

Constitutional Law for NIMBYs: A Review of “Principles of Home Rule for the 21st Century” by The National League of Cities

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Model laws play an extremely important role in the history of “home rule” for local governments in the United States. So it is of no small moment that the National League of Cities (NLC) proposed a new Model Constitutional Home Rule Article (the Model Article) last February.

Unfortunately, the Model Article is severely flawed. Rather than systematically addressing and responding to the various contemporary problems of local governance, it is laser-focused on a single issue: the spate of preemptive laws passed by politically-conservative state legislatures in recent years to override policies adopted by politically-liberal cities. To address these preemptive laws, the NLC suggests the adoption of a suite of provisions that would radically increase and protect the powers of local governments. But while the Model Article suggests very substantial expansions of local authority, it does not balance this with any new limits, even in areas where local governments systematically create huge societal costs. The NLC barely mentions many of the most important problems in contemporary local governance, including zoning and the housing crisis, police brutality, subsidies for firm location, unrepresentative local elections, segregation, and underfunded public employee pension programs. Further, the Model Article does not propose any substantive requirements that would address these issues and would substantially frustrate state legislative efforts aimed at limiting socially-costly local policies in these areas. It does not address questions of incorporation or annexation, granting new powers to our existing set of local governments, despite the problems their boundaries create for regional economic output, segregation, and inequality. The NLC report also implicitly takes a strong ideological position about what types of policies local governments can and should adopt, something that its putatively neutral rhetoric about the value of localism and laboratories of democracy does not support.

For the NLC, with great new powers come absolutely no new responsibility or limits. The Model Article would allow and encourage local governments to exclude outsiders and create regulatory confusion

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inside metropolitan areas. It would generate a substantial amount of harm to metropolitan economies and inequality in the name of allowing even small home rule local governments to choose their own policies without interference from outsiders. No state should adopt the NLC's recommendation.

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I. INTRODUCTION: CONSTITUTIONAL LAW FOR NIMBYS

Home rule comes in waves. In the twentieth century, there were two such waves, one in the Progressive Era and another following a model state constitutional amendment proposed by the American Municipal Association (AMA) in the 1950s.¹ So, it is a big deal that the National League of Cities (the NLC, the successor organization to the AMA) just proposed a new Model Constitutional Home Rule Article (Model Article) for states to adopt.²

The NLC “Principles of Home Rule for the 21st Century” report (the Report) contains an ambitious wish list for local governments seeking more power and less oversight from state governments.³ It proposes a Model Article that contains

¹ NAT'L LEAGUE OF CITIES, PRINCIPLES OF HOME RULE FOR THE 21ST CENTURY 11–12 (2020), <https://www.nlc.org/sites/default/files/2020-02/Home%20Rule%20Principles%20ReportWEB-2.pdf> [<https://perma.cc/4GVL-T8Y3>] [hereinafter PRINCIPLES]; see also LYNN A. BAKER, CLAYTON P. GILLETTE, & DAVID SCHLEICHER, LOCAL GOVERNMENT LAW: CASES AND MATERIALS 317–20 (5th ed. 2015).

² PRINCIPLES, *supra* note 1, at 21.

³ See *id.* at 8 (describing four “interrelated propositions” to “foster” the conversations surrounding the relationship between state and local governments).

the same type of broad delegation of authority to local governments that marked the AMA's 1950s-era home rule proposal.⁴ But rather than pairing that with a relatively easy means for state legislatures to preempt local decisions, as the 1950s model amendment did, the Report's Model Article instead marries its substantial delegation of authority with a huge number of other protections for local authority.⁵ These include a "presumption against preemption," requiring preemptive state laws to be: (a) expressly preemptive, (b) necessary to serve a substantial state interest, (c) narrowly tailored to that interest, and (d) pursuant to a "general" state law.⁶ The Model Article would also remove any constitutional restrictions on local taxing authority and on the power of local governments to pass "private laws," like contract or tort laws.⁷ It also recommends that state constitutions provide local governments with almost full autonomy to structure local elections and local governmental form, and would bar many conditions on state aid and unfunded mandates.⁸ And it would provide affirmative constitutional rights for residents of local governments, including a barely-described but potentially radical requirement that the state provide to all local governments "adequate" money to provide local services.⁹

The Report is a creative and important effort, and the Model Article contains some attractive elements. Its authors are serious scholars.¹⁰ But the Report is fatally flawed.¹¹ The Model Article should not be adopted anywhere.

⁴ See *id.* at 20.

⁵ See *id.* at 21.

⁶ See *id.* at 26. Notably, "general" here means something much broader than it does under most state constitutional bans on "special legislation." See *id.*; *infra* text accompanying note 49.

⁷ See PRINCIPLES, *supra* note 1, at 24–25.

⁸ *Id.* at 25, 36–37.

⁹ *Id.* at 37.

¹⁰ The working group that produced the Report was led by Nestor Davidson, and included Richard Briffault, Paul Diller, Sarah Fox, Laurie Reynolds, Erin Adele Scharff, Richard Schragger, and Rick Su. *Id.* at 2.

¹¹ It should be noted that this response was written before both the COVID-19 crisis that swept the nation and world and before the protests following the killing of George Floyd. Rather than rewrite it in the middle of the pandemic, the economic crisis that followed, and the rapidly changing politics of policing, I will keep the arguments as they were with a few minor exceptions in the introduction and elsewhere where absolutely necessary. The uncertainty that exists now about what the future holds means that an effort to shape the text to the news of the moment would be folly. However, based on what we know now, the argument in this piece is far stronger than it was originally. If a central problem facing the country is a need for coordinated responses to a virus that pays no attention to jurisdictional boundaries, the case for local variation is weaker. The problems of interlocal inequality and segregation are more severe in a world where a pandemic and a recession severely tax local fiscal capacity in poor jurisdictions. Some local governments were in favor of more aggressive responses than the states in which they sit. See, e.g., Meredith Deliso, *From Reopenings to Masks, How Georgia Gov. Kemp Has Handled the Coronavirus Pandemic*, ABC NEWS (July 21, 2020), <https://abcnews.go.com/Health/reopenings-masks-georgia-gov-kemp-handled-coronavirus-pandemic/story?id=71882007> [<https://perma.cc/BSV5-39Z6>] (describing how the city of Atlanta required stricter mask-wearing adherence than its parent

Why? The Report refuses to respond to, or even consider, the numerous reasons for skepticism about local authority. As a result, it is unbalanced, seeing harm in state oversight but no benefits, and all local authority as good. And even though it suggests substantial constitutional changes, the Report includes no proposals to address the shape, size, or makeup of local governments, granting substantial new powers to our existing set of local governments even when the boundaries and politics of those local governments generate problems of inequality, slow growth, and segregation.

Rather than taking a broad look at the issues facing local governments, the Report understands the problem to which it is responding to be a relatively narrow one: the rash of preemptive state laws, largely passed by Republican state legislatures to overcome liberal social policies passed by Democratic-run cities, over the last decade or so.¹² In its monomania to address this issue, the Report either barely discusses or fails to even mention problems for which local governments bear substantial responsibility, from the housing crisis to police brutality to underfunded public pension programs. While the Model Article suggests very substantial expansions of local authority, it does not balance this with any new limits, even in areas where local governments have been clearly creating huge societal costs.¹³ Nor does it seek to limit which types of local governments should be given these vast new powers or to encourage municipal consolidation, allowing the many home rule local governments found in most metropolitan areas to use these powers to exclude or create substantial regulatory confusion.¹⁴ It does not seek to tailor local authority to specific policy

state of Georgia). Some were in favor of weaker responses. *See, e.g.,* Jake Sheridan, ‘I Don’t Believe It’: Huntington Beach a Symbol of Mask Resistance as Doubters Abound, L.A. TIMES (July 22, 2020), <https://www.latimes.com/california/story/2020-07-22/doubts-about-dangers-of-covid-19-linger-in-huntington-beach> [<https://perma.cc/QD9N-2R3T>] (describing how Huntington Beach, California adopted a less mask-stringent stance and culture than its parent state). But a problem like the COVID-19 pandemic calls for regional solutions, not locally-tailored ones. Also, the NLC Report claims it is bringing rules governing local authority in the twenty-first century but does not even mention the problems of police brutality and abuse and how its proposals would implicate those issues. I think it is pretty clear it did not have its finger on the pulse of what truly matters in twenty-first century American cities.

¹² *See* PRINCIPLES, *supra* note 1, at 16–17.

