38. Scharff, *supra* note 10, at 301 (“Progressive-era urban activists, fearing state legislatures would fail to respond to the increasing problems faced by growing urbanization and industrialization, advocated for greater home rule authority, at least over some policy decisions.”); see also LYDIA BEAN & MARESA STRANO, *NEW AM., PUNCHING DOWN: HOW STATES ARE SUPPRESSING LOCAL DEMOCRACY* 15 (2019), <https://perma.cc/3SCE-EA3C> (“[L]ocal decision-making has a number of benefits for democracy that transcend partisan divides, such as economic efficiency, greater political participation, and policy experimentation and innovation.”).

39. See Richard Briffault, *Home Rule and Local Political Innovation*, 22 J.L. & POL. 1, 19-24 (2006) (discussing balancing tests); Frank I. Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145, 146 (1977-1978) (discussing common law approaches); see also Clayton P. Gillette, *Dictatorships for Democracy: Takeovers of Financially Failed Cities*, 114 COLUM. L. REV. 1373, 1380-81 (2014) (“Antipathy toward state degradation of local autonomy has been embodied in constitutional prohibitions on special state commissions that assume municipal functions, as well as in broad interpretations of municipal affairs within which localities may exercise independence and sometimes even trump conflicting state statutes.” (footnote omitted)).

40. Nestor Davidson has recently advocated for a similar privileging of a normative or values-based approach to resolving state preemption disputes. His argument is rich in detail and full of valuable insights. He does not, however, engage with the unique challenges presented by *structural* preemption disputes. See Nestor M. Davidson, *Essay, The Dilemma of Localism in an Era of Polarization*, 128 YALE L.J. 954, 957-62, 984 (2019) (“The need to reconcile the attractive and troubling aspects of localism is newly
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believe that structural preemption disputes should be informed by the four values we explicate below. Our claim is not outcome determinative; in many cases, we believe that judges resolving structural preemption disputes have reached sensible outcomes. State and local officials have advanced compelling arguments in support of their respective views about where power should rest. But the resolution of these disputes would be substantially improved, we assert, by supplementing the imprecise status quo with our values-based approach.⁴¹

In addition, we are mindful that many see the trend of increasing state preemption in purely partisan terms.⁴² This Article pushes against this reading of preemption efforts for both descriptive and normative reasons. Debates about structural preemption do not fall neatly along partisan lines. For example, local elected officials of both major parties may prefer structural rules that increase the advantage of incumbency. Further, viewing these changes as purely partisan power grabs does not assist the judiciary in analyzing the laws under state preemption doctrine.

The Article proceeds as follows. Part I provides background on local authority and state preemption generally, with a particular focus on state preemption's recent substantive manifestations. It then discusses structural preemption specifically, explaining why it presents distinct issues and summarizing structural preemption doctrine. Part II documents recent structural preemption bills proposed in or enacted by state legislatures. Part III explicates four values as paramount when thinking about structural preemption: (1) administrative cost, (2) democratic accountability, (3) democratic deliberation, and (4) pluralism. Part IV then bolsters the normative case for the four values by considering their application in two structural preemption contexts.

Cities are receiving greater attention from journalists, public policy experts, and scholars. Yet the role that cities will play in the future is highly uncertain. Some see cities as "increasingly in a defensive posture, fending off

resurgent, but a solution continues to elude courts and scholars. While there is no simple way to resolve the dilemma, normative considerations undergirding the vertical allocation of power in the states should be more directly confronted, allowing evaluation of the valence of local power in light of the normative commitments states have made.").

41. *Cf. State ex rel. Brnovich v. City of Tucson*, 399 P.3d 663, 679 (Ariz. 2017) (concluding that a balancing approach "is neither helpful nor appropriate, and instead would potentially cause confusion and inconsistent results").

42. *See, e.g., Riverstone-Newell, supra* note 13, at 406 ("If the surge of preemption legislation in recent years has been fueled in part by efforts of industry groups and conservative organizations to rein in cities, it can also be attributed to the growing Republican control of state legislatures, especially after the tide turned in Republicans' favor during the 2010 elections.").

broad-based attacks on their ability to govern.”⁴³ Others perceive cities as “scaling up: they now pass regulations about national social issues, publicly take stances on international issues, agree to international protocols, and collaborate to form vast municipal networks that span the nation and beyond.”⁴⁴ Central to this conversation are fundamental questions of state power and local democracy. We should approach these questions with the proper values in the foreground.

I. Local Authority and Two Types of Preemption

While significant variations exist across the fifty states, two central issues animate legal debates over state preemption. The first concerns the delegation of power to local governments: that is, the authority of local governments to act on their own initiative. The second concerns states’ ability to override, through preemption legislation, local decisions otherwise authorized under state law. This Part provides background on local authority and state preemption generally, with a particular focus on state preemption’s recent substantive manifestations. It then discusses structural preemption specifically, explaining why it presents distinct issues. The Part then closes with a brief overview of structural preemption doctrine.

A. Local Authority

For those accustomed to thinking about the U.S. constitutional system, the framework of local democracy can seem quite foreign. States, of course, have inherent, independent authority within our federal structure, their sovereignty limited only by specific constitutional enumeration or by the Supremacy Clause.⁴⁵

Localities, on the other hand, lack sovereignty.⁴⁶ Traditionally, local governments have been viewed as creatures of state law. As a result, it has long

43. Schragger, *supra* note 13, at 1216.

44. *See, e.g.*, Sarah L. Swan, *Plaintiff Cities*, 71 VAND. L. REV. 1227, 1286 (2018).

45. *See, e.g.*, U.S. CONST. art. I, § 10; *id.* art. VI, cl. 2; *id.* amend. XIV, § 1.

46. *See* Richard C. Schragger, *The Political Economy of City Power*, 44 FORDHAM URB. L.J. 91, 115-17, 117 nn.137-38 (2017) (discussing the historical decline in municipal corporate power and the dominance of John Forrest Dillon’s view); *see also* 1 JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 237 (5th ed. 1911) (“It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation,—not simply convenient, but indispensable.” (emphasis omitted)).

been black-letter law that localities have no federal constitutional rights as against the state. In 1907, the U.S. Supreme Court, in *Hunter v. City of Pittsburgh*, considered a constitutional challenge brought by the citizens of Allegheny, Pennsylvania, to a state law that allowed Pittsburgh to annex their town without the majority approval of Allegheny residents.⁴⁷ In considering the challenge, the Court disclaimed any reliance interest local taxpayers had in their local government charters, instead declaring that the State “at its pleasure may modify or withdraw all such [charter] powers, may take without compensation such [local] property, hold it itself, or vest it in other agencies, expand or contract the territorial area, [or] unite the whole or a part of it with another municipality.”⁴⁸

Subsequent opinions have undermined the absolutism of the *Hunter* rule,⁴⁹ and Kathleen Morris and others have persuasively suggested that *Hunter* should be abandoned on both doctrinal and policy grounds.⁵⁰ Nevertheless, federal courts still grant local governments few substantive protections against state authority. Consequently, many of the challenges brought by local governments against state action are brought in state court.⁵¹

As a matter of state constitutional law, the status of local governments has shifted over time. In the nineteenth century, local governments were almost entirely subordinate to state legislatures. Under the then-ascendant doctrine known as Dillon’s Rule, local governments generally required an explicit delegation by the state to exercise governmental authority.⁵²

47. 207 U.S. 161, 174-75 (1907).

48. *Id.* at 178-79.

49. *See, e.g., Romer v. Evans*, 517 U.S. 620 (1996) (implicitly recognizing local government standing to assert equal protection claims on behalf of residents); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (explicitly distinguishing *Hunter* and applying the Equal Protection Clause to limit state power over municipal boundary changes); *see also* Kathleen S. Morris, *The Case for Local Constitutional Enforcement*, 47 HARV. C.R.-C.L. L. REV. 1, 3-4 (2012) (“[A]stonishingly, the Court has not applied the *Hunter* doctrine to bar a local constitutional challenge since 1933. Instead, the Court has reached the merits of several such cases with barely a mention of the *Hunter* doctrine.”).

50. *See* Morris, *supra* note 49, at 3-5 (arguing that the Supreme Court has implicitly overturned *Hunter* and describing the case’s “shaky analytical ground”); *see also* David J. Barron, Essay, *Why (and When) Cities Have a Stake in Enforcing the Constitution*, 115 YALE L.J. 2218, 2243-45 (2006) (suggesting, based on *parens patriae* principles, a narrow reading of *Hunter* that allows cities a role in federal constitutional disputes); Josh Bendor, Note, *Municipal Constitutional Rights: A New Approach*, 31 YALE L. & POL’Y REV. 389, 390-93 (2013) (arguing that *Romer*, *Gomillion*, and other cases have limited *Hunter*).

51. *See* Lynn A. Baker & Daniel B. Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, 86 DENV. U. L. REV. 1337, 1338 (2009).

52. *See* ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 26 (rev. ed. 2009) (referring to “the ascent of a broad concept of state supremacy, the idea that municipalities legally ought to be regarded as administrative creatures of the state, rather than as separate sovereignties of any type”);
footnote continued on next page

Things changed in the early twentieth century, when reformers successfully fought for some degree of “home rule.”⁵³ Under home rule, state law delegates police power to a class of local governments, thereby allowing the governments to act on their own initiative.⁵⁴ Today, most states permit some version of home rule, though the specifics vary depending on a variety of factors, as does the source of home-rule authority.⁵⁵

As Paul Diller has detailed, in slightly more than a quarter of states, legislative preemption authority is limited by way of express constitutional provision or judicial interpretation of the state constitution.⁵⁶ Often, these limits turn on whether a given law is a matter of statewide concern. Unfortunately, judicial efforts to distinguish between matters of local and statewide concern have been met with skepticism by both commentators and the judiciary itself.⁵⁷

That said, even for home-rule governments, the state retains the power to preempt local authority by way of general laws (that is, laws that do not target specific jurisdictions).⁵⁸ In other cases, exercises of state power require precision.

David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2278 (2003); *see also supra* note 46.

53. *See* Barron, *supra* note 52, at 2288-90.

54. Rick Su, *Have Cities Abandoned Home Rule?*, 44 FORDHAM URB. L.J. 181, 191 (2017).

55. *See* Paul A. Diller, *The City and the Private Right of Action*, 64 STAN. L. REV. 1109, 1129-34 (2012). *See generally* HOME RULE IN AMERICA: A FIFTY-STATE HANDBOOK (Dale Krane et al. eds., 2001) (surveying the types of home-rule authority across the fifty states).

56. Diller, *supra* note 15, at 1066.

57. *See* Briffault, *supra* note 39, at 19 (“Strikingly, two of the classic distinctions in home rule thinking—whether home rule is based on a state constitutional provision or only a state statute, or whether the home rule is of the *imperio* form vesting localities with both initiative and immunity from inconsistent laws on the same subject or merely of the *legislative* form, granting broad initiative powers but making them subject to state legislative preemption—appear not to matter much.” (footnotes omitted)); Diller, *supra* note 15, at 1067 (“Interestingly, even in states where the constitutional system of home rule is not self-executing or it expressly allows the legislature to weaken local authority, the courts have nonetheless recognized some realm of local enactments that cannot be overruled by the state legislature.”); *see also* Davidson, *supra* note 40, at 982 (“The work of courts in these cases involves state constitutional and statutory interpretation, and the materials courts apply often themselves reflect a great deal of uncertainty. Courts ultimately struggle through in a kind of constitutional common-law way.” (footnote omitted)).

58. *See* Su, *supra* note 54, at 193. In non-home-rule states and non-home-rule local governments within home-rule states, state delegations of authority must be explicitly granted in statutes or implied as necessary corollaries of statutory delegations. However, the powers of non-home-rule jurisdictions can be quite broad, thus minimizing some of the difference between home-rule and non-home-rule jurisdictions. *See, e.g.*, ADVISORY COMM’N ON INTERGOVERNMENTAL RELATIONS, M-131, MEASURING LOCAL DISCRETIONARY AUTHORITY 17 (1981), <https://perma.cc/36CZ-267N> (discussing Alabama’s broad delegation to cities and the political limits on state authority over localities in Kentucky).

For instance, under Texas’s home-rule law, “the Legislature may limit a home-rule city’s police power regarding a particular subject matter so long as that limitation appears with unmistakable clarity.”⁵⁹ Moreover, in most states, counties are not eligible for home rule at all.⁶⁰ In sum, though enormous variation exists across jurisdictions, local government authority is often significantly circumscribed.

B. Substantive Preemption

As has been widely noted, states and cities are increasingly clashing over important and sensitive social and economic issues. These fights often manifest in the form of preemption disputes. While such disputes are hardly a novelty, the frequency, nature, and partisan valence of these contests have heightened tensions as of late.⁶¹ The dispute over North Carolina’s “Bathroom Bill” is a recent and well-documented example. Charlotte’s efforts to expand its civil rights protections to include protections based on “sexual orientation, gender identity, [and] gender expression”⁶² were quickly and expressly preempted by the state legislature.⁶³ Public conversation at the time was focused on

59. *Laredo Merchs. Ass’n v. City of Laredo*, No. 04-15-00610-CV, 2016 WL 4376627, at *4 (Tex. App. Aug. 17, 2016), *aff’d*, 550 S.W.3d 586 (Tex. 2018); *see also* *City of Sweetwater v. Geron*, 380 S.W.2d 550, 552 (Tex. 1964).

60. MATTHEW SELLERS, NAT’L ASS’N OF CTYS., COUNTY AUTHORITY: A STATE BY STATE REPORT 204 tbl. (2010), <https://perma.cc/2WSX-BEC5> (identifying just fourteen states where counties have some possibility of home rule).

61. Briffault, *supra* note 15, at 1997 (“Classic preemption disputes continue to arise, but the real action today is the *new preemption*: sweeping state laws that clearly, intentionally, extensively, and at times punitively bar local efforts to address a host of local problems.”); Davidson, *supra* note 40, at 957 (“Traditionally, states have invoked their power over local authority periodically to vindicate concerns about statewide regulatory uniformity or to address particularly significant interlocal conflicts. As rising political and cultural polarization exacerbates long-standing urban/rural conflicts, however, progressive cities find themselves increasingly at odds with conservative state legislatures.”); Emily Badger, *Blue Cities Want to Make Their Own Rules. Red States Won’t Let Them*, N.Y. TIMES: UPSHOT (July 6, 2017), <https://perma.cc/3WZU-FLB7>; Rob O’Dell & Nick Penzenstadler, *Copy, Paste, Legislate: You Elected Them to Write New Laws. They’re Letting Corporations Do It Instead.*, USA TODAY (updated June 19, 2019, 3:56 PM PDT), <https://perma.cc/3BS5-GQKX> (“Model-legislation factories have increasingly proposed what are known as ‘preemption’ bills. These laws, in effect, allow state legislators to dictate to city councils and county governing boards what they can and cannot do within their jurisdiction—including preventing them from raising the minimum wage, banning plastic grocery bags, and destroying guns.”).

62. Charlotte, N.C., Ordinance No. 7056-X, § 3 (Feb. 22, 2016), *repealed by* Charlotte, N.C., Ordinance No. 8195 (Dec. 21, 2016).

63. *See* Act of Mar. 23, 2016, No. 2016-3, pts. II-III, 2016 N.C. Sess. Laws 12, 14-16, *repealed by* Act of Mar. 30, 2017, No. 2017-4, 2017 N.C. Sess. Laws 81.

the subject of transgender people's choice of public restroom.⁶⁴ The state law preempted local discretion in regulating the matter and required bathrooms in public buildings "to be designated for and only used by persons based on their biological sex" as "stated on a person's birth certificate."⁶⁵

Though public outcry ultimately led to the repeal of the Bathroom Bill,⁶⁶ the preemption fight at the center of the controversy was typical. States have preempted a host of workplace regulation laws, including those increasing minimum wage rates and providing employees with sick leave.⁶⁷ Local gun regulations have been preempted,⁶⁸ as have local jurisdictions' self-designation as "sanctuary cities."⁶⁹ A wide swath of public health measures, including tobacco-related regulations and attempts to provide consumers with nutritional information, have also been preempted.⁷⁰

In the environmental arena, states have preempted local fracking bans⁷¹ and other efforts to regulate the oil and gas industry.⁷² States have also

64. For instance, in response to the state bill, the National Collegiate Athletic Association and National Basketball Association, among other entities, implemented a ban on holding certain events in North Carolina. See Valerie Bauerlein, *North Carolina May Lose More NCAA Games amid Bathroom Bill Deadlock*, WALL ST. J. (Mar. 29, 2017, 2:23 PM ET), <https://perma.cc/4FVY-L3YA>.

