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The Use of Preemption to Limit Social Progress in South Carolina: The Road to the Bathroom Bill,

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THE USE OF PREEMPTION TO LIMIT SOCIAL PROGRESS IN SOUTH CAROLINA: THE ROAD TO THE BATHROOM BILL

I. INTRODUCTION

Increasingly, cities across the country find that their efforts to adopt local laws addressing issues such as anti-LGBTQ discrimination or employers' wage and leave laws are stymied when the more conservative state legislature asserts preclusive authority over these regulatory domains.[1] This practice is known as preemption, and its use is expected to proliferate in both number and magnitude in the coming years.[2] The reasons for the

1. *See* David A. Graham, *Red State, Blue City*, ATLANTIC (Mar. 2017), https://www.theatlantic.com/magazine/archive/2017/03/red-state-blue-city/513857; *see also* Emily Badger, *Blue Cities Want to Make Their Own Rules. Red States Won't Let Them*, N.Y. TIMES: THE UPSHOT (July 6, 2017), https://www.nytimes.com/2017/07/06/upshot/blue-cities-want-to-make-their-own-rules-red-states-wont-let-them.html; Jenny Jarvie, *The South's New Divide: Blue Cities and Red States*, L.A. TIMES (Apr. 20, 2016, 3:08 PM), http://www.latimes.com/nation/la-na-south-culture-wars-20160420-story.html.

2. Graham, *supra* note 1.

increase in preemption are grounded in demographics, and nowhere is this increase more evident than in the South.[3] Recent population increases in the South's metropolitan areas have led to a correlated increase in efforts at what mainly Democratic local leaders believe to be progressive reform.[4] However, with Republicans controlling the region's state capitols and enjoying a majority in the state legislatures, many of these efforts have been curtailed through preemption.[5]

This regional trend especially holds true in South Carolina, where the state legislature has statutorily preempted progressive municipal law in areas such as firearm and minimum wage regulation as well as anti-discrimination measures.[6] Local authority to regulate firearms was originally preempted by the legislature via statute in 1986 and was subsequently amended in 2008 to increase the scope of state control.[7] The legislature statutorily preempted local efforts to increase the minimum wage beyond the federal rate in 2002, and in 2017, it similarly prohibited locally mandated employee benefits.[8] Two bills have been proposed in the South Carolina General Assembly to preempt local anti-discrimination ordinances in places of public accommodation. The first proposed bill was defeated in the senate in 2006.[9] However, the second proposed bill, which mirrors the provisions of the first, has been referred to the House Judiciary Committee.[10] Although the proposed bill is pending carryover to the 2018 legislative session,[11] the legislature's continued adherence to the use of preemption as a means to stunt social progress brings the state ever closer to foiling local anti-discriminatory measures.

II. BACKGROUND

In March 2016, following a one-day specially convened session, the North Carolina legislature passed the Public Facilities Privacy and Security Act.[12] Colloquially referred to as "HB2" and the "Charlotte Bathroom Bill,"

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3. *See id.*
4. *Id.*
5. *Id.*
6. S.C. CODE ANN. § 41-1-25 (Supp. 2017).
7. S.C. CODE ANN. § 23-31-510 (2017).
8. S.C. CODE ANN. § 6-1-130 (2004); S.C. CODE ANN. § 41-1-25 (Supp. 2017).
9. S. 1203, 2015–2016 Gen. Assemb., 121st Sess. (S.C. 2016).
10. H.R. 3012, 2017–2018 Gen. Assemb., 122nd Sess. (S.C. 2017).
11. *Id.*
12. H.R. 2, Sess. Law 2016-3, 2016 Gen. Assemb., 2d Extra Sess. (N.C. 2016); NICOLE DUPUIS ET AL., NAT'L LEAGUE OF CITIES, CITY RIGHTS IN AN ERA OF PREEMPTION: A

the Act was passed in direct response to a non-discrimination ordinance enacted by the Charlotte City Council in February, which prohibited sex discrimination in public facilities.[13] HB2 most notably stripped local governments of the authority to regulate public facilities by designating usage of single-sex bathrooms and changing facilities based on biological sex.[14] By defining biological sex as "[t]he physical condition of being male or female, which is stated on a person's birth certificate,"[15] the state legislature circumvented the city council's attempt to resolve discrimination based on gender identity in public accommodations.[16] Although less controversial, HB2 also included language eliminating local authority to increase the minimum wage.[17] The fallout from HB2 included the cancellation of public events, such as concerts and the out-of-state relocation of the 2017 NBA All-Star Game, the ACC championship game, and the NCAA championship game.[18] When combined with lawsuits against the state and the decrease in business expansion and tourism, HB2 has cost North Carolina taxpayers around $395 million.[19] Following such pushback, the North Carolina legislature struck a deal in which it would repeal HB2 so long as the Charlotte City Council acted in kind by striking the non-discrimination ordinance.[20] Both the state legislature and city council followed through;[21] however, HB2's replacement is widely criticized among Democrats for doing little to reverse the ill-effects of the controversial bill.[22]

The questions of how the situation and consequences—both intended and unintended—surrounding HB2 unfolded and how the North Carolina state legislature so easily stripped away power from the Charlotte City Council to reverse municipal law both lie in the doctrine of preemption.

STATE-BY-STATE ANALYSIS 11 (2017), http://nlc.org/sites/default/files/2017-03/NLC-SML%20Preemption%20Report%202017-pages.pdf.

13. DUPUIS ET AL., *supra* note 12, at 11.

14. H.R. 2, Sess. Law 2016-3, 2016 Gen. Assemb., 2d Extra Sess. (N.C. 2016); DUPUIS ET AL., *supra* note 12, at 11.

15. H.R. 2, Sess. Law 2016-3, 2016 Gen. Assemb., 2d Extra Sess. (N.C. 2016).

16. *See* DUPUIS ET AL., *supra* note 12, at 11.

17. H.R. 2, Sess. Law 2016-3, 2016 Gen. Assemb., 2d Extra Sess. (N.C. 2016); DUPUIS ET AL., *supra* note 12, at 11.

18. Emma Grey Ellis, *Guess How Much That Anti-LGBTQ Law is Costing North Carolina*, WIRED (Sept. 18, 2016, 7:00 AM), https://www.wired.com/2016/09/guess-much-anti-lgbtq-law-costing-north-carolina/.

19. *Id.*

20. DUPUIS ET AL., *supra* note 12, at 11.

21. *Id.*

22. Gabriel Rosenberg, *HB2 Replacement Makes All the Wrong Compromises*, HILL (Mar. 31, 2017, 4:30 PM), http://thehill.com/blogs/pundits-blog/civil-rights/326777-hb2-replacement-makes-all-the-wrong-compromises.

Preemption is perhaps most often associated with the concept of federalism.[23] Federalism is typically justified through the Constitution's Supremacy Clause, which grants Congress "the power to preempt state laws, rendering them 'null, void, invalid, and inoperative.'"[24] However, the doctrine of preemption extends not only from the federal to state level, but also from the state to county and municipal levels.[25] Some argue that "local governments have a form of sovereignty apart from the states."[26] Moreover, just as Congress uses preemption to nullify state law, state legislatures use preemption to nullify local ordinances and authorities.[27]

Fear of an overreaching federal government led to the passage of the Tenth Amendment to the Constitution, reserving for the states all powers not expressly granted to the federal government.[28] It follows that advocates of states' rights, mainly Conservatives, would support the autonomy of local governments against a strong centralized state government, since such a conceptualization echoes the sentiment of the Tenth Amendment. However, the notion that states' rights equate to "weak or unobtrusive government" on all levels proves to be mistaken in that, although conservative states' rights advocates may battle against preemption when used by the federal government, many utilize that same power in a similar manner to usurp authority from municipal and county governments, a crucial distinction for the purposes of this Note.

Although the use of preemption is conceptually the same on both the federal-to-state and state-to-local levels, delegation of power between state and local is less clear than the provisions of the Tenth Amendment, and law requiring subordination of local governments to state rule is not uniform among the states. This lack of uniformity results in the split between Dillon's Rule and home rule.[29] Dillon's Rule stands for the proposition that

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23. *See* Annie Decker, *Preemption Conflation: Dividing the Local from the State in Congressional Decision Making*, 30 YALE L. & POL'Y REV. 321, 324 (2012).