¹³ For the most part, the proposal allows as much—or more—local authority in every dimension than every state. It does not give local government hard *imperio in imperium* style immunity from state override, instead relying on a very powerful presumption against preemption. *See infra* text accompanying notes 37–49. Other than that, there is only one example where the Model Article proposes less local authority than exists in any state. Colorado allows local governments some power to engage in eminent domain outside of their boundaries through home rule authority. *See* PRINCIPLES, *supra* note 1, at 49 (describing Colorado’s extraterritorial eminent domain rules). The Model Article would only allow local governments to exercise their authority extraterritorially with state legislative authorization. *See id.*

¹⁴ *See* PRINCIPLES, *supra* note 1, at 5 (describing how the Report intends to encompass the empowerment of “cities, towns[,] and villages” in light of perceived excessive limits on their power to “respond to local policy demands”).

areas, finding no policy areas at all in which the presumption in favor of local authority should focus in the opposite direction, even those most likely to create interlocal externalities. The Model Article would also clearly complicate state legislative efforts aimed at limiting socially-costly local policies in these areas. Further, the Report takes a narrow partisan tack, loading up its diagnosis and Model Article provisions in a way likely to produce liberal or left outcomes and more regulation, while dressing it up in neutral rhetoric about devolution and localism.¹⁵

Here are some examples of the problems:

Over the last forty or so years, it has become increasingly clear that many local governments—both suburbs and big cities—aggressively exclude outsiders through excessive zoning restrictions and other land use policies.¹⁶ These policies have reduced national economic growth by making it harder for workers to move to hot job markets, increasing economic inequality, encouraging racial segregation, and generating sprawl.¹⁷ The Model Article does not address this problem and would clearly frustrate the many state efforts at reform we have seen in recent years.¹⁸ California’s Housing Accountability Act and Regional Housing Needs Allocation process, Oregon’s multifamily zoning requirements, “anti-snob zoning” laws in Massachusetts and Connecticut, the Minnesota replanning requirements that led to Minneapolis’s

¹⁵ See *id.* at 17, 53 (describing how typically “liberal” policies—such as gun control, minimum wage increases, and gay rights—enacted by local governments have been often subject to state preemption).

¹⁶ See William A. Fischel, *The Rise of the Homevoters: How the Growth Machine Was Subverted by OPEC and Earth Day*, in EVIDENCE AND INNOVATION IN HOUSING LAW AND POLICY 13, 19–21 (Lee Anne Fennell & Benjamin J. Keys eds., 2017), https://www.cambridge.org/core/services/aop-cambridge-core/content/view/574C995DC14AFFD1BD71A70C5804C87B/9781316691335c1_p13-37_CBO.pdf/rise_of_the_homevoters_how_the_growth_machine_was_subverted_by_opec_and_earth_day.pdf [<https://perma.cc/HRS5-K3QF>] (arguing that the rise of environmentalism and the effect hyperinflation had on beliefs about whether houses were an investment caused increased zoning regulations in the 1970s and 1980s); David Schleicher, *City Unplanning*, 122 YALE L.J. 1670, 1692, 1704–17 (2013) [hereinafter Schleicher, *City Unplanning*] (describing increased intensity of the use of zoning to exclude in the past forty years).

¹⁷ See JESSICA TROUNSTINE, SEGREGATION BY DESIGN: LOCAL POLITICS AND INEQUALITY IN AMERICAN CITIES 73 (2018) (describing link between zoning and housing segregation); Chang-Tai Hsieh & Enrico Moretti, *Housing Constraints and Spatial Misallocation*, 11 AM. ECON. J.: MACROECONOMICS, Apr. 2019, at 1, 1–3, <https://pubs.aeaweb.org/doi/pdfplus/10.1257/mac.20170388> [<https://perma.cc/72CT-FMVY>] (estimating lost economic output due to zoning regimes in restrictive regions); David Schleicher, *Stuck! The Law and Economics of Residential Stagnation*, 127 YALE L.J. 78, 81–83 (2017) [hereinafter Schleicher, *Stuck!*] (reviewing literature on the economic and social costs of zoning restrictions). See generally Peter Ganong & Daniel W. Shoag, *Why Has Regional Income Convergence in the U.S. Declined?*, 102 J. URB. ECON. 76 (2017) (describing how zoning regimes have biased migration patterns away from rich restrictive regions and states).

¹⁸ To be fair, the Report does offer two short paragraphs mentioning the problem. See PRINCIPLES, *supra* note 1, at 19, 49–50. See *infra* text accompanying notes 105 and 125 for a discussion of this brief discussion in the Report.

successful recent zoning liberalization, and many others would all be imperiled, as would proposed zoning reforms in California, Nebraska, Maryland and Virginia, among other places.¹⁹

A huge amount of research has highlighted problems in representation in local elections and participation.²⁰ Voters know little about local government and vote in ways entirely determined by national party preference, particularly in local legislative elections.²¹ Or, they do not show up at all; turnout in local elections and participation in local civic affairs is often low and unrepresentative, leading to greater power for residents who do participate—a group that is richer, whiter, and more likely to own homes than the general population.²² The Report does not mention these problems, holding out the outcomes of local elections as an uncomplicated representation of local preferences.²³ And because it gives local governments almost free rein to organize the structures of their own electoral and governmental forms, the Model Article would allow insiders to impose rules that would continue or worsen this inequality in representation.²⁴ While state elections have similar problems, a new model constitutional amendment could have included any number of substantive provisions to encourage local democracy to work better. Before substantial new authority is devolved, it would make sense to consider ways to improve local democracy.

Cities have offered huge giveaways to attract businesses in ways that are almost certainly bad for society as a whole (think Amazon’s HQ2 or giveaways for sports stadia).²⁵ The Model Article would make it difficult and perhaps nearly impossible for states to police such subsidies.²⁶

Written only a few years after the rise of the Black Lives Matter movement (and just before the protests over the killing of George Floyd), police brutality

¹⁹ See *infra* text accompanying notes 119–27.

²⁰ See *infra* text accompanying notes 169–94.

²¹ See Christopher S. Elmendorf & David Schleicher, *Informing Consent: Voter Ignorance, Political Parties, and Election Law*, 2013 U. ILL. L. REV. 363, 397, 404–05.

²² See Zoltan L. Hajnal & Paul G. Lewis, *Municipal Institutions and Voter Turnout in Local Elections*, 38 URB. AFF. REV. 645, 655–57, 665 (2003).

²³ “At the heart of the concept of local democratic self-government is the accountability of local officials to the local community that results from local popular election of local lawmakers.” PRINCIPLES, *supra* note 1, at 62.

²⁴ See *id.* at 36.

²⁵ See DANIEL J. WILSON, FRBSF ECONOMIC LETTER 2015–06, COMPETING FOR JOBS: LOCAL TAXES AND INCENTIVES 1, 3 (2015), <https://www.frbsf.org/economic-research/files/el2015-06.pdf> [<https://perma.cc/H39K-L5EY>]; Robert S. Chirinko & Daniel J. Wilson, *State Investment Tax Incentives: A Zero-Sum Game?*, 92 J. PUB. ECON 2362, 2362 (2008) (finding, generally, that investment tax incentives are typically a “zero-sum game” resulting in negligible capital formation). For discussion about sports stadia and Amazon’s HQ2, see *infra* notes 208–09.

²⁶ See PRINCIPLES, *supra* note 1, at 42–43.

doesn't merit a single mention in the Report.²⁷ The Report does criticize excessive use of criminal fines by local governments, as we saw in Ferguson, Missouri, acknowledging that such fines are often imposed on nonresidents or populations with less power in local politics.²⁸ But the Model Article proposes substantial expansions of, and no limits on, this power.²⁹ Again and again, the Report barely acknowledges any systematic problems with local authority and proposes reforms that would make it very hard for states to address these problems. Further, it does not propose any constitutional limits on local policing authority or power, which it clearly could have done. This would have been a limit on local authority, and so the Model Article does not go there.

Further, the Report does not propose any constitutional limits that would make increased local power more palatable. For instance, the Model Article does not contain any limits on local fragmentation. Local government scholars have long understood that powers and boundaries are the two major questions in the field.³⁰ But the Report explicitly avoids any policy recommendations about policies around changing local governmental boundaries. Given what else is in the Model Article, adopting it would mean granting a vast array of powers to the many relatively small local governments in metropolitan regions, allowing these governments to use their powers to exclude, increasing inequality and segregation.³¹ It would also increase patchwork policymaking at a time when region, rather than town, defines much of our economic and social life.³²

The Model Article does not propose any limits on local fiscal authority, even honest accounting rules, despite suggesting huge new funds being sent their way and prevalent concerns about accounting and budgeting practices surrounding many local governments' public employee pension systems.³³

I am not pointing out a few minor omissions. These issues have been the most important issues in local governance (or at least were, in the period before the COVID-19 crisis, which came as this paper went into its editing process).³⁴ A proposal to modify local governmental authority in 2020 that has nothing to say about the housing crisis, police brutality, public subsidies for private firms, and the pension crisis is problematic, to say the very least.