65. Act of Mar. 23, 2016, pt. I, 2016 N.C. Sess. Laws at 12-14.

66. Richard Fausset, *North Carolina Strikes a Deal to Repeal Restrictive Bathroom Law*, N.Y. TIMES (Mar. 29, 2017), <https://perma.cc/GXF5-QVAM>; see also Act of Mar. 30, 2017.

67. See, e.g., FLA. STAT. § 218.077(2) (2019) (prohibiting local governments from establishing a minimum wage different than the state or federal minimum wage); MISS. CODE ANN. § 17-1-51(1) (2019) (prohibiting local governments from requiring mandatory minimum sick days for employees).

68. Briffault et al., *supra* note 10, at 9-10 ("[F]orty-three states have enacted broad preemption statutes related to firearms and ammunition, with eleven states absolutely preempting all municipal firearm regulations, including New Mexico, which took the extreme step of amending its state constitution to enshrine the ban.").

69. See Pratheepan Gulasekaram et al., *Essay, Anti-Sanctuary and Immigration Localism*, 119 COLUM. L. REV. 837, 848 (2019).

70. STANTON A. GLANTZ & EDITH D. BALBACH, *TOBACCO WAR: INSIDE THE CALIFORNIA BATTLES* 212-15 (2000) ("By December 1990, the industry had succeeded in getting six states to pass legislation preempting communities from passing ordinances pertaining to clean indoor air, youth access to tobacco, and other tobacco control measures."); Briffault, *supra* note 15, at 2000 ("Environmental and public health preemption measures include bans on local nutrition regulations, such as calorie counts and other menu labeling rules . . .").

71. See, e.g., OKLA. STAT. tit. 52, § 137.1 (2019); Riverstone-Newell, *supra* note 13, at 408-11.

72. See Davidson, *supra* note 40, at 967 ("On local environmental protection, at least eight states preempt local regulation of oil and gas drilling and conservation efforts."); Hannah J. Wiseman, *Disaggregating Preemption in Energy Law*, 40 HARV. ENVTL. L. REV. 293, 295-96 (2016).

preempted plastic bag regulations⁷³ and various aspects of the so-called “sharing economy.”⁷⁴ Given these trends, it hardly seems hyperbolic to claim that “the breadth and ambition of the recent preemption efforts have rarely been seen in American history.”⁷⁵ To the point, it is now increasingly common for states to pass statutes preempting local policymaking on a variety of issues simultaneously.⁷⁶

Even more troubling are some legislators’ proposals to pass prophylactic preemption laws that strip local governments of their authority entirely.⁷⁷ Along similar lines, some states have gone so far as to pass punitive preemption laws, which punish jurisdictions or their elected officials for enacting ordinances that conflict with state laws.⁷⁸ In short, as of late, preemption disputes have intensified, as local governments have sought to regulate new areas and states have become more assertive in their exertions of authority.

C. Structural Preemption

Structural authority—the autonomy of local governments to design and modify their government institutions and the terms of local political participation—presents distinct issues as a matter of both law and policy. Fully appreciating these issues requires an understanding of democracy at the local level.

73. See, e.g., *Plastic Bag Law Maps*, PLASTICBAGLAWS.ORG, <https://perma.cc/ED95-CZ75> (last updated Aug. 13, 2019).

74. Davidson, *supra* note 40, at 968 (noting that “at least forty-two states preempt aspects of local authority over the sharing economy”).

75. See Kenneth A. Stahl, *Preemption, Federalism, and Local Democracy*, 44 FORDHAM URB. L.J. 133, 134 (2017).

76. In 2015, for example, Michigan enacted a broad preemption statute that prevents local governments from regulating many aspects of employment, including wages, benefits, application questions, and legal remedies for violations of state wage and hour claims. This legislation prevents local governments from enacting paid sick leave requirements, higher local minimum wages, ban-the-box ordinances that would prohibit employers from asking about criminal history, and ordinances that would seek to ensure employees had predictable, regular schedules to make childcare arrangements easier for working parents, among other policies. See Local Government Labor Regulatory Limitation Act, No. 105, 2015 Mich. Pub. Acts 64 (codified at MICH. COMP. LAWS §§ 123.1381-1396 (2019)). Iowa passed a similar measure in 2017, preempting a range of local regulations on employment as well as local regulation of plastic bags and take-out containers. See Act of Mar. 30, 2017, ch. 20, 2017 Iowa Acts (codified as amended at IOWA CODE §§ 331.301(6)(c), 331.304(12), 364.3(3)(c), 364.3(12) (2020)).

77. See Briffault, *supra* note 15, at 2007 (“Legislators in several states have raised the idea of completely eliminating local legislative power, either over entire fields of regulation or with respect to any subject in which the state has an interest.”).

78. See Scharff, *supra* note 12, at 1473.

While federal elections often grab the headlines, voters in the United States are awash in local democracy. In addition to local elected positions like mayors and city council members, voters elect candidates to a variety of special-purpose boards, including school boards, utility boards, and water boards.⁷⁹ County supervisors, sheriffs, and prosecutors are also directly elected in many jurisdictions.⁸⁰ In some communities, voters select members of the local zoning commission,⁸¹ though no one actually elects dog catchers anymore.⁸² Because of these diverse features—coupled with the fundamental questions about democratic design, political entrenchment, and political participation that structural preemption raises—we argue that structural preemption should be considered apart from general preemption.

First, in contrast to subject-specific or multi-issue preemption (even of the punitive sort), structural preemption implicates what is arguably the most important feature of local democracy, namely, the ability of a local government to control the means by which it operates. It is for this reason that many states afford autonomy to home-rule local governments in this realm.⁸³ Issues like when to hold elections, how many members must serve on the city council, or what types of electoral districts a city must use are core aspects of governance that play an essential role in defining a political community.

Second, as noted in the Introduction, structural preemption resists categorical treatment under which courts attempt to cleanly delineate state from local matters. Though a strong tradition supports conceiving of local

79. See, e.g., Christopher R. Berry & William G. Howell, *Accountability and Local Elections: Rethinking Retrospective Voting*, 69 J. POL. 844, 844-45 (2007) (discussing school board elections); Troy A. Rule, *Buying Power: Utility Dark Money and the Battle over Rooftop Solar*, 5 LSU J. ENERGY L. & RESOURCES 1, 8 (2017) (“All five seats on the Arizona state agency regulating electric utilities—the Arizona Corporation Commission (ACC)—are filled through popular elections.”); Katie Campbell, *Water Board Election a Dry Topic for Most Voters*, ARIZ. CAPITOL TIMES (Oct. 29, 2018), <https://perma.cc/3KGY-N4CW>.

80. See, e.g., Emily Bazelon & Miriam Krinsky, Opinion, *There’s a Wave of New Prosecutors. And They Mean Justice.*, N.Y. TIMES (Dec. 11, 2018), <https://perma.cc/8FUC-LDGX> (discussing the election of “progressive prosecutors”); Dakota Smith, *Holly Mitchell and Herb Wesson Appear Headed for Runoff in Race for L.A. County Supervisor*, L.A. TIMES (Mar. 3, 2020, 9:12 AM), <https://perma.cc/5QWD-JGLK>; Skyler Swisher, *Racy Photos and an Undisclosed Killing: Sheriff’s Race Is Broward County’s Raucous Election to Watch*, S. FLA. SUN SENTINEL (May 8, 2020, 6:00 AM), <https://perma.cc/TTE4-T36T>.

81. See, e.g., *Planning & Zoning Commission*, TOWN OF NEWTOWN, <https://perma.cc/5RE7-RFSR> (archived May 13, 2020) (elected zoning commission); *Zoning Board of Appeals*, CITY OF TAUNTON, <https://perma.cc/5DYY-EWQD> (archived May 13, 2020) (elected zoning board).

82. Philip Bump, *A Brief History of People Who Have Actually Been Elected Dogcatcher*, WASH. POST (Oct. 24, 2017, 6:10 AM PDT), <https://perma.cc/X9UP-HTA5>.

83. See Diller, *supra* note 15, at 1067 (“Structural and personnel home rule are the areas in which immunity is most prevalent.”); Scharff, *supra* note 10, at 302 (“Home rule municipalities have the greatest authority over structural and personnel decisions.”).

governments as uniquely representative of the citizenry,⁸⁴ there are reasons to doubt this school of thought.⁸⁵ Local governments may be efficient laboratories of democracy that are accountable to their constituents and foster political participation. But they may also be inefficient bureaucracies controlled by entrenched special interests that don't register their constituents' preferences.⁸⁶ Consequently, the issues presented in structural preemption disputes involve more than just garden-variety policy disagreements. Finally, current doctrine recognizes local structural authority only in the context of home-rule jurisdictions.⁸⁷ However, in the context of decisions about the nature of local democracy, we think it is worth highlighting the ways that states are changing the rules in non-home-rule jurisdictions as well.

What sorts of structural preemption issues are arising throughout the country? Broadly speaking, the issues can be put into two categories: those that implicate the design and modification of government and those that implicate the terms of political participation. We preview the two categories here and provide a fuller treatment in Part II.

1. Government design

There are three ways in which states attempt to preempt (and often succeed at preempting) the design of local governments. First, an obvious government design feature is a local government's leadership structure. Is a city to be governed by a city manager or an elected mayor? What role will the city council play in governance? These longstanding questions were at the heart of Progressive-era reformers' efforts to root out government corruption in city politics (and to limit the influence of certain segments of the urban population).⁸⁸ Today, cities confront a host of challenges: improving

84. See Justin Weinstein-Tull, Essay, *A Localist Critique of Shelby County v. Holder*, 11 STAN. J. C.R. & C.L. 291, 305 (2015) (tracing the tradition to "Thomas Jefferson, Alexis de Tocqueville, and Thomas Cooley"); see also Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1069-71 (1980).

85. See, e.g., David Schleicher, *Why Is There No Partisan Competition in City Council Elections?: The Role of Election Law*, 23 J.L. & POL. 419, 460-65 (2007) ("[A] lack of partisan competition in local elections results in government that is not representative, does not feature the proper development of new political leaders, coalitions and policy ideas and has disorganized local legislatures that cannot easily translate even their weakly representative ideas into policy.").

86. See *id.*

87. See NAT'L LEAGUE OF CITIES, PRINCIPLES OF HOME RULE FOR THE 21ST CENTURY 62-66 (2020), <https://perma.cc/F8DD-FV4U> (discussing local control over local elections and government structure, and citing state constitutional law and cases granting such authority to home-rule jurisdictions).

88. See Chris Tausanovitch & Christopher Warshaw, *Representation in Municipal Government*, 108 AM. POL. SCI. REV. 605, 607 (2014) ("The Progressive reform movement came to
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infrastructure, boosting entrepreneurship, securing pension obligations, and monitoring law enforcement.⁸⁹ When, then, is it sensible for a state legislature to preempt a local government's leadership structure?

A second important feature is the size of a city's city council (or other governing body). What interest does a state have in dictating how many elected officials a city selects or in prohibiting size modifications? A third feature is a city's decision about whether to use at-large, multimember, or single-member electoral districts. Section 2 of the Voting Rights Act of 1965 (VRA)⁹⁰ is frequently used to invalidate at-large and multimember districts when their use effectively prevents minority groups from electing their candidates of choice,⁹¹ but these cases do not necessarily explain a state's decision to preempt a city's districting map.

2. Terms of political participation

States have also taken steps to preempt cities' enactments regarding the terms of local political participation. A bill introduced by four Washington state representatives would broadly establish that

[t]he state occupies and preempts the entire field with respect to voting practices and procedures. Counties and political subdivisions may adopt or administer only those voting practices and procedures that are specifically permitted by state law, including rules adopted by the secretary of state, or that meet the requirements of . . . this section.⁹²

While most bills do not go this far, the effort is nonetheless instructive. Preemption bills are a case study in horizontal federalism, with ideas introduced in one state often appearing in bills introduced by other state legislatures in short order.⁹³ There are four ways in which states commonly attempt to preempt or succeed at preempting local governments' terms of political participation.

First, a city's decision to hold off-cycle elections is a political participation issue. The choice of when to hold an election is a standard election-

link mayor-council systems with the inefficiency and corruption of party machines. Reformers argued that city governments should be run by experts rather than politicians.”).

89. See, e.g., CHAD SHEARER ET AL., BROOKINGS INST., WHERE JOBS ARE CONCENTRATING AND WHY IT MATTERS TO CITIES AND REGIONS 4-8 (2019), <https://perma.cc/QUE7-MWM3>.

90. 52 U.S.C. § 10301 (2018).

91. See generally Ellen Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. MICH. J.L. REFORM 643 (2006) (cataloguing judicial decisions on Section 2 claims between 1982 and 2005).

92. H.R. 2060, 66th Leg., Reg. Sess. (Wash. 2019).

93. See O'Dell & Penzenstadler, *supra* note 61.

administration issue that turns on several factors, including convenience and resource availability.⁹⁴

Second, campaign finance disputes between state and local governments are certain to arise. As the fight over the corrupting influence of money in politics continues, a city may wish to impose lower contribution limits than what the state imposes. It is also conceivable that a city may desire to exempt dark money from disclosure despite a state law requiring disclosure. We can expect recurrent state-local contests of this sort.

Third, courts are apt to be confronted with disputes over voting methods. More and more jurisdictions are experimenting with novel methods of aggregating votes, such as cumulative voting and ranked-choice voting.⁹⁵ Some states have already taken steps to prevent such experimentation,⁹⁶ and the resulting conflicts are unlikely to abate.

Finally, friction may arise between state and local governments over voter eligibility. Local governments, both historically and at present, have extended the franchise to populations that are otherwise ineligible to participate.⁹⁷ Given the politically sensitive status of some of these populations—noncitizens and felons, for example—we anticipate clashes between state and local governments over such policies in the future. All told, the terms of political participation, a crucial determinant of political outcomes, will be part of the preemption conversation going forward.

D. Legal Distinctions

State courts have treated laws that preempt local governments' structural decisions more skeptically than laws that preempt local regulatory authority.⁹⁸ Constitutional home-rule provisions sometimes make local authority over these structural decisions explicit, though such authority is frequently conditioned on consistency with the state's general laws. For example, Illinois's constitution provides that "[a] home rule municipality shall have the power to provide for its officers, their manner of selection and terms of office only as approved by

94. See Christopher R. Berry & Jacob E. Gersen, *The Timing of Elections*, 77 U. CHI. L. REV. 37, 48-49, 48 n.46 (2010) (discussing California's decision to consolidate elections based on cost and convenience considerations).

95. See, e.g., John David Rausch, Jr., *Cumulative Voting Comes to the Amarillo Independent School District: A Research Note*, 29 POL. & POL'Y 602, 604 (2001).

96. See, e.g., Peter Callaghan & Briana Bierschbach, *A Bipartisan Group in the Legislature Wants to Ban Ranked-Choice Voting in Minnesota*, MINNPOST (Mar. 14, 2018), <https://perma.cc/P434-7QXJ>; Jessie Van Berkel, *Minnesota Lawmakers Push to Prohibit Ranked-Choice Voting*, STAR TRIB. (Mar. 27, 2018, 10:07 PM), <https://perma.cc/EKQ8-AY5X>.