24. U.S. CONST. art. VI, § 2; *see* Decker, *supra* note 23, at 322 (quoting Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 279 (1987) (internal quotation marks and citation omitted)); *see also* RICHARD A. EPSTEIN & MICHAEL S. GREVE, *Introduction: Preemption in Context*, *in* FEDERAL PREEMPTION: STATES' POWERS, NATIONAL INTERESTS 1, 3 (2007) ("The vast judicial edifice of federal preemption is perched atop a single constitutional provision . . . ."); Stephen Gardbaum, *Congress's Power to Preempt the States*, 33 PEPP. L. REV. 39, 40–46 (2005).

25. *See* Decker, *supra* note 23, at 322–26; DUPUIS ET AL., *supra* note 12, at 11.

26. Decker, *supra* note 23, at 329.

27. *See* DUPUIS ET AL., *supra* note 12, at 11.

28. U.S. CONST. amend. X.

29. *See generally* Charlie B. Tyer, *Local Government in the Palmetto State*, S.C. GOVERNANCE PROJECT, http://www.ipspr.sc.edu/grs/sccep/articles/local_government.htm (last visited Mar. 14, 2018).

if there is a reasonable doubt whether a power has been conferred to a local government, then the power has not been conferred.[30] This rule was adopted from the opinions in *Clinton v. Cedar Rapids and the Missouri River Railroad*[31] and the complementary case *Hunter v. City of Pittsburgh*.[32] Dillon's Rule not only allows state legislatures to control local government structure, but it also allows the state to control local governments' procedures, methods of financing, and authority to make and implement policy. The rigidity of Dillon's Rule, along with urbanization and increased social complexity following the World Wars, led to the home rule movement of the twentieth century, which sought to limit the degree of state interference in local affairs by delegating more power from the state to local governments.[33]

South Carolina followed the path of many other states, originally adhering to Dillon's Rule and transitioning to home rule through a series of state supreme court cases and statutory reform.[34] The Local Government Act of 1975, also referred to as the Home Rule Act, marked the culmination of this transition.[35] This Act allowed for independently elected county governments and had the practical effect of increasing uniformity between county and municipal governments.[36] Contrary to connotation and popular

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30. "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 declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of power is resolved against the corporation, and power is denied." *Id.* (quoting Clinton v. Cedar Rapids, 24 Iowa 455 (1868)).

31. *Clinton*, 24 Iowa 455; Decker, *supra* note 23, at 331.

32. Hunter v. City of Pittsburgh, 207 U.S. 161 (1907); Decker, *supra* note 23, at 331.

33. Decker, *supra* note 23, at 332. "'Metropolitanization' particularly characterized the demographic change of the United States in the 20th century. Prior to World War II, the majority of Americans lived outside of metropolitan territory. By the end of the century, 4 out of every 5 people in the United States resided in a metropolitan area." FRANK HOBBS & NICOLE STOOPS, U.S. CENSUS BUREAU, DEMOGRAPHIC TRENDS IN THE 20TH CENTURY 9 (2002), https://www.census.gov/prod/2002pubs/censr-4.pdf. Furthermore, "[d]uring the early part of the century, the metropolitan population grew quickly, due in part to the influx of immigrants into large cities, while the nonmetropolitan population changed very little. . . . By 1950, the U.S. population had become predominantly metropolitan for the first time, and the metropolitan population exceeded the nonmetropolitan population by 18.3 million people." *Id.* at 32.

34. Tyer, *supra* note 29.

35. *Id.*

36. ERIC BUDDS, MUN. ASS'N OF S.C., STATE LAW AND BEYOND 9 (Sept. 14, 2015), http://www.masc.sc/SiteCollectionDocuments/Affiliated%20Associations/state_law_and_beyond.pdf#search=state%20law%20and%20beyond; HOLLEY ULBRICH, THE LEAGUE OF WOMEN VOTERS OF S.C., HOME RULE IN SOUTH CAROLINA (Nov. 2013), http://www.lwvsc.org/files/20131111homerule.pdf.

belief, however, the Home Rule Act does not grant autonomy to counties or municipalities in making laws because the express language of the statute requires local ordinances and regulations to comply with the state constitution and state laws.[37] When these laws conflict, the state legislature has and likely will continue to use preemption to standardize laws across the state.

Preemption can be accomplished in one of three ways. The first is via express preemption, whereby the legislature "declares in express terms its intention to preclude local action in a given area."[38] Express preemption thereby makes a specific local ordinance null and void. The second method is implied field preemption, where an act "manifest[s] a legislative intent that no other enactment may touch upon the subject in any way."[39] Implied field preemption addresses an entire subject and all local law pertaining to that subject, as opposed to a specific ordinance, and is therefore broader in scope than express preemption. The third method is implied conflict preemption, which "occurs when the ordinance hinders the accomplishment of the statute's purpose or when the ordinance conflicts with the statute such that compliance with both is impossible."[40] Therefore, implied conflict preemption pertains only when a conflict arises between state and local law.

The subsequent analysis will trace the trends of preemption in South Carolina, beginning with firearm regulation, followed by minimum wage and employee leave laws, and ultimately the future of anti-discrimination laws. The laws discussed will proceed in semi-chronological order as well as, however unintended, order of increasing controversy and debate. Although the bounds of preemption have not been clearly defined, the anti-discrimination laws, even if held to be a valid exercise of preemptive power, will likely force South Carolina courts to enumerate more exacting limits on preemption.

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37. S.C. CODE ANN. § 5-7-30 (2004); BUDDS, *supra* note 36, at 10.

38. S.C. State Ports Auth. v. Jasper Cty., 368 S.C. 388, 397, 629 S.E.2d 624, 628 (2006).

39. Wrenn Bail Bonding Serv., Inc. v. City of Hanahan, 335 S.C. 26, 28, 515 S.E.2d 521, 522 (1999) (citing Town of Hilton Head Island v. Fine Liquors, Inc., 302 S.C. 550, 397 S.E.2d 662 (1990)).

40. *State Ports Auth.*, 368 S.C. at 400, 629 S.E.2d at 630.

III. ANALYSIS

A. Firearm Regulation

Nationwide, the most common and comprehensive preemptive efforts are aimed at local firearm and ammunition laws.[41] Among the forty-five states that address the issue, preemption laws range from absolute prohibitions on local regulations to blanket prohibitions tempered with one or more exceptions.[42] Like many other preemption movements, state regulation of local gun laws began, or at least was framed, as an issue of public safety.[43] More recently, however, the issue has become increasingly politicized.[44]

1. Policy Arguments

The arguments for and against preemption of firearm regulation are muddled along party lines and not as clear as one might expect. Although Democrats overwhelmingly support specifically tailored municipal and county laws regarding firearms, there is a split among conservative camps on how to best address the issue. The issue is also as much geographic and demographic as it is political, pitting rural communities against bigger cities and thus further complicating the conversation.[45]

The divide on gun legislation is centered around gun violence, which is a predominant issue in metropolitan areas but viewed, sometimes mistakenly, as a lesser issue in rural communities.[46] The crime problems specific to urban areas call for specifically tailored responses, to which many argue is best achieved through local legislation.[47] Moreover, by allowing for local solutions to local problems, policymakers on both sides of the aisle argue that state legislatures can avoid imposing burdensome law on non-

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41. Forty-five states have a preemptive statute or constitutional provision that restricts what their cities can and cannot do regarding gun regulation. Twelve of those states have absolute preemption provisions, and twenty-nine are in the middle and allow local jurisdictions to regulate some limited aspect of guns. Joseph Tartakovsky, *Firearm Preemption Laws and What They Mean for Cities*, 54 MUN. LAW. 6, 6–7 (2013).

42. *Id.* at 7.

43. *See id.* at 8.

44. *See id.* at 7–8.

45. *See* Matt Valentine, *Disarmed: How Cities Are Losing the Power to Regulate Guns*, ATLANTIC (Mar. 6, 2014), https://www.theatlantic.com/politics/archive/2014/03/disarmed-how-cities-are-losing-the-power-to-regulate-guns/284220/.

