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Check State: Avoiding Preemption by Using Incentives

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I. INTRODUCTION

Unlike other topics that are the subject of heated debate among legal academics, state preemption of local government health and safety measures can literally be a matter of life and death. A glaring example can be found during the current COVID-19 pandemic. Local measures designed to prevent or slow the spread of the virus initially went hand-in-hand with complementary state controls, and some governors allowed localities to be more (but not less) protective of public health and safety. For example, in his original stay-at-home order, Illinois Governor JB Pritzker provided that "[n]othing in this Executive Order shall, in any way, alter or modify any existing legal authority allowing a county or local government body to enact provisions that are stricter than those in this Executive Order."[1]

In other instances, as more circumspect state officers finally acted, they also sought to rein in existing local protective measures they deemed unnecessary. For example, as noted by Professor Sheila Foster, Georgia Governor Brian Kemp "signed an Executive Order superseding any previous local 'shelter-in-place' order, effectively reopening beaches that had been closed under those

* Richard E. Nelson Eminent Scholar Chair in Local Government, University of Florida Levin College of Law. The author thanks his fellow participants in the Local Auxtonomy and Energy Law Symposium from whom he gained much knowledge and inspiration, and particularly the host who made it possible, Professor Hannah Wiseman, who with the author and Professor John Nolon, fancy themselves to be the Athos, Porthos, and Aramis of land use law. Matt Geiger and Paul Pakidis provided expert guidance. Conversations with Tom Ankersen and Dennis Calfee helped sharpen the arguments; any dullness is the author's responsibility.

1. Ill. Exec. Order No. 20-10 (Mar. 20, 2020), https://www2.illinois.gov/Pages/Executive-Orders/ExecutiveOrder2020-10.aspx.

previous orders."[2] Alan Wilson, the Attorney General of South Carolina, was asked by state representative Jeff Bradley, "Do the Governor's extraordinary powers in a state of emergency preempt similar orders of counties and municipalities during the same state of emergency?"[3] Wilson answered that a "local government cannot exercise the emergency powers delegated to the Governor by the General Assembly," which meant that "counties and municipalities should be aware that any unauthorized exercise of such emergency powers could subject these political subdivisions to liability at the behest of a private citizen with requisite legal standing."[4]

After states began to lift their restrictions, and as infection numbers and rates began to climb to alarming levels, measures such as mandatory mask-wearing and social distancing, as well as the re-imposition of restrictions on non-essential business, became highly politicized, and the tension between state and local officials in several states became more acute. When, for example, Atlanta Mayor Keisha Lance Bottoms announced a return to pre-spike stay-at-home restrictions, Governor Kemp responded via the twenty-first century's message medium of choice for embattled politicians—Twitter—and stated that Mayor Bottoms' order was "'merely guidance—both non-binding and legally unenforceable . . . . As clearly stated in my executive orders, no local action can be more or less restrictive, and that rule applies statewide.'"[5]

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2. Sheila R. Foster, *As COVID-19 Proliferates Mayors Take Response Lead, Sometimes in Conflicts with Their Governors*, THE GEORGETOWN PROJECT ON STATE AND LOCAL POLICY AND LAW, https://www.law.georgetown.edu/salpal/as-covid-19-proliferates-mayors-take-response-lead-sometimes-in-conflicts-with-their-governors/ (last visted Sept. 29, 2020); *See* Ga. Exec. Order No. 04.02.20.01 (Apr. 2, 2020) ("[T]he powers of counties and cities . . . are hereby suspended to the extent of suspending enforcement of any local ordinance or order adopted or issued since Mar. 1, 2020, with the stated purpose or effect of responding to a public health state of emergency, ordering residents to shelter-in-place, ordering a quarantine, or combatting the spread of coronavirus or COVID-19 that in any ways conflicts, varies, or differs from the terms of this Order.").

3. Letter from Alan Wilson, Att'y Gen., S.C., to Jeff Bradley, State Rep., S.C. H.R., at 1 (Mar. 29, 2020), http://2hsvz0l74ah31vgcm16peuy12tz.wpengine.netdna-cdn.com/wp-content/uploads/2020/03/COVID-opinion-on-extraordinary-powers-with-additional-citations-02245943xD2C78.pdf (concerning the extraordinary powers of the Governor during a state of emergency based upon a new declaration of emergency dated Mar. 28, 2020).

4. *Id*. at 5.

5. Scott Neuman, *Georgia Governor and the Mayor of Atlanta in Turf War over COVID-19 Restrictions*, NPR (July 10, 2020), https://www.npr.org/sections/coronavirus-live-updates/2020/07/10/889930319/georgia-governor-and-the-mayor-of-atlanta-in-turf-war-over-covid-19-restrictions (quoting a Tweet from Governor Brian Kemp on July 10, 2020); *See* Ga. Exec. Order No. 04.23.20.02, at 25 (Apr. 23, 2020) ("[E]nforcement of any county or municipal ordinance or order that is more or less restrictive than this Order is hereby suspended."); Press Release, Keisha Lance Bottoms, Mayor of Atlanta, Ga., Mayor Keisha Lance Bottoms Orders City's Phased Reopening Plan to be Moved Back to Phase I (July 10, 2020), https://www.atlantaga.gov/Home/Components/News/News/13408/672.

Should Atlanta officials assert that they have the power to defy the governor's authority to impose statewide COVID-19 restrictions, there is more than a century of consistent jurisprudence indicating that the city will lose. It is not the purpose of this Article to question the legal *authority* for a state's imposition of less protective measures on the residents of localities whose officials have opted to err on the side of public health and safety. That authority is longstanding and seemingly airtight. Instead, the Article proposes a tactic that local government officials can employ to achieve a range of strategies designed to enhance the public good, such as reducing greenhouse gas emissions, protecting wildlife, eliminating pollution, protecting the fragile coastal environment, enhancing workers' wages and paid leave benefits, reducing gun-related violence, providing more affordable housing units, and more. Indeed, the example around which this Article is fashioned—an incentive-based program for reducing the use of single-use plastic containers—seeks to achieve several of these admirable and beneficial goals.

The Article will proceed as follows: Part I introduces a practically insurmountable federal constitutional barrier to local government autonomy—the principle that localities are mere creations of the state. Part II highlights state laws enacted to negate local laws designed to reduce or eliminate the use of single-use plastic bags and other containers as a typical and disturbing example of the "new preemption." Professor Richard Briffault has described this phenomenon as comprising "sweeping state laws that clearly, intentionally, extensively, and at times punitively bar local efforts to address a host of local problems."[6] Part III introduces the idea of a purely local tax incentive as a solution for states closer to red than blue on the ROYGBIV American political spectrum and explains three advantages—moral, political, and constitutional—that this tool has over outright bans, prohibitions, or orders. The concluding section, Part IV, considers other settings in which a similar tactic might work for the betterment of the public good, in order to protect local initiatives within and far beyond the environmental sustainability realm that have drawn negative attention from state lawmakers who hold the awesome power to preempt.