97. See *infra* Part IV.B.

98. The Authors wish to thank Richard Briffault for guiding them to some of the case law discussed in this Subpart.

referendum or as otherwise authorized by law.”⁹⁹ Colorado’s constitution goes even further, giving home-rule governments explicit immunity from state laws that conflict with charter provisions covering local structural authority.¹⁰⁰

Colorado aside, in most jurisdictions, the fate of a charter provision or municipal ordinance conflicting with state law is determined under the state’s general preemption framework. As discussed above, the exact locution of a state’s preemption test varies, but such tests generally require state courts to distinguish between matters of purely local concern and matters of statewide importance. The Connecticut Supreme Court, for example, has explained that the state’s constitutional home-rule provision prevents “the legislature from encroaching on the local authority to regulate matters of purely local concern, *such as the organization of local government or local budgetary policy*,” but “matters that concern public health and safety, and other areas within the purview of a state’s police power, have traditionally been viewed as matters of statewide concern.”¹⁰¹

As in Connecticut, other states frequently suggest that issues of structural authority are paradigmatic examples of local concern. The Arizona Supreme Court observed that it could “conceive of no essentials more inherently of local interest or concern to the electors of a city than who shall be its governing officers and how they shall be selected.”¹⁰² Courts have also noted

99. ILL. CONST. art. VII, § 6(f); *see also* LA. CONST. art. VI, § 5(E) (“A home rule charter adopted under this Section shall provide the structure and organization, powers, and functions of the government of the local governmental subdivision, which may include the exercise of any power and performance of any function necessary, requisite, or proper for the management of its affairs, not denied by general law or inconsistent with this constitution.”).

100. COLO. CONST. art. XX, § 6 (“Such charter and the ordinances made pursuant thereto in such matters shall supersede within the territorial limits and other jurisdiction of said city or town any law of the state in conflict therewith.”); *id.* art. XX, § 6(a) (giving home-rule governments the power to “legislate upon, provide, regulate, conduct and control . . . [t]he creation and terms of municipal officers, agencies and employment; the definition, regulation and alteration of the powers, duties, qualifications and terms or tenure of all municipal officers, agents and employees”).

101. *Cook-Littman v. Bd. of Selectmen*, 184 A.3d 253, 260-61 (Conn. 2018) (first quoting *Bd. of Educ. v. Town & Borough of Naugatuck*, 843 A.2d 603, 613-14 (Conn. 2004); and then quoting *Windham Taxpayers Ass’n v. Bd. of Selectmen*, 662 A.2d 1281, 1293 (Conn. 1995)).

102. *Strode v. Sullivan*, 236 P.2d 48, 54 (Ariz. 1951); *see also* *State ex rel. Haynes v. Bonem*, 845 P.2d 150, 157 (N.M. 1992) (“[T]he purpose of our home rule amendment is to delegate to municipalities autonomy in matters concerning their local community, as opposed to matters of statewide concern or interest. We believe that the present subject—the number of commissioners in the governing body—is precisely the sort of matter intended to fall within the decisionmaking power of a home rule municipality.”); *Fitzgerald v. City of Cleveland*, 103 N.E. 512, 514 (Ohio 1913) (“It will not be disputed that one of the powers of government is that of determining what officers shall administer the government, which ones shall be appointed and which elected, and the method of their

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the limited extraterritorial effect of local decisions about structural authority.¹⁰³

This logic has animated state court opinions rejecting state attempts to require on-cycle local elections,¹⁰⁴ require partisan (or nonpartisan) elections,¹⁰⁵ change the number of city council members,¹⁰⁶ and prevent the use of at-large city council districts.¹⁰⁷ State courts have also rejected claims that state law can displace local government campaign finance regulations and programs¹⁰⁸ or displace charter terms governing the replacement of elected local officials who resign before their terms are up.¹⁰⁹

However, state courts are not always solicitous of local structural authority. Often, the legitimacy of the state's action will depend on the legislative purpose of the state's preemption legislation. The Nebraska Supreme Court, for example, upheld that state's efforts to preempt Omaha's charter provision that required at-large city council elections.¹¹⁰ The court held that

while the action of the Nebraska Legislature in this instance directly affects the manner by which a metropolitan city selects its city council, the primary concern of the legislation was to insure the fundamental right to vote and the right to proportionate representation. Such matters are not of local concern alone and go well beyond the manner in which an election is conducted.¹¹¹

The legislative history and text of the Nebraska statute persuaded the court that “the ‘concern’ of the bill was to insure adequate and equal representation to all socioeconomic segments of the populations of cities of the metropolitan class.”¹¹²

appointment and election. These are essentials, which are confronted at the very inception of any undertaking, to prepare the structure or Constitution for any government.”)

103. *See, e.g.*, *Cawdrey v. City of Redondo Beach*, 19 Cal. Rptr. 2d 179, 188 (Ct. App. 1993) (“[T]he persons primarily affected by [the City’s term-limit provision] are City council members and residents. Council members can only exercise the City’s police powers within the City, and [the provision] has at most a minimal extraterritorial effect.”); *Haynes*, 845 P.2d at 157 (“Of what concern is it statewide what the City’s residents decide as to the number of commissioners they wish to serve on their city commission?”).

104. *See, e.g.*, *City of Tucson v. State*, 333 P.3d 761 (Ariz. Ct. App. 2014); *State ex rel. Carroll v. King County*, 474 P.2d 877 (Wash. 1970).

105. *See, e.g.*, *City of Tucson v. State*, 273 P.3d 624 (Ariz. 2012) (en banc); *Strode*, 236 P.2d 48; *Hoper v. City & County of Denver*, 479 P.2d 967 (Colo. 1971); *State ex rel. Short v. Callahan*, 221 P. 718 (Okla. 1923).

106. *See, e.g.*, *Haynes*, 845 P.2d 150.

107. *See, e.g.*, *City of Tucson*, 273 P.3d 624.

108. *See, e.g.*, *Johnson v. Bradley*, 841 P.2d 990 (Cal. 1992); *McDonald v. N.Y.C. Campaign Fin. Bd.*, 985 N.Y.S.2d 557 (App. Div. 2014); *Nutter v. Dougherty*, 938 A.2d 401 (Pa. 2007); *State v. Hutchinson*, 624 P.2d 1116 (Utah 1980).

109. *See, e.g.*, *Cook-Littman v. Bd. of Selectmen*, 184 A.3d 253 (Conn. 2018).

110. *See Jacobberger v. Terry*, 320 N.W.2d 903 (Neb.), *amended by* 322 N.W.2d 620 (Neb. 1982).

111. *Id.* at 907.

112. *Id.* at 905-06.

Similarly, California courts, which have often been receptive to local claims on structural authority issues, have similarly sided with the state when state preemption law seeks to vindicate voting rights. A California appellate court upheld the remedial provisions of the California Voting Rights Act (CVRA) against a claim that these provisions violated California's constitutional home-rule provision.¹¹³ The CVRA allowed plaintiffs to pursue claims of voter dilution under a lower standard than that of the federal Voting Rights Act, and, where plaintiffs proved such voter dilution, local governments could be required to switch from at-large city council elections to district-based elections.¹¹⁴ In upholding the law, the court found that “[e]lectorate results lack integrity where a protected class is denied equal participation in the electoral process because of vote dilution. Thus, [the CVRA] addresses an issue of statewide concern.”¹¹⁵

In sum, despite local governments' relatively greater autonomy over structural matters, courts have by no means found this autonomy to be sacrosanct, and they often wrestle with the same challenges that exist when resolving substantive preemption disputes. We turn now to consider in detail where and in what ways states have structurally preempted local governments.

II. Examples of Structural Preemption

This Part documents recent structural preemption bills proposed in or enacted by state legislatures. These examples are not intended to constitute a comprehensive summary of all relevant legislation—an immense body of proposed laws, as even a cursory review of state-bill-tracking databases reveals. Many of these bills died in committee, were only passed by one legislative body, or were vetoed. Moreover, the application of many of these proposals in the context of state home rule is not necessarily straightforward. First, some of these bills explicitly target governmental units (like counties and school districts) that likely do not have home rule. Second, to the extent these proposals intend to preempt home-rule authority, the validity of such preemption under state law is not clear. Our purpose here is simply to use these data points to illustrate various types of structural preemption that we suspect are likely to increase in frequency.

113. *Jauregui v. City of Palmdale*, 172 Cal. Rptr. 3d 333 (Ct. App. 2014).

114. *See id.* at 339-40.

115. *Id.* at 346.

A. Local Government Leadership

Local government leadership takes many forms. This is unsurprising, given the large number of local governments that exist across the nation.¹¹⁶ The most common form is the “council-manager” system, in which authority is shared between a city council and a professional city manager.¹¹⁷ This system largely replaced “mayor-council” systems that were thought to be corrupt and inefficient.¹¹⁸ But in addition to voting for these relatively high-profile positions, voters in many jurisdictions also vote for school board members, finance directors, local judges, sheriffs, prosecutors, and a wide variety of other local officials.¹¹⁹ Other local officials are, of course, appointed. Yet in either case, the idea that decisions about local government leadership should be made at the local level has an intuitive appeal. What have state legislatures done on this front?

A recent New Hampshire bill would have required a city’s chief elections officer to be a registered voter of the city.¹²⁰ Under existing state law, city clerks also function as chief elections officers.¹²¹ Under the terms of the bill, if the city clerk was a registered voter of the city, no change was necessary.¹²² But if the city clerk was not a registered voter of the city, the governing body of the city was obligated to elect a registered voter of the city as chief elections officer.¹²³

One of the defining features of many local government positions is their nonpartisan nature. But, again, there is variance on this front, and states have at times sought to alter the terms of these positions. Legislators in Nebraska, for example, sought to require candidates for county office to be nominated and elected on a partisan basis.¹²⁴ In Nevada, however, the effort has been in the opposite direction. Current law already designates certain positions—including judges, city officers, and school officials—as nonpartisan.¹²⁵ Legislators proposed to expand the list of legislatively designated nonpartisan officials to include county clerks, county commissioners, district attorneys, and public administrators, among others.¹²⁶

116. See Tausanovitch & Warshaw, *supra* note 88, at 605 (“There are nearly 90,000 local governments in the United States.”).

117. *Id.* at 607.

118. *Id.*

119. See *supra* notes 79-81 and accompanying text.

120. S. 349, 2016 Gen. Court, Reg. Sess. (N.H. 2016).

121. N.H. REV. STAT. ANN. § 652:14-a (2020).

122. N.H. S. 349, § 1.

123. *Id.*

124. Leg. 273, 104th Leg., 1st Sess. § 2 (Neb. 2015).

125. NEV. REV. STAT. § 293.195(1) (2019).

126. Assemb. 320, 2015 Leg., 78th Sess. § 1 (Nev. 2015).

The Nevada legislature also attempted to amend the charters of the cities of Reno and Sparks. In each, city attorneys are elected officials.¹²⁷ The proposed change would have given the cities' respective city councils the power to appoint city attorneys and would have made city attorneys removable at will by a majority vote of the city council.¹²⁸

Some bills attempt to change the composition of local government leadership entirely. A Nebraska bill aspired to require each county of over 100,000 inhabitants to create "an advisory committee to assist the election commissioner."¹²⁹ The advisory committee, which was to consist of six members, would "advise the election commissioner on matters relating to voter registration and the conduct of elections in the county."¹³⁰ This is a small sampling, but in light of a growing number of disputes between state and local officials, it would be surprising if we do not see more efforts by state governments to dictate the nature of local government leadership.

B. Local Government Size

Altering the size of a government body can be a shrewd means of achieving desired ends, and states routinely transfigure local government bodies. This issue arose in New Mexico, where a state statute required a five-member city commission but the City of Clovis preferred a larger commission.¹³¹ The Supreme Court of New Mexico upheld the city's authority, finding no apparent intention in the statute to deprive home-rule municipalities (such as Clovis) of "their powers of local governance."¹³²

Georgia, just last year, enacted a bill changing the size of the Jackson County Board of Elections and Registration.¹³³ Prior to July 1, 2019, the Board was composed of a chairperson and just two members.¹³⁴ The bill mandated that, as of that date, the Board be composed of five members.¹³⁵ In 2015, the North Carolina legislature attempted to restructure Greensboro's city government, including by changing the city council from a combination of at-large and single-district seats to a council composed entirely of single-district

127. Charter of the City of Sparks, ch. 470, § 1.060, 1975 Nev. Stat. 724, 725; Charter of the City of Reno, ch. 662, § 1.060, 1971 Nev. Stat. 1962, 1963.

128. S. 434, 2017 Leg., 79th Sess. §§ 6, 13 (Nev. 2017).

129. Leg. 235, 103d Leg., 1st Sess. § 15 (Neb. 2013).

130. *Id.*

131. State *ex rel.* Haynes v. Bonem, 845 P.2d 150, 152 (N.M. 1992).

132. *See id.* at 157-58.

133. Act of Apr. 30, 2019, No. 98, § 1, 2019 Ga. Laws 3682, 3682.

134. *Id.*

135. *Id.*

seats, with district boundaries drawn by the state.¹³⁶ This attempt also implicates the next type of structural preemption.

C. District Type

The history of litigation under Section 2 of the Voting Rights Act of 1965 (VRA)¹³⁷ is in large part a history of legal fights over district type. At-large and multimember electoral districts often functionally prohibit minority voters from electing candidates of their choice, and the VRA has been the principal means by which such districts have been challenged.¹³⁸ But as noted above, the relevant case law tells us nothing about why a state might choose to preempt a city's districting choice. Thus, putting instances involving racial "vote dilution" aside,¹³⁹ the challenge of how to evaluate structural preemption of local district type remains.

This brand of structural preemption comes in many forms. New Mexico again provides an example. The City of Gallup, a home-rule municipality, provided in its charter for at-large elections for city councilors.¹⁴⁰ The question for the New Mexico Supreme Court was whether this provision was preempted by a state statute requiring cities with a population of 10,000 or more to elect city officials from single-member districts.¹⁴¹ The court found the charter provision to be preempted.¹⁴²

The Nebraska Supreme Court was asked to rule on the question whether a state statute requiring cities to elect their city council members from single-member districts superseded the Omaha city charter requiring that elections be held at large.¹⁴³ Finding the state's interest—"to protect the fundamental

136. See *City of Greensboro v. Guilford Cty. Bd. of Elections*, 251 F. Supp. 3d 935, 938 (M.D.N.C. 2017); see also Act of July 2, 2015, No. 2015-138, § 2.(c), 2015 N.C. Sess. Laws 337, 338-45, *invalidated by City of Greensboro*, 251 F. Supp. 3d 935. These efforts were ultimately defeated in litigation. *City of Greensboro*, 251 F. Supp. 3d at 951-52 (granting a permanent injunction against enforcement of the statute for violating the Equal Protection Clause).

137. 52 U.S.C. § 10301 (2018).

138. See Joshua S. Sellers, *Election Law and White Identity Politics*, 87 *FORDHAM L. REV.* 1515, 1533-40 (2019).

139. See, e.g., *Thomas v. Bryant*, 366 F. Supp. 3d 786, 809 (S.D. Miss.) (quoting *Monroe v. City of Woodville*, 881 F.2d 1327, 1333 (5th Cir. 1989), *modified on reh'g*, 897 F.2d 763 (5th Cir. 1990)), *aff'd*, 938 F.3d 134 (5th Cir.), *reh'g en banc granted*, 939 F.3d 629 (5th Cir. 2019), *argued sub nom. Thomas v. Reeves*, No. 19-60133 (5th Cir. Jan. 22, 2020).

140. See *Casuse v. City of Gallup*, 746 P.2d 1103, 1104 (N.M. 1987).

141. *Id.*

142. *Id.* at 1104-05.