²⁷ To be fair, the Report was written before the George Floyd killing and the following protests. I suspect, had it been written in May 2020, it would have looked a bit different.

²⁸ See PRINCIPLES, *supra* note 1, at 45, 47–48.

²⁹ See *id.* at 42–44.

³⁰ See, e.g., Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 351, 374, 422, 429 (1990) (arguing that boundaries, tax-hoarding, and exclusion—more than varying powers—are the central problems facing our system of local governance).

³¹ See PRINCIPLES, *supra* note 1, at 34–37.

³² See generally Laurie Reynolds, *Intergovernmental Cooperation, Metropolitan Equity, and the New Regionalism*, 78 WASH. L. REV. 93 (2003).

³³ See, e.g., Schleicher, *Stuck*, *supra* note 17, at 141 (describing the power of pensioners in Detroit local government).

³⁴ See *supra* text accompanying note 11.

A review like this one cannot propose its own set of rules on preemption and local power. But any such effort to do so—like the Report—should make at least some effort to explain how it would improve governance in the policy areas that have dominated local political life in recent years.

With the exception of the vague but potentially radical requirement that the state legislature provide adequate revenue to all local governments, this is constitutional law for coastal Not in My Backyard (NIMBY) homeowners. The Report embraces the powers of local government to pass more regulations but does nothing to stop them from using those regulations to exclude and further segregation. It assumes local politics represent local preferences, something that is not true for many—particularly those who do not own homes.³⁵ The Report will find supporters among the kind of people who put up two lawn signs in front of their multimillion dollar homes, one that says “Immigrants Welcome,” while the other opposes an affordable housing project nearby.³⁶ For the rest of us, there is less to like.

One should not take this criticism as an unalloyed endorsement of state authority. State democracy is flawed as well. Many state legislatures have gone far further to restrict local authority than is wise. A constitutional reform that limits and shapes the way courts engage in their preemption analysis is warranted to some degree. Some parts of the Model Article, including some new and stronger limits on preemption, would be attractive had they been combined with efforts to reduce local exclusion and fragmentation, and increase local governmental responsiveness and accountability.

As it stands, though, the Model Article is too flawed for anyone to consider adopting.

II. WHAT DOES THE NLC’S MODEL CONSTITUTIONAL HOME RULE ARTICLE ACTUALLY CONTAIN?

The original two models for home rule laws were efforts at balance. The original *imperio in imperium* form of home rule responded to the restrictions of Dillon’s Rule by empowering local governments in a limited sphere of “local or municipal matters” and protecting them against override in local affairs.³⁷ The 1950s effort broadened the sphere of local authority (to “all delegable” legislative authority) but paired that with a barely-limited ability of the state legislature to override (and is hence sometimes called “legislative” home rule).³⁸

³⁵ See WILLIAM A. FISCHER, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES 4, 12 (2001).

³⁶ See Bill Nordwall (@billnordwall), TWITTER (Apr. 19, 2017, 2:43 PM), <https://twitter.com/billnordwall/status/854765246849863680> (on file with the *Ohio State Law Journal*) (picturing a house with such signs).

³⁷ See PRINCIPLES, *supra* note 1, at 10–12; see also BAKER ET AL., *supra* note 1, at 318.

³⁸ *City of New Orleans v. Bd. of Comm’rs*, 93-0690 (La. 7/5/94); 640 So. 2d 237, 243; see PRINCIPLES, *supra* note 1, at 12; see also BAKER ET AL., *supra* note 1, at 319.

As the Report notes, across the states, there is a mix of each of these styles of home rule, along with a whole host of other differences.³⁹ Further, the difference between these broad systems has declined: courts have interpreted the initiative and immunity portions of *imperio* home rule differently, creating very substantial spaces where cities can propose laws but can be overruled by states—a type of legislative home rule inside *imperio* systems.⁴⁰

This year’s effort, the Report, is *not* an effort at balance. It proposes a series of reforms.

A. *Local Authority*

Much like the 1950s AMA model constitutional amendment, the Model Article starts off with a grant to local governments of the power to legislate on any topic within its territorial bounds, bounded only by the terms of the state constitution and valid preemptive state laws.⁴¹ But it would expand that grant even further, removing restrictions on local governmental authority commonly found in state constitutions.⁴² The Model Article suggests that states remove any restrictions on local governmental power to pass new taxes or “private laws” like contract or tort laws.⁴³ It would also give local governments extensive power to engage in interlocal contracting, through a suggestion that they adopt the “power of one unit” approach, which allows local governments to contract with each other to do anything either government has the power to do.⁴⁴ Further, this section adds an interpretative clause that explicitly overrules Dillon’s Rule of narrow construction of legislative grants to local governments, and replaces with its opposite: a rule that any doubt about local authority be resolved in favor of its existence.⁴⁵

B. *Presumption Against Preemption*

Rather than freely allowing preemption, the Model Article creates a presumption against preemption.⁴⁶ This contains a number of elements. The Model Article requires any preemptive state law to be explicit, banning implied

³⁹ See PRINCIPLES, *supra* note 1, at 13.

⁴⁰ See, e.g., *Am. Fin. Servs. Ass’n v. City of Oakland*, 104 P.3d 813, 820 (Cal. 2005) (describing areas of mixed state and local concern in which cities can propose regulations but state can override them despite *imperio*-style home rule provision); *Town of Telluride v. Lot Thirty-Four Venture, L.L.C.*, 3 P.3d 30, 37 (Colo. 2000) (explaining the same).

⁴¹ PRINCIPLES, *supra* note 1, at 34.

⁴² See *id.* at 38–40.

⁴³ See *id.* at 24, 34.

⁴⁴ See Reynolds, *supra* note 32, at 122, 135 (describing the “power of one unit” approach).

⁴⁵ PRINCIPLES, *supra* note 1, at 51.

⁴⁶ *Id.* at 26, 35.

or field preemption.⁴⁷ Further, a state may preempt local authority “only if necessary to serve a substantial state interest, only if narrowly tailored to that interest, and only by general law.”⁴⁸ The first two are pretty self-explanatory, requiring substantial justification and evidence that the same end could not have been achieved through less preemptive means. The last requirement—“general law”—is a term of art, drawn from an Ohio judicial decision which bars much more than ordinary state constitutional limitations on “special legislation.”⁴⁹ To constitute a general law, a preemptive state law must:

⁴⁷ See *id.* at 53–54 (requiring “express-only” preemption and directly banning implied preemption).

⁴⁸ *Id.* at 35.

⁴⁹ The rule is taken from *City of Canton v. State*, 95 Ohio St.3d 149, 2002-Ohio-2005, 766 N.E.2d 963, ¶ 21, in which the Ohio Supreme Court overruled an effort by the state to force localities to allow manufactured housing. See PRINCIPLES, *supra* note 1, at 59. The fact that the Report would borrow a rule from a decision protecting such a blatantly exclusionary regulation—one clearly intended to limit the construction of affordable housing—reveals a great deal about what it was willing to ignore in order to find legal doctrines that protect local authority. See Anika Singh Lemar, *The Role of States in Liberalizing Land Use Regulations*, 97 N.C. L. REV. 293, 318–19 (2019) (showing that manufactured housing provides naturally-occurring affordable housing but is banned by many local governments as part of efforts to keep the poor out); Daniel K. Mandelker, *Zoning Barriers to Manufactured Housing*, 48 URBAN LAWYER 233, 233 (2016) (“Manufactured housing is a major affordable housing resource for millions of people. . . . [Z]oning barriers are all too common.”). Further, the status of *Canton* in Ohio law is extremely sharply disputed, with several Ohio Supreme Court justices calling for its reversal. See *City of Dayton v. State*, 151 Ohio St.3d 168, 2017-Ohio-6909, 87 N.E.3d 176, ¶ 54 (DeWine, J., dissenting) (“As demonstrated by a decade and a half of inconsistent case law—now including the lead opinion and concurrence in this case—the *Canton* test has proved unworkable. It is time we abandon the test and return to the language of the Home Rule Amendment.”); *Id.* ¶ 47 (O’Neill, J., dissenting) (citations omitted) (“[T]he test created in *Canton v. State* has become unworkable and . . . home-rule cases should be resolved by applying the text of the Constitution.”). *Canton* requires legislation apply equally to private and government officials, seemingly ruling out much state law that governs local governmental processes. For instance, *Canton* is pretty explicit that state laws setting standards about how local governments go about passing zoning laws would not be general laws. See *City of Canton* ¶ 37 (finding a state ban on local prohibitions on manufactured housing to violate the state’s home rule provision because the state did not prescribe zoning for the whole state and instead only regulated the decisions of government officials). The Report states, in extremely question-begging fashion:

To be sure, the *Canton* test is more robust than many states’ general-law requirements. In application, however, the *Canton* test does not prohibit all state regulation of local governments *qua* local governments, nor does it require that state law apply equally to local governments and to citizens generally. . . . The specification of the essential characteristics of an appropriately “general” exercise of the police power—including the concept that the state cannot solely single out local authority in order for state legislation to be considered “general”—provides courts with functional criteria and prevents the state from disabling local authority in the absence of a legitimate statewide regulatory purpose.