6. Richard Briffault, Essay, *The Challenge of the New Federalism*, 70 STAN. L. REV. 1995, 1997 (2018).

II. DON'T EVEN TRY: THE INSURMOUNTABLE BARRIER TO CONSTITUTIONAL LOCAL AUTONOMY

In 1907, the U.S. Supreme Court delivered a boatload of bad news to champions of the notion of local autonomy as part of the American polity. In *Hunter v. City of Pittsburgh*,[7] Justice Moody, writing a concise opinion for a unanimous Court, rejected the challenge brought by residents of Allegheny, Pennsylvania, who objected to the wisdom and legality of a state-sanctioned consolidation of their city with the larger city to the south—Pittsburgh. Even though a majority of Allegheny voters rejected the merger, a change in state law provided that a majority of the voters in all affected areas would be sufficient (in this case, the voters of the more populous and pro-consolidation Pittsburgh with their hesitant potential mates to the north).

One of the key charges brought by Allegheny residents was "that the Act of Assembly deprives the plaintiffs in error of their property without due process of law, by subjecting it to the burden of the additional taxation which would result from the consolidation."[8] Although the Court had yet to consider "[t]he precise question thus presented" (by the voting scheme),[9] Justice Moody dismissively explained that "its solution by principles long settled and constantly acted upon is not difficult."[10] Following a long list of citations, the Court presented what was then and still is now the final word regarding the paucity of local governments' power against the states that created (and could dissolve) them:

> Municipal corporations are political subdivisions of the State, created as *convenient agencies* for exercising such of the governmental powers of the State as may be entrusted to them. . . . The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the *absolute discretion of the State*. Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the State within the meaning of the Federal Constitution. The State, therefore, at

7. Hunter v. City of Pittsburgh, 207 U.S. 161 (1907).

8. *Id.* at 177.

9. *Id.*

10. *Id.*

> its pleasure, *may modify or withdraw all such powers*, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. *In all these respects the State is supreme*, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may by such changes suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right by contract or otherwise in the unaltered or continued existence of the corporation or its powers, and *there is nothing in the Federal Constitution which protects them* from these injurious consequences. The power is in the State, and those who legislate for the State are alone responsible for any unjust or oppressive exercise of it.[11]

It was a fruitless endeavor for Allegheny residents to rely on the city as a source of constitutional protection against the state creator. Unlike many decisions issued by the Court in the early years of the twentieth century,[12] *Hunter* has stood the test of time.

In his recent rumination on the "new preemption," Professor Briffault provides this straightforward summary of the relative status of localities and states:

> The U.S. Constitution does not recognize local governments, and the U.S. Supreme Court has long treated local governments as essentially subdivisions of their states, no more protected from state regulation or displacement than the state's department of motor vehicles. In effect, federalism trumps any claim of localism. Local governments have no constitutional rights against their

11. *Id.* at 178–79 (emphasis added).

12. Perhaps the best example of a contemporary decision that has not fared so well is *Lochner v. New York*, 198 U.S. 45 (1905). Descriptions of this case quite often include the adjective "notorious." *See, e.g.*, Stephen G. Gey, *The Case Against Postmodern Censorship Theory*, 145 U. PA. L. REV. 193, 235 (1996) (footnote omitted) ("The civic republicans liken the courts' approach in the speech cases to the notorious *Lochner* decision, in that the speech cases require governmental neutrality and thereby reinforce the status quo."). *But see infra* notes 59–61 and accompanying text.

> states, and local residents have no federal constitutional claim to the rights, powers, boundaries, or even the very existence of their local governments.[13]

Regretfully for those who would like to see a power shift on the state-local scale, the admirable scholarly attempts to challenge *Hunter*'s vitality[14] and to demonstrate that its impact has been limited by subsequent decisions[15] have not yet resonated with the courts. The state's authority to preempt—be it express or implied, classic or new—the laws of its political subdivisions remains inviolate on federal constitutional grounds.

The 21st century has witnessed preemption on steroids. The unprecedented use of state legislation designed purposefully to frustrate local experimentation is noteworthy and the subject of concern and study. The table of contents for a helpful (and troubling) compendium prepared by an interested party—the National League of Cities (NLC)—includes information about state stifling efforts under headings for "Minimum Wage, Paid Leave, Anti-Discrimination, Sharing Economy, Municipal Broadband, Tax and Expenditure Limitations, [and] Other Areas of Preemption."[16] Some, but certainly not all, of these examples reflect the tension between pro-business or socially conservative Republicans in state capitols versus their Democratic rivals to the left economically and socially with power bases in central cities.[17] This is particularly true

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13. Briffault, *supra* note 6, at 2008 (footnotes omitted).

14. Kathleen S. Morris, *The Case for Local Constitutional Enforcement*, 47 HARV. C.R.-C.L. L. REV. 1 (2012). Morris's agenda was an ambitious one:

> On the doctrinal front, the Article offers two arguments. First, it argues that *Hunter*'s federal rule of local governmental powerlessness vis-a-vis the states was effectively overruled in 1938 by *Erie v. Tomkins*. Second, it argues that we should not mourn the loss of *Hunter* because the rule of local powerlessness has always stood on shaky analytical ground.

Id. at 5 (footnote omitted).

15. David J. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 563 (1999) ("*Hunter*'s seemingly unlimited holding is, however, more confined than it appears.").

16. NAT'L LEAGUE OF CITIES (NLC), CITY RIGHTS IN AN ERA OF PREEMPTION: A STATE-BY-STATE ANALYSIS 2018 UPDATE (2008) (table of contents, page numbers omitted).

17. *See, e.g.*, ALAN STONECIPHER & BEN WILCOX, PREEMPTION STRATEGY: THE ATTACK ON HOME RULE IN FLORIDA 5–6 (Integrity Florida, Jan. 2020). According to this study:

> Republican and conservative supporters of preemption have made clear that preemption is a strategy rooted in partisan, ideological and urban-rural concerns. One Florida legislator has predicted that preemption will accelerate because of "an ideological battle developing between a conservative state Legislature and more liberal urban centers." A national group [the American Legislative Exchange Council] says state preemption is justified because "local governments have become victims of far left organizations manipulating the public and local officials."

Id. (footnotes omitted).

in the four subjects quickly discussed under the "Other Areas" heading—state preemption of plastic bag bans, gun control, nutritional labeling, and inclusionary zoning and rent control.[18]

If this movement seems somewhat contrived and purposeful, well, it is, and there are two reasons why. The first is the coordinated efforts of special interests (fossil fuel companies, gun and ammunition manufacturers, retailers, and the like) to employ lobbyists in order to influence state legislatures. The second reason is that conservative special interests have at their disposal a not-so-secret weapon—the American Legislative Exchange Council (ALEC). ALEC not only drafts and circulates model legislation; it also coordinates effective lobbying efforts.[19] ALEC's record in stimulating and following through with state legislative preemption is impressive, and depressing for advocates of city power.[20]

With this powerful combination of constitutional toothlessness and political vulnerability, what is a city to do if its officials want to implement an initiative that will draw the ire of powerful special interests and the politicians whom they influence through campaign donations and other means? Before proposing an answer to this tough question, we should spend some time on a specific example of the new preemption at work.

III. A MIXED BAG: STATE APPROACHES TO LOCAL PLASTIC CONTAINER BANS

A textbook example of the "new preemption"—again, in Professor Briffault's words, "clearly, intentionally, extensively, and at times punitively bar[ring] local efforts to address a host of local problems"[21]—is state legislation that prevents local governments from banning the use of plastic bags and other single-use containers. ALEC has been far from passive in this area, as evidenced by its

18. NAT'L LEAGUE OF CITIES, *supra* note 16, at 23.

19. *See* Mike McIntire, *Nonprofit Acts as a Stealth Business Lobbyist*, N.Y. TIMES, Apr. 22, 2012, at A1 (noting that ALEC's internal documents "offer a glimpse of how special interests effectively turn ALEC's lawmaker members into stealth lobbyists, providing them with talking points, signaling how they should vote and collaborating on bills affecting hundreds of issues like school vouchers and tobacco taxes.").