46. *Id.*

47. *Id.*

applicable situations or communities unaffected by gun violence.[48] However, these measures cannot be implemented when preemption is at play.[49] Over the past several decades, with support from the National Rifle Association (NRA), almost every state has successfully passed legislation to preempt local firearm regulation.[50] The NRA frames the issue as one of inconvenience to law-abiding gun owners, who are burdened with the difficulty of "a complex patchwork of restrictions that change from one local jurisdiction to the next."[51] Other than advancing the position that the government has no authority to restrict gun ownership pursuant to the Second Amendment, the NRA also argues that preemption is the most prudent means to ensure the least amount of confusion and ambiguity towards gun laws.[52]

2. *Preemption of Firearm Regulation in South Carolina*

Along with twenty-eight other states, South Carolina occupies the so-called middle ground of preemption, which preempts local authority to regulate firearm laws but with some exceptions.[53] Enacted in 1986 and amended in 2008, the initial statutory prohibition is sweeping in nature, lamenting that:

> No governing body of any county, municipality, or other political subdivision in the State may enact or promulgate any regulation or ordinance that regulates or attempts to regulate: (1) the transfer, ownership, possession, carrying, or transportation of firearms, ammunition, components of firearms, or any combination of these things; (2) a landowner discharging a firearm on the landowner's property to protect the landowner's family, employees, the general public, or the landowner's property from animals that the landowner reasonably believes pose a direct threat or danger to the

48. *See id.*

49. *Id.* Almost identical to the situation in South Carolina in 2008, former Republican Ohio Governor Bob Taft vetoed a 2006 preemptive bill that was subsequently overridden by his own party. *Id.* Cleveland sued the state in an attempt to avoid the preemptive measure, but the city was promptly defeated when the NRA joined as co-defendant to the proceeding. *Id.*

50. *Id.* (statement of Laura Cutilletta, Senior Staff Attorney at the Law Center to Prevent Gun Violence) (stating that "[o]ver the years . . . almost every state has preempted local regulations of firearms")

51. *Id.*

52. *Id.* (statement of Patricia Stoneking, President of the Kansas Rifle Association and prominent NRA member).

53. Tartakovsky, *supra* note 41, at 7.

landowner's property, people on the landowner's property, or the general public.[54]

The subsequent section of the South Carolina Code does, however, partially limit the scope of preemption by deferring authority to "any county, municipality, or political subdivision to regulate the careless or negligent discharge or public brandishment of firearms . . . [and] the regulation of public brandishment of firearms during the times of or a demonstrated potential for insurrection, invasions, riots, or natural disasters."[55] This statutory article also denies local authorities the power to confiscate firearms or ammunition unless incident to an arrest.[56]

The preemptive power authorized by these statutes has been used recently to ban an emergency ordinance passed by the City of Columbia in 2015.[57] In response to planned demonstrations following the tragic killings at the Mother Emanuel AME Church in Charleston, this ordinance was originally authorized to prohibit the carrying and brandishment of firearms and dangerous weapons on public property within a two hundred fifty foot zone extending from the boundaries of the Capitol grounds.[58] Citing several South Carolina Supreme Court cases pertaining to preemption generally, as none have yet dealt with the specific issue of firearm regulation, the Office of the Attorney General concluded that the ordinance was prohibited *in toto* by state law and was therefore unconstitutional.[59] The preemption statute was most recently used by Assistant Attorney General David S. Jones to invalidate an ordinance regulating concealed weapons in Greenville.[60]

Some years before these opinions from the Office of the Attorney General, former Republican Governor of South Carolina Mark Sanford

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54. S.C. CODE ANN. § 23-31-510 (Supp. 2017).

55. S.C. CODE ANN. § 23-31-520 (2017).

56. *Id.*

57. S.C. Att'y Gen. Op. (July 20, 2015), 2015 WL 4596713 [hereinafter S.C. Att'y Gen. Op.].

58. Columbia, S.C., Ordinance 2015-066 (July 9, 2015); S.C. Att'y Gen. Op., *supra* note 57, at *1.

59. S.C. Att'y Gen. Op., *supra* note 57, at *6. The opinion cited to several South Carolina Supreme Court cases pertaining to preemption generally. *See generally* Foothills Brewing Concern, Inc. v. City of Greenville, 377 S.C. 355, 660 S.E.2d 264 (2008); S.C. State Ports Auth. v. Jasper Cty., 368 S.C. 388, 629 S.E.2d 624 (2006); Town of Hilton Head v. Fine Liquors, Ltd., 302 S.C. 550, 397 S.E.2d 662 (1992).

60. *S.C. Attorney General Opinion: Municipal Gun Restrictions Invalid*, FITSNEWS (Jan. 12, 2018), https://www.fitsnews.com/2018/01/12/sc-attorney-general-opinion-municipal-gun-restrictions-invalid/.

vetoed the 2008 amended bill on an argument grounded in federalism.[61] Although the amendment only dealt with the preemption of local law regulating firearm usage for protection against animals, former Governor Sanford's position and the legislature's subsequent response speak to the troubling turn in the use of preemption. In his veto message, Sanford defended local governments' authority to regulate and enforce their own laws, noting that "local governments are best equipped to address the specific needs and interest of their communities."[62] He opted to abandon the notion that "Columbia knows best" in favor of the Jeffersonian notion of federalism where "the government that is most local governs best."[63] Less than twenty-four hours later, the veto was overridden by the Republican-controlled senate in favor of increased preemption.[64]

The South Carolina legislature's override of then-Governor Sanford's veto helped to set the tone for the future trajectory of preemption in the state. The override proved that the legislature's commitment to preemption would not be stifled, even by the governor, and would proceed irrespective of party lines. This trend in preemption foreshadowed the legislature's treatment of labor laws.

B. Minimum Wage and Paid Leave Laws

Preemption of minimum wage and paid leave ordinances demonstrate the continued and growing tension between local and state governments across the country. The federal minimum wage has not been raised since 2009, and no federal laws exist requiring paid sick leave.[65] As an alternative to congressional inaction, progressive activists began pushing for change towards a "living wage" and paid sick leave at the local level.[66] By 2016, such efforts were manifested in the widespread passage of municipal ordinances to increase minimum wages and mandate employer-provided

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61. Letter from Mark Sanford, Governor, State of South Carolina, to André Bauer, President, South Carolina Senate (May 14, 2008), https://dc.statelibrary.sc.gov/bitstream/handle/10827/2963/GOV_Veto_S1039_2008-5-14.pdf?sequence=1&isAllowed=y (vetoing Senate Bill 1039, R-239).

62. *Id.*

63. *Id.*

64. S.C. HOUSE OF REPRESENTATIVES, LEGISLATIVE UPDATE: MAJOR ISSUES FROM 2008 LEGISLATIVE SESSION, at 42 (June 3, 2008), https://dc.statelibrary.sc.gov/bitstream/handle/10827/10280/HOUSE_Legislative_Update_2008-6-3.pdf?sequence=1&isAllowed=y.

65. DUPUIS ET AL., *supra* note 12, at 9; Apurva Bose, *History of Minimum Wage*, BEBUSINESSED, https://bebusinessed.com/history/history-of-minimum-wage/ (last visited Mar. 14, 2018).

66. DUPUIS ET AL., *supra* note 12, at 6–9.

paid sick leave.[67] In response, red state legislatures reacted with comparatively more extensive preemptive measures. Thirty-six states considered legislation to stymie minimum wage increases and paid sick leave requirements in 2016, increasing from twenty-nine in 2015 and twenty-three in 2014.[68] In 2017, twenty-one states introduced some sixty bills that either expanded existing preemption laws or established new preemption laws altogether.[69] South Carolina joined the likes of Arkansas, Iowa, and Tennessee by enacting such preemptive measures, bringing the tally of states that preempt minimum wage and paid leave laws to twenty-five and twenty, respectively.[70]

67. *See id.*

68. Bryce Covert, *Red State Legislatures are Taking Away Workers' Raises and Paid Leave*, THINKPROGRESS (Mar. 28, 2017, 2:37 PM), https://thinkprogress.org/iowa-minimum-wage-paid-sick-leave-preemption-44168f0a223/.

69. Lauren Doroghazi, *Heat Between Cities and States Rises as Local Preemption Continues*, MULTISTATE (Apr. 18, 2017), https://www.multistate.us/blog/heat-between-cities-and-states-rises-as-local-preemption-continues.

70. DUPUIS ET AL., *supra* note 12, at 6, 9; MARNI VON WILPERT, ECON. POL'Y INST., CITY GOVERNMENTS ARE RAISING STANDARDS FOR WORKING PEOPLE—AND STATE LEGISLATORS ARE LOWERING THEM BACK DOWN (2017), http://www.epi.org/publication/city-governments-are-raising-standards-for-working-people-and-state-legislators-are-lowering-them-back-down/; Doroghazi, *supra* note 69.