[B]e part of a statewide and comprehensive legislative enactment; apply to all parts of the state alike and operate uniformly throughout the state; set forth police, sanitary, or similar regulations, rather than purport only to grant or limit legislative power of a home rule government to set forth police, sanitary, or similar regulations; and prescribe a rule of conduct upon citizens generally.⁵⁰

Also, state regulations are understood to be “floors” unless there is express preemption.⁵¹ Localities can regulate more strictly but cannot permit weaker regulations.⁵² The Model Article also bans “punitive preemption,” or state laws aimed at stopping local governments from even challenging preemptive state laws.⁵³

The presumption against preemption in the Model Article would be a radical change from the way preemption is analyzed in any state. Most, although not all, of these provisions exist in some states, but the full suite of protections for local authority is unique to the Report.⁵⁴ Replacing a local law would go from a relatively easy thing for state legislatures to do to something that would require an express statement, the provision of a strong justification, an effort at narrow tailoring, and most radically, a replacement with a clear substantive state standard that applies everywhere in the state.⁵⁵ There would be substantial limits on the ability of states to direct local governance, as the general law standard requires that preemptive state laws apply equally to governmental and private citizens and proscribe rules of conduct, rather than processes.⁵⁶ Given limited state legislative capacity (both time and resources), this system would give localities either free rein to do what they wanted and/or huge power over the state legislative agenda, given the extensive time and effort legislatures would need to devote to knocking down local laws.⁵⁷

PRINCIPLES, *supra* note 1, at 59–60. The problem with this is that the interpretation the Report suggests *Canton* has had “in application” conflicts with the actual text the Model Article suggests for state constitutions. Perhaps Ohio courts have not taken the decision as far as the rhetoric contained within (although it has been used to overrule many preemptive state laws, as the Report notes). *See id.* at 59. But states adopting the constitutional text would likely start their analysis with, well, the text. And the text—and *Canton* itself—is pretty clear that laws that regulate local governmental decisions, rather than establishing specific substantive standards, are not allowed. And even the narrowest reading of *Canton* and the general law requirement would be particularly protective of local zoning and planning authority, which is one of the weaknesses of the Report as a whole. *See City of Canton* ¶ 38 (“[T]his statute, which attempts to limit the ability of political subdivisions to zone their communities as they see fit, strikes at the heart of municipal home rule: the orderly planning of a city”).

⁵⁰ PRINCIPLES, *supra* note 1, at 35.

⁵¹ *See id.* at 60.

⁵² *Id.* at 35.

⁵³ *Id.* at 21, 66.

⁵⁴ *See id.* at 12–19.

⁵⁵ *See* PRINCIPLES, *supra* note 1, at 54, 56, 58.

⁵⁶ *See id.* at 59.

⁵⁷ *See id.* at 60 (noting that the general law requirement “impos[es] a high bar on the state”).

C. Local Democratic Self-Government

Not content to end there, the Report goes on to establish an extra powerful presumption against preemption for local laws governing the structure of government or local elections.⁵⁸ Preemptive state laws in the areas of the organization of local government or local elections must be “acting to advance an overriding state concern.”⁵⁹ State courts have always been more protective of local democracy than other areas of local power, but this codifies and strengthens this.⁶⁰

D. State Support for Local Democracy

Finally, the Model Article creates an affirmative right for local governments and residents to state funds.⁶¹ The state legislature would be required to provide “equitable access to adequate intergovernmental aid to local governments.”⁶² This would effectively make all local services subject to the type of adequacy requirements we generally see in education clauses in state constitutions. The Report is extremely vague about what this requires, though. The basic concept is that the state would have an affirmative obligation to tax sufficiently and spend broadly enough to give local governments sufficient resources to provide a completely-undefined minimum level of services.⁶³

The Model Article also recommends limits on the ability of the state to put conditions on aid, outside of the expenditure of money granted, and bars the removal of state aid as a penalty for a local government exercising its home rule authority.⁶⁴

There are a few other small things in there, but it should be clear that this is not a restatement in the traditional sense. Many of the provisions are found in the law of some state or another, but there is no state that even comes close to this level of delegation to local authority.⁶⁵ Notably, the Report also explicitly eschews suggesting any limits or changes to the laws governing incorporation, annexation, or secession.⁶⁶ The new powers would be granted to all home rule

⁵⁸ PRINCIPLES, *supra* note 1, at 36.

⁵⁹ *Id.* at 30.

⁶⁰ See Joshua S. Sellers & Erin A. Scharff, *Preempting Politics: State Power and Local Democracy*, 72 STAN. L. REV. 1361, 1380 (2020) (“State courts have treated laws that preempt local governments’ structural decisions more skeptically than laws that preempt local regulatory authority.”).

⁶¹ See PRINCIPLES, *supra* note 1, at 37.

⁶² *Id.*

⁶³ See *id.* at 73.

⁶⁴ *Id.* at 37.

⁶⁵ To be fair, the Article does not include an *imperio*-style immunity from preemption provision. See *supra* text accompanying notes 37–40 (describing *imperio*-style home rule provisions). But, it is pretty clear (to this scholar at least) that the Article would be more protective of local authority than any actual state’s constitution by a substantial amount.

⁶⁶ See PRINCIPLES, *supra* note 1, at 31.

governments—not to all towns and villages, but to all governments currently granted home rule authority.⁶⁷ This universe varies by state, but almost inevitably includes many cities in a given metropolitan area.⁶⁸

Both *imperio* and the 1950s-era AMA version of home rule were understood as responses to particular policy problems and to the failures of the local government law regimes that came before them.⁶⁹ This report poses itself in the same way, an institutional design response to contemporary problems and to flaws that have emerged in the application of existing systems of home rule.⁷⁰

⁶⁷ See *id.* at 38–39.

⁶⁸ For instance, only roughly one-third of the 101 municipalities in the Boston metro area have decided to adopt city charters, but any of them could. DAVID J. BARRON, GERALD E. FRUG, & RICK T. SU, RAPPAPORT INST. FOR GREATER BOS., DISPELLING THE MYTH OF HOME RULE: LOCAL POWER IN GREATER BOSTON 4 (2004), https://www.mma.org/wp-content/uploads/2018/07/homerule_myth_legalstructure_0.pdf [<https://perma.cc/D5DY-P9AN>] (explaining legal structure of home rule in Massachusetts). Under the California Constitution, California cities can adopt a charter giving themselves full home rule authority. CAL. CONST. art. XI, § 3(a); LEAGUE OF CAL. CITIES, GENERAL LAW CITY V. CHARTER CITY (2011), https://www.cacities.org/Resources-Documents/Resources-Section/Charter-Cities/Chart_General_Law_v-Charter_Cities-07-26-11 [<https://perma.cc/2JBT-8TDC>] (describing the powers of charter cities and non-charter “general law” cities). Currently, California has 121 Charter cities. LEAGUE OF CAL. CITIES, CHARTER CITIES (2007), https://www.cacities.org/Resources-Documents/Resources-Section/Charter-Cities/Charter_Cities-List [<https://perma.cc/9MPY-9QYR>].

⁶⁹ See PRINCIPLES, *supra* note 1, at 9–13 (discussing the history and the impetus behind home rule).

⁷⁰ The Report is heavy on the latter but lacking in the former. I have argued that laws governing local authority—from Dillon’s Rule to home rule—have tracked and responded to the nature of agglomeration economies extant at the time. David Schleicher, *The City as a Law and Economic Subject*, 2010 U. ILL. L. REV. 1507, 1513–15 (2010) (arguing that both Dillon’s Rule and home rule provisions responded to changes in the economic sources of urban advantage). One might imagine that the Report would tie its recommendations to something about how the nature of the economy has changed. But the Report does not even really try to do this. It starts off by stating that urban and metropolitan populations and economies have grown substantially in recent years. PRINCIPLES, *supra* note 1, at 14–15. True enough! But that fact does not necessarily imply anything about the powers of local governments. Density likely creates more demand for government services, but it is not necessary that these services be provided by general-purpose local governments, rather than special-purpose local governments, public authorities, regional governments or the state directly. It is not clear that densification has created greater diversity of preferences and needs, justifying more powers for local governments. In many ways, metropolitan areas are more similar to one another than ever, as the economy has become more dependent on services (which are similar place to place) and less on goods (different goods are produced in different places). Cf. Ryan Avent, *Hyperglobalisation and Metropolitan Gravity*, ECONOMIST: FREE EXCH. (Oct. 24, 2013), <https://www.economist.com/node/21003975/blogs/freexchange/2010/01/18805673?page=59> [<https://perma.cc/H5NM-GBDB>]. Further, metropolitan growth creates substantial downsides for local regulatory power, as it makes it extremely likely that most individuals spend their days governed by multiple local governments (people commute to different places to work, different places to shop, etc.). In contrast, in rural areas, people are more likely to live and work in one local government.