20. *See* Henry Grabar, *The Shackling of the American City*, SLATE (Sept. 9, 2016, 5:53 AM), https://slate.com/business/2016/09/how-alec-acce-and-pre-emptions-laws-are-gutting-the-powers-of-american-cities.html ("ALEC has successfully pushed pre-emption into more and more areas of GOP policy, from guns and tobacco to sanctuary cities, pesticides, and even municipal broadband. The tactic has consumed state-level lawmaking as American political life has become increasingly polarized between Republican-led statehouses . . . and Democrat-controlled cities . . . . Thanks in part to ALEC's promotion of the concept, pre-emption has become the most powerful statehouse tactic of our time.").

21. *See* Briffault, *supra* note 6 and accompanying text.

Model Resolution from 2015, "Regulating Containers to Protect Business and Consumer Choice,"[22] and by its Model Policy from 2018, the "Act to Establish Statewide Uniformity for Auxiliary Container Regulations."[23]

This preemption project has been a qualified success. As of early 2020 the majority of state legislatures have left it up to local governments whether or not to ban, tax, or otherwise regulate single-use plastic bags, according to the National Conference of State Legislatures (NCSL).[24] However, for each of the seven states whose legislatures have imposed bans on single-use plastic bags, imposed a fee on the bags, or both (California, Connecticut, Delaware, Maine, New York, Oregon, and Vermont),[25] there were, as of the summer of 2020, at least two states that instead flexed their preemption muscles (Arizona, Colorado, Florida, Idaho, Indiana, Iowa, Michigan, Minnesota, Mississippi, Missouri, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, and Wisconsin), striking down dozens of existing and potential local government bans.[26] No fewer than eleven out of the states that have

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22. Am. Legislative Exch. Council, *Regulating Containers to Protect Business and Consumer Choice*, ALEC.ORG (2015), https://www.alec.org/model-policy/regulating-containers-to-protect-business-and-consumer-choice/ ("If the individual political subdivisions of the state regulate such containers, there exists the potential for confusing and varying regulations that could lead to unnecessary increased costs for retail and food establishments to comply with such regulations.").

23. Am. Legislative Exch. Council, *Act to Establish Statewide Uniformity for Auxiliary Container Regulations*, ALEC.ORG (2018), https://www.alec.org/model-policy/act-to-establish-statewide-uniformity-for-auxiliary-container-regulations/ (designed "to preempt local ordinances regulating the use, disposition, or sale of, prohibiting or restricting, or imposing any fee, charge, or tax on certain containers"); *See, e.g.*, MISS. CODE ANN. §§ 17-1-71 to -75 (2020).

24. Nat'l Conference of State Legislatures, *State Plastic and Paper Bag Legislation*, NCSL.ORG (Sept. 29, 2020), https://www.ncsl.org/research/environment-and-natural-resources/plastic-bag-legislation.aspx.

25. *Id.* Representative statutory provisions include CAL. PUB. RES. CODE § 42283(a) (West 2020) ("Except as provided in subdivision (e) [regarding certain compostable bags that may be sold to customers], on and after July 1, 2015, a store . . . shall not provide a single-use carryout bag to a customer at the point of sale."); CONN. GEN. STAT. ANN. § 22a-246a(b)(1) (West 2020) ("For the period commencing August 1, 2019, and ending June 30, 2021, each store shall charge a fee of ten cents for each single-use checkout bag provided to a customer at the point of sale."); § 22a-246a(c) ("On and after July 1, 2021, no owner or operator of a store shall provide or sell a single-use checkout bag to a customer."); DEL. CODE tit. 7 § 6099A(b) (West 2020) ("The store which provides plastic bags for exemptions [from the prohibition in (e) that are] listed in paragraph (e)(3) of this section below shall establish an at-store recycling program pursuant to this section that permits a customer of the store to return clean and dry plastic bags and film to the store."); N.Y. ENVTL. CONSERV. LAW § 27-2805(1)(a) (Consol. 2020) ("Notwithstanding any other provision of law to the contrary, any city and any county, other than a county wholly within such a city, acting through its local legislative body, is hereby authorized and empowered to adopt and amend local laws, ordinances or resolutions imposing a paper carryout bag reduction fee within the territorial limits of such city or county, to take effect on or after March first, two thousand twenty.").

26. NCSL, *supra* note 24. South Dakota joined the list after this publication appeared. *See* S.D. COD. LAWS §§ 34A-6-61 and -92.

enacted "plastic ban bans" took their preemption language directly out of the ALEC playbook, including South Dakota, which secured passage and a gubernatorial signature in late February of 2020, right before COVID-19 cast its wide shadow on legislative activities throughout the nation.[27]

In those states that have flexed their preemption muscles to stifle local government experimentation, there is little cities, counties, and towns can do to challenge their "creators" in court on constitutional or statutory grounds. The letter and spirit of *Hunter*, even 113 years after its announcement by the Supreme Court, are alive and well. There may, however, be a feasible alternative for local government officials and residents who live in states with uncooperative legislatures and who are not willing to give up the fight to reduce pollution of oceans, other waterways, and forests; to protect wildlife; to avoid overcapacity in landfills; and to reduce greenhouse gas emissions.[28]

IV. SKIN (AND A PRIVATE PARTNER) IN THE GAME

Scholars, students, and practitioners of environmental law are well aware of the classic paradigm that pits command-and-control versus market-based instruments. Tons of ink have been spilt by lawyers, economists, and others in debating the wisdom and efficiency of competing approaches for achieving environmental protection and sustainability.[29] A plastic bag ban is a classic example of command and control—the targeted activity, distribution of single-use plastic bags, is prohibited by law. Some local governments have enacted a market-based solution by charging customers a fee for each plastic bag they secure to take

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27. 2020 S.S. SB 54, codified at S.D. COD. LAWS §§ 34A-6-61 and -92 (effective July 1, 2020). The four states that went their own way are Colorado, Florida, Minnesota, and Missouri.

28. Courtney Lindwall, *Single-Use Plastics 101, NRDC* (Jan. 9, 2020), https://www.nrdc.org/stories/single-use-plastics-101?gclid=EAIaIQobChMI-N2Y3fyx6gIVisDACh0lAgHBEAAYASAAEgLghPD_BwE#why.

29. The legal literature alone on this topic is legion. *See, e.g.*, David M. Driesen and Amy Sinden, *The Missing Instrument: Dirty Input Limits*, 33 HARV. ENVTL. L. REV. 65, 66 (2009) ("After decades of experience in designing regulatory instruments to combat various forms of environmental degradation, the discussion still largely revolves around a single dimension of the problem: the choice between traditional regulation—often called 'command-and-control'—and market-based mechanisms, like pollution taxes and emissions trading."). *See also* sources cited *id*. at note 1; W. Kip Viscusi et al., *Discontinuous Behavioral Responses to Recycling Laws and Plastic Water Bottle Deposits*, 15 AM. LAW & ECON. REV. 110, 139 (2013) ("We find both water bottle deposits and recycling laws to be effective. Moreover, the strength of effects for the recycling laws follows the degree of stringency of these measures.").

their goods out of the store or restaurant.[30] As with carbon taxes, the idea is to create a disincentive so that customers will alter their behavior in order to avoid a direct cost.