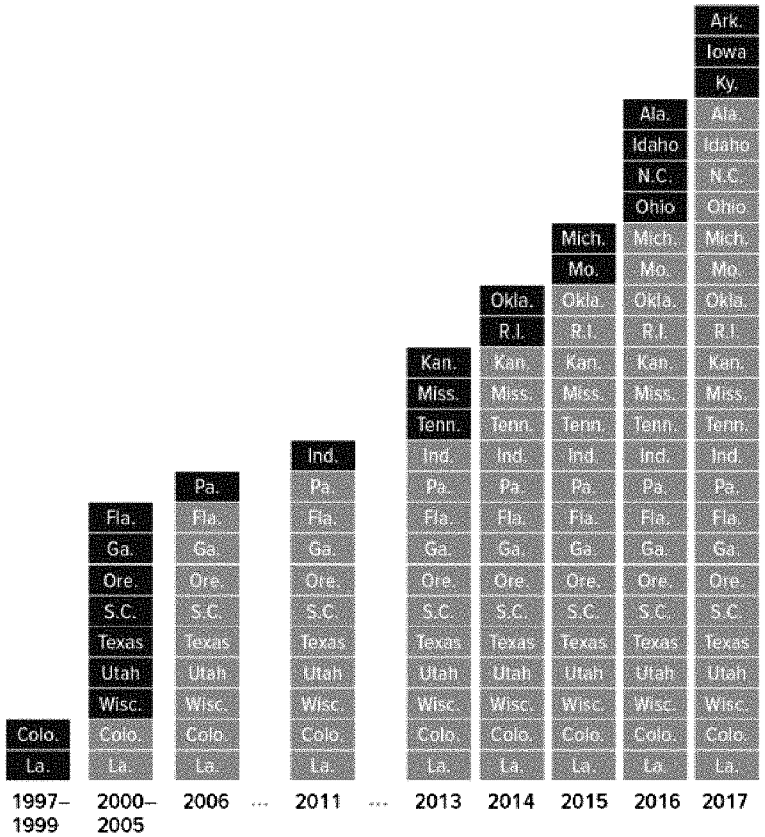

Figure A: States passing laws preempting local minimum wages, 1997–2017[71]

71. In each column, the darker colored boxes represent minimum wage preemption laws passed in the given year(s). The lighter colored boxes represent minimum wage preemption laws in effect (passed in previous years). VON WILPERT, *supra* note 70.

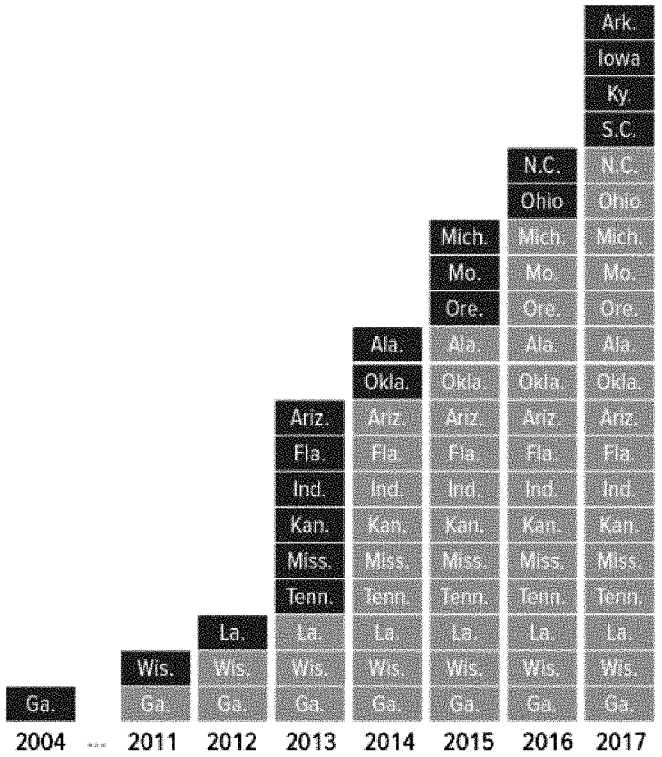

Figure B: States passing laws preempting local paid leave laws, January 2004–July 2017[72]

1. Policy Arguments

Ordinances increasing minimum wage and requiring paid leave are oftentimes passed in tandem or within the same bill, much like the state legislation used to preempt such local law.[73] Although closely related, increased minimum wage and paid leave ordinances do not address the same issues, and neither do the proposed arguments for or against their preemption. Unlike with gun laws, arguments for or against preemption of minimum wage and paid leave ordinances are divided clearly along party lines.

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72. In each column, darker colored boxes represent minimum wage preemption laws passed in the given year(s). Lighter colored boxes represent minimum wage preemption laws in effect (passed in previous years). VON WILPERT, *supra* note 70.

73. *See* S.C. CODE ANN. § 41-1-25 (Supp. 2017).

Opposition to an increased minimum wage—and therefore support for preemption—is one of the tenets of conservatism, and the argument against a mandated wage increase has changed little over the past several decades.[74] The consensus among the Right posits that increased minimum wage leads to such ill-effects as a higher unemployment rate, increased costs for city governments, and less competitive business environments.[75] Conservative state legislatures have argued that preempting local minimum wage laws avoids the problem of having a "patchwork" of wage levels across the state, thus affording employers consistency, especially those with businesses spanning multiple municipalities and counties.[76] Many of the laws passed by conservative state legislatures to preempt local increases in minimum wage reflect model legislation forwarded by the American Legislative Exchange Council (ALEC).[77] ALEC has been described as a "collaboration between multinational corporations and conservative state legislators" and is notorious for its lobbying influence.[78] Just between 2011 and 2013, one hundred five bills aimed at combatting increases to minimum wage were introduced in thirty-one legislatures, sixty-seven of which were "directly sponsored or co-sponsored by ALEC-affiliated legislators."[79] The most drawn-upon piece of model legislation put forth by ALEC is the "Living Wage Mandate Preemption Act," which repeals "any local 'living wage' mandates, ordinances or laws enacted by political subdivisions of the state."[80] The model act also highlights its policy justification:

> [L]ocal variations in mandated wage rates threaten many businesses with a loss of employees to areas which require higher mandated

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74. *See Republican Views on the Minimum Wage*, REPUBLICAN VIEWS: ON THE ISSUES (June 2, 2014), https://www.republicanviews.org/republican-views-on-minimum-wage/.

75. Noah Smith, *Be Careful When Raising Minimum Wages*, BLOOMBERG (Jan. 11, 2018, 5:00 AM), https://www.bloomberg.com/view/articles/2018-01-11/be-careful-when-raising-minimum-wages.

76. *Fighting Preemption: The Movement for Higher Wages Must Oppose State Efforts to Block Local Minimum Wage Laws*, NAT'L EMP. LAW PROJECT (July 6, 2017), http://www.nelp.org/publication/fighting-preemption-local-minimum-wage-laws/ [hereinafter *Fighting Preemption*].

77. *See* DUPUIS ET AL., *supra* note 12, at 6 (noting that Alabama's preemption bill resembled "The Living Wage Mandate Preemption Act" drafted by ALEC).

78. Rachel Curley, *How ALEC Legislators Are Fueling Efforts to Block Paid Sick Leave and Other Pro-Worker Policies*, THINKPROGRESS (Mar. 13, 2013, 7:45 PM), https://thinkprogress.org/how-alec-legislators-are-fueling-efforts-to-block-paid-sick-leave-and-other-pro-worker-policies-3cace975c40c/.

79. *Id.*

80. *Living Wage Mandate Preemption Act*, AM. LEGIS. EXCHANGE COUNCIL, https://www.alec.org/model-policy/living-wage-mandate-preemption-act/ (last modified Jan. 28, 2013).