143. *Jacobberger v. Terry*, 320 N.W.2d 903, 904-05 (Neb.), *amended by* 322 N.W.2d 620 (Neb. 1982).

civil rights of suffrage and proportionate representation”—to be a matter of statewide concern, the court interpreted the state statute as preempting the city charter.¹⁴⁴

More recently, the City of Tucson, Arizona, challenged a state statute that prohibited the city from “electing its city council in partisan elections or in ward-based primaries combined with at-large general elections.”¹⁴⁵ In ruling for the city, the Arizona Supreme Court found a distinction between “administrative aspects of elections” and the question of “how a city will constitute its governing council.”¹⁴⁶ Because the latter was a matter of “local autonomy preserved for charter cities by Arizona’s Constitution,” Tucson was entitled to make an autonomous decision.¹⁴⁷

Meanwhile, legislators in New York have proposed a bill that would require counties to conform to state reapportionment standards when designing local legislative districts.¹⁴⁸ In other words, the bill would harmonize reapportionment standards statewide, requiring counties to privilege certain factors when gerrymandering.¹⁴⁹ A Nebraska bill would have prohibited political subdivisions from considering noncitizens when apportioning electoral districts.¹⁵⁰ District type is likely to be a continuing site of contestation between state and local governments.

D. Election Timing

Though presidential elections are national events, most local elections are not. Unsurprisingly, voter turnout in local elections is often dismal,¹⁵¹ particularly when such elections do not align with presidential elections.

144. *Id.* at 907, 909.

145. *City of Tucson v. State*, 273 P.3d 624, 625 (Ariz. 2012) (en banc).

146. *Id.* at 630, 632.

147. *Id.* at 632.

148. Assemb. 426, 242d Leg., Reg. Sess. (N.Y. 2019) (as amended on third reading).

149. *See id.* § 1. In order of priority, the standards would require that (1) voters be given substantially equal weight for representation purposes; (2) towns, unless heavily populated, be represented by the same representative, and adjacent representation areas contain no more than a 5% population variance; (3) the redistricting plan provide fair and effective representation; and (4) the districts be as contiguous and compact as practicable. *Id.*

150. Leg. 1115, 105th Leg., 2d Sess. § 1 (Neb. 2018). The bill would have required districting officials to subtract from the total population the noncitizen population of the state as estimated by the most recent federal census. *Id.* The question whether the Trump Administration could add a citizenship question to the census was, of course, recently resolved by the Supreme Court, which found against the Administration albeit only on administrative procedure grounds. *See Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2575-76 (2019).

151. *See Schleicher*, *supra* note 85, at 421.

Researchers have confirmed that the timing of elections matters for voter turnout. Melissa Marschall and John Lappie, for instance, found that “the factor most strongly associated with turnout in local elections is election timing.”¹⁵² Christopher Berry and Jacob Gersen similarly found that off-cycle elections lead not only to lower turnout but also to identifiable changes in public policy:

Off-cycle elections generate systematically lower turnout and shifts in electoral timing produce identifiable shifts in voter participation and ultimately changes in public policy. Timing regimes that make it more costly for voters to participate in a given local government election produce measurable policy shifts in favor of special interests. These timing effects are detectable not just across jurisdictions, but even within jurisdictions where the timing regime has changed.¹⁵³

Even a cursory review of state legislative activity reveals that bills pertaining to the timing of local elections are commonplace.

In *City of Tucson v. State*, an Arizona appellate court heard a challenge brought by the cities of Tucson and Phoenix, which argued that the state legislature lacked the authority to mandate that they hold their elections “on-cycle,” that is, during even-numbered years.¹⁵⁴ After reviewing the cities’ and legislature’s respective interests, the court concluded that “the state has not shown [that its statute] implicates an existing, statewide interest that is not independent of the interests of the charter cities.”¹⁵⁵

California mandates on-cycle elections in localities that have previously suffered from low voter turnout in off-cycle elections.¹⁵⁶ A New Mexico law requires “regular” local elections to be “held on the first Tuesday after the first Monday in November of each odd-numbered year.”¹⁵⁷ And “[a]ll municipalities shall elect their municipal officers . . . on the municipal officer election day, which is the first Tuesday in March of even-numbered years.”¹⁵⁸

152. Melissa Marschall & John Lappie, *Turnout in Local Elections: Is Timing Really Everything?*, 17 ELECTION L.J. 221, 221 (2018). Marschall and Lappie additionally found that contestation—that is, actual political competition between candidates—“can reduce or even eliminate the differences in turnout between elections held on different schedules.” *Id.* at 231.

153. Berry & Gersen, *supra* note 94, at 55.

154. 333 P.3d 761, 762 (Ariz. Ct. App. 2014).

155. *Id.* at 767; *see also* State *ex rel.* Carroll v. King County, 474 P.2d 877, 877-78 (Wash. 1970) (concluding that a home-rule county could, consistent with its charter, determine the timing of elections for county officers).

156. CAL. ELEC. CODE §§ 14051-14052 (West 2019). A California appellate court recently ruled that this provision does not apply to charter cities because, in enacting the provision, the California Assembly did not clearly indicate an intent to subject charter cities to the provision’s terms. *City of Redondo Beach v. Padilla*, 260 Cal. Rptr. 3d 263, 269-75 (Ct. App. 2020); *see also infra* text accompanying notes 291-95.

157. N.M. STAT. ANN. § 1-22-3(A) (West 2020).

158. *Id.* § 1-22-3.1(A).

A Florida bill would have preempted local governments' authority to establish election dates.¹⁵⁹ A Connecticut bill would have required municipalities currently holding elections in November to hold their primaries in August of the same year.¹⁶⁰ Nevada has, on several occasions, sought to align all of its elections.¹⁶¹ Virginia changed the timing of the vote for city council members in the town of Montross from May to November.¹⁶² This is but a sampling of what states have done or attempted to do.

E. Campaign Spending (and Disclosure)

Campaign finance remains one of the more hotly contested issues in American politics, and we anticipate that structural preemption of local campaign finance initiatives—as occurred in Arizona with regard to Tempe's dark money ordinance—will only increase.¹⁶³ Though their ordinances have not been preempted, the cities of Denver, Philadelphia, and Santa Fe have also passed dark money laws.¹⁶⁴ Voters in Phoenix, unmoved by the state legislature's response to Tempe, approved their own dark money ban in late 2018.¹⁶⁵ Around the same time, the Michigan legislature passed a bill prohibiting, among other things, "any state or local governmental unit," including "a county, city, township, village, school district, community college district, or any other local governmental unit," from requiring nonprofits to disclose their donors.¹⁶⁶ Governor Rick Snyder vetoed the bill.¹⁶⁷ Mississippi, however, enacted a law (with language identical to the Michigan bill) that affords nonprofits near-blanket immunity from disclosure requirements.¹⁶⁸

159. H.R. 1325, 119th Leg., Reg. Sess. § 8 (Fla. 2017) (as passed by House, Apr. 28, 2017).

160. S. 409, 2018 Gen. Assemb., Feb. Sess. (Conn. 2018).

161. *See, e.g.*, Assemb. 416, 78th Leg., Reg. Sess. (Nev. 2015).

162. S. 940, 2015 Leg., Reg. Sess. (Va. 2015).

163. *See* Paul Ryan, *Beyond BCRA: Cutting-Edge Campaign Finance Reform at the Local Government Level*, 92 NAT'L CIVIC REV. 3, 3 (2003) ("[F]ew realize that local governments around the country have for many years enforced and refined the most progressive campaign finance laws in the United States."); *see also* Florida Legislature Moves to Block Local Curbs on Campaign Finance, FULCRUM (updated Feb. 14, 2020), <https://perma.cc/543S-9NR7>.

164. *See* DENVER, COLO., REVISED MUN. CODE §§ 15-35(c)-(d), 15-35.5 (2020); SANTA FE, N.M., CODE § 9-2.6 (2020); PHILA., PA., CODE § 20-1006 (2020); *see also* Derek Green, *City Council Passes Bill Targeting Campaign Finance Loopholes, Dark Money Contributions*, PHILA. CITY COUNCIL (Apr. 25, 2019), <https://perma.cc/B7W'W-4D5F>.

165. *See supra* note 3.

166. S. 1176, 99th Leg., Reg. Sess. §§ 2(b), 3(1)(a) (Mich. 2018).

167. Jim Malewitz, *Gov. Snyder Vetoes Michigan Bills Criticized as Republican "Power Grabs,"* BRIDGE (Dec. 28, 2018), <https://perma.cc/BL43-5A7W>.

168. Act of Mar. 28, 2019, ch. 423, §§ 1-2, 2019 Miss. Laws Adv. Sh. (LexisNexis) (codified at MISS. CODE ANN. §§ 25-62-1(b), 25-62-3(1)(a) (2019)).

Just a few years ago, a case arose in New York involving New York City's contribution limits.¹⁶⁹ A mayoral candidate, who had chosen not to participate in the city's matching funds program, argued that the city's extension of its contribution limits to him was preempted under state law.¹⁷⁰ The court disagreed, finding that "passing a public finance scheme, including restrictions on non-participating candidates" is "within the constitutional grant of local authority to the City over its property, affairs or government."¹⁷¹

Two Texas state senators have introduced a bill to preempt local public financing of political campaigns.¹⁷² The bill states that a "political subdivision of this state may not adopt or implement a policy or program that permits the use of public money or revenue of any kind to finance a political campaign."¹⁷³ The bill expressly prohibits voter voucher programs as well.¹⁷⁴

Some structural preemption of local campaign finance matters is mundane. For instance, a 2014 New Jersey law relieved candidates from a preexisting obligation to file duplicate copies of their campaign finance reports with county clerk offices, and its language precluded county governments from reimposing such a requirement.¹⁷⁵

F. Voting Method

The way in which voters cast their ballots can have monumental—and in some cases, as revealed in *Bush v. Gore*,¹⁷⁶ dispositive—effects. Disputes over how various voting methods may have dictated electoral outcomes are, regrettably, a recurrent feature of our elections.¹⁷⁷ State laws preempting local decisions pertaining to voting methods should be closely scrutinized. In referring to voting methods, we include both the actual method by which votes are cast

169. *McDonald v. N.Y.C. Campaign Fin. Bd.*, 965 N.Y.S.2d 811 (Sup. Ct. 2013), *aff'd as modified*, 985 N.Y.S.2d 557 (App. Div. 2014).

170. *Id.* at 813, 815.

171. *Id.* at 825.

172. S. 974, 86th Leg., Reg. Sess. (Tex. 2019).

173. *Id.* § 1.

174. *Id.*

175. *Compare* N.J. STAT. ANN. § 19:44A-16(c) (West 2013), *with* Act of Sept. 10, 2014, ch. 58, sec. 1, § 16(c), 2014 N.J. Laws 582, 585 (codified at N.J. STAT. ANN. § 19:44A-16(c) (West 2019)).

176. *See* 531 U.S. 98, 103-05 (2000) (per curiam) ("Much of the controversy seems to revolve around ballot cards designed to be perforated by a stylus but which, either through error or deliberate omission, have not been perforated with sufficient precision for a machine to register the perforations.").

177. *See, e.g.*, Amended Complaint for Declaratory & Injunctive Relief at 19-22, *Fair Fight Action, Inc. v. Raffensperger*, 413 F. Supp. 3d 1251 (N.D. Ga. 2019) (No. 1:18-cv-05391), 2019 WL 4926590, ECF No. 41 (alleging several problems with Georgia's voting system).

and the method by which votes are tabulated. Incidentally, the COVID-19 pandemic has brought renewed pressure to expand voting by mail and other forms of absentee balloting to mitigate the public health risks of election lines and shared voting equipment. Local governments are already acting to increase vote-by-mail access, and it is unclear how states will respond to such local initiatives.¹⁷⁸

It is hard to imagine an objection to the New York state bill requiring each county board of elections to provide pens at polling sites.¹⁷⁹ Nor should there be much dispute over a Nebraska bill that would require counties of over 100,000 people to establish at least three early polling places for residents.¹⁸⁰ Conversely, local officials in Vermont may be less enthusiastic about a state bill that would require them to cover the cost of local election ballots and further specifies that the ballots’ “printing shall be black.”¹⁸¹ The same goes for a Nevada law that bans local governments from using certain voting machines unless those machines are approved by the Secretary of State.¹⁸²

An Indiana law provides preferential ballot placement to school board candidates seeking election as members of districts rather than at large.¹⁸³ And a Virginia law will prohibit localities from using direct-recording electronic voting machines after July 1, 2020.¹⁸⁴

In Minnesota, several state legislators introduced a bill to prohibit local governments from adopting ranked-choice voting.¹⁸⁵ Ranked-choice voting is a method of voting whereby voters are permitted to rank candidates in order of preference. The ostensible advantages of this method include increased competition and public participation, insofar as voters need not worry about “wasting” their votes.¹⁸⁶ Maine recently adopted a ranked-choice voting system

178. See Alex Seitz-Wald, *Trump’s Home County and Other Democratic Strongholds Ramp Up Vote-by-Mail*, NBC NEWS (updated Apr. 22, 2020, 3:40 PM PDT), <https://perma.cc/BPM6-T363>.

179. See Assemb. 1342, 242d Leg., Reg. Sess. (N.Y. 2019). One of us has personally witnessed the problems created when polling places run short on pens.

180. See Leg. 163, 105th Leg., 1st Reg. Sess. § 1 (Neb. 2017).

181. See H.R. 426, 2019-2020 Legis. Sess. (Vt. 2019).

182. See NEV. REV. STAT. § 293B.1045 (2019).

183. IND. CODE § 3-11-2-12.2 (2019).

184. Act of Mar. 23, 2016, ch. 464, § 1, 2016 Va. Acts 803, 803-04 (to be codified at VA. CODE ANN. § 24.2-626).

185. S. 3325, 90th Leg., 2d Reg. Sess. (Minn. 2018); see sources cited *supra* note 96.

186. See SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 1238-39 (5th ed. 2016); DENNIS F. THOMPSON, *JUST ELECTIONS: CREATING A FAIR ELECTORAL PROCESS IN THE UNITED STATES* 70-71 (2002) (“With this kind of system, inferior candidates may still win, but no votes are wasted and no choices are forced. The system increases the proportion of voters who cast a ballot for a winning candidate, and the likelihood that individual voters will be represented by legislators they chose.”).

for most of its elections.¹⁸⁷ In Minnesota, however, the proposed bill would ban the use of ranked-choice voting by home-rule charter or statutory cities, counties, townships, and school districts.¹⁸⁸

G. Voter Eligibility

Though fewer current examples exist in this area, future disputes may arise between state and local governments over voter eligibility. Even here, however, examples are easy to find. For instance, an Indiana law shuts down voter registration for municipal elections twenty-nine days before the election (and for fourteen days after the election).¹⁸⁹

Certain local governments have gone further than state governments in expanding voter eligibility: “Cities and towns have lowered the voting age in local elections to sixteen, granted the right to vote to noncitizens, expanded access for property-owning nonresidents, and called for greater overall inclusion for those otherwise disenfranchised, such as felons.”¹⁹⁰ Cities in Massachusetts have been at the forefront of the effort to authorize both sixteen-year-olds and noncitizens to vote in local elections, but these efforts have been stalled by the state’s failure to pass enabling legislation.¹⁹¹ Eleven Maryland municipalities permit noncitizen participation in city elections.¹⁹² If this trend continues, structural preemption is likely. We now turn to an examination and defense of our four suggested values.

III. Values in Structural Preemption Disputes

This Part explicates four values as paramount when thinking about structural preemption: (1) administrative cost, (2) democratic accountability, (3) democratic deliberation, and (4) pluralism. First, however, we justify our choice of these particular values.

187. See Katharine Q. Seelye, *Maine Adopts Ranked-Choice Voting. What Is It, and How Will It Work?*, N.Y. TIMES (Dec. 3, 2016), <https://perma.cc/CU79-4FV5>; Kate Taylor & Liam Stack, *Maine Counts Votes Differently. That Could Put a House Republican in Jeopardy.*, N.Y. TIMES (Nov. 13, 2018), <https://perma.cc/94UF-8VB4>.