It mentions the increased urbanization of America and recent policy innovation by some cities.⁷¹

It does not take much critical reading to see that the report is not quite what it claims to be. The report is clearly spurred by recent efforts by Republican-led state legislatures to preempt local authority in largely Democratic cities, sometimes through particularly coercive tools like “punitive preemption.”⁷² The motivation for the piece is clearly stated here:

States, however, are increasingly violating the spirit of this oversight authority. North Carolina’s preemption in the spring of 2016 of an ordinance passed by Charlotte that would have extended the city’s antidiscrimination protections to gay, lesbian, bisexual, and transgender people brought national attention to current state-local conflicts; similar examples have become commonplace. At least twenty-five states, for example, currently use their authority to preempt local minimum wage laws while twenty-two states prohibit local paid sick leave ordinances. In the public health arena, thirteen states now ban local food and nutrition policies, ten states prevent local governments from regulating e-cigarettes, and forty-three states limit the authority of local governments to regulate firearm safety. Similar statistics can be found for policies as diverse as civil rights, the environment, and emerging technologies (such as broadband and autonomous vehicles), not to mention core local governance functions such as municipal finance and local elections.⁷³

In its treatment of preemption, the Report is unbalanced, both rhetorically and substantively, including an ideological bent that it does not attempt to justify. More problematically, it does not even seem cognizant of other problems of local governance that the Model Article will worsen, even though those problems are a far bigger deal. And the Report barely discusses the potential radical elements of its fiscal proposals, providing almost no detail or explanation of what they mean, while attention is lavished on exploring the justifications for and elements of their preemption proposal.

III: THE POLITICAL FAILURE OF THE NLC REPORT

Let’s start with the Report’s obsession. The Report clearly understands the central, contemporary problem of local government to be that there are a bunch of mean, mean Republican-controlled state legislatures that keep overruling local authority in Democratic-run cities. States of all sorts, they argue, need to

Exactly what connection the Report seeks to draw between increased urbanization and the empowerment of extant municipal governments is left unexplained.

⁷¹ PRINCIPLES, *supra* note 1, at 14–15.

⁷² See Richard Briffault, Nestor Davidson, Paul A. Diller, Olatunde Johnson, & Richard C. Schragger, *The Troubling Turn in State Preemption: The Assault on Progressive Cities and How Cities Can Respond*, 11 ADVANCE: J. ACS ISSUE BRIEFS 3, 3–4 (2017).

⁷³ PRINCIPLES, *supra* note 1, at 16–17.

change their constitutions to stop this plague of preemption.⁷⁴ Notably, despite citing dozens of examples of preemption, the report mentions zero cases of home rule protecting non-politically liberal or left outcomes. It also barely mentions any cases about issues that do not neatly track national partisan alignments.

This bias towards treasuring local authority when it is liberal or left, but not when it takes other political forms is not merely rhetorical. In the presumption against preemption section, the report proposes that state constitutions be amended to be explicit that:

A home rule government may exercise and perform concurrently with the state any governmental, corporate, or proprietary power or function to the extent that the Legislature has not preempted local law pursuant to the preceding paragraphs. In exercising concurrent authority, a home rule government may not set standards and requirements that are lower or less stringent than those imposed by state law, but may set standards and requirements that are higher or more stringent than those imposed by state law, unless a state law provides otherwise.⁷⁵

The bias towards more regulation rather than less is clear. Absent express preemption, the state's regulatory standards are not rules to be adopted until local government act to strengthen or weaken them; they are always floors above which local governments can go. In justifying this, the report says: "For example, this latter clause helps local governments promote interests that are important to them—such as raising minimum wage requirements, broadening labor benefits, or strengthening environmental protections—but blocks local governments from acting to weaken state regulatory standards."⁷⁶ It is not hard to see what the authors of the Report think the point of the Article is.

As a matter of rhetoric, the Report broadly embraces local governance as a process value, suggesting it allows variation, experimentation, and fit to local tastes.⁷⁷ But variation, experimentation, and fit could be achieved through local regimes that were looser than state regulations too. The Report and Article do not allow for those outcomes. The arguments the Report offers do not fit with its clear ideological direction.

The Report could have made an effort to justify the left-bias of its approach. It could have simply said that the country needs more regulation and this is a good way to achieve it. After all, state constitutional amendments are often substantive, and there is nothing wrong with arguing that sections of the state constitution that deal with local government should enshrine a particular ideological vision. But it would then have to justify those arguments, rather than simply arguing in terms of devolution.

⁷⁴ See generally PRINCIPLES, *supra* note 1.

⁷⁵ *Id.* at 35.

⁷⁶ *Id.* at 60.

⁷⁷ *Id.*

Or the Report could argue that Republican Party preemption of “blue cities” is a particular problem requiring constitutional intervention. Paul Diller, drawing on Jonathan Rodden’s work, has argued convincingly that the fact that state legislatures use districted elections packs liberal urbanites into heavily Democratic districts, leaving state legislatures more Republican than the median voter.⁷⁸ Diller argues that home rule is a good response to this political problem.⁷⁹ Many others agree.⁸⁰ But to do that it would have to take a clear partisan stance that there is something wrong with the power Republicans have in state legislatures.

Either way, the Report would have to acknowledge that it is not simply making process-based arguments. Instead, it tries to hide an ideological agenda behind facially-neutral arguments about institutional design and the nature of local governance in the twenty-first century.

One wonders who the authors of this Report think their audience is. What person not convinced of the substance of the authors’ politics would accept a proposal with such a clear ideological valance? If the Report is going to propose something this ideological, why not just say that these are constitutional amendments primarily aimed at helping the cause of the Democratic Party in the South and Southwest? That would be something that readers could engage with. Instead, the Report pretends that an ideological effort is actually a neutral application of institutional design principles.

This is a political failure. The Report is not likely to fool anyone with its neutral language and should just have been clear about its political goals.

IV. THE POLICY FAILURES OF THE NLC REPORT

In its effort to address the problem of conservative legislative preemption, the Report ignores virtually everything else happening in local governance, including many problems that the Model Article would exacerbate. In a long Report full of examples of modern policy problems, here are some that are not mentioned or only barely discussed: exclusionary zoning, segregation, local

⁷⁸ See Paul A. Diller, *Reorienting Home Rule: Part 1—The Urban Disadvantage in National and State Lawmaking*, 77 LA. L. REV. 287, 336–51 (2016) (arguing that systematic Republican advantage in state legislatures provides a justification for home rule); see also JONATHAN RODDEN, *WHY CITIES LOSE: THE DEEP ROOTS OF THE URBAN-RURAL POLITICAL DIVIDE* 1–3, 7–13 (2019) (arguing that because districts in dense cities naturally pack together left-leaning voters, the use of districting—rather than propositional representation—aids right-leaning parties).

⁷⁹ See Paul A. Diller, *Reorienting Home Rule: Part 2—Remedying the Urban Disadvantage through Federalism and Localism*, 77 LA. L. REV. 1045, 1077–96 (2017).

⁸⁰ See David A. Graham, *Red State, Blue City*, THE ATLANTIC (Mar. 2017), <https://www.theatlantic.com/magazine/archive/2017/03/red-state-blue-city/513857/> [https://perma.cc/U2AB-5BQ6] (arguing that “Red State” preemption is a major social problem); see also Kalena Thomhave, *Blue City Challenge: Clawing Back Power from Red States*, AM. PROSPECT (May 15, 2019), <https://prospect.org/economy/blue-city-challenge-clawing-back-power-red-states/> [https://perma.cc/3GRY-5WJ6] (same).

subsidies for company location (think Amazon HQ2), annexation and secession, municipal bankruptcies (like Detroit), and local pension problems. Its one-paragraph discussion of Ferguson, Missouri suggests that granting that city more authority will make its decisions fairer, ignoring the deep problems of representation and accountability in local democracy in places like Ferguson.⁸¹ Its one paragraph discussion of the single-most important local power—control over land use and zoning—cites only few contradictory and vague potential limits on local authority.⁸²

The economic and social harms created by local exclusion through zoning and other regulations, local democratic failure, inter-local conflicts and resource hoarding, and local fiscal crises are much bigger problems than the ones addressed in this report. But the Report is so obsessed with problematic forms of state preemption that it proposes changes that will exacerbate these other problems.