> wage rates, threaten many other businesses with the loss of patrons to areas which allow lower mandated wage rates, and are therefore detrimental to the business environment of the state and to the citizens, businesses, and governments of the various political subdivisions as well as local labor markets . . . [i]n order for businesses to remain competitive and yet attract and retain the highest possible caliber of employees, private enterprises in this state must be allowed to function in a uniform environment with respect to mandated wage rates; and [l]egislated wage disparity between political subdivisions of this state creates an anticompetitive marketplace that fosters job and business relocation.[81]

In contrast, arguments in favor of an increased minimum wage, and against preemption, are canonized among progressives. The Left postulates that the power to enact a local wage allows high-cost-of-living communities to adopt a minimum wage that better meets local living costs and ensures that localities can address the need for higher worker pay when the state is unwilling to raise the minimum wage.[82] Moreover, in opposition to the conservative position, progressives hold that "local minimum wage laws—which generally impact just a few high-cost communities in a particular state—have proven effective and manageable for businesses."[83] The National Employment Law Project (NELP), a progressive workers' rights group and one of the main advocates for wage reform, cites a multitude of studies conducted across the United States to rebut claims made by proponents of preemption.[84] Among those is a 2016 study by the White House Council of Economic Advisors, which overall found "that [minimum wage] increases delivered significant raises with little negative effect on job growth."[85] Much of the conservative opposition warns of the irreversible damage that will be done to the food and beverage and hospitality industries with an increase in minimum wage.[86] In response, NELP cites to various studies where an increased minimum wage had no discernable negative

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81. *Id.*
82. *Fighting Preemption*, *supra* note 76.
83. *Id.*
84. *Id.*
85. *Id.* (citing Sandra Black et al., *Minimum Wage Increases by US States Fueled Earnings Growth in Low-Wage Jobs*, VOX (Dec. 2, 2016), https://voxeu.org/article/minimum-wage-increases-and-earnings-low-wage-jobs).
86. *See* Peter D. Kramer, *Businesses Fear Ripple Effect from Minimum-Wage Hike*, USA TODAY (Sept. 7, 2015, 1:02 PM), https://www.usatoday.com/story/money/business/2015/09/05/businesses-fear-ripple-effect-minimum-wage-hike/71796178/.

economic effect and, in some cases, even led to growth in the service industry.[87]

Although the discussion surrounding paid leave also falls along party lines and draws on similar economic implications as minimum wage, the policy justifications are distinct and therefore worthy of mention. For the purposes of this Note, and most relevant to current political discourse, the term "paid leave" refers to paid family and sick leave. In opposition to paid family leave, conservative representatives commonly argue that mandated paid family leave makes it more expensive to hire unskilled, easily replaceable workers and will therefore have a negative effect on low-income

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87. *Fighting Preemption*, *supra* note 76.

- In April 2015, Seattle began implementation of its new wage floor, which will reach $15 by 2021. In a front-page story titled, 'Apocalypse Not: $15 and the Cuts that Never Came,' the *Puget Sound Business Journal* reported on '[t]he minimum wage meltdown that never happened,' explaining that Seattle's restaurant industry has continued to expand and thrive as the $15 wage phases in. As of October 2016, the number of food services and beverage industry business licenses issued in Seattle had increased by 9 percent since the minimum wage law went into effect . . . .
- A 2014 study examining the impact of San Francisco's minimum wage ordinance and other city compensation requirements that cumulatively raised employment costs 80 percent above the federal minimum wage rate found no adverse effect on employment levels or hours. It found, in fact, that food service jobs—the sector most heavily affected—grew about 17 percent faster in San Francisco than in surrounding counties during that period . . . .
- One of the most sophisticated studies of minimum wages was published by economists at the Universities of California, Massachusetts, and North Carolina. The study looked at the impact of minimum wage rates in more than 250 pairs of neighboring counties in the United States that had different minimum wage rates. Comparing neighboring counties on either side of a state line is an especially effective way of isolating the true impact of minimum wage differences, because neighboring counties tend to have similar economic conditions. The study found no difference in job growth rates . . . .
- Two of the counties compared in the study of 250 counties noted above were Washington State's Spokane County and Idaho's Kootenai County, where the minimum wage was substantially lower. The economists found no evidence that higher minimum wages in Washington State harmed the state's competitiveness . . . .
- A 2006 study compared job growth in Santa Fe with that in Albuquerque, New Mexico. Santa Fe was one of the first cities to enact a higher minimum wage, and Albuquerque did not have its own local minimum wage at the time of the study. The study found that Santa Fe's higher minimum wage had no discernible impact on employment and that Santa Fe actually did better than Albuquerque in terms of employment changes . . . .

Id.

wage earners, particularly women.[88] Conservatives warn against ignoring the ill effects of feel-good policies intended to protect the vulnerable.[89] For instance, after the passage of the Americans with Disabilities Act (ADA), the employment rate of disabled men fell from sixty to forty-nine percent.[90] In response to costs associated with accommodations for the disabled and the increased threat of litigation, business owners cut back on hiring the disabled.[91] Conservatives argue that mandatory paid family leave will have similar consequences for similar reasons, especially for women.[92] As an alternative, many among the conservative camp advocate for measures modeled after the Earned Income Tax Credit.[93] Conservatives argue that this provides low-income taxpayers necessary support after missing work for family reasons or sickness but that it does so without the negative implications to employer-employee incentives and without the hiring practices associated with mandated paid leave.[94]

Progressives, on the other hand, argue much the opposite by highlighting the positive effects of paid leave on local fiscal and economic conditions.[95] Many on the Left are of the position that employee protections afforded by mandatory paid leave decreases the unemployment rate.[96] For instance, New York City's mayor attributes the strength of the city's economy, at least in part, "to the recent expansion of paid family and medical leave laws. Approximately 3.4 million public and private employees are now protected, 1.2 million of whom were previously subject to the loss of jobs and pay in the event of serious illness."[97]

Progressive paid leave advocates also argue that preemption brings about negative health impacts. They posit that when states preempt cities' authority to pass paid sick and family and medical leave laws, "they are not only limiting local control, but also undermining the overall health and well-being of employees."[98] The National League of Cities, a nonprofit advocate

88. Nita Ghei, *The Argument Against Paid Family Leave*, NEWSWEEK (Aug. 4, 2009, 8:00 PM), http://www.newsweek.com/argument-against-paid-family-leave-78741.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *See id.*; *see also* Carrie Lukas, *The Paid Sick Leave Debate: Let's Start with the Facts*, FORBES (Feb. 10, 2015, 9:26 AM), https://www.forbes.com/sites/carrielukas/2015/02/10/the-paid-sick-leave-debate-lets-start-with-the-facts/#20ea84f516d5.

95. DUPUIS ET AL., *supra* note 12, at 8.

96. *Id.* at 8–9.

97. *Id.*

98. *Id.* at 8.

for urban reform, cites a 2008 study in which "public health researchers found that 68 percent of those without paid sick leave went to work with a contagious illness," thereby increasing the risk of disease transmission and negatively affecting overall productivity and well-being.[99]

2. *Preemption of Minimum Wage and Paid Leave Laws in South Carolina*

The most recent bill passed by the South Carolina legislature expands on the previous bill, which preempted local increases to minimum wage, to also include the repeal of any local efforts to mandate paid leave.[100] The original statute, ratified in May 2002, prohibited any political subdivision of the state, including municipalities and counties, from establishing or mandating a minimum wage rate that exceeded the federal minimum wage rate.[101] The 2017 bill expanded the scope of preemption to include the prohibition of any mandated "employee benefit."[102] The statute defines an "employee benefit" as the following:

> [A]nything of value that an employee may receive from an employer in addition to wages. This term includes, but is not limited to, any health benefits, disability benefits, death benefits, group accidental death and dismemberment benefits, paid days off for holidays, paid sick leave, paid vacation leave, paid personal necessity leave, retirement benefits, and profit-sharing benefits.[103]

The bill places South Carolina at the far-right end of the preemption spectrum, along with nineteen other states that preempt both minimum wage and paid leave laws.[104]

Although no case law yet exists in relation to either preempting bill, a proposed bill was introduced into the state legislature in 2016 in an attempt to raise the minimum wage from the federally mandated seven dollars and twenty-five cents per hour by increments until reaching fifteen dollars in 2020.[105] The bill was defeated by a senate subcommittee three votes to two

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99. *Id.*
100. *See* S.C. CODE ANN. § 41-1-25 (Supp. 2017).
101. S.C. CODE ANN. § 6-1-130 (2004).
102. S.C. CODE ANN. § 41-1-25 (Supp. 2017).
103. *Id.*
104. VON WILPERT, *supra* note 70.
105. Jeff Wilkinson, *Proposal to Raise SC's Minimum Wage Killed*, STATE (S.C.) (Apr. 27, 2016, 6:22 PM), http://www.thestate.com/news/business/article74291572.html.

along party lines.[106] Although the proposed bill did not specifically raise issues of preemption of local authority by state law, commentary surrounding the bill offers valuable insight into the legislature's motivation behind preempting minimum wage and paid leave laws.[107] The majority and minority views within the South Carolina legislature towards preemption of minimum wage and paid leave laws can be inferred from the positions forwarded towards the proposed bill.