Government can also incentivize positive behavior,[31] which it often does by granting tax incentives.[32] Local governments collect all sorts of taxes and fees, which vary from state to state and even within the same state. For example, Alachua County, Florida (population exceeding 260,000)[33] imposes ad valorem real estate and tangible personal property taxes and municipal public service taxes,[34] and collects assessments for purposes such as refuse collection, solid waste management, fire services, and storm water.[35] The county also levies a 1% surcharge on top of the state's 6% sales and use tax,[36] a local option above the state's fuel tax,[37] a 5% "local option transient rental tax,"[38] and a surcharge above the state's "communications services tax."[39] The county's fiscal year 2019-2020

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30. *See, e.g.*, D.C. CODE § 8-102.03(a)(1) ("A consumer making a purchase from a retail establishment shall pay at the time of purchase a fee of $.05 for each disposable carryout bag.").

31. Robert W. Hahn & Robert N. Stavins, *Incentive-Based Environmental Regulation: A New Era for and Old Idea*, 18 ECOLOGY L.Q. 1 (1991).

32. Early in his career, the author devoted much of his scholarship to state enterprise zones, a set of tax and regulatory incentives designed to attract much-needed investment and employment to many of the nation's most economically distressed neighborhoods. *See, e.g.*, Michael Allan Wolf, *An "Essay in Re-Plan": American Enterprise Zones in Practice*, 21 URB. LAWYER 29 (1989). For an example of a current list of state tax incentives for businesses, see *Tax Incentives for Businesses,* FLA. DEP'T OF REVENUE, https://floridarevenue.com/taxes/taxesfees/Pages/tax_incentives.aspx.

33. FLA. OFFICE OF ECON.AND DEMOGRAPHIC RESEARCH, FLORIDA POPULATION ESTIMATES BY COUNTY AND MUNICIPALITY (Apr. 2019), http://edr.state.fl.us/Content/population-demographics/data/2019_Pop_Estimates.pdf.

34. *Municipal Public Service Tax Database,* FLA. DEP'T OF REVENUE (Feb. 2020), https://taxapps.floridarevenue.com/MPST/MPSTsearchResults.aspx (on electric, fuel oil, gas, and water). Incorporated municipalities within the county impose their own taxes.

35. *Property Taxes,* ALACHUA CTY. TAX COLLECTOR (2019), https://www.alachuacollector.com/property-taxes/; *See also Property Tax Bill Guide,* ALACHUA CTY. TAX COLLECTOR (2019); https://www.alachuacollector.com/a-guide-to-your-2019-property-tax-bill/.

36. *Discretionary Sales Surtax,* FLA. DEP'T OF REVENUE, https://floridarevenue.com/taxes/taxesfees/Pages/discretionary.aspx; FLA. DEP'T OF REVENUE, DISCRETIONARY SALES SURTAX (2020), https://floridarevenue.com/Documents/dr15DSS_%20r11_19.pdf.

37. *Florida Fuel Tax,* FLA. DEP'T OF REVENUE, https://floridarevenue.com/taxes/taxesfees/Pages/fuel.aspx; https://floridarevenue.com/taxes/Documents/19B05-03_chart.pdf.

38. FLA. DEP'T OF REVENUE, LOCAL OPTION TRANSIENT RENTAL TAX RATES (2020), https://floridarevenue.com/Forms_library/current/dr15tdt.pdf ("[These taxes] include the tourist development tax, convention development tax, tourist impact tax, and municipal resort. The local tax imposed is in addition to the 6% state sales tax and any applicable discretionary sales surtax.").

39. This tax is imposed on "[c]able and satellite television," "[v]ideo and music streaming," "[t]elephone," and "[moble communications." *Florida Communications Services*

budget showed more than $471 million in total revenue, including $150.4 million in ad valorem tax, $37.7 million in other taxes (sales and use, utility services, communications services), and $37.9 million for "items such as permits, impact fees, and special assessments on property."[40]

Retailers play an important role in the county's economy: Walmart, listed among the "Top Ten Principal Taxpayers," is also included, along with Publix Supermarkets, as one of the county's "Top Ten Employers."[41] Not surprisingly, these two companies alone paid several hundred thousands of dollars in ad valorem real property taxes in 2019,[42] not including the many thousands of other dollars in taxes, fees, and revenues assessed by the county. Local governments in Florida,[43] and in several other states,[44] cannot implement a plastic bag ban. What if, instead of banning or prohibiting outright the distribution to shoppers of single-use plastic bags and containers, the county entered into an agreement to reduce the local taxes of those retailers, restaurants, and others who make the voluntary decision to stop the distribution? Even if the tax incentive does not make up for the increased costs attributable to the purchase of more expensive

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Tax, FLA. DEP'T OF REVENUE, https://floridarevenue.com/taxes/taxesfees/Pages/cst.aspx. This surcharge can be imposed by unincorporated counties as well as incorporated cities and other entities within counties. *See Communications Services Tax Rate Table, ,* FLA. DEP'T OF REVENUE (2020), https://pointmatch.floridarevenue.com/General/Communications ServicesTaxRates.aspx.

40. ALACHUA COUNTY, FLORIDA, ADOPTED BUDGET FY 2019-2020, at 28–29.

41. *Id*. at 21.

42. A search of these public records can be performed here: ALACHUA CTY. TAX COLLECTOR, https://alachua.county-taxes.com/public. (Search Publix Super Markets Inc, then select each store individually; then search Wal-Mart and select each store individually).

43. *See* Fla. Retail Fed'n, Inc. v. City of Coral Gables, 282 So. 3d 889, 896 (Fla. Ct. App. 2019) (footnote omitted) ("Here, the statutes at issue are unambiguous; they expressly preempt the City's Polystyrene Ordinance. [Fla. Stat.] Section 403.708(9) preempts regulatory control over '[t]he packaging of products manufactured or sold in the state. . . . .' The plain text encompasses all types of packaging, including polystyrene. Similarly, section 403.7033 prohibits local governments from regulating 'auxiliary containers.' Again, the 'polystyrene containers' regulated by the City's Ordinance are a type of 'auxiliary container.' Finally, section 500.90 specifically preempts the regulation of 'polystyrene products.'"). Tom Ankersen has cautioned the author that the broad wording of ALEC-based preemption legislation such as FLA. STAT. § 403.7033 (2020) might even jeopardize certain tax incentives. That would require a very expansive reading of the word "regarding" in the following language: "[N]o local government, local governmental agency, . . . may enact any rule, regulation, or ordinance regarding use, disposition, sale, prohibition, restriction, or tax of such auxiliary containers, wrappings, or disposable plastic bags."

44. *See supra* note 24 and accompanying text.

paper bags, for example,[45] there is always the chance that the new non-plastic policy will attract some new customers.[46]

Sometimes the choice of a regulatory tool results not from economic analyses but from political realities. Such is the case with the alternative proposed here to state preemption of local plastic bag bans and to a wide range of other local bans, prohibitions, and orders within and well beyond the bounds of environmental and energy law, such as gun control, living wage, and much, much more.

The political realities here are twofold. First, state lawmakers who are themselves science skeptics, who perceive that their current and potential electors are science skeptics and deniers, or both, hold sway in many state legislatures.[47] Second, with the spirit of *Hunter* alive and well, local governments (even home rule municipalities), regardless of their officials' confidence in science, are considered constitutionally powerless vis-à-vis the state that created (and has the power to destroy) them.