Let me go through these a little more directly.

A. Zoning and Exclusion

Zoning and other land use controls have always been about exclusion, at least in part.⁸³ Starting soon after the Supreme Court struck down racial zoning in *Buchanan v. Warley*, the first zoning codes in the United States were committed to keeping single-family areas free from apartments and flop houses, and did so in part to keep these areas racially and economically exclusive.⁸⁴ During the post-World War II era, the desire for a single-family home of one's own away from densely populated, racially-diverse cities helped drive suburbanization, among other forces.⁸⁵ The use of zoning and other land use controls like minimum lot sizes in suburbs stopped newly-built suburbs from ever densifying.⁸⁶ Zoning was far from the only tool of racial and economic

⁸¹ PRINCIPLES, *supra* note 1, at 45.

⁸² *Id.*

⁸³ There were, and are, many other goals, of course—such as nuisance minimization and planning public services.

⁸⁴ See *Buchanan v. Warley*, 245 U.S. 60, 82 (1917); SONIA A. HIRT, *ZONED IN THE USA: THE ORIGINS AND IMPLICATIONS OF AMERICAN LAND-USE REGULATION* 1–15 (2014) (describing how zoning in the United States has always been unique from any other system in the world to the extent it protects single-family home zones from apartments or retail); SEYMOUR I. TOLL, *ZONED AMERICAN* 190–210 (1969) (describing how the protection of single family zones was a crucial factor in zoning's popularity and spread); TROUNSTINE, *supra* note 17, at 84 (making a direct connection between the rise of economic zoning and decline of racial zoning).

⁸⁵ See generally Robert J. Reinstein, Gerald McFadden, Susan A. Feder, & Robert E. Kerper, Jr., *A Case of Exclusionary Zoning*, 46 TEMP. L.Q. 7 (1972) (outlining the post-war suburban boom as well as the racial and zoning issues that helped instigate it).

⁸⁶ See TROUNSTINE, *supra* note 17, at 185; Robert C. Ellickson, *The Zoning Strait-Jacket: The Freezing of American Neighborhoods of Single-Family Houses* 9–23 (Jan. 7, 2020) (unpublished manuscript) (on file with the *Ohio State Law Journal*) (showing that,

segregation, nor was exclusion the only goal of zoning. But the two are certainly and necessarily intertwined.⁸⁷

Through the 1970s and 1980s, the central political challenge to zoning was that it was economically and racially exclusive at the level of the individual town.⁸⁸ Rich suburbs used zoning to reduce construction and to ensure high per capita property values, keeping outsiders from accessing the high quality services paid for with taxes on those high per capita property values.⁸⁹ There were well-known legal and political challenges to exclusionary zoning in the suburbs, from the *Mt. Laurel* cases to the Fair Housing Act's requirement that federal agencies encourage recipients of federal money to "affirmatively further fair housing."⁹⁰ Well-known legal scholar Charles Haar famously argued that there should be a "constitutional right to live in the suburbs."⁹¹

But no one thought zoning had effects on housing prices at the regional level. Big cities, a few pro-growth suburbs, and exurban areas allowed for enough construction of new housing such that people could be housed and access regional job markets.⁹²

But, starting in the 1970s and 1980s, this changed.⁹³ As demand to live in them increased, big cities in our richest and most innovative metropolitan areas became less hospitable to growth, and sprawl hit some natural limits (and the few pro-growth suburbs changed their tune).⁹⁴ Each town and city excluded new development and, in so doing, created limits on growth at the metropolitan level.⁹⁵ When paired with strong demand, zoning restrictions started to drive up

once built, single-family neighborhoods with detached houses in the United States rarely ever densify, largely because of zoning regulations).

⁸⁷ See generally Reinstein et al., *supra* note 85.

⁸⁸ See Schleicher, *City Unplanning*, *supra* note 16, at 1684 (reviewing the literature).

⁸⁹ See Bruce W. Hamilton, *Zoning and Property Taxation in a System of Local Governments*, 12 URB. STUD. 205, 210–11 (1975); Schleicher, *City Unplanning*, *supra* note 16, 1680–92.

⁹⁰ See Robert G. Schwemm, *Overcoming Structural Barriers to Integrated Housing: A Back-to-the-Future Reflection on the Fair Housing Act's "Affirmatively Further" Mandate*, 100 KY. L.J. 125, 127 (2011) (discussing history of affirmatively furthering fair housing requirement in the Fair Housing Act). See generally Roderick M. Hills, Jr., Essay, *Saving Mount Laurel?*, 40 FORDHAM URB. L.J. 1611 (2013) (discussing the *Mount Laurel* cases and their aftermath).

⁹¹ CHARLES M. HAAR, *SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES* 133–36 (1996).

⁹² See Schleicher, *City Unplanning*, *supra* note 16, at 1693.

⁹³ See generally Fischel, *supra* note 16; Ganong & Shoag, *supra* note 17.

⁹⁴ See Schleicher, *City Unplanning*, *supra* note 16, at 1692–99 (describing increased restrictiveness of cities). See generally Robert C. Ellickson, *Zoning and the Cost of Housing: Evidence from Silicon Valley, Greater New Haven, and Greater Austin* (Jan. 20, 2020) (unpublished manuscript) (on file with the *Ohio State Law Journal*) (describing the decline of pro-growth suburbs).

⁹⁵ See Schleicher, *City Unplanning*, *supra* note 16, at 1692–99.

prices at the regional level in places like San Francisco and New York.⁹⁶ This process has even stalled national economic convergence.⁹⁷ In the hundred or so years before the 1980s, the poorest and richest states were getting closer together in per capita economic performance, as capital flowed to poor states and workers moved to richer ones.⁹⁸ But, among strictly zoned states, this process slowed in the 1980s and has now stopped completely.⁹⁹

The collective effects of local land use rules in rich metropolitan areas on the broader economy are enormous. We have had economic booms in some metropolitan areas—Silicon Valley, New York—but not boomtowns, as workers cannot move to the places where their labor is most valuable and best remunerated.¹⁰⁰ Scholars using a variety of methods have attempted to estimate how big an effect this is, and the numbers they have come up with are almost incomprehensibly large.¹⁰¹ For instance, two prominent papers find that the negative effect of zoning restrictions in just three big, rich metropolitan areas is larger than eight percent of the U.S. economy.¹⁰² And these effects are all based on the effect zoning regulations have on current wages—that is, how much more people would earn if they were able to move—not on the effect on innovation, which is also linked to greater density in rich metros.¹⁰³

The effect zoning regulations have had on economic inequality is no less dramatic. In rich regions, housing prices have appreciated so much that we regularly describe them as suffering from a housing crisis, not just in a few isolated areas, but in the entire state of California and in metro areas like New York, Washington D.C., and Boston (with other metros catching up).¹⁰⁴ When

⁹⁶ See Edward L. Glaeser, Joseph Gyourko, & Raven Saks, *Why Is Manhattan So Expensive? Regulation and the Rise in Housing Prices*, 48 J.L. & ECON. 331, 332–51 (2005) (discussing effects on prices); Schleicher, *City Unplanning*, *supra* note 16, at 1692–99 (same).

⁹⁷ Ganong & Shoag, *supra* note 17, at 89–90.

⁹⁸ See *id.* at 76.

⁹⁹ *Id.*

¹⁰⁰ See Schleicher, *Stuck*, *supra* note 17, at 83, 101; Emily Badger, *What Happened to the American Boomtown?*, N.Y. TIMES: THE UPSHOT (Dec. 6, 2017), <https://www.nytimes.com/2017/12/06/upshot/what-happened-to-the-american-boomtown.html> [<https://perma.cc/9L45-8YRN>].

¹⁰¹ See generally, e.g., Hsieh & Moretti, *supra* note 17 (estimating land use restrictions in just a few metropolitan areas decrease GDP by more than eight percent); Gilles Duranton & Diego Puga, *Urban Growth and Its Aggregate Implications* (Nat'l Bureau of Econ. Research, Working Paper No. 26491, 2019) (same); Kyle F. Herkenhoff, Lee E. Ohanian, & Edward C. Prescott, *Tarnishing the Golden and Empire States: Land-Use Restrictions and the U.S. Economic Slowdown* (Nat'l Bureau of Econ. Research, Working Paper No. 23790, 2017), <https://www.nber.org/papers/w23790.pdf> [<https://perma.cc/F2DX-FYVM>] (finding that deregulating all regions to 1980 levels of land use law would increase productivity by ten percent).

¹⁰² See Hsieh & Moretti, *supra* note 17, at 26; Duranton & Puga, *supra* note 101, at 3.

¹⁰³ See Schleicher, *City Unplanning*, *supra* note 16, at 1692–99 (making this argument).