In response to the proposed bill, Republican legislators in the senate "feared a higher minimum wage would cause businesses to [re]locate [to] other states, cause business owners to lower wages of slightly higher paid employees to balance the bottom line, and prevent teenagers from getting summer jobs."[108] Subcommittee chairman Kevin Bryant echoed the sentiment of other Conservatives by supporting the right of business owners to make their own decisions regarding wages in excess of the federal minimum rate.[109] The only support offered for the bill came from AFL-CIO union representative John Brisini, who argued that a higher minimum wage would save money for the senate by decreasing the number of residents requiring state welfare assistance.[110] The proposed bill's author, Senator Marlon Kimpson, a Democrat from Charleston County, responded to the defeat by noting that the General Assembly has "funneled hundreds of millions of dollars in incentives to companies like Boeing and Volvo . . . [but has not] passed one bill to benefit workers in South Carolina. . . ."[111]

The bill, although defeated, shows that there is some level of discontent surrounding the minimum wage in South Carolina. This sentiment is supported by a March 2015 Winthrop University poll that found sixty-eight percent of South Carolinians support lawmakers raising the minimum wage above the federal rate.[112] With South Carolina being a conservative state, this figure shows that support for an increased minimum wage, at least among voters, if not legislators, crosses party lines. However, because of preemption, this discontent cannot be ameliorated at the local level. Nor can a progressive proposed remedy pass through the gauntlet of the conservative state legislature. Herein lies the paradox with preemption. When the conservative legislature stymies local solutions that do not reflect the

106. *Id.*
107. *See id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*

popular will of voters across the state, then preemption merely acts to further the democratic notion of majority rule with minority rights within the state. On the other hand, when preemption is used, whether due to the influence of lobbyists or political ideology, to suppress the popular will, as it seems is the case with increasing the minimum wage in South Carolina, minimal options exist in the way of recourse. In this manner, preemption is used as a tool to undermine democratic processes and further minority rule.

The obvious counterargument to the preemption paradox is that voters can initiate change by crossing party lines and electing representatives who better align with their desires. However, this does nothing to stop the newly-elected legislators from once again using preemption to combat the popular will, and so the cycle goes. On the other hand, enacting statutory limits on preemption would avoid this problem and ensure that preemption is limited to furthering and not weakening democracy.

C. Anti-Discrimination Laws

Perhaps the most infamous use of preemption against the will of the majority was North Carolina's "bathroom bill."[113] Although the fallout, both to the state's economy and reputation,[114] led to the controversial bill's ultimate repeal, it was very much a valid exercise of the state legislature's preemptive power, further illuminating the dangers of unchecked preemption. Additionally, the replacement bill has come under fierce criticism by LGBTQ activist groups who argue that the new bill still allows for discrimination against transgender people.[115]

1. Policy Arguments

Preemption of anti-discrimination laws, specifically those "bathroom bills" that prohibit localities from enacting laws allowing transgender people to use public restrooms according to the gender they affiliate with, is criticized across party lines. For example, only thirty-five percent of North Carolina voters supported the bathroom bill, while forty-four percent were opposed.[116] Fifty percent of voters supported the repeal of HB2.[117] The

113. H.R. 2, Sess. Law 2016-3, 2016 Gen. Assemb., 2d Extra Sess. (N.C. 2016).

114. Ellis, *supra* note 18.

115. Jason Hanna et al., *North Carolina Repeals 'Bathroom Bill'*, CNN (Mar. 30, 2017, 9:36 PM), http://www.cnn.com/2017/03/30/politics/north-carolina-hb2-agreement/index.html.

116. Tom Jensen, *HB2 Continues to Have Little Support from North Carolinians*, PUB. POL'Y POLLING (May 24, 2016), https://www.publicpolicypolling.com/polls/hb2-continues-to-have-little-support-from-north-carolinians/.

bathroom bill was criticized widely by Democrats for its discriminatory impact, but the policy argument against the bill, spanning both ends of the political spectrum, was backed by its negative impact upon the state both economically and regarding its national reputation.[118] An overwhelming fifty-six percent of voters felt HB2 was negatively affecting the state overall, while only twenty-nine percent of North Carolinians believed it helped.[119] Fifty percent of residents believed the bathroom bill was negatively impacting the state in a purely economic sense, and twelve percent felt it helped.[120] Fourteen percent more of Republicans believed the bill hurt the state's economy than those Republicans who felt it did nothing or helped.[121] In terms of North Carolina's national reputation, just twenty-four percent of voters thought HB2 helped, in contrast to fifty-three percent who felt it had a negative impact.[122]

Like with other areas of preemption, North Carolina legislators framed the bathroom bill as an issue of public safety.[123] However, North Carolina voters across the political spectrum also believed the bill failed to fulfill its stated purpose in this regard as well. Thirty-six percent of voters felt it made North Carolina safer, while forty-seven percent felt it did not.[124] Some purported that the bathroom bill would especially protect women from sex crimes committed by men falsely claiming to be transgendered.[125] As it played out, only twenty-eight percent of women felt it made public restrooms safer, as opposed to fifty-three percent who think it did not.[126]

The bill that replaced the North Carolina bathroom bill only repealed HB2 to the extent that it required people at government-operated facilities to use restrooms and locker rooms that corresponded with the stated gender on their birth certificates.[127] More important, however, is what the replacement bill did not do, as it failed to advance any protections to transgender people against discrimination. Instead, the power to regulate access to public restrooms remained with the legislature.[128] The new bill also prohibits local governments from enacting or amending any nondiscrimination ordinances

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117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. Hanna et al., *supra* note 115.
128. *Id.*

relating to private employment and public accommodations, at least until December 2020.[129] The effect is to bar local governments from adding gender identity to the list of those protected from discrimination in places of public accommodation, like the ordinance enacted in Charlotte to which HB2 was passed in response.[130] Because the Charlotte municipal ordinance conflicted with HB2, the state statute impliedly preempted it. In contrast, at least until further legislation or the sunset year of 2020, the replacement bill expressly preempts local law by forbidding new or amended anti-discrimination laws.

Even after the fallout in North Carolina initiated by HB2 and the remaining controversy surrounding its replacement, five other states—Missouri, Montana, South Carolina, Texas, and Virginia—have considered legislation that expressly preempts municipal and county anti-discrimination laws.[131] These measures are still pending in Missouri, South Carolina, and Texas.[132]

2. *Preemption of Anti-Discrimination Laws in South Carolina*

The South Carolina legislature's first attempt at passing its own bathroom bill, modeled directly after North Carolina's HB2, came in 2016 in the form of Senate Bill 1203.[133] Proposed by Republican Senator Lee Bright, the bill prevented transgender men and women from using the bathroom or locker room of their choice.[134] The proposed bill was killed after it managed to get only four of the nine votes necessary to reach the South Carolina Senate floor.[135] Like other bathroom bill proponents, Senator Bright argued the issue was a matter of public safety, lamenting that "[w]e're not going to sacrifice the privacy and safety of 99.7 percent of the population because 0.3 percent is confused about their gender identity."[136] Opponents of the bill included parents of transgender children and then-Governor Nikki Haley,

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129. *Id.*

130. *Id.* Because of the two clauses from HB2 left in the replacement bill, many within the LGBTQ community felt the bill was a repeal in name only, duly dubbing it "HB2.0." *Id.*

131. Joellen Kralik, *"Bathroom Bill" Legislative Tracking*, NAT'L CONF. ST. LEGISLATURES (July 28, 2017), http://www.ncsl.org/research/education/-bathroom-bill-legislative-tracking635951130.aspx.

132. *Id.*

133. S. 1203, 2015–2016 Gen. Assemb., 121st Sess. (S.C. 2016).

134. *Id.*

135. Jamie Self, *SC Transgender Bathroom Bill Dead*, STATE (S.C.) (Apr. 27, 2016, 7:27 PM), http://www.thestate.com/news/politics-government/politics-columns-blogs/the-buzz/article74310252.html.