Using financial incentives as a way of enlisting private partners to achieve a regulatory goal—for example, the reduction of plastic pollution—holds three advantages over an outright ban. The first advantage is moral: because there is a real and readily measurable cost to local government coffers in the form of foregone revenue from taxes and fees, local officials will have real skin in the game. In other words, for every dollar in tax and fee reductions granted to a local retail business that provides the incentive sought by local government officials (in this case a decision not to provide single-use plastic bags and other containers to its customers), local officials

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45. It is hard to get a handle on the exact cost difference between plastic and paper grocery bags. One large national vendor's advertised price for 12 x 7 x 17" paper bags was $57 per bundle of 300 ($.19 per bag) versus a price of $32 per carton of 1,000 for 12 x 7 x 22" clear plastic bags ($.032 per bag). ULINE, https://www.uline.com/BL_5504/Grocery-Bags; ULINE, https://www.uline.com/BL_5557/Plain-T-Shirt-Bags. *See also* WEBSTRAUNT STORE, https://www.webstaurantstore.com/327/grocery-bags.html?filter=type:grocery-bags.

46. Even the same multi-state grocery chain will respond to local politics and consumer desires. *See* Steve Contorno, *Publix Embraces Plastic Bag Ban in South Carolina, So Why Not in Florida?*, TAMPA BAY TIMES BLOGS, Apr. 9, 2019 (contrasting the grocery company's compliance with a municipal ban in South Carolina with its opposition to lifting the prohibition of local plastic bag bans in Florida).

47. *See, e.g.*, Clare Foran, *Donald Trump and the Triumph of Climate-Change Denial* (Dec. 25, 2016), https://www.theatlantic.com/politics/archive/2016/12/donald-trump-climate-change-skeptic-denial/510359/ ("Scientific evidence that human activity is the leading cause of global warming has continued to accumulate in recent years, and the evidence for man-made climate change is now overwhelming. In spite of that, Republicans are slightly less convinced than they were a decade and a half ago that the Earth is getting warmer as a result of human activity. Democrats have moved in the opposite direction and become more likely to say that man-made climate change is real. This year, Gallup found that while 85 percent of Democrats believe human activity has led to higher temperatures, only 38 percent of Republicans agree.").

will need either to raise taxes and fees or to cut budget allocations.[48] No longer can critics portray the ban as a costless, quixotic effort by inland lawmakers to save wildlife in the middle of a vast ocean. With this tactic, money and mouth are, as they say in the real estate business, co-located.

On the one hand, opponents can argue that it is easy and cost-free for tree-hugging public officials in cities, counties, and towns located far from oceans and other large water bodies to pass the cost of a plastic bag ban (or, better yet, a tax on single-use containers) on to others—a classic example of a negative externality. Professor Stephen Carter, for example, in arguing against plastic bag bans, has noted that "[i]t's true that plastic pollution is literally smothering life at the bottom of the seas. That pollution, however, comes overwhelmingly from 10 rivers, none of which is located in the Western Hemisphere."[49]

On the other hand, the use of tax incentives will force local officials to make a difficult choice among various ways to compensate for the shortfall: (1) raise existing taxes or fees or impose new ones, (2) cut current expenditures from existing programs, or (3) a combination of 1 and 2. No matter the choice officials make, they will run the real risk of alienating their constituencies (that is, the voters). In other words, in exchange for the public policy gain, elected officials will have to feel the pain.

The second advantage of offering a financial incentive to businesses whose behavior local governments wish to push in a positive direction—in this instance the elimination of plastic pollution—is political in nature. The industry-funded lobbying group that has taken the lead in encouraging state efforts to preempt local plastic bag bans and taxes is the American Recyclable Plastic Bag Alliance (formerly known by the misleading name, American Progressive Bag Alliance).[50] The Alliance, funded by

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48. Part of the cost of the tax incentives may well be offset by solid waste disposal savings.

49. Stephen L. Carter, *Get Off the Bandwagon of Banning Plastic Bags*, BLOOMBERG OP. (Aug. 5, 2019), https://www.bloomberg.com/opinion/articles/2019-08-05/banning-single-use-plastic-bags-won-t-save-our-oceans. The article linked to the word "overwhelmingly" in Professor Carter's piece reports that, despite its misleading title, "[a] recent study estimates that more than a quarter of all that waste could be pouring in from just 10 rivers, eight of them in Asia." Prachi Patel, *Stemming the Plastic Tide: 10 Rivers Contribute Most of the Plastic in the Oceans*, https://www.scientificamerican.com/article/stemming-the-plastic-tide-10-rivers-contribute-most-of-the-plastic-in-the-oceans/ (Feb. 1, 2018).

50. *See* https://bagalliance.org/ ("The Frontline Defense Against Plastic Bag Bans and Taxes Nationwide"); DeAnne Toto, *American Progressive Bag Alliance becomes American Recyclable Plastic Bag Alliance*, RECYLING TODAY (Feb. 4, 2020), https://www.recyclingtoday.com/article/american-progressive-bag-alliance-changes-name-sets-sustainability-goals/. The Plastics Industry Association, which has close ties to the Alliance,

plastic bag manufacturers and recyclers, has a history of throwing around big bucks to achieve its agenda.[51] The Alliance also benefits from some influential partners in helping to strike down local plastic bag bans such as trade groups representing retailers, restaurants, and lodging.[52]

Imagine that a local government employs the tactic of entering into agreements with retailers to reduce local taxes in exchange for eliminating the distribution of single-use plastic containers to customers. Then lobbyists for businesses such as groceries, department and specialty stores, and restaurants may either take a pass on the issue at the state capitol or perhaps even advocate that state lawmakers withhold their preemptive powers. The manufacturers and recyclers who fund the Alliance would then be on their own should they choose to oppose the public-private incentive arrangement.

The final advantage of the incentive alternative to plastic bag bans and taxes is constitutional in nature. Should local governments' and their retailer allies' attempts to level the lobbying playing field fall short, resulting in state preemption of local, voluntary agreements between private retailers and local governments, the resulting lawsuit might be captioned something like *Super Markets, Inc. and Center City v. State*. (In many preemption cases local officials find themselves on the receiving end of service in connection with a lawsuit brought by a disgruntled business or citizen against the local government that had the chutzpah to defy state law.) Regardless of who files the suit (or countersuit), however, the constitutional hegemony (with the paucity of municipal rights) enshrined in *Hunter v. Pittsburgh*

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lost two big players in 2019. Danielle Wiener-Bronner, *Coke and Pepsi Abandon the Plastics Lobby*, CNN BUS., https://www.cnn.com/2019/07/30/business/coke-pepsi-plastics/index.html (last updated Aug. 5, 2019, 5:35 PM).

51. *See, e.g.*, Jeff Guo, *A Plastic Bag Lobby Exists, and It's Surprisingly Tough* (Mar. 3, 2015), https://www.washingtonpost.com/blogs/govbeat/wp/2015/03/03/a-plastic-bag-lobby-exists-and-its-surprisingly-tough/ ("The American Progressive Bag Alliance, which is supported by major plastics manufacturers, spent over $3 million on consultants and a petition management company between October and December, when it was collecting signatures.").