¹⁰⁴ See, e.g., Jill Cowan, *Can the Housing Crisis Be Solved?*, N.Y. TIMES (Feb. 21, 2020), <https://www.nytimes.com/2020/02/21/us/california-affordable-housing.html>

housing prices increase, the rich can continue to move in, but poorer residents cannot, and thus the rich can access job markets and growth opportunities denied to others.¹⁰⁵ Matthew Rognile shows that a large percentage of Thomas Piketty's famous "R>G" finding comes from appreciation in land prices.¹⁰⁶ And high housing prices have created a homelessness crisis in many places.¹⁰⁷ Further, density limits in dense cities and inner ring suburbs create vast amounts of extra greenhouse gas emissions, as they encourage people to live far away and commute by car or to move to regions that are less dense and hence more car dependent.¹⁰⁸

These new inter-regional effects of zoning on migration and economic growth did not mean that the pre-1980 analysis that zoning in rich towns led to segregation and tax hoarding went away.¹⁰⁹ Just the opposite; they became more extreme.¹¹⁰ And tax hoarding and segregation are problems everywhere, occurring not just in the Los Angeleses and Bostons of the country, but in almost every metropolitan area.¹¹¹

The housing crisis, slow economic growth, and segregation are major social problems. Economists and political scientists have shown that local governments' land use regulations are a major cause of each of these problems.¹¹² Any comprehensive discussion about local power in 2020 should

[<https://perma.cc/3VLA-EV63>] (describing California's housing crisis); Eric Kober, *Supply-Side Housing Solutions*, CITY J. (Oct. 24, 2019), <https://www.city-journal.org/supply-side-solutions-ny-housing-shortage> [<https://perma.cc/7T9C-ZZAW>] (describing New York's housing crisis); Shirley Leung, *We Need More—and Faster—Fixes for the Housing Crisis*, BOS. GLOBE (Oct. 16, 2019), <https://www.bostonglobe.com/business/2019/10/16/need-more-and-faster-fixes-for-housing-crisis/kidZt6ss0b1p42CgD6pHHP/story.html> [<https://perma.cc/BHK5-7ETY>] (describing Boston's housing crisis); Robert McCartney, *D.C. Region's Leaders Face Big Challenges as They Tackle Affordable-Housing Shortage*, WASH. POST (Sept. 4, 2019), https://www.washingtonpost.com/local/dc-regions-leaders-face-big-challenges-as-they-tackle-affordable-housing-shortage/2019/09/03/8d155496-ce77-11e9-8c1c-7c8ee785b855_story.html [<https://perma.cc/FVV6-BFFW>] (describing Washington D.C.'s housing crisis).

¹⁰⁵ See Schleicher, *Stuck*, *supra* note 17, at 81–83, 101, 104–07. See generally Ganong & Shoag, *supra* note 17.

¹⁰⁶ See generally Matthew Rognlie, *Deciphering the Fall and Rise in the Net Capital Share: Accumulation or Scarcity?*, 2015 BROOKINGS PAPERS ON ECON. ACTIVITY 1 (2015).

¹⁰⁷ See GABRIEL PETEK, CALIFORNIA LEGISLATIVE ANALYST'S OFFICE, THE 2020–21 BUDGET: THE GOVERNOR'S HOMELESSNESS PLAN 1, 3 (2020), <https://lao.ca.gov/reports/2020/4152/homelessness-plan-021120.pdf> [<https://perma.cc/N95Z-3C24>] (explaining how housing costs in California have led to homelessness).

¹⁰⁸ See Christopher Jones & Daniel M. Kammen, *Spatial Distribution of U.S. Household Carbon Footprints Reveals Suburbanization Undermines Greenhouse Gas Benefits of Urban Population Density*, 48 ENVTL. SCI. & TECH. 895, 900 (2014).

¹⁰⁹ See TROUNSTINE, *supra* note 17, at 78–97.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 88 (explaining the sample sizes of Trounstine's calculations of zoning trends include 4,293 city-years from 240 cities).

¹¹² See John Infranca, *The New State Zoning: Land Use Preemption Amid a Housing Crisis*, 60 B.C. L. REV. 823, 830–34 (2019) (describing how land use regulation contributes

address the problems created by excessive zoning restrictions. But here's the sum of what the Report says about the problem of local exclusion.

No level or type of government is perfect and there can be legitimate governance concerns at the local level. Local governments can be parochial or insular and some have undoubtedly used their authority for invidious exclusion. As much as these issues must be addressed—they must and can through a variety of appropriately targeted legal doctrines—it is still critical not to let specific local challenges be a reason to disenfranchise local governments generally.¹¹³

This is the “#NotAllMen” of local government law arguments.¹¹⁴ To say that a few local governments engage in exclusion is to ignore the modern reality that most local governments—particularly rich ones—engage in exclusion to one degree or another, and a huge number do so in ways that both harm economic efficiency and equity. The cumulative effect of this exclusion is to create huge economic and social problems. #NotAllLocalGovernments just will not do as a claim here.

States already give local governments the power to zone and to pass other land use regulations.¹¹⁵ But the Model Article would bar many efforts to restrict local authority over land use, and thus would make local exclusion an even bigger problem.

For most of the history of zoning, local governments were largely given free rein to regulate land uses and densities as they saw fit.¹¹⁶ In the 1960s and 70s, a “quiet revolution” led to states being more involved in land use.¹¹⁷ Many of the regulations from this era created a “double veto” for development, creating another hurdle for developers.¹¹⁸

to the housing crisis); *see also* Jessica Trounstein, *The Geography of Inequality: How Land Use Regulation Produces Segregation*, 114 AM. POL. SCI. REV. 443, 449–53 (2020) (describing how land use regulation contributes to segregation); Duranton & Puga, *supra* note 101, at 2 (describing how land use regulation contributes to slow economic growth).

¹¹³ PRINCIPLES, *supra* note 1, at 19.

¹¹⁴ *See generally* Jess Zimmerman, *Not All Men: A Brief History of Every Dude's Favorite Argument*, TIME (Apr. 28, 2014), <https://time.com/79357/not-all-men-a-brief-history-of-every-dudes-favorite-argument/> (on file with the *Ohio State Law Journal*).

¹¹⁵ *See* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 390–97 (1926). *See generally* David L. Krooth, *Control of Land Use in the United States: Statutory Developments and the Case of New Communities*, 4 URB. LAW. 519 (1972) (noting the delegation of land use power from states to local governments).

¹¹⁶ *See* Patricia E. Salkin, *The Quiet Revolution and Federalism: Into the Future*, 45 J. MARSHALL L. REV. 253, 257 (2012).

¹¹⁷ *See id.* at 254–55 (describing the history of the “quiet revolution”). *See generally* FRED BOSSELMAN & DAVID CALLIES, THE QUIET REVOLUTION IN LAND USE CONTROL (1971) (describing and naming the Quiet Revolution).

¹¹⁸ *See* Fischel, *supra* note 16, at 28; Christopher S. Elmendorf, *Beyond the Double Veto: Housing Plans as Preemptive Intergovernmental Compacts*, 71 HASTINGS L.J. 79, 82 (2019) (describing the history of “double veto”). Notably, because of the Model Article's statement

But in recent years, however, state concern with collective action among local government, for the welfare of residents outside of local boundaries and renters, as well as worries about broader economic growth, have led to many state efforts at preempting local authority.¹¹⁹ California has beefed up its “regional housing needs assessment” system to—for the first time—ask cities to allow real increases in housing growth, and taken steps toward imposing penalties in the form of “builder’s remedies” for not doing so.¹²⁰ California also adopted a state version of the federal law affirmatively furthering fair housing requirements.¹²¹ Oregon requires local governments to allow duplexes on substantially all lots and to allow for the building of more dense building types somewhere in every single-family zone in big cities.¹²² Just this year, states from Nebraska to Virginia have considered substantial statewide reforms.¹²³ Other states have proposed tying transportation or other funding streams to local relaxation of zoning regulations.¹²⁴

that local laws, particularly environmental laws, can be stricter than state standards absent a clear preemptive statement by the legislature, but not less strict, most of the Quiet Revolution laws would continue to apply their “double veto” of new development.

¹¹⁹ Elmendorf, *supra* note 118, at 85–95 (describing rise of pro-housing state interventions); Infranca, *supra* note 112, at 836–46 (describing the same).

¹²⁰ See Elmendorf, *supra* note 118, at 100–05 (describing California reforms). They did not go as far as they should have gone in beefing up RHNA allocation levels, but there have already been substantial changes. See Hillary Davis, Julia Sclafani, & Luke Money, *Potential Housing Mandates Take Coastal Cities by Surprise*, L.A. TIMES (Nov. 16, 2019), <https://www.latimes.com/socal/daily-pilot/news/story/2019-11-16/potential-housing-mandates-take-coastal-cities-by-surprise> [<https://perma.cc/Y5YE-CBBN>] (discussing the adoption of new higher housing targets for coastal cities in the Los Angeles region).