136. *Id.*

who said that the bill was unnecessary and therefore "going nowhere" in the senate.[137]

Later in 2016, Senator Larry Grooms put forth a separate bathroom bill, Senate Bill 1306, this time in the form of a local bill, which, if passed, would apply only to Berkeley County.[138] The proposed bill attempted to preempt local law in Berkeley County by requiring students to use the bathroom that corresponds to their gender at birth.[139] Being a local bill, it does not go to committee and is only voted on by those senators who represent the affected county.[140] The vetting process for local bills is brief—the maximum time opponents are allowed to speak against a bill is fifteen minutes.[141] Like HB2, which was pushed through in an emergency session in a similarly expedited manner, Senator Grooms' bill was an attempt to exploit a procedural backdoor to advance unpopular preemptive measures. Ultimately, the bill was defeated after Senators Paul Campbell (R-Berkeley) and Sean Bennett (R-Dorchester) levied adequate objections to halt its progress.[142]

The defeat of Senate Bill 1203 and Senate Bill 1306 apparently did little to weaken the resolve of some in the legislature. Republican Representative Steven Long undertook a second attempt at a statewide bathroom bill in 2017, this time beginning in the state house of representatives. Unlike its precursor, House Bill 3012 has been referred to the House Judiciary Committee and is pending carryover into the 2018 legislative session.[143] The proposed bill, much like Senate Bill 1203 and HB2, would preempt local laws protecting transgendered persons from discrimination.[144] The proposed bill states, in pertinent part:

> A local government or other political subdivision in this State may not enact local laws, ordinances, orders, or other regulations that require a place of public accommodation or a private club or other

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137. *Id.* (citing Andrew Shain, *SC Gov. Haley: Transgender Bathroom Bill Not Needed*, STATE (S.C.) (Apr. 7, 2016, 12:06 PM), http://www.thestate.com/news/politics-government/politics-columns-blogs/the-buzz/article70481297.html).

138. S. 1306, 2015–2016 Gen. Assemb., 121st Sess. (S.C. 2016); Cindi Ross Scoppe, *Main Problem with Latest SC Bathroom Bill Has Nothing to Do with Bathrooms*, STATE (S.C.) (May 23, 2016, 5:20 PM), http://www.thestate.com/opinion/opn-columns-blogs/cindi-ross-scoppe/article79307117.html [hereinafter *Nothing to Do with Bathrooms*].

139. S. 1306, 2015–2016 Gen. Assemb., 121st Sess. (S.C. 2016); *Nothing to Do with Bathrooms*, *supra* note 138.

140. *Nothing to Do with Bathrooms*, *supra* note 138.

141. *Id.*

142. *SC Public Policy Update*, LEXOLOGY (May 27, 2016), https://www.lexology.com/library/detail.aspx?g=aa28c007-9305-4c4b-b164-a7f1ce15583d.

143. H.R. 3012, 2017–2018 Gen. Assemb., 122nd Sess. (S.C. 2017).

144. *Id.*

> establishment, not in fact open to the general public, to allow a person to use a multiple occupancy bathroom or changing facility regardless of the person's biological sex. A local law, ordinance, order, or other regulation enacted by a local government to require a person to use a multiple occupancy bathroom or changing facility designated for his biological sex is not a violation of this chapter and does not constitute discrimination based upon a protected category.[145]

Like other bathroom bills, House Bill 3012 defines biological sex as the "physical condition of being male or female, which is stated on a person's birth certificate."[146]

The representatives behind House Bill 3012 are borrowing yet another tactic employed by the North Carolina state legislature to pass HB2. As previously mentioned, HB2 was passed in conjunction with a less controversial bill preempting local authority to raise the minimum wage above the federal rate.[147] House Bill 3012 is receiving piggyback treatment similar to HB2, as part of Representative John King's House Bill 3156, which requires county councils to "provide office space and appropriations for the operation of the county legislative delegation office including compensation for staff personnel and necessary office supplies and equipment."[148] Although unnecessarily "heavy-handed," the subject matter of House Bill 3156 is much milder and less controversial than House Bill 3012. Whether the intention or not, House Bill 3156 may serve to take some of the heat off of House Bill 3012, thus getting South Carolina's bathroom bill one step closer to becoming law.

House Bill 3012 will not receive its day of reckoning until the 2018 legislative session. From a macro-perspective, those in opposition to the bill may feel that the future is bright considering the two previous attempts were defeated with bipartisan efforts. However, upon closer inspection, the tactics employed by South Carolina legislators to push a bathroom bill through the legislature are concerning—even more so after the fallout surrounding HB2 in North Carolina—and reveal a troublesome trend in the use of preemption.

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145. *Id.*

146. *Id.*

147. *See supra* text accompanying note 17.

148. H.R. 3156, 2017–2018 Gen. Assemb., 122nd Sess. (S.C. 2017); Cindi Ross Scoppe, *When a Bathroom Bill is Something Much, Much Bigger*, STATE (S.C.) (Jan. 2, 2017, 5:07 PM), http://www.thestate.com/opinion/opn-columns-blogs/cindi-ross-scoppe/article123772214.html [hereinafter *Bathroom Bill is Something Bigger*].

HB2 was passed, in no small part, because (1) it was moved through the North Carolina legislature in an expedited manner as part of an emergency session; and (2) it piggybacked off of another, less controversial bill.[149] Although no proposed bill in South Carolina has yet to receive both of those treatments, Senator Grooms attempted to exploit expedited procedure with limited vetting, much like HB2, by framing Senate Bill 1306 as a local bill.[150] Representative Long is employing the second method used to pass HB2 with House Bill 3012 by piggybacking his controversial proposed bill with a less controversial bill preempting local administrative control over county legislative delegation offices.[151] Although Senate Bill 1306 was defeated and House Bill 3012 is pending carryover into 2018, both proposed bills reveal the disconcerting ends that some South Carolina legislators will go to in order to exercise their preempting power, even when that power proved disastrous in North Carolina some mere months before. If nothing more, this troubling trend should at least bring talks to the table about the potential need for limits on preemption.

These developments in North and South Carolina uncover another dangerous side of preemption, whereby preemption is hastily used to preliminarily advance unpopular policies with the hope and expectation that the long-term result will be a watered-down version of those policies cloaked beneath the veil of bipartisan "compromise." HB2 was passed in an emergency session instead of waiting until the regularly scheduled legislative session. As noted earlier, this allowed the North Carolina legislature to push through HB2 in an expedited fashion. Although the legislature likely did not foresee the extent of the backlash caused by the bill, some pushback was unavoidable, and the potential for HB2 to get repealed at a later date was at least foreseeable. Similarly, even if Senator Groom's Berkeley County bathroom bill had made it through the South Carolina Senate, then-Governor Nikki Haley's position on the issue, previously stated in regard to Senate Bill 1203, suggests that she would have vetoed the bill. Moreover, in the event that then-Governor Haley did sign the bill into law, it likely would not have withstood constitutional challenges in the courts. The doomed path of Senate Bill 1203 was more than foreseeable—it was probable.

The foreseeable in North Carolina and the probable in South Carolina both ultimately became realities. HB2 was repealed and replaced, and Senate Bill 1203 was defeated well before making it to then-Governor Haley's

149. *See* DUPUIS ET AL., *supra* note 12, at 11.
150. *Nothing to Do with Bathrooms*, *supra* note 138.
151. *Bathroom Bill is Something Bigger*, *supra* note 148.

desk. Both of which, however, beg the question of the intent behind proposed bills that possess little chance of becoming law or little chance of longevity once made into law. The answer may lie in the aforementioned criticisms of HB2's replacement—that it does nothing to protect transgender persons from discrimination and retains two of the most controversial aspects of HB2. Instead of suffering politically for the estimated half a billion dollars lost due to HB2, the North Carolina legislature still has the power to preempt local law, and cities and counties are prohibited from amending or enacting any new anti-discrimination laws until the end of 2020. When the dust finally settled, the replacement bill was ironically still a win for Republicans.

D. Combatting Preemption Moving Forward

1. Nationwide Attempts to Challenge Preemption

Although this Note is intended to advocate for statutory limitations on preemption, none currently exist in South Carolina. However, other avenues have been used to combat preemption. The most obvious, yet perhaps, most challenging method is for cities to lobby legislators to repeal or amend pieces of preempting legislation. Although especially difficult to accomplish in states such as South Carolina with overwhelmingly Republican legislatures, cities can form coalitions and advocacy groups within the state to increase their lobbying power. The mayors of Ohio's thirty largest cities followed such a method by banding together to form the Ohio Mayors Alliance in an effort to more effectively lobby on issues such as infrastructure investments and the opioid epidemic.[152]

Cities can also create limited solutions through public statements against preemption using the "power of the purse." Recently, Atlanta and Pittsburgh, two cities preempted by a statewide minimum wage ban, took action by raising the minimum wage for city employees and city contractors.[153]

Local executive or administrative action can also be used to defy preemption. For example, in February 2017, the Harris County district attorney and Houston city officials decriminalized possession of small amounts of marijuana.[154] Contrary to Texas law which requires arrests and

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152. Molly Cohen, *A Lawyer's Playbook to Fight State Preemption*, CITYLAB (July 19, 2017), https://www.citylab.com/equity/2017/07/a-lawyers-playbook-to-fight-state-preemption/533862/.