188. Minn. S. 3325.

189. IND. CODE § 3-7-13-10 (2019).

190. Joshua A. Douglas, *The Right to Vote Under Local Law*, 85 GEO. WASH. L. REV. 1039, 1052 (2017).

191. See H.R. 3861, 190th Gen. Court (Mass. 2017); H.R. 388, 190th Gen. Court (Mass. 2017); Douglas, *supra* note 190, at 1055; see also Lauren Sampson & Iván Espinoza-Madrigal, *The Case for “All Resident” Voting*, WBUR: COGNOSCENTI (Feb. 27, 2019), <https://perma.cc/7CPV-AAA2>.

192. Caitlynn Peetz, *Chevy Chase Town Council Approves Plan Allowing Non-Citizens to Vote in Local Elections*, BETHESDA MAG. (Dec. 11, 2018, 5:19 PM), <https://perma.cc/66LU-D7RJ>.

Structural preemption efforts might stem from legitimate concerns about local democracy deficits, such as low turnout in local elections. Therefore, as we thought through the proper role of the state in influencing these local structural decisions, it was clear to us that home rule should not provide absolute protection for local structural authority. At the same time, it seemed equally obvious that the case for local control over such decisions was often strong. Further complicating matters, decisions about structural authority often influence elections in a partisan manner, and thus elected officials at both the state and local levels must be assumed to be weighing such partisan considerations in their structural choices.

Moreover, the degree of authority granted to local governments differs depending on the particular structural issue. For instance, while home rule often provides some local authority over purely structural matters, other structural issues, most glaringly voter eligibility, are generally seen as being within the purview of the state.¹⁹³ Simply put, questions of local authority in the context of structural preemption are nuanced and context dependent.

In such a context, we think state claims of preemption and corresponding claims of local government autonomy must be evaluated within a framework that recognizes that both levels of government will often have a strong claim of authority. Because a similar dynamic is at work in the context of our national federalist system, the values that undergird debates about state and federal authority offer a useful framework for this analysis. In fact, the Supreme Court's articulation of these federalist values implicitly seems to celebrate the decentralization of local government.

Arguments about the merits of local decisionmaking often parallel the more frequently discussed merits of state authority in the traditional federalism literature. As Richard Briffault observes, “[t]he values of local autonomy are frequently celebrated in our system, as they are the values of federalism.”¹⁹⁴ He suggests that the normative concerns expressed in the Supreme Court's federalism jurisprudence, specifically “responsiveness to diverse needs in a heterogeneous society, innovation and experimentation, and citizen involvement in democratic processes,” are even more applicable to local governments.¹⁹⁵

Other scholars considering the federalist system have similarly described the advantages of decentralized decisionmaking.¹⁹⁶ Broadly, the arguments in favor of decentralization focus on both process and substance. For example,

193. See U.S. CONST. art. I, § 4, cl. 1 (granting states authority over the “Times, Places and Manner of holding Elections for Senators and Representatives”).

194. Briffault, *supra* note 15, at 2018.

195. *Id.* at 2018-19.

196. See, e.g., Robert P. Inman, *Federalism's Values and the Value of Federalism* 3-10 (Nat'l Bureau of Econ. Research, Working Paper No. 13735, 2008).

Barry Friedman suggests that decentralization has the potential to promote civic participation, political accountability, policy innovation, and pluralism.¹⁹⁷ He also notes that decentralized decisionmakers may be more likely to regulate for the protection of public health and safety and that investing states with independent government authority protects liberty by limiting federal power.¹⁹⁸ Paul Diller, in his focus on home rule, emphasizes the role of cities as innovators and as centers of public participation.¹⁹⁹

Of course, these scholars also note that there are advantages to centralization. Friedman suggests that centralization may better provide public goods, minimize externalities, and offer a host of benefits by ensuring uniformity in rules.²⁰⁰ Diller notes that “[c]ritics have decried home rule for encouraging parochialism, isolation, and segregation.”²⁰¹ In our own work, one of us has focused on the state’s role in minimizing the administrative costs imposed on businesses that are subject to differing local sales tax bases and race-to-the-bottom tax competition.²⁰²

We draw from these discussions in selecting the criteria by which to evaluate both the structural authority granted to cities and state efforts to interfere with this authority. Our analysis differs, however, because of our narrowed lens. We do not engage with claims about the role that decentralization plays in securing liberty. Those arguments sound more in the debates about sovereignty of states vis-à-vis the federal government, which are out of place in discussions about the power of cities within a state. Further, under this theory, the existence of separate governments at the state and federal levels, and not the particular arrangements of structural authority within the states, secures liberty. As a result, we do not think granting structural authority to local governments does much to secure liberty.

More significantly, we do not stress the potential externality costs of local control in this context. Externality costs are clearly important in the context of evaluating local government regulatory policy, but we believe they play a less central role in justifying state control over the structural decisions of local governments.²⁰³ That is, while local decisions about, say, zoning affect the

197. See Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 389-402 (1997).

198. See *id.* at 400-04.

199. See Paul A. Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1127-32 (2007).

200. Friedman, *supra* note 197, at 405-09.

201. Diller, *supra* note 199, at 1132.

202. Scharff, *supra* note 10, at 330-34 (discussing the administrative costs of different local tax bases); *id.* at 324-26 (concluding that states have not used their authority to limit such tax competition).

203. Of course, the actual geographic boundaries of a local government may place certain externality costs on neighboring jurisdictions if, for example, wealthier geographic areas seek to incorporate to avoid the costs of supporting central city infrastructure. See
footnote continued on next page

residential and commercial development patterns in neighboring jurisdictions, it is more farfetched to argue that a local government's choice to rely on an appointed or elected zoning commission would, in and of itself, impose costs beyond a locality's borders. We believe the absence of such externality costs favors local control, a point reflected in judicial opinions on many structural preemption issues. That is, the absence of direct externalities invites judicial consideration of structural preemption as a "purely" local issue.

We believe our four values—administrative cost, democratic accountability, democratic deliberation, and pluralism—reflect the remaining analysis relevant in decisions about allocating structural authority between state and local governments. We discuss each of these criteria in more depth below. While we have endeavored to create a framework for evaluation that is not outcome oriented, these criteria are also not value free. In particular, we prefer rules that expand, rather than contract, the franchise.

Finally, we avoid assigning relative priority to any of the four values. For one, there are circumstances in which the values themselves may work in opposition. A cost-effective local election may provide insufficient opportunities for democratic deliberation. In the same way, a regime in which local governments are free to experiment is likely to increase overall electoral costs. But more fundamentally, determining which of the four values should take priority is like determining which of the four seasons is most enjoyable: If you live in upstate New York, the first signs of summer are likely a godsend; residents of Phoenix might prefer the mild winter; a football fanatic is apt to prefer the fall; a gardener perhaps eagerly awaits spring.

Likewise, state-local conditions differ markedly from place to place. A resource-poor municipality may be grateful for a state law mandating that county officials oversee local elections, even if some degree of democratic accountability is lost. A city on the verge of adopting a ranked-choice voting system is likely to resent its state legislature denying it the authority to proceed. In short, no *ex ante* ranking of the values is sensible. We now consider the four values in turn.

A. Administrative Cost

Limiting administrative cost is always of great concern to governments. One of the main justifications for state preemption of local authority is easing

Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 73-77 (1990); *see also* EVAN THOMAS, *FIRST: SANDRA DAY O'CONNOR* 59 (2019) (discussing the role of John O'Connor in incorporating the town of Paradise Valley, Arizona, to avoid Phoenix taxes). In thinking about structural preemption, we put to the side questions of incorporation, disincorporation, and annexation.

the administrative burden that arises through local variance.²⁰⁴ Arizona Governor Doug Ducey, for example, has opposed local governments' "ill-advised plans to create a patchwork of different wage and employment laws."²⁰⁵ In upholding Ohio's preemption of local gun control ordinances, the Ohio Supreme Court noted that the preemptive law addressed the "concern that absent a uniform law throughout the state, law abiding gun owners would face a confusing patchwork of licensing requirements, possession restrictions, and criminal penalties as they travel from one jurisdiction to another."²⁰⁶ Such considerations are important, but do they outweigh the benefits of localism? And are states necessarily the *most* cost-effective actor?

While the cost-based arguments for uniformity in the context of local governments' structural authority resemble arguments about regulatory authority more generally, there are important distinctions to be drawn. For one, in the context of decisions about structural authority, many of the benefits of uniformity accrue to the state and local governments themselves. Uniform rules about voter eligibility, say, may make elections easier (and cheaper) to administer. Centralizing election days similarly reduces the fixed costs of elections such as ballot printing and voting-site rentals.

The analysis is quite different when states impose obligations on local governments that the states do not themselves share and for which the states bear no burdens. Constraints such as requiring cities to modify their leadership structure or to create a new local commission are likely to increase costs on balance. The same could be said about state laws requiring the creation and operation of new polling locations or requiring localities to provide early voting days. Whatever the case, administrative cost should always be considered in resolving structural preemption disputes.

B. Democratic Accountability

Throughout both Supreme Court case law and academic scholarship pertaining to federalism, government accountability is held up as a particularly important value. In the Court's anti-commandeering doctrine, emphasis is

204. See, e.g., Alice Kaswan, *Climate Adaptation and Land Use Governance: The Vertical Axis*, 39 COLUM. J. ENVTL. L. 390, 421 (2014) ("The degree of local variation also affects the relative administrative efficiency of localized versus centralized decision-making, because it is difficult for centralized decision-makers to accommodate substantial local variation. Additional efficiency concerns, such as risks of duplication and complexity, arise in connection with multilevel governance policies that blend federal, state, and local roles." (footnote omitted)).

205. Yvonne Wingett Sanchez & Alia Beard Rau, *Arizona Cities React to Ducey's Ultimatum on Minimum Wage, Labor Rules*, AZCENTRAL (updated Jan. 13, 2016, 9:27 AM MT), <https://perma.cc/L4MY-S43M>.

206. *City of Cleveland v. State*, 942 N.E.2d 370, 378 (Ohio 2010).

given to the need to protect citizens' ability to assign credit (or blame) to the appropriate government agents. As Justice O'Connor observed in *New York v. United States*,

where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.²⁰⁷

We believe that democratic accountability should necessarily be taken into account in structural preemption disputes.

While there is no state-local equivalent to the anti-commandeering doctrine, scholars and elected officials have raised similar concerns about the ways that policies instituted at the state level may result in blame being unjustly heaped upon local officials.²⁰⁸ For example, a frequent criticism of state-imposed restrictions on taxing authority is that they obscure state responsibility for local budget decisions.²⁰⁹ Further, the federalism literature often presumes that decentralization leads to greater accountability. "Officials at the local level are likelier to be available, and thus are likelier to be held accountable. Local officials actually responsible for making policy live in the localities where the impact of their policies are felt," observes Friedman.²¹⁰

This localism-accountability narrative is bolstered by J. Eric Oliver, Shang E. Ha, and Zachary Callen, who, in their book-length study of local elections, found that local elections turn on decidedly local matters, in contrast to state and federal elections, which are ideological and partisan in nature:

The primary difference between national and local elections is that while the former are highly ideological, the latter are *managerial* in character. In a "managerial democracy" electoral politics are primarily about the custodial performance of incumbent regimes. When Americans vote for a mayor, city council member, or association officer with few powers and a limited jurisdiction, their electoral behavior primarily will be a referendum on that person's managerial competence (or guesses about his or her future managerial competence). In

207. 505 U.S. 144, 169 (1992).

208. See, e.g., Scharff, *supra* note 10, at 314-15 (discussing this problem in the context of state fiscal restrictions on local governments).

209. See *id.*

210. Friedman, *supra* note 197, at 395 (footnote omitted); see also Erin Ryan, *Federalism and the Tug of War Within: Seeking Checks and Balance in the Interjurisdictional Gray Area*, 66 MD. L. REV. 503, 620 (2007) ("Colloquial accounts of American federalism generally proceed from a localist assumption that government action should be taken at the most local level possible—or conversely, that higher levels of government should never take action that could be accomplished as well or better at a more local level." (footnote omitted)).

most circumstances, incumbents will be successful if they simply maintain a preexisting equilibrium between taxes and services and if they can avoid major scandals or faux pas.²¹¹

Central to this perspective is the notion that local political matters are essentially nonpartisan. Everyone, it is believed, can agree on the importance of maintaining basic city services.²¹² While greater dissension exists in sensitive contexts like public education, these debates are generally about issues over which *local* entities are more accountable on balance.²¹³

Though it can be tempting to romanticize local government, and any responsible endorsement of decentralization should be accompanied by a string of qualifiers, evidence does indicate a relationship between localism and democratic accountability.²¹⁴ Again, that relationship should inform structural preemption disputes.

C. Democratic Deliberation

Democratic accountability implies a vertical relationship between elected officials and the electorate, but a vibrant democracy should also create horizontal relationships within the political community. Outpourings of voter approval or disapproval, whether at the ballot box or on Twitter, are important; but it is equally important that there be meaningful discussion among the citizenry about the relative importance of various policy priorities and the costs and benefits of particular policy approaches. There is, in fact, a significant body of empirical

211. J. ERIC OLIVER ET AL., LOCAL ELECTIONS AND THE POLITICS OF SMALL-SCALE DEMOCRACY 5-7 (2012) (examining cities with fewer than 100,000 residents).

212. See PAUL E. PETERSON, CITY LIMITS 109-16 (1981) (arguing that local politics is largely nonideological). The classic adage of city politicians is that “there is no Democratic or Republican way to run a city.” See, e.g., Joyce Purnick, *Boss Tweed and Giuliani? Follow Closely*, N.Y. TIMES (Dec. 24, 2001), <https://perma.cc/LNU5-NEGH>. See generally Amalie Jensen et al., *City Limits to Partisan Polarization in the American Public* (Mar. 2019) (unpublished manuscript), <https://perma.cc/FT2V-GVWL> (finding public opinion on local development issues to be significantly less polarized than on national issues).

213. See, e.g., KENNETH K. WONG & FRANCIS X. SHEN, CTR. FOR AM. PROGRESS, MAYORAL GOVERNANCE AND STUDENT ACHIEVEMENT: HOW MAYOR-LED DISTRICTS ARE IMPROVING SCHOOL AND STUDENT PERFORMANCE (2013), <https://perma.cc/PY73-NGYR>; see also Kate Taylor, *Does It Matter Who Runs New York City’s Schools?*, N.Y. TIMES (June 23, 2017), <https://perma.cc/CK5Q-4MHQ>.

214. See David Schleicher, *Federalism and State Democracy*, 95 TEX. L. REV. 763, 776 (2017) (“William Fischel’s ‘homevoter hypothesis’ argues that voters in small local governments have incentives to pay attention to local politics and thus can and do exert substantial control over local and county legislators. Empirical evidence supports this. For instance, voters in less-population-dense areas are more wont to split their tickets, voting one way in national races and another in local ones. But voters in denser places do this rarely.” (footnotes omitted) (quoting WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES 4 (2001))).

evidence suggesting that democratic deliberation strengthens democracies.²¹⁵ Theorists like Amy Gutmann, Cass Sunstein, and Jane Mansbridge have extolled the virtues of democratic deliberation.²¹⁶ We follow these scholars in focusing on democratic deliberation rather than formal political participation because we want to stress the importance of reasoned decisionmaking, and not simple majoritarianism, in creating a democratic society.²¹⁷

Local governments, it is argued, foster political awareness and, in turn, participation both formal and informal.²¹⁸ The sentiment underlying the images of the New England town meeting, or the local school board held to account by a deeply invested group of parents, are perhaps most instructive in thinking about this value. Because the scale is small, advocates of localism assert, local government officials are more accessible than their state or federal counterparts.²¹⁹ This availability encourages greater involvement by constituents in a variety of matters that directly affect day-to-day life.

The availability of multiple avenues for meaningful political participation at the local level has the attendant benefit of building community, which further promotes democratic deliberation.²²⁰ Gerald Frug is the leading

215. See generally DEMOCRACY IN MOTION: EVALUATING THE PRACTICE AND IMPACT OF DELIBERATIVE CIVIC ENGAGEMENT (Tina Nabatchi et al. eds., 2012).