52. *See, e.g.*, *FRF Applauds Appeals Court Decision to Strike Down Coral Gables' Polystyrene Ordinance*, FLA. RETAIL FED'N, (Aug. 15, 2019), http://www.frf.org/index.php/news/news-releases ("The Florida Retail Federation (FRF), the state's premier trade association supporting Florida's retail industry for more than eighty years, applauds today's ruling by Miami's 3rd District Court of Appeal. A victory for FRF and its members, the Court struck down the City of Coral Gables' effort to circumvent state law and restrict use of all polystyrene products in the City."). *See also* Fla. Retail Fed'n, Inc. v. City of Coral Gables, 282 So. 3d 889 (Fla. Ct. App. 2019) (finding state preemption of city's polystyrene container ban).

is irrelevant, and the plethora of constitutional rights that benefit American corporations and other private business entities are suddenly in play.[53]

Let us suppose that Center City, a home rule municipality, has indeed granted tax incentives to Super Markets, because the company has agreed to cease providing single-use plastic bags to its customers. Influenced by lobbyists and motivated by their own (or voters') skepticism about the evils of plastic bags, the state legislature preempts this kind of local tax incentive program. Center City and Super Markets react to this legislation by bringing suit in federal court against the state, alleging that as a home rule municipality the city has the power to create this incentive program and that the state statute has violated *Super Markets*' rights under the U.S. Constitution to substantive due process (Fourteenth Amendment), equal protection (Fourteenth Amendment), compensation for a regulatory taking (Fifth Amendment through the Fourteenth Amendment), and to be free from the state's "impairing the Obligation of Contracts" (Contracts Clause).[54] If the plaintiffs find themselves before a federal district court judge who is sympathetic to the anti-pollution and greenhouse gas emission reduction goals of the incentive program, perhaps the court will rely on the work of (former professor and now First Circuit Judge) David Barron[55] or others to distinguish this situation (a voluntary, incentive-based program featuring private and public actors) from the *Hunter* paradigm and thereby recognize the home rule city's authority. But what if the case is instead assigned to one of the several dozen new judges appointed by a science- and climate-change skeptical President and his allies in the Senate majority?

In an intriguing plot twist, the oft-noted shift of federal trial and appellate court appointments in a decidedly libertarian and

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53. For the most controversial contemporary articulation of this principle, see Citizens United v. FEC, 558 U.S. 310 (2010), in which Justice Kennedy, writing for the majority, explained: "The Court has recognized that First Amendment protection extends to corporations . . . The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.'" *Id*. at 342–43 (citations omitted) (quoting First Nat'l Bank v. Bellotti, 435 U.S. 765, 776 (1978).

54. U.S. CONST. art. I, § 10, cl. 1.

55. *See* Barron, *supra* note 15 at 563–64 (noting that "*Hunter*'s positivist description of local government power" was "necessarily incomplete," in that "[i]t ignored the degree to which local communities may provide the vital institutional context within which people live their public lives in a constitutional democracy. A local community is not simply a type of state administrative agency to be shaped at will to serve the need of the central state. It is, in a fundamental sense, the locus for those human interactions that comprise what we conceive to be democratic life in a constitutional system committed to self-government. So understood, local governments are necessarily something more than the mere creatures of state law, a point that the *Hunter* Court did not acknowledge.").

federalist direction during the Trump Administration[56] could actually and somewhat surprisingly *enhance* the chances that local efforts to incentivize private section behavior, even behavior that advances climate change resiliency and environmental sustainability, will survive state preemption efforts.

Imagine now that the federal district judge who is assigned to the case is one of the more than 140 such judges appointed by Trump as of the summer of 2020.[57] Law students over the past several decades who paid attention in their basic constitutional law classes are well aware that substantive due process and equal protection challenges brought by corporations and other business entities against run-of-the-mill economic regulation are subject to the rational basis test (a test that governments at all levels find easy to pass).[58] There is a chance that *Super Markets, Inc. and Center City v. State* will end up in the courtroom of a recently appointed libertarian-leaning judge who, heeding recent calls by legal academics[59] and judges[60] on the ideological right for judicial

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56. *See, e.g.*, Jason Zengerle, *How the Trump Administration is Remaking the Courts*, N.Y. TIMES MAGAZINE, June 29, 2020, at 30. Zengerle notes, *id*. at 32, "The Federalist Society for Law and Public Policy Studies, as it is officially known, has played a crucial role in putting conservative jurists on the bench." Even though many members are strong proponents of co-equal sovereignty for state, the name "Federalist Society" is a bit misleading. According to the organization's web page,

> The Federalist Society for Law and Public Policy Studies is a group of conservatives and *libertarians* interested in the current state of the legal order. It is founded on the principles that the *state exists to preserve freedom*, that the separation of governmental powers is central to our Constitution, and that it is emphatically the province and duty of the judiciary to say what the law is, not what it should be.

About Us, THE FEDERALIST SOCIETY, https://fedsoc.org/about-us (last visited June 17, 2021) (emphasis added).

57. Devon Cole & Ted Barrett, *Senate confirms Trump's 200th judicial nominee*, CNN (June 24, 2020), https://www.cnn.com/2020/06/24/politics/trump-200-judicial-appointments-cory-wilson/index.html ("With the confirmation of Judge Cory Wilson to the Fifth Circuit Court of Appeals, Trump has successfully appointed 53 appeals court judges, 143 district court judges, two US Court of International Trade judges and two Supreme Court justices—Neil Gorsuch and Brett Kavanaugh—according to Senate Majority Leader Mitch McConnell's office.").

58. *See, e.g.*, FCC v. Beach Commc'n, 508 U.S. 307 (1993) ("In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.").

59. For the best example of the recent reinvigoration of *Lochner* see DAVID E. BERNSTEIN, REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM (Univ. of Chi. Press) (2011).

60. For a recent example of judges cozying up to Lochnerism, see Patel v. Tex. Dep't of Licensing & Regul., 469 S.W.3d 69, 94 n.11 (2015) (Willett, J., concurring) (citations omitted) ("The principal dissent dramatically—and predictably—accuses the Court of seeking to unleash the '*Lochner* monster,' trying to resurrect *Lochner v. New York*, in which the U.S. Supreme Court invalidated on federal 'liberty of contract' grounds a state maximum-hours

activism on behalf of economic freedom, has harbored the strong suspicion that the Supreme Court was not necessarily incorrect in *Lochner v. New York*[61] when it invalidated a business regulation that unconstitutionally interfered with "liberty of contract."

Consider the following proposal for strengthening judicial scrutiny in substantive due process cases, offered by Professor Randy Barnett, one of the brightest legal academic candles in the libertarian menorah, and Evan Bernick:

> In this Article, we revisit the original meaning of the text—the "letter"—of the Due Process of Law Clauses. We then apply our model of good-faith construction based on the clauses' original functions—their "spirit"—of barring arbitrary exercises of power over individuals. We contend that the original letter and spirit of "due process of law" in both the Fifth and Fourteenth Amendments require legislatures to exercise their powers over the life, liberty, and property of individuals in good faith by enacting legislation that is actually calculated to achieve constitutionally proper ends. Further, the original letter and spirit of "due process of law" impose a duty upon both state and federal judges to make good-faith determinations of whether legislation is calculated to achieve constitutionally proper ends.[62]

Our neophyte jurist might relish the opportunity to put ideas like these in play, striking down the state's arbitrary and unreasonable preemption of a voluntary contractual arrangement entered into by a private company and a local government. This scenario is not as farfetched as it might seem.