153. *Id.*

154. *Id.* (citing Tom Dart, *Houston's New District Attorney Stands by Her Bold Move to Decriminalize Marijuana*, GUARDIAN (Apr. 18, 2017, 7:00 AM)).

prosecution for simple possession, Houston officials instead opted for mandatory education programs.[155] However, such a method to combat preemption can be easily reversed following political power shifts and is also subject to review by the courts.

Localities can avoid preemption by narrowly tailoring ordinances. So long as local measures do not directly conflict with state law, they may survive challenges in the courts. New York and Pennsylvania courts, for instance, "have upheld local fracking bans as a valid use of zoning power, despite comprehensive state law that governs oil and gas extraction."[156] However, mindful drafting avoids only implied conflict preemption and is therefore of little use in combatting express or implied field preemption.

Lastly, preemption can also still be challenged in the courts based on a number of legal theories. Cities may wish to reconcile local and state law by arguing no conflict exists or that the legislature intended to leave localities room to regulate.[157] However, some courts do not allow municipalities, as creatures of the state, to pursue legal recourse against the state. In such situations, the only remaining avenue is for municipalities to file suit under the theory of associational standing, which allows localities to act as an organization acting on behalf of its residents.[158]

In the alternative, localities may instead choose to follow a *Romer v. Evans* inspired approach and attack preemption on constitutional grounds. In *Romer v. Evans*,[159] the United States Supreme Court struck down a Colorado amendment barring localities from enacting anti-discrimination provisions for the LGBTQ community on grounds of violating the Equal Protection Clause of the U.S. Constitution.[160] Such an approach may be the future of combatting bathroom bills and other laws preempting anti-discrimination ordinances.

2. Challenges to Preemption in South Carolina

Prior to 2008, South Carolina courts were split on the issue of preemption. In June 2006, a trial court enforced a smoke-free workplace law on Sullivan's Island after finding no express or implied preemption in state

155. *Id.* (citing Dart, *supra* note 154).

156. *Id.* (citing Wallach v. Town of Dryden, 16 N.E.3d 1188 (N.Y. Ct. App. 2014); Robinson v. Commonwealth, 83 A.3d 901 (Pa. 2013)).

157. *Id.*

158. *Id.*

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

160. *Id.* at 635–36; Cohen, *supra* note 152.

law.[161] The trial court held that section 5-7-30 of the South Carolina Code, part of the Home Rule Act, specifically authorizes local governments to enact ordinances "preserving health, peace, and good government" and recognized that "the power to regulate and control smoking is widely recognized."[162] On the other hand, in October 2006, a different trial court ruled the opposite on a smoke-free law enacted in Greenville, which was ultimately challenged in the Supreme Court of South Carolina roughly a year later.[163] The trial court used the two-step process outlined by the supreme court in *South Carolina State Ports Authority v. Jasper County* to determine whether the ordinance was valid:

> Determining whether a local ordinance is valid is essentially a two-step process. The first step is to ascertain whether the county had the power to enact the ordinance. If the state has preempted a particular area of legislation, then the ordinance is invalid. If no such power existed, the ordinance is invalid and the inquiry ends. However, if the county had the power to enact the ordinance, then the Court ascertains whether the ordinance is inconsistent with the Constitution or general law of this state.[164]

In the Greenville smoke-free law case, the respondent argued that the ordinance failed on both counts, asserting "[o]n the one hand, it is preempted by existing South Carolina state law and, on the other, the Ordinance unconstitutionally criminalizes behaviors and/or actions otherwise allowed by state law."[165]

In 2008, the Supreme Court of South Carolina put an end to the ambiguity by enforcing the smoke-free law in Greenville, citing the preservation of health argument grounded in the Home Rule Act.[166] Also in

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161. Beachfront Entm't, Inc. v. Town of Sullivan's Island, No. 2006-CP-10-3501, 2006 WL 6102859, at *4–10 (S.C. Ct. Com. Pl. Dec. 20, 2006), *aff'd in part, rev'd in part*, 379 S.C. 602, 606, 666 S.E.2d 912, 914 (2008).

162. *Id.* at *4.

163. Foothills Brewing Concern, Inc. v. City of Greenville, No. 2006-CP-23-7803, 2007 WL 3052337 (S.C. Ct. Com. Pl. 2007), *rev'd*, 377 S.C. 355, 660 S.E.2d 264 (2008).

164. *Id.*; Foothills Brewing Concern, Inc. v. City of Greenville, 377 S.C. 355, 361, 660 S.E.2d 264, 267 (citing Denene, Inc. v. City of Charleston, 352 S.C. 208, 212, 574 S.E.2d 196, 198 (2002); Bugsy's v. City of Myrtle Beach, 340 S.C. 87, 93, 530 S.E.2d 890, 893 (2000)).

165. Brief of Respondents at *5, Foothills Brewing Concern, Inc. v. City of Greenville, No. 2006-CP-23-07803, 2007 WL 4135977 (S.C. 2007).

166. *Foothills Brewing*, 377 S.C. 355, 660 S.E.2d 264; *Local Control Affirmed in South Carolina!*, AM. NONSMOKERS' RTS. FOUND., http://www.no-smoke.org/goingsmokefree.php?id=163 (last visited Mar. 14, 2018).

2008, the supreme court found that the Sullivan's Island smoke-free workplace law conflicted with state law because it imposed a fine for smoking in public places when that conduct was not illegal under state law.[167] Moving forward, it is foreseeable that preemption of local laws can be defeated in other areas, most notably firearm regulation and anti-discrimination ordinances, following a similar argument of "preserving health, peace and good government."[168]

IV. CONCLUSION

The suppression of progressive initiatives on the local level in South Carolina through the state legislature's use of preemption mirrors the growing nationwide trend of using preemption to stymie social progress, particularly in the South where blue cities are pitted against red states. Preemption has not only expanded in use but also into more controversial and politicized areas of the law. In South Carolina and nationwide, preemption of local firearm and ammunition laws saw the least amount of pushback from either side of the aisle. However, the preemption of local wage and leave laws, along with anti-discrimination ordinances, have been met with increased debate and resistance. Because local governments are ill-equipped to combat state legislatures, preemption has the practical effect of weakening democratic processes.

Preemption, however, has seemed to reach a potential turning point on the hotly-debated issue of anti-discrimination laws. On the one hand, should pending measures such as South Carolina's second attempted bathroom bill pass, it is foreseeable that there will be little else in the way to stop state legislatures' unfettered use of preemption. Preemption accomplished through procedural diversion is similarly worrisome, like in North Carolina, where local minimum wage ordinances were preempted in an emergency session and perhaps purposefully overshadowed by HB2's more controversial ban on anti-discrimination measures. The failure of HB2's replacement bill to provide any protections or solace to North Carolina's LGBTQ community further foreshadows a potential path regarding the dangerous use of preemption.

On the other hand, if states' attempts at passing bathroom bills are thwarted, which would require both liberal and conservative backing in the

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167. Beachfront Entm't, Inc. v. Town of Sullivan's Island, 379 S.C. 602, 606, 666 S.E.2d 912, 914 (2008).

168. Beachfront Entm't, Inc. v. Town of Sullivan's Island, No. 2006-CP-10-3501, 2006 WL 6102859, at *4 (S.C. Ct. Com. Pl. Dec. 20, 2006), *aff'd in part, rev'd in part*, 379 S.C. 602, 606, 666 S.E.2d 912, 914 (2008).

South, the use and scope of preemption may very well diminish and possibly reveal a more progressive future for the region. Continued demographic and economic trends in the South may also lead to a decrease in the use of preemption. Although the influx of progressive-minded residents to the South's urban centers is a major contributing factor in the conflict between blue cities in red states and the associated increase in the use and scope of preemption, continued migration could lead to more Democrats elected to state legislatures, ultimately leveling the playing field in the battle against preemption. South Carolina ranks second in the nation in new residents and is the number one state in terms of foreign capital investment.[169] This demographic trend, when coupled with the bipartisan defeat of the first attempted bathroom bill in South Carolina, has left some Democrats in the state hopeful for a more progressive future.[170]

William Peter Maurides

169. Tim Smith, *Is SC More Progressive Now That the Bathroom Bill Has Been Defeated?*, GREENVILLE NEWS (S.C.) (Apr. 30, 2016, 12:07 PM), http://www.greenvilleonline.com/story/news/politics/2016/04/30/sc-more-progressive-now-bathroom-bill-has-been-defeated/83697066/.

170. *See id.*