216. See generally AMY GUTMANN & DENNIS THOMPSON, WHY DELIBERATIVE DEMOCRACY? (2004); CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1995); James S. Fishkin & Jane Mansbridge, *Introduction*, DAEDALUS, Summer 2017, at 6, 7 (“If the many versions of a more deliberative democracy live up to their aspirations, they could help revive democratic legitimacy, provide for more authentic public will formation, provide a middle ground between widely mistrusted elites and the angry voices of populism, and help fulfill some of our common normative expectations about democracy.”).

217. See THOMPSON, *supra* note 186, at 195 (“When citizens deliberate, they offer justifications that are intended to influence others and to invite others to influence them. As deliberators, citizens modify their views in response to the views voiced by others. When citizens vote, they simply record their own conclusions. They do not change them in response to anyone.”).

218. See, e.g., Friedman, *supra* note 197, at 391 (“[S]tate and local governments appear to serve as breeding grounds for democracy. They provide a way for many people interested in public service to step on to the ladder in a manageable way.” (footnote omitted)).

219. E.g., BERMAN, *supra* note 27, at 4 (“Proponents of shifting authority to local units have been able to draw upon a rich American tradition in which local governments are seen as closer and more responsive to the people and are praised for providing a venue through which people can develop habits of citizenship and a sense of civic responsibility.”); Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 389 (1990) (“Local governments are state-created and state-empowered, yet particularly responsive to local residents’ social concerns.”).

220. See David J. Barron, *The Promise of Cooley’s City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 489-91 (1999).

exponent of this view, contending that citizen engagement with smaller governmental units builds a communitarian ethos.²²¹

In advancing this value, however, we are not taking a strong position endorsing deliberative democracy as *the model* of our constitutional system. To be sure, there are reasons to be skeptical of deliberation at the local level. News coverage of local issues has waned,²²² and voter participation in local-only elections is often much lower than turnout in elections timed with national political races.²²³

Nevertheless, we are suggesting that, all else equal, we would prefer local governments that, in both design and leadership, encourage deliberative democracy. As put by Dennis Thompson,

[t]he aim should be not only to reach agreement on the procedures so that citizens can accept the results of elections as just. It should also be to understand better the nature of the disagreements that inevitably persist so that citizens can find a basis for cooperating to make their electoral process as just as it can be.²²⁴

State decisionmakers should keep these aspirations in mind when considering structural preemption and make decisions that hold the promise of increased democratic deliberation.

D. Pluralism

Finally, in considering whether state or local authority should be granted deference, we think decisionmakers should give weight to the value of pluralism. The belief that policy experimentation at the state and local levels will, over time, reveal outcomes worth emulating at the state or federal levels is widespread.²²⁵

221. See generally GERALD E. FRUG, *CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS* (1999) (promoting decentralization as a means of building community).

222. See Alexis C. Madrigal, *Local News Is Dying, and Americans Have No Idea*, ATLANTIC (Mar. 26, 2019), <https://perma.cc/YJR8-M9HE>.

223. See *infra* Part IV.A.3.

224. THOMPSON, *supra* note 186, at 197.

225. Among legal scholars, Justice Brandeis's dissent in *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932), is perhaps the most famous articulation of this view. See *id.* at 311 (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."); see also Briffault, *supra* note 39, at 31-32. For an informative interpretation of Justice Brandeis's dissent, see James A. Gardner, *The "States-as-Laboratories" Metaphor in State Constitutional Law*, 30 VAL. U. L. REV. 475, 479 (1996) ("Brandeis, then, uses the experimentation metaphor not to undergird a conclusion that states must have the power to experiment—a position he never asserts—but to support his conclusion that the challenged policy is rational and therefore constitutional.").

In a pluralistic society, a society wrestling with many divisive issues—gun control, access to abortion, and the teaching of evolution, to name a few—majoritarian rule inevitably leads to political losers. Allowing local governments to make their own choices may reduce the number of political losers by allowing people to, at least on issues decided at the local level, sort themselves according to their preferences. This is the theory offered by Charles Tiebout in his classic work on residential choice.²²⁶ In Tiebout's model, taxpayers sort themselves among various localities based on their preference for the bundle of goods each locality offers and the tax payments required to support that bundle of goods.²²⁷ Because different taxpayers will have different preferences about which goods they prefer and at what prices, the existence of multiple jurisdictions ensures that a wider range of taxpayer preferences can be honored.

As many scholars have observed, the initial simplifications of the Tiebout model elide many complexities of residential choice.²²⁸ Nevertheless, this model makes clear that there are costs to uniform policies when preferences are heterogeneous. Joseph Blocher, for example, has made a forceful argument for localism in gun control laws.²²⁹ He notes sharp divides between rural and urban communities with regard to gun ownership patterns and norms. Urban residents are both less likely to own guns and more likely to support gun control than those who live in rural communities.²³⁰ Respecting these differences may make for better policies.

But what does pluralism offer in the context of local structural authority? The powers granted to local governments via structural authority are not regularly divisive social issues requiring policy solutions that accommodate a variety of perspectives. Still, there is merit in local communities having the authority to make autonomous choices about the structure of government and the rules by which local officials are elected.

First, pluralism, in this context, respects not simply the variety of political opinions within our polity but also the variety of polities that exist in our system of government. Local governments encompass an incredibly diverse set of political institutions in terms of their design, their relationship to the state, their political powers, their geographic scope, and their population. Even a narrow focus on cities and towns must acknowledge the incredibly wide-ranging differences that exist between major cities like New York, Los Angeles,

226. See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

227. *Id.* at 418-20.

228. See generally THE TIEBOUT MODEL AT FIFTY: ESSAYS IN PUBLIC ECONOMICS IN HONOR OF WALLACE OATES (William A. Fischel ed., 2006) (presenting scholarship that both refines and advances the Tiebout model).

229. Blocher, *supra* note 35, at 133.

230. *Id.* at 85-86.

Atlanta, and Miami; suburban and exurban communities; and smaller cities and towns located in rural areas.²³¹

Second, granting structural authority to local governments can encourage innovation not only in policy but also in the design of government itself. Two decades ago, localities were at the forefront in recognizing the equality of same-sex relationships by offering gay couples the opportunity to register for domestic partnerships.²³² Similar democracy-enhancing structural innovations could proliferate at the local level.²³³ There is ample precedent for such innovations. As Briffault notes, in the late nineteenth and early twentieth centuries, cities “professionalized their administrations and employment structures and experimented with a broad range of political and government innovations, including the council-manager and commission forms of government, competitive bidding on public works, planning and zoning, and nonpartisan elections.”²³⁴ Cities have also experimented with different voting rules, campaign finance reforms, and noncitizen voting.²³⁵ Unlike administrative cost, democratic accountability, and democratic deliberation, which point alternately to local or state control depending on the particular issue at hand, valuing pluralism will always put a thumb on the scale for local control.

231. Of course, state law might be able to account for this diversity by setting certain geographic or demographic thresholds. The problem with this solution, however, is that it allows legislators without a clear stake in these decisions to have input. Why should all members of the Illinois legislature weigh in on how Chicago structures its local government? Why should all members of the Arizona legislature weigh in on how Phoenix apportions city council seats? Allowing local communities to make policy themselves helps ensure that those crafting the policies are stakeholders in the affected communities.

232. See Richard C. Schragger, *Cities as Constitutional Actors: The Case of Same-Sex Marriage*, 21 J.L. & POL. 147, 148-50 (2005).

233. See THOMPSON, *supra* note 186, at 56 (“Local variation is likely to give citizens more control over the electoral process, encourage political participation, increase partisan competitiveness, and enable districts to experiment with different procedures that if successful may be more widely used.”).

234. Briffault, *supra* note 203, at 15.

235. See *supra* Parts II.D-G. In the election law context, Joshua Douglas has offered the most full-throated defense of giving local governments the freedom to experiment with the contours of the right to vote. See Douglas, *supra* note 190, at 1043 (“If states are ‘laboratories of democracy’ that can try out various reforms, then municipalities can be ‘test tubes of democracy’ that may experiment with different voting rules. These expansions can then ‘trickle across’ to other municipalities, and eventually ‘trickle up’ to states or Congress, which will more likely adopt reforms that are working well at the local level.” (footnote omitted)).

IV. Our Values in Context

By now, it should be apparent that there are circumstances in which deference to local government may be preferable, but even in the context of structural authority, state action may be necessary to serve a coordinating role or to address deficits in local democracy. The difficulty of the task lies in “calibrat[ing] the benefits of democratic decentralization against the harm at moments when local empowerment turns dark.”²³⁶ This final Part explores the ways our normative framework can inform this calibration.

We illustrate the application of the framework developed in Part III by applying it to two case studies: election timing and voter qualifications. While neither of our case studies explores questions of structural authority in the context of government design, we think these examples effectively illustrate the range of questions posed by structural preemption. In the case of election timing, there has been a noticeable uptick in state preemption laws and legislative activity as a result of recent studies documenting low voter turnout in local elections.²³⁷ State laws restricting local authority to expand the franchise are of an older vintage.²³⁸

It is worth noting that both examples can involve potential partisan calculations by state officials. For example, there is evidence that Democrats prefer off-cycle elections because reduced participation gives Democratic-leaning interest groups more influence in many urban jurisdictions.²³⁹ At the same time, Republican-controlled legislatures have pushed for election consolidation,²⁴⁰ perhaps in an effort to dilute support for Democratic candidates and Democratic-leaning candidates in nonpartisan races. Because structural preemption questions will frequently have such partisan overtones, we think it

236. Davidson, *supra* note 40, at 980; *see also* Scharff, *supra* note 12, at 1503 (“Blanket preemption proposals make little sense. These statutes are likely to create significant legal confusion, as they give retroactive preemptive effect to *all* state laws without any sort of reasoned decision making as to whether uniform state law or local control is appropriate for a particular policy area.”).

237. *See supra* Part II.D (listing examples of recent legislation); *infra* Part IV.A.2 (discussing studies); *infra* notes 281-88 and accompanying text (discussing studies).

238. *See* GENERATION CITIZEN, YOUNG VOICES AT THE BALLOT BOX: LOWERING THE VOTING AGE FOR LOCAL ELECTIONS IN 2017 AND BEYOND app. B (2017), <https://perma.cc/LT7Z-SK4K> (discussing the possibility of reforming the voting age at the city level under the constitution and home-rule provisions of all fifty states); Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1415-17 (1993) (describing the decline in noncitizen voting from the turn of the twentieth century through World War I, as anti-immigrant sentiment drove reforms to state constitutions).

239. *See, e.g.*, Eitan Hersh, *How Democrats Suppress the Vote*, FIFETHIRTYEIGHT (Nov. 3, 2015, 6:30 AM), <https://perma.cc/K52S-5AZW>.

240. *Id.*

is essential that legislators, the voting public, and especially judges have the analytic tools to evaluate a state's claimed need for control absent short-term political considerations.

Our aim is not to produce definitive answers about the "right" division of authority between state and local governments. These questions are interesting because they are both hard and context dependent. Rather, our hope is to illustrate the ways our framework helps clarify the tradeoffs that must be made when privileging either state or local authorities as decisionmakers.

A. Election Timing

Since 1845, Congress has required the presidential election to be held on the "Tuesday next after the first Monday" of November,²⁴¹ and Congress in 1872 fixed this same day for congressional elections.²⁴² A "crazy quilt of elections,"²⁴³ however, persists at the state and especially local levels: Only five states require local elections to be held in conjunction with the federal election calendar.²⁴⁴

When Progressive-era reformers moved to standardize the timing of elections, they purposely avoided consolidating local elections with federal elections. At the time, reformers claimed that consolidating local elections would inject partisanship into what they had designed to be nonpartisan local government.²⁴⁵ Some historians, however, suggest that reformers also hoped to reduce turnout among immigrant and working-class voters.²⁴⁶ Whatever their motivation, multiple election days offered an additional advantage: In an era of hand-counting ballots, consolidated elections would have been very difficult to administer.²⁴⁷

While technology has simplified vote tabulation, local elections still regularly take place outside of the traditional Tuesday in November. In 2019, voters in Phoenix chose their mayor in a runoff election held on March 12, held separate runoffs for other city council positions on May 21, and voted on

241. Act of Jan. 23, 1845, ch. 1, 5 Stat. 721, 721 (codified as amended at 3 U.S.C. § 1 (2018)).

242. Act of Feb. 2, 1872, ch. 11, § 3, 17 Stat. 28, 28 (codified as amended at 2 U.S.C. § 7 (2018)).

243. Cf. Selena Simmons-Duffin, *Why Are Elections on Tuesdays?*, NPR (Oct. 23, 2012, 4:37 AM ET), <https://perma.cc/D5EQ-W8GQ> (quoting Don Ritchie, Senate Historian).

244. These states are Arkansas, Kentucky, Nebraska, Oregon, and Rhode Island. *Election Dates May or May Not Matter*, CANVASS (Nat'l Conference of State Legislatures, Denver, Colo.), Apr. 2016, at 1, 2, <https://perma.cc/5ZZL-PLKH>.

245. *Id.* at 1.

246. See ZOLTAN L. HAJNAL ET AL., MUNICIPAL ELECTIONS IN CALIFORNIA: TURNOUT, TIMING, AND COMPETITION 6 (2002).

247. See *Election Dates May or May Not Matter*, *supra* note 244, at 1.

two municipal ballot propositions in a special election on August 27.²⁴⁸ That same year, voters in Chicago participated in a general election in February, then chose their mayor in a runoff election that April.²⁴⁹ In Florida, on more than two-thirds of the Tuesdays in 2019, a local election occurred somewhere in the state.²⁵⁰ In fact, Ballotpedia's election calendar suggests that Florida is typical; it seems that nearly every week, somewhere in the United States, there are local elections.²⁵¹

One could see all of this election activity as a flowering of local democracy but for one glaring problem: Turnout in local elections is appallingly low.²⁵² As documented in Part III above, states have recently shown an interest in regulating the timing of municipal elections, in part to address this concern. Below we consider these efforts in the context of our framework.

1. Administrative cost

Consolidating local elections would likely achieve administrative savings, though it is difficult to say how large the savings would be. Determining the actual costs of election administration is difficult, in part because so many different levels and types of governments are involved. According to the National Conference of State Legislatures, over 10,000 entities across the nation administer elections,²⁵³ and “[n]o one knows how much it costs to run elections in the United States.”²⁵⁴

There are some costs that likely increase as a result of consolidation, since more elections on the same day result in longer and more complicated ballots.²⁵⁵ The ways in which local government boundaries intersect with

248. See *City Election Results*, CITY OF PHOENIX, <https://perma.cc/Y6LA-X4MZ> (archived Mar. 27, 2020) (showing 2019 election dates).

249. See *Election Results*, BOARD ELECTION COMMISSIONERS FOR CITY OF CHICAGO, <https://perma.cc/M8PB-CHD2> (archived Apr. 30, 2020).

250. See *Dates for Local Elections*, FLA. DEP'T ST.: DIVISION ELECTIONS, <https://perma.cc/B7VX-VB44> (archived Apr. 30, 2020).

251. See *2019 Elections Calendar*, BALLOTPEDIA, <https://perma.cc/33U9-2EKH> (archived Apr. 30, 2020). Ballotpedia's list includes municipal elections for at least the “100 largest cities in the country” and school board elections for the “200 largest school districts.” *Scope of Ballotpedia*, BALLOTPEDIA (updated Mar. 11, 2018), <https://perma.cc/2JD2-JBBM>. As a result, many local elections are not included in its calendar.

252. See *infra* Part IV.A.3 (discussing low turnout in mayoral elections).

253. *Election Costs: What States Pay*, NAT'L CONF. ST. LEGISLATURES (Aug. 3, 2018), <https://perma.cc/Y7P7-NFLC>.