Even if our new judge resists the temptation to speak out in the name of economic freedom, the Takings Clause provides an alternative foundation for striking down the state preemption statute. After all, if Super Markets had already been promised (or, better yet, received) thousands of dollars in tax benefits, then negation of the incentive arrangement would arguably amount to a total taking of those dollars.[63] Perhaps our new judge is

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law for bakery workers. The *Lochner* bogeyman is a mirage but a ready broadside aimed at those who apply rational basis rationally.").

61. Lochner v. New York, 198 U.S. 45 (1905).

62. Randy E. Barnett & Evan D. Bernick, *No Arbitrary Power: An Originalist Theory of the Due Process of Law*, 60 WM. & MARY L. REV. 1599, 1605 (2019).

63. For the notion that the Takings Clause applies to governments who confiscate money as well as real and tangible personal property, *see* Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 613 (2013) ("In this case, . . . the monetary obligation burdened petitioner's ownership of a specific parcel of land. In that sense, this case bears resemblance to our cases holding that the government must pay just compensation when it takes a lien—

familiar with legal libertarian legend Professor Richard Epstein's influential, though highly criticized, "blueprint for takings doctrine,"[64] or has followed with admiration the work of the Pacific Legal Foundation, a public interest law firm dedicated to protecting individual liberty that has a long track record of bringing, and supporting as an amicus, regulatory takings cases in the U.S. Supreme Court.[65]

Should our new judicial appointee feel uncertain about taking bold steps in the name of due process, equal protection, and private property rights, there is another constitutional provision that, upon simply reading the text, seems to apply to the state's abrogation of the agreement between Super Markets and Center City. The Contracts Clause provides that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts."[66] Unfortunately for companies such as Super Markets, the Contracts Clause has long been a nonstarter for private parties challenging state interference with contracts and other agreements. This hands-off approach is best typified by the Supreme Court's decision in *Home Building & Loan Assn. v. Blaisdell*,[67] a 1934 case in which the majority upheld Minnesota's Mortgage Moratorium Law, which, not unlike similar foreclosure moratoria implemented during the COVID-19 pandemic in the spring of 2020,[68] "provide[d] that, during the emergency declared to exist, relief may be had through

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a right to receive money that is secured by a particular piece of property."). *See also* E. Enter. v. Apfel, 524 U.S. 498, 555 (1998) (plurality) ("The Court has also made clear that the Clause can apply to monetary interest generated from a fund into which a private individual has paid money.").

64. Douglas T. Kendall & Charles P. Lord, *The Takings Project: A Critical Analysis and Assessment of the Progress So Far*, 25 B.C. ENV'T. AFF. L. REV. 509, 510 (1998) ("How then is it that Epstein's work is having such a widespread influence on the development of takings law? What we found is a large and increasingly successful campaign by conservatives and libertarians to use the federal judiciary to achieve an anti-regulatory, anti-environmental agenda.").

65. The PLF's most recent victory in the High Court came in Knick v. Twp. of Scott, 139 S. Ct. 2162 (2019) (holding that "the state-litigation requirement imposes an unjustifiable burden on takings plaintiffs, conflicts with the rest of our takings jurisprudence, and must be overruled."). Prevailing counsel was J. David Breemer. https://pacificlegal.org/staff/j-david-breemer/. *See* James Pollack, Note, *The Takings Project Revisited: A Critical Analysis of this Expanding Threat to Environmental Law*, 44 HARV. ENV'T L. REV. 235, 262–63 (2020) (footnote omitted) ("Organizations like PLF thrive not only because they have a set of beliefs, but also because they get cases in front of the U.S. Supreme Court. Their entire fundraising model is premised on this fact. This is clear from their marketing that highlights "12 victories and counting" at the Court, as well as from their website redesign meant to emphasize Supreme Court cases in a way that spurred a large increase in donations.").

66. U.S. CONST. art. I, § 10, cl. 1.

67. Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934).

68. *See* Michael Allan Wolf, *COVID-19 Pandemic and Real Property Law: An Early Assessment of Relief Measures for Tenants and Residential Mortgagors*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3623281 (June 9, 2020).

authorized judicial proceedings with respect to foreclosures of mortgages, and execution sales, of real estate; that sales may be postponed and periods of redemption may be extended."[69] Writing for the bare majority of five Justices, Chief Justice Hughes distinguished the application of constitutional provisions that are "specific" and "so particularized as not to admit of construction" (such as the requirement that each state have two Senators)[70] from situations in which "constitutional grants and limitations of power are set forth in general clauses, which afford a broad outline, the process of construction is essential to fill in the details."[71]

In *Blaisdell*, the Contracts Clause fell into the latter category, to the utter dismay of the four dissenters. Justice Sutherland, speaking for the conservative bloc on the Court, stated that "[h]e simply closes his eyes to the necessary implications of the decision who fails to see in it the potentiality of future gradual but ever-advancing encroachments upon the *sanctity of private and public contracts*."[72] In this opinion, Sutherland was singing the swan song for a vigorous interpretation of the Contracts Clause.

But, wait, there is at least one current Justice who is not ready to give up on the notion that judges should consider the words of this weakened clause more substantively and consequentially. In a 2018 case, the Court upheld another Minnesota statute, this one providing that "[i]f one spouse has made the other the beneficiary of a life insurance policy or similar asset, their divorce automatically revokes that designation—on the theory that the policyholder would want that result."[73] Justice Gorsuch filed a strong dissent in which he traced the winding path taken by the Court in interpreting the Contracts Clause.

Gorsuch began his historical excursion by pointing out that the Framers chose a categorical prohibition over "more nuanced limits on state power."[74] While for several decades the Justices, for the most part, acted in accordance with original understanding of the Clause, "more recently," Gorsuch wrote that, regretfully, "the Court has charted a different course" by "'permit[ting] a state to

69. *Blaisdell*, 290 U.S. at 416.

70. U.S. CONST. art. I, § 3 ("The Senate of the United States shall be composed of two Senators from each state . . . .").

71. *Blaisdell*, 290 U.S. at 426.

72. *Id*. at 448 (Sutherland, J., dissenting) (emphasis added).

73. Sveen v. Melin, 138 S. Ct. 1815, 1818 (2018) (citing MINN. Stat. §524.2-804, subd. 1 (2016)).

74. *Id*. at 1826 (Gorsuch, J., dissenting).

'substantial[ly] impai[r]' a contractual obligation in pursuit of 'a significant and legitimate public purpose' so long as the impairment is 'reasonable.'"[75]

At this point, Gorsuch provided a blueprint for our novice judge and for other likeminded libertarians seeking to protect contractual agreements from state interference:

> That test seems hard to square with the Constitution's original public meaning. After all, the Constitution does not speak of "substantial" impairments—it bars "any" impairment. Under a balancing approach, too, how are the people to know today whether their lawful contracts will be enforced tomorrow, or instead undone by a legislative majority with different sympathies? Should we worry that a balancing test risks investing judges with discretion to choose which contracts to enforce—a discretion that might be exercised with an eye to the identity (and popularity) of the parties or contracts at hand? How are judges supposed to balance the often radically incommensurate goods found in contracts and legislation? And does this test risk reducing the "Contract Clause's protection" to the "Court's judgment" about the "'reasonableness'" of the legislation at hand?[76]

> As a special bonus, Gorsuch pointed interested lawyers and judges to the work of "[m]any critics [who] have raised serious objections along these and other lines"[77] and suggested that those critics "deserve a thoughtful reply, if not in this case then in another."[78]

> There is certainly no guarantee (or even a high likelihood) that any federal district court judge, new or longstanding, will jump at the opportunity to endorse the theories discussed in the paragraphs above in support of economic liberty. Nevertheless, counsel who would be defending the incentive approach from state preemption

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75. *Id*. at 1827 (Gorsuch, J., dissenting) (quoting Energy Reserves Grp., Inc. v. Kan. Power & Light Co., 459 U.S. 400, 411–412 (1983)) (internal quotation marks omitted).