254. Katy Owens Hubler & Wendy Underhill, *Election Costs: Who Pays and with Which Funds?*, NAT'L CONF. ST. LEGISLATURES (Mar. 2018), <https://perma.cc/4FVJ-L29K>.

255. At least one study suggests that voters are more likely to vote no on down-ballot initiatives when ballots are longer. See Ned Augenblick & Scott Nicholson, *Ballot Position, Choice Fatigue, and Voter Behaviour*, 83 REV. ECON. STUD. 460, 462-63 (2016).

footnote continued on next page

state legislative districts, congressional districts, and each other make the production of many different types of ballots necessary, so that voters receive ballots containing only elections in which they are eligible to participate. When Kansas considered consolidating elections, officials raised concerns about the number of ballot styles that such a consolidation would require.²⁵⁶ Of course, whatever costs arise due to the production of ballots for the purpose of election consolidation, they likely pale in comparison to the savings on facilities rentals; the recruiting, training, and paying of poll workers; and the mailing of election-related materials.²⁵⁷

Other factors can also impact the cost of election administration. When Phoenix considered a proposal to consolidate its city elections, city staff identified both savings and additional expenses it could incur. Since Phoenix's off-cycle elections are run by the city's own administrative staff, it costs the city about \$1 million to run an election.²⁵⁸ Were the city to consolidate its elections, county election officials estimated that they would charge the city \$500,000 to include city elections on the county ballots during a primary or general election, a substantial savings.²⁵⁹ However, should the city need to hold a special election—to consider a citizen ballot initiative or in a race requiring a runoff—the county would charge the city \$2 million.²⁶⁰ Because Phoenix “has more special elections than most cities,”²⁶¹ this figure is potentially of great concern.

Similarly, when Michigan was considering a proposal to consolidate some local government elections, the state's House Fiscal Agency suggested that there would be “no significant fiscal impact to the state” and that “the fiscal impact to local governments is indeterminate.”²⁶² Yet even when the cost savings are clear, a state's interest in consolidation depends not only on the cost savings themselves, but also on the portion of those costs borne by the state. In some states, like Alaska and Delaware, election administration is highly centralized, and the state bears all election administration costs.²⁶³ Most states,

Such a conclusion is not surprising: Ballot position even *within* a race matters. See Matthew Wills, *Ballot Position: It Matters*, JSTOR DAILY (Aug. 29, 2016), <https://perma.cc/TCA2-SC6U>.

256. *Election Dates May or May Not Matter*, *supra* note 244, at 2-3.

257. See sources cited *supra* note 254.

258. Jessica Boehm, *Phoenix Will Likely Change How Elections Are Conducted. What Are the Options?*, AZCENTRAL (Mar. 8, 2018, 3:37 PM MT), <https://perma.cc/9NUA-SU7L>.

259. *Id.*

260. *Id.*

261. *Id.*

262. J. HUNAULT & PERRY ZIELAK, MICH. HOUSE FISCAL AGENCY, LEGISLATIVE ANALYSIS: ELIMINATE FEBRUARY REGULAR ELECTION DATE 2 (2015), <https://perma.cc/4NMN-T47K>.

263. Hubler & Underhill, *supra* note 254.

though, require local governments to bear some costs. Approximately half of the states, for example, provide no state funding to cover the costs of acquiring, maintaining, or operating voting machines.²⁶⁴

Further complicating matters, and as the Phoenix example just mentioned reveals, we can't merely consider the split between state and local government in funding elections, because the majority of election administration in the United States is done at the county level. If municipal governments choose to hold more expensive, off-cycle elections, and county governments bear these costs, the state may have a coordinating role to play. Such state intervention might also be justified when the opposite dynamic is at play, that is, when counties rely on city funds.

To illustrate, Phoenix has its own ballot-counting machines to administer city races, which of course increases the city's election expenses.²⁶⁵ But Maricopa County (which encompasses Phoenix) has at times relied on the city's machines as part of its backup plan in the event of election-day failures.²⁶⁶ The head of the county's election department warned that, if Phoenix were to switch its election schedule, the county would need to come up with a new backup plan.²⁶⁷ All told, where local governments are footing the bill for their own elections, they are on stronger ground in arguing that they should get to choose whether they prefer on- or off-cycle elections.

As a result, reliance on the simple assertion that state control results in meaningful (and relevant) cost savings may unnecessarily tip the balance toward state control. Rather, when legislators or the state argue that consolidated elections save money, policymakers and courts should ask not only what the potential cost savings are but also who bears such costs currently.

2. Democratic accountability

We have seen how the first of our values, administrative cost, cuts in multiple directions when evaluating structural preemption in the context of election timing. What about the second value, democratic accountability? Are consolidated elections, on balance, more likely to increase or decrease democratic accountability? Here, again, the best research indicates that *ex ante* judgments would be unwise.

264. KAREN L. SHANTON, CONG. RESEARCH SERV., R45549, THE STATE AND LOCAL ROLE IN ELECTION ADMINISTRATION: DUTIES AND STRUCTURES 10 tbls.3 & 4 (2019), <https://perma.cc/7Y4B-74RK>.

265. See Boehm, *supra* note 258.

266. *Id.*

267. *Id.*

The traditional opposition to consolidated elections invokes concerns about democratic accountability. Whatever the goals of Progressive-era reformers, off-cycle elections do allow voters to separate their votes on local politics from national trends.²⁶⁸ In an era in which split ballots are growing less common, this temporal division could arguably become more important.²⁶⁹ That is, if voter preferences on local issues do not map neatly onto fractures in national politics, consolidated elections may fail to accurately signal local policy preferences, thereby reducing democratic accountability. As the National Conference of State Legislators notes, opposition to changing the election schedule often comes from local officials themselves, who “worry that campaign fundraising and publicity efforts will be drowned out by the bigger races.”²⁷⁰

Further, more than 80% of U.S. cities have nonpartisan elections.²⁷¹ Critics of election consolidation suggest that combining these nonpartisan contests with partisan general election ballots could threaten this system.²⁷² However, the value of nonpartisan elections is unclear. Some studies suggest that nonpartisanship itself decreases voter turnout.²⁷³

In assessing how to best foster democratic accountability, we must also consider the evidence that off-cycle elections significantly reduce the advantage of incumbency.²⁷⁴ As political scientist Justin de Benedictis-Kessner explains, “[t]he incumbency advantage is a hallmark of when there’s a problem of accountability.”²⁷⁵ When people vote for the incumbent simply because they are the incumbent and “not because they’re necessarily better at governing,

268. See, e.g., *City of Tucson v. State*, 333 P.3d 761, 765 (Ariz. Ct. App. 2014) (“An off-cycle election allows a city to obtain the full focus of the electorate and to insulate its electoral process from the influence of partisan issues that are inevitably interwoven with federal, state, and county elections.”).

269. See Philip Bump, *The Decline and Fall of Split-Ticket Voting, Visualized*, WASH. POST (May 20, 2016, 8:17 AM PDT), <https://perma.cc/UX95-CS3D>.

270. *Election Dates May or May Not Matter*, *supra* note 244, at 3.

271. Randy M. Mastro, Opinion, *Make Elections Nonpartisan*, N.Y. TIMES (updated June 26, 2012, 11:14 PM), <https://perma.cc/KRN2-33UX>.

272. See Boehm, *supra* note 258 (discussing the opposition of Phoenix City Councilman Daniel Valenzuela, who was concerned that “placing city elections alongside partisan elections [would] cause voters to view city council elections as partisan” and emphasized that the “partisan politicking happening in Congress and the state Legislature should not trickle down to the city”).

273. See generally, e.g., Brian F. Schaffner et al., *Teams Without Uniforms: The Nonpartisan Ballot in State and Local Elections*, 54 POL. RES. Q. 7 (2001).

274. Justin de Benedictis-Kessner, *Off-Cycle and Out of Office: Election Timing and the Incumbency Advantage*, 80 J. POL. 119, 119, 130 (2018).

275. Kriston Capps, *To Defeat an Incumbent Mayor, Run in an Off-Cycle Election Year*, CITYLAB (Dec. 20, 2017), <https://perma.cc/6CN5-YK6H> (quoting Justin de Benedictis-Kessner).

that's a problem for how we think of democracy."²⁷⁶ Obviously, democratic accountability is increased when we prevent such stagnation at the local level.

At the same time, scholars have argued that off-cycle elections allow certain interests to dominate local elections. Sarah Anzia's research examining off-cycle elections suggests that they increase the influence of teacher and municipal unions over public policy.²⁷⁷ Even if one thinks that public sector unions are a useful and important voice in policymaking, it would seem that such influence that relies on low voter turnout would be undesirable. David Schleicher similarly argues that allowing local officials to design election systems creates political entrenchment.²⁷⁸ All of these factors are relevant to determining whether state or local authority over the issue of election timing is more likely to enhance democratic accountability and should be taken under advisement by legislatures and courts.

3. Democratic deliberation

Whereas democratic accountability is about the alignment between voter preferences and policy decisions, democratic deliberation is about increasing public participation in politics writ large. Voting is perhaps the most consequential form of political participation, but it is certainly not the only one. One can join voluntary organizations, write letters, attend town hall meetings, or sit on a local school board as alternative forms of engagement.²⁷⁹ Do off-cycle elections increase democratic deliberation?

As noted above, when free from the pressures of a consolidated election cycle, local candidates running in off-cycle elections can campaign on local issues. Consequently, off-cycle elections might enhance democratic deliberation by both freeing up resources that would otherwise be devoted to more

276. *Id.* (quoting Justin de Benedictis-Kessner).

277. See SARAH F. ANZIA, TIMING AND TURNOUT: HOW OFF-CYCLE ELECTIONS FAVOR ORGANIZED GROUPS 118, 194 (2014) (arguing that low turnout in local elections drives policy outcomes that favor organized groups such as teacher and firefighter unions).

278. David Schleicher, *The Boundary Problem and the Changing Case Against Deference in Election Law Cases: Lessons from Local Government Law*, 15 ELECTION L.J. 247, 262 (2016) ("If . . . we want our deference regime to track the democratic mandate of a given policy, then election law decisions generally should receive little deference, and the decisions made by local governments deserve less still."); see also Berry & Gersen, *supra* note 94, at 62 ("So long as the rest of the population cares little and the minority cares a lot, allowing groups with the most at stake to determine electoral outcomes may enhance rather than reduce welfare. The difficulty is that the opposite conclusion is entirely plausible as well, particularly if the minority can use its electoral influence to impose costs on the majority.").

279. See, e.g., SIDNEY VERBA ET AL., VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS 40-43 (1995).

high-profile state or federal races and focusing individuals' attention on local concerns.²⁸⁰

This line of thinking, however, is difficult to square with the now-familiar evidence demonstrating that off-cycle elections reduce voter turnout. Even if democratic deliberation and voter participation are different phenomena, it is safe to assume that those most likely to deliberate are most likely to vote as well.²⁸¹ Looking at the most recent election data, researchers at Portland State University found that, in ten of the country's thirty largest cities, fewer than 15% of eligible voters participated in those cities' elections.²⁸² Only one city, Portland, had turnout greater than 50%, and in three cities—Las Vegas, Dallas, and Fort Worth—turnout was less than 10%.²⁸³ Another study of the 165 largest cities in the United States found average turnout in mayoral elections to be just under 26%.²⁸⁴ Perhaps more troubling, turnout seems to be decreasing over time.²⁸⁵

Further, voter participation does not drop off equally among all populations. Voters who are older, whiter, and wealthier have been more likely to vote in off-cycle elections.²⁸⁶ As a result, off-cycle elections decrease not only the total number of voters but also the range of voices involved in civic life. Again, this strikes us as a highly plausible assumption, even though democratic deliberation is not synonymous with voter participation. If low voter turnout is a problem, consolidated elections are a potential solution. Studies consistently show that consolidating elections significantly increases voter turnout. For example,

280. See *City of Tucson v. State*, 333 P.3d 761, 765 (Ariz. Ct. App. 2014) (“[M]unicipal candidates may have a more difficult time competing with state and national candidates for resources if the elections are aligned. Even if the candidates receive sufficient resources, it may be more difficult or expensive to use those resources for election advertising during general elections.”); Berry & Gersen, *supra* note 94, at 60 (“So long as citizens have a limited stock of political attention in any given time period, spreading elections across time periods may result in an increase in per-issue or per-election citizen attention, even if aggregate turnout is lower.”).

281. See VERBA ET AL., *supra* note 279, at 367 (“[T]aking part in politics probably enhances political interest, efficacy, and information; reciprocally, these political orientations surely have an impact on participation.”).

282. WHO VOTES FOR MAYOR?, <https://perma.cc/ZL5M-VMDS> (archived Mar. 28, 2020).

283. *Id.*

284. Thomas M. Holbrook & Aaron C. Weinschenk, *Campaigns, Mobilization, and Turnout in Mayoral Elections*, 67 POL. RES. Q. 42, 45-46 (2014).

285. Neal Caren, *Big City, Big Turnout? Electoral Participation in American Cities*, 29 J. URB. AFF. 31, 42-43 (2007).

286. See Mike Maciag, *Voter Turnout Plummeting in Local Elections*, GOVERNING (Oct. 2014), <https://perma.cc/D7MR-62W8> (“If local turnout doesn’t improve, the implications could extend much further than the ballot box. Low-turnout elections typically aren’t representative of the electorate as a whole, dominated by whiter, more-affluent and older voters.”); WHO VOTES FOR MAYOR?, *supra* note 282.

researchers exploiting differences in the timing of municipal elections in California found that “presidential elections are associated with turnouts of registered voters in city elections that are 36 percent higher than off-cycle elections.”²⁸⁷ That same study also found higher turnout when municipal elections coincided with gubernatorial elections and presidential primaries.²⁸⁸

Of course, even if on-cycle elections offer opportunities to improve democratic deliberation, it does not follow that state laws preempting local control over election timing are necessary to bring about such deliberation. After all, local governments could themselves decide to hold their elections on-cycle without interference from the state. Where local governments are not pursuing these reforms on their own, evidence on democratic deliberation supports state efforts to force the issue.

4. Pluralism

Our normative framework also explicitly values the ability of localities to make independent choices, placing a thumb on the scale in favor of local decisionmaking. In thinking through the weight to give local preferences about election timing, decisionmakers must ask what value there is in permitting localities to hold elections on different dates.

In defense of pluralism, it is worth noting that one of the reasons we know that election consolidation increases voter turnout is that different localities make many different choices about election timing.²⁸⁹ As researchers have noted, it is harder to study the effects of other policies on turnout because the range of variation between localities is smaller.²⁹⁰ Of course, if we now have sufficient data connecting election consolidation and turnout, it seems silly to let the experiment keep running. That said, while the advantage of consolidation for turnout is clear, there remain open questions, especially about the impact of longer ballots on voter behavior.

There also may be other advantages of local variation in election timing. For example, if jurisdictions within the same metropolitan areas schedule elections for different times, local media may be able to provide more coverage of the issues in each election. Local governments might have an easier time experimenting with franchise expansions during off-cycle elections, as there is less need to coordinate voter eligibility with state and federal races. In short,

287. HAJNAL ET AL., *supra* note 246, at vii-viii.

288. *Id.* at viii.

289. See Zoltan L. Hajnal & Paul G. Lewis, *Municipal Institutions and Voter Turnout in Local Elections*, 38 URB. AFF. REV. 645, 656 (2003) (“Why do some cities have much higher participation rates than others? The short answer is timing.”).

290. See HAJNAL ET AL., *supra* note 246, at 8.

we are sympathetic to any election reform that would promise the possibility of increasing voter turnout.

Given this preference, our sympathy for state action increases to the extent the state's efforts target the problem of low voter turnout. California's voter timing reforms, for example, require cities to consolidate elections only if "turnout for a regularly scheduled [off-cycle] election in a political subdivision [was] at least 25 percent less than the average voter turnout within that political subdivision for the previous four statewide general elections."²⁹¹ Whether this law applies to California's charter cities has recently been litigated.²⁹² The Los Angeles Superior Court found that charter cities were protected from this mandate,²⁹³ and a California appellate court affirmed in March 2020.²⁹⁴ The courts' decisions seem consistent with the deference usually accorded local governments' decisions concerning their own structural authority. "It remains to be seen" if the State will appeal to the California Supreme Court.²⁹⁵

As we hope the preceding discussion illustrates, analysis that merely examines the "local" versus "state" interest in consolidation misses the mark because it provides no clear guidance for articulating the respective interests in controlling the timing of elections. While we are unpersuaded that administrative costs alone would justify state control over election timing, it seems equally true that the value of pluralism, in and of itself, does not justify granting local governments unmitigated authority as to the scheduling of local elections. Given the strong evidence that election consolidation increases voter participation, and relatedly enhances both democratic accountability and democratic deliberation, we support state-led reforms in this area.

Having applied our preferred framework in the election timing context, we turn now to a second context, voter eligibility. The lesson remains the same: A values-based approach to the resolution of structural preemption disputes offers a means of clarifying how choices about voter eligibility affect democratic engagement.

291. CAL. ELEC. CODE §§ 14051-14052 (West 2020).

292. David Rosenfeld, *Redondo Beach Prevails in Fight over Election Dates*, BEACH REP. (Sept. 26, 2018), <https://perma.cc/H4VC-4LEJ>.

293. *Id.*

294. *City of Redondo Beach v. Padilla*, 260 Cal. Rptr. 3d 263 (Ct. App. 2020).

295. David Mendez, *Appeals Court Sides with Redondo Beach in Election Date Lawsuit*, EASY READER NEWS (Mar. 23, 2020), <https://perma.cc/5SP2-9L8B> (quoting Redondo Beach City Attorney Michael Webb).

B. Voter Eligibility

In November 2016, San Francisco voters approved Proposition N, a charter amendment that allows noncitizens “who are of legal voting age, not in prison or on parole for a felony conviction, and who are parents, legal guardians, or legally recognized caregivers of children under the age of 19 living in San Francisco” to vote in San Francisco school board elections.²⁹⁶ San Francisco is not alone in its interest in expanding the local franchise beyond just citizens. Until New York City disbanded its elected school board in favor of mayoral control, noncitizens could vote in the city’s school board elections.²⁹⁷ Maryland has long allowed its cities to grant voting rights to noncitizens in local elections: The Town of Chevy Chase extended the franchise to noncitizens in 2018, while the City of Takoma Park has allowed noncitizens voting rights since 1992.²⁹⁸ Nine other Maryland municipalities also allow noncitizens to vote.²⁹⁹

In fact, the idea of noncitizen voting is not new. Prior to the twentieth century, noncitizen voting was quite common. According to Ron Hayduk, noncitizen voting was common in elections until the 1920s.³⁰⁰ In an 1874 case challenging Missouri’s failure to allow women suffrage, the U.S. Supreme Court observed that “citizenship has not in all cases been made a condition precedent to the enjoyment of the right of suffrage.”³⁰¹ The Court noted that Missouri allowed “persons of foreign birth” who “have declared their intention to become citizens of the United States” to vote in certain circumstances and that similar provisions existed in Alabama, Arkansas, Florida, Georgia, Indiana, Kansas, Minnesota, and Texas.³⁰² Today, however, it is more common for states to bar local efforts to expand the franchise. For example, voters in Montpelier, Vermont, endorsed a charter amendment to allow noncitizen voting in the March 2019 election, but such changes must be approved by state lawmakers, who put their consideration of the measure on hold until 2020.³⁰³

296. *Non-Citizen Registration and Voting*, CITY & COUNTY OF SAN FRANCISCO DEP’T ELECTIONS, <https://perma.cc/GD68-MQXL> (archived Mar. 28, 2020); see also S.F., CAL., MUN. ELECTIONS CODE art. X (2019).

297. Felipe de la Hoz, *Why Don’t We Let Noncitizen Residents Vote?*, VILLAGE VOICE (Nov. 7, 2017), <https://perma.cc/ET6X-ZQ6X>.

298. Peetz, *supra* note 192.

299. *Id.*

300. Ron Hayduk, *Political Rights in the Age of Migration: Lessons from the United States*, 16 J. INT’L MIGRATION & INTEGRATION 99, 100-01 (2015).

301. *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 177 (1875), *superseded in other part by constitutional amendment*, U.S. CONST. amend. XIX.

302. *Id.*

303. Peter Hirschfeld, *Senate Committee Punts Decision on Non-Citizen Voting Until 2020*, VPR (May 13, 2019), <https://perma.cc/PC8K-VC55>.

Noncitizen voting is not the only area in which local governments have expressed an interest in expanding the franchise. As scholar Joshua Douglas details in his study of local voting regimes, local governments have passed or considered reforms that would both lower the voting age in local elections and reenfranchise felons.³⁰⁴ Douglas also highlights nonresident voting laws that permit property owners in some jurisdictions (often vacation communities) to vote even when they are not residents.³⁰⁵ With this general background, we turn to application of our preferred framework.

1. Administrative cost

Expanding the local franchise beyond what is permitted by state and federal law entails additional election administration costs. Even in jurisdictions where local governments bear primary responsibility for election administration, the state almost always maintains voter registration information. States universally, and understandably, keep track of only the voters eligible to vote under both state and federal law.³⁰⁶ Thus, San Francisco has had to develop, at a cost of around \$310,000, a separate voter list and registration system to keep track of noncitizens who are interested in voting in school board elections.³⁰⁷ While such costs are real, they are likely not significant enough to justify states' preemption of local franchise expansion, especially since it is likely that such costs will be borne by the municipalities enacting the reforms.

A more significant administrative challenge to local variations on the franchise is coordination with state and federal elections. As Douglas notes, “[g]iven that many places already hold separate local elections on different days, voter expansions for these elections present no significant administrative hurdles.”³⁰⁸ Douglas, however, is sympathetic to the push toward on-cycle local elections as a means of increasing voter turnout. He therefore suggests that expansion of the right to vote at the local level can be done even with election consolidation.³⁰⁹ Technology, he argues, “already facilitates differentiation among voters based on their eligibility to vote for certain offices, so increased

304. Douglas, *supra* note 190, at 1052-62, 1068.

305. *Id.* at 1066-68.

306. See RUTH IGIELNIK ET AL., PEW RESEARCH CTR., COMMERCIAL VOTER FILES AND THE STUDY OF U.S. POLITICS: DEMYSTIFYING THE DIGITAL DATABASES WIDELY USED BY POLITICAL CAMPAIGNS 4 (2018), <https://perma.cc/9344-UZ4P>.

307. Don Sweeney, *San Francisco Spends \$310,000 to Register 49 Non-Citizens to Vote in School Election*, SACRAMENTO BEE (Oct. 30, 2018, 8:18 AM), <https://perma.cc/2VFX-2DRD>.

308. Douglas, *supra* note 190, at 1097.

309. *Id.* at 1097-99.

use of that technology can mitigate any implementation concerns when a locality expands the right to vote.”³¹⁰

There is some precedent for tailoring ballots to certain voter qualifications. Arizona law, for example, requires voters in state elections to provide proof of citizenship. The Supreme Court found this citizenship requirement to conflict with the National Voter Registration Act, thereby nullifying the requirement in the context of federal elections.³¹¹ Consequently, voters in Arizona who fail to provide proof of citizenship are given federal-only ballots.³¹² Presumably, similar methods would allow for local-only ballots in jurisdictions where local voting rules were more permissive than state and federal laws. Overall, while adding new individuals to the voter rolls may increase costs, particularly if unique databases are required to track select subgroups, it is hard to imagine a scenario in which concerns about administrative costs would, by themselves, justify structural preemption in the context of voter eligibility. Put differently, if there are other reasons to justify expansion of the local franchise, administrative costs alone should not be a barrier to reform.

2. Democratic accountability

Expanding the franchise at the local level would, under certain normative assumptions, likely increase democratic accountability. This is often the explicit justification for permitting nonresidents to vote in local elections. Douglas is again instructive in observing that such rules “give those who own property a say in the policies that may affect their investment, even if the owners do not live in the town full-time.”³¹³ Nonresident property holders understandably view local officials as stewards of their real estate investments, but one can hardly claim that their concerns are identical to full-time residents. Thus, expanding the franchise to nonresidents does suggest a change in how the political community is defined. Critics could argue that local democracy is weakened when local officials are beholden to nonresident property holders.

While certainly more controversial, efforts to expand the franchise to noncitizens are also premised on arguments about public accountability. Many noncitizens are longtime community residents and taxpayers. Allowing them a say in local government increases the accountability of local elected officials to this population. This is especially the case in jurisdictions where noncitizens represent a significant portion of the affected population. Almost 11% of New

310. *Id.* at 1099.

311. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 4-5, 15 (2013).

312. *Proof of Citizenship Requirements*, ARIZ. SECRETARY ST., <https://perma.cc/THG3-GZVG> (archived Mar. 28, 2020).

313. Douglas, *supra* note 190, at 1066.

York City residents are immigrants with lawful status, while an additional 6% of residents are undocumented immigrants.³¹⁴

Though New York City schools do not keep data on the citizenship status of parents or students,³¹⁵ it is possible that an even higher percentage of parents of New York City public school students are noncitizens compared to the city's general population.³¹⁶ If the parents of children in the New York City public schools cannot vote in school district elections, those parents lack the most meaningful way of holding their elected officials accountable for the adequacy of their children's education. In other jurisdictions with significant immigrant populations, the situation is likely similar.

Of course, there is an alternative account of a political community that would suggest that granting voting rights to noncitizens may reduce democratic accountability by enfranchising voters who are not fully integrated into the community or by reducing the incentive to naturalize. A related line of thinking has informed legal challenges to the inclusion of noncitizens when apportioning electoral districts.³¹⁷ As a result, a state's interest in preempting a locality's ability to determine these issues for itself risks being framed in substantive policy terms. While our substantive commitment is to expanding the franchise, the competing claims we have outlined may offer an additional reason for this issue to be decided at the local level, as we discuss in Part IV.B.4 below.

3. Democratic deliberation

Local efforts to expand the franchise advance the goal of democratic deliberation. These reforms necessarily bring new voices into the political process. Of course, nonvoters have many other mechanisms for participating in the political process. They can, for example, lobby elected officials, organize rallies and protests, conduct letter-writing campaigns, register voters, and volunteer for local elections. Underage supporters of the March for Our Lives gun control movement, for example, have engaged in many of these alternative forms of political activity.³¹⁸ And federal law allows green card

314. N.Y.C. MAYOR'S OFFICE OF IMMIGRANT AFFAIRS, STATE OF OUR IMMIGRANT CITY: ANNUAL REPORT 11 (2018), <https://perma.cc/3YGL-Q8PP>.

315. *Immigrant Families*, N.Y.C. DEP'T EDUC., <https://perma.cc/98ZG-SKUL> (archived Mar. 28, 2020).

316. See N.Y.C. MAYOR'S OFFICE OF IMMIGRANT AFFAIRS, *supra* note 314, at 14 (finding that 49.5% of documented noncitizen immigrants and 66.1% of undocumented noncitizen immigrants were between the ages of eighteen and forty-four—that is, prime parenting ages—while only 41.1% of the city's total population was in that age range).

317. See *Evenwel v. Abbott*, 136 S. Ct. 1120, 1126 (2016).

318. Emily Witt, *Launching a National Gun-Control Coalition, the Parkland Teens Meet Chicago's Young Activists*, NEW YORKER (June 26, 2018), <https://perma.cc/56KQ-GRRU>; see also *footnote continued on next page*

holders and, under certain circumstances, minors to donate to political campaigns.³¹⁹

Nevertheless, voting is understood as the basic building block of civic participation. In the context of political polling, campaigns often first ask whether someone is an eligible voter, and, in jurisdictions with initiative power, the public often sees signature collectors asking whether potential signatories are eligible to vote. There is considerable symbolic value in being able to answer these questions in the affirmative, even if other options for civic participation are also available.

Further, some efforts to expand the franchise may also increase democratic deliberation in other ways. For instance, efforts to reduce the voting age are often focused not simply on bringing younger voters into the political process but also on encouraging them to stay civically engaged.³²⁰ The value of democratic deliberation strongly supports affording local governments the authority to expand the franchise.

4. Pluralism

Finally, there is significant value in allowing localities to differ in the ways they choose to expand the franchise beyond the state-law floor. First, opinions on whether to include younger voters, nonresidents, or noncitizens vary significantly between jurisdictions within states. Allowing local governments the authority to make this decision respects these differences of opinion.

Inviting nonresidents to vote may not be a decision that makes sense in all communities. This reform is common in vacation communities, where a significant portion of property owners may not be local residents.³²¹ As suggested above, expanding the franchise in this way has the potential to significantly change public policy. Nonresidents may be less interested in certain locally provided public goods (such as municipal afterschool programs) and more interested in others (such as zoning ordinances that limit local development). Not all communities will be similarly situated vis-à-vis nonresidents, and local voters in different communities will feel differently about a franchise regime that includes both residents and property owners.

Paul Maryniak, *Across EV, High School Students Plead for Help*, E. VALLEY TRIB. (Mar. 3, 2019), <https://perma.cc/4EPB-YKLP>.

319. *Who Can and Can't Contribute*, FED. ELECTION COMMISSION, <https://perma.cc/Z8CK-8QL9> (archived Mar. 28, 2020).

320. See Douglas, *supra* note 190, at 1057 (“[S]tudies show the potential for a ‘trickle up’ effect: the younger a person begins to vote, the more likely they will sustain that habit throughout their lives.”).

321. See *id.* at 1066-68 (providing examples of nonresident voting rules).

Further, expansion of the vote to nonresidents is a reform that makes less sense at the state level. While out-of-state property owners will have an interest in state politics, allowing voters to vote in multiple state elections raises both theoretical problems under the “one-person, one-vote” principle and practical problems of coordination among states, impacting, for example, state efforts to maintain accurate voter rolls by sharing information about new voter registrations.

For different reasons, we think respect for pluralism is important when localities seek to enfranchise noncitizens. Questions of citizenship and immigration status are deeply polarizing not only across states but within them as well. On issues so politically divisive, it is prudent to allow communities to differ from each other, especially when the new local policy is rights expanding.

Second, experimentation with the franchise may also inform future efforts to expand the franchise at the state and national level. Local government experiments eliminating property ownership requirements and granting female suffrage moved those causes forward at the state and national levels.³²² Similarly, efforts to lower the voting age at the local level may inform public policy more generally. At least in the current climate, we think noncitizen voting is likely to remain polarizing nationally for some time, though we could imagine local experimentation advancing calls for reform within certain states. Local reforms may also provide more opportunities to experiment with the administrative side of expanding the franchise beyond federal eligibility.

In sum, we think the case for state preemption of local voter eligibility expansion is quite weak and that this is an area where policymakers and the courts should likely defer to local opinion.

Conclusion

In this Article, we have argued that issues of structural preemption, that is, state attempts to control the design of local democracy, deserve special attention in the broader debate about local authority. Specifically, we have argued that four values—administrative cost, democratic accountability, democratic deliberation, and pluralism—should inform the consideration and resolution of structural preemption disputes by state officials, courts, and scholars. Courts are, in some sense, already deferring to local governments in resolving these disputes. In this way, judicial decisions reflect some of the insights of our normative framework. We think courts, however, given their role in enunciating the standards and frameworks under which structural preemption disputes are resolved, should be more rigorous in their analysis. For one thing, as we show, this instinct to defer to local governments may not always be correct.

322. *See id.* at 1045-51.

Under our framework, state governments have strong arguments in support of preemption on certain topics, like election timing. On others, like voter eligibility, the arguments are substantially weaker. On many other topics, the analysis is quite complicated. We offer our values-based approach not as a panacea but with the hope that it will foster more robust discussion of what is at stake. The solutions that will best serve our democracy are often elusive. But with the proper values guiding the analysis, we will be better equipped to meet the challenge of identifying them.