76. *Id*. at 1827–28 (Gorsuch, J. dissenting) (quoting City of El Paso v. Simmons, 379 U.S. 497, 529 (1965) (Black, J., dissenting)).

77. *Id.* at 1828 (Gorsuch, J., dissenting) (citing, among other sources, JAMES W. ELY, JR., THE CONTRACT CLAUSE: A CONSTITUTIONAL HISTORY 7–29 (2016), and Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703, 705–17 (1984)).

78. *Id*.

would be wise to prepare arguments along these lines as part of their litigation arsenal, if only to preserve these constitutional claims for appeal.

It is at the federal appellate level that the odds of Super Markets and Center City prevailing over the preemptive state should increase dramatically, as roughly 30% (53) of the 179 seats on U.S. courts of appeal were held by Trump appointees as of the summer of 2020.[79] They joined forty-five of the judges already sitting on those courts who were appointed by Republican Presidents.[80] Basic math (and voting patterns that correlate with the party of the President making the appointment)[81] should teach counsel that nearly all appellate court judges will be interested to hear arguments either (1) supporting a local government's authority to craft a responsive, incentive-based anti-pollution measure designed to survive a state preemption effort, or (2) advancing solid conservative and libertarian values such as economic liberty, property rights, and contract rights.

The goal of a litigator, it must always be remembered, is to prevail in the instant case, which means to get at least two appellate court votes invaliding the preemption attempt out of three. Many local government and environmental attorneys will not find the latter set of arguments to be persuasive, appealing, and consistent with their personal beliefs. As I have suggested elsewhere in a related context, "sustainability advocates need to keep their eye on the prize—winning the case so that government officials can continue to respond creatively and effectively to the causes and impacts of climate change—even if it means holding their noses while drafting their briefs and delivering oral arguments."[82] The legal landscape in federal courts has been reshaped and redrawn by one party determined to leave its ideological imprint on the judicial

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79. JUDICIAL CONFIRMATIONS UPDATE (June 24, 2020), https://www.rpc.senate.gov/policy-papers/judicial-confirmations-update.

80. JUDGESHIP APPOINTMENTS BY PRESIDENT (2019), https://www.uscourts.gov/sites/default/files/apptsbypres.pdf.

81. For a sampling of this extensive literature and critiques thereof, see CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL?: AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY (2006); Lee Epstein, *Some Thoughts on the Study of Judicial Behavior*, 57 WM. & MARY L. REV. 2017 (2016).

82. Michael Allan Wolf, *Right Environmentalism: Repurposing Conservative Constitutionalism*, 50 ARIZ. ST. L.J. 651, 663 (2018).

branch, casting to the dust heap of history Senate traditions such as the blue slip and cutting off floor debate on nominees.[83] To close one's eyes and hope that this situation (like a certain deadly virus) suddenly disappears, or to continue to push arguments that are an anathema to a wide swath of the judiciary are both foolhardy choices.

V. CHECKING STATE PREEMPTION IN OTHER SETTINGS

Local government officials throughout the nation are seeking to improve the health and safety of their citizens, to protect fragile ecosystems and reduce greenhouse gas emissions, to ensure living wages and improve conditions of employment, to enhance the supply of affordable housing, and to provide other important amenities. These officials increasingly find themselves stymied and frustrated by state legislatures, often dominated by members of the opposing party, who are eager to pull the preemption trigger. Only a fool would claim to be certain about future partisan alignments in state capitols even just a few years from now. Still, there is no indication that the "new preemption" is just a problem when Republicans control state legislatures. After all, as the decisions by each party to employ the "nuclear option" for federal judicial appointments make clear,[84] what is sauce for the goose is inevitably sauce for the gander.

Because there is no indication on the horizon that the current Court is eager to depart from more than a century of prior practice by recognizing some form of city autonomy, and because the stakes can be very high (as in the struggle between Georgia's governor and Atlanta's mayor over COVID-19 measures[85]), experimenting with incentives as alternatives to bans and prohibitions makes sense in practical, political, and constitutional terms. Not unlike retailers and restaurants that agree to substitute paper for plastic bags and containers, businesses that pay all full-time employees a living wage or who expand their leave benefits could be rewarded with tax and

83. *Judicial Vacancies*, A.B.A, https://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/independence_of_the_judiciary/judicial_vacancies/ (Oct. 1, 2020).

84. *See, e.g.*, Andrew Duehren, *"Nuclear Option" Adopted*, WALL ST. J., Apr. 4, 2019, at A5 ("Senate Republicans invoked the so-called nuclear option to use a simple majority to change the chamber's rules for confirming many appointees to the executive and judicial branches. . . . In 2013, then-Senate Majority Leader Harry Reid, a Democrat, implemented a temporary set of procedural changes similar to the ones Republicans permanently enacted on Wednesday.").

85. *See supra* note 5.

fee incentives,[86] as could developers who set aside affordable units,[87] gun shop and firing range owners who agree to locate only in industrial zones,[88] and beachfront landowners who promise to rebuild at their own expense sand dunes that are destroyed by storms or erosion.[89] Indeed, in any area of municipal regulation in which local officials believe that there is a high risk of state legislative preemption, the use of incentives should be considered as a sound alternative to outright bans, prohibitions, and orders. The resulting public-private partnership, cemented by valuable concessions, will ensure that local governments bear their fair share of the costs of implementing regulations; help level the lobbying playing field in state legislatures that are considering preemption; and, should the state attempt to invalidate the partnership, provide ample rationale for a judicial response that is receptive to local needs, protective of private rights, and in support of the common good.

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86. *Cf.* NLC, *supra* note 16, at 6–8 (noting that, as of 2018, twenty-eight states had in some fashion preempted local minimum wage provisions, and twenty-three had preempted local paid leave provisions).

87. *Cf.* ARIZ. REV. STAT. § 9-461.16 (2016) ("[A] city or town shall not adopt a land use regulation or general or specific plan provision, or impose as a condition for approving a building or use permit, a requirement or fee that has the effect of establishing the sales or lease price for a residential housing unit or residential dwelling lot or parcel or that requires a residential housing unit or residential dwelling lot or parcel to be designated for sale or lease to any particular class or group of residents.").

88. *Cf.* Ezell v. City of Chicago, 846 F.3d 888 (7th Cir. 2017) (invalidating "(1) a zoning restriction allowing gun ranges only as special uses in manufacturing districts; [and] (2) a zoning restriction prohibiting gun ranges within 100 feet of another range or within 500 feet of a residential district, school, place of worship, and multiple other uses . . . . ").

89. *Cf.* Suzanne P. Sutherland, Note, *Revision of Michigan's Sand Dune Protection and Management Act Benefits Private Interests at the Expense of Local Zoning Regulations*, 59 WAYNE L. REV. 1379, 1381 (2014) (noting that 2012 legislation imposed "a greater degree of state preemption of local zoning ordinances."). *See* MICH. COMP. LAWS SERV. § 324.35312(2) ("A zoning ordinance . . . shall not be more restrictive than the model zoning plan or the standard of review for permits or variances prescribed in the model zoning plan.").