¹²¹ See *California Enacts Affirmatively Furthering Fair Housing Law*, NAT’L LOW INCOME COALITION (Oct. 9, 2018), <https://nlihc.org/resource/california-enacts-affirmatively-furthering-fair-housing-law> [<https://perma.cc/9FGJ-DTRW>] (describing state fair housing law).

¹²² See Elmendorf, *supra* note 118, at 106 (describing Oregon reforms); Michael Andersen, *Oregon Just Voted to Legalize Duplexes on Almost Every City Lot*, SIGHTLINE INST. (June 30, 2019), <https://www.sightline.org/2019/06/30/oregon-just-voted-to-legalize-duplexes-on-almost-every-city-lot/> [<https://perma.cc/K397-Q7Y7>] (describing the same).

¹²³ James Brasuell, *‘Missing Middle Housing Act’ Would Allow More Housing Options in Nebraska Residential Areas*, PLANETIZEN (Jan. 13, 2020), <https://www.planetizen.com/news/2020/01/108025-missing-middle-housing-act-would-allow-more-housing-options-nebraska-residential> [<https://perma.cc/58PJ-LNZ5>] (describing proposal in Nebraska); Kriston Capps, *With New Democratic Majority, Virginia Sees a Push for Denser Housing*, BLOOMBERG CITYLAB (Dec. 20, 2019), <https://www.citylab.com/equity/2019/12/virginia-legislature-statewide-upzoning-law-codes-ordinance/602818/> [<https://perma.cc/SDH6-ZTQA>] (detailing a legislative proposal to relax zoning in Virginia).

¹²⁴ Laura Bliss, *California’s New Governor Would Punish Cities over Affordable Housing*, BLOOMBERG CITYLAB (Jan. 11, 2019), <https://www.citylab.com/transportation/2019/01/gavin-newsom-housing-reform-transportation-budget-homeless/580192/> [<https://perma.cc/3PN5-GLLA>] (discussing Governor Newsom’s proposal to restrict transportation dollars for excessively restrictive cities).

All of these efforts would be at risk if a state adopted this form of home rule. While a state could preempt specific types of local zoning policy, it would have to target them narrowly and offer substantial justifications for each restriction. How many of the policies listed above would pass the test set out in the Model Article? How many of them would be sufficiently narrowly tailored? Would they be “general law” in that they apply equally to citizens and governments? What about laws like Massachusetts and Connecticut’s “anti-snob zoning” acts?¹²⁵ The Minnesota planning requirements that led to the well-regarded Minneapolis 2040 replanning and upzoning?¹²⁶ State laws preempting local regulations that ban mobile homes?¹²⁷ I suspect many of these would not qualify as “general law” and would be struck down. At the very least, judges—who often represent NIMBYish local politics at their worst¹²⁸—would have tons of new tools to strike down such efforts. And some state efforts, like conditioning spending on allowing new housing, would clearly be ruled out.

Here’s the full extent of what a sixty-four page report and recommendation has to say about zoning, which is clearly one of, if not the, most important regulatory tools of local governments:

Some courts—particularly in policy areas such as housing and the environment—have reminded local governments of their affirmative obligation to consider the impact of local policy on others outside the jurisdiction who might be significantly affected by the government’s exercise of its delegated police power authority. *See, e.g., Associated Homebuilders, Inc. v. City of Livermore*, 557 P.2d 473, 487 (Cal. 1976) . . . *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel*, 336 A.2d 713, 725, 726 (N.J. 1975) The Supreme Court too has recognized the

¹²⁵ *See generally* Terry J. Tondro, *Connecticut’s Affordable Housing Appeals Statute: After Ten Years of Hope, Why Only Middling Results?*, 23 W. NEW ENG. L. REV. 115 (2001) (discussing a similar law in Connecticut); Paul K. Stockman, Note, *Anti-Snob Zoning in Massachusetts: Assessing One Attempt at Opening the Suburbs to Affordable Housing*, 78 VA. L. REV. 535 (1992) (discussing Massachusetts’s 40B “anti-snob” zoning act).

¹²⁶ *Land Use Planning—The Metropolitan Land Use Planning Act—Act of Apr. 2, 1976, Ch. 127, 1976 Minn. Laws 292*, 3 WM. MITCHELL L. REV. 305, 305–10 (1977) (analyzing the Minnesota replanning statute); Patrick Sisson, *Can Minneapolis’s Radical Rezoning Be a National Model?*, CURBED (Nov. 27, 2018), <https://www.curbed.com/2018/11/27/18113208/minneapolis-real-estate-rent-development-2040-zoning> (on file with the *Ohio State Law Journal*).

¹²⁷ *See City of Canton v. State*, 95 Ohio St.3d 149, 2002-Ohio-2005, 766 N.E.2d 963, ¶ 10–11 (striking down state law barring local governments from banning manufactured housing as a non-general law).

¹²⁸ In New York City in recent months, courts have gone on a particular anti-development tear. *See* Stefanos Chen, *The People vs. Big Development*, N.Y. TIMES (Feb. 7, 2020), <https://www.nytimes.com/2020/02/07/realestate/the-people-vs-big-development.html> [<https://perma.cc/WH5H-2P4K>]; Steve Cuzzo, Opinion, *Judges’ Suck-Up to the NIMBY Mob Puts Even Existing NYC Buildings at Risk*, N.Y. POST (Feb. 18, 2020), <https://nypost.com/2020/02/18/judges-suck-up-to-the-nimby-mob-puts-even-existing-nyc-buildings-at-risk/> [<https://perma.cc/728R-C7DU>].

possibility that extra-local impacts may impose limits on local governments. See *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 390 (1926). . . .

In short, this provision acknowledges the general welfare limits embodied in many state constitutions as a possible limit on local authority exercised in accordance with this Article. . . . Moreover, states may have a substantial interest in ensuring that home rule governments share in the social, economic, environmental, or other responsibilities of a metropolitan area or region in which they are located, and that state interest could meet the requirements of Sections C and D of this Article, if tailored appropriately.¹²⁹

To start, the first paragraph is either confusing or confused. *Livermore* and *Mt. Laurel* do both acknowledge the possibility that local regulations might harm regional interests and thus go beyond statutory and constitutional limits on that city's power.¹³⁰ But *Livermore* denied a challenge to a moratorium on all development inside a city, effectively allowing local governments to exclude without constraint, despite creating the theoretical possibility that a city would exceed its zoning authority by creating regional harms.¹³¹ In contrast, *Mt. Laurel* is the single biggest judicial intrusion on local zoning authority, imposing serious constraints on local power.¹³² Citing them both for the same proposition is not false, but it is misleading. When *Euclid*—the classic case in which the Supreme Court announced that zoning was constitutionally permissible and that apartment houses in single-family neighborhoods were “mere parasite[s],” while including a throwaway line about potential regional harms—is added in, this paragraph becomes effectively meaningless.¹³³ In a state that adopts the Model Article, a court still could limit local zoning authority, I suppose, but there is nothing in the Model Article or the Report that suggests they should do so.

The second quoted paragraph notes that states could overrule local zoning rules if their preemptive efforts meet the requirements of express preemption, necessity, narrow tailoring, and sourcing from general law.¹³⁴ But the whole point of the Report is to make exactly this kind of preemption harder!¹³⁵

Further, narrowly-tailored express preemption is an extraordinarily bad fit for addressing local exclusionary land use policies.¹³⁶ Cities have a whole host

¹²⁹ PRINCIPLES, *supra* note 1, at 49–50.

¹³⁰ See *id.* at 50.

¹³¹ See *Associated Home Builders v. City of Livermore*, 557 P.2d 473, 476, 487 (Cal. 1976).

¹³² See generally Hills, Jr., *supra* note 90.

¹³³ See *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 392, 394–95 (1926).

¹³⁴ PRINCIPLES, *supra* note 1, at 50.

¹³⁵ *Id.* at 21.

¹³⁶ Further, many types of local regulation do not have a large effect on housing prices on their own, but instead work as part of a web of regulations restricting housing supply and thus increasing housing prices. For instance, if a city engages in substantial amounts of historic preservation, it will not affect housing prices as a whole if the city allows lots of

of tools for restricting development: not only zoning, but discretionary reviews, subdivision requirements, impact fees, parking requirements, and many others.¹³⁷ When states target one exclusionary policy, local governments regularly respond using their other tools, with restrictions coming back hydraulic-like.¹³⁸ As a result, the best states could do under the Model Article is to play whack-a-mole against the excesses of local restriction. At worst, there would be effectively nothing they could do to stop the richest places in America from stopping new development and profiting from the harm they create for the broader economy and the least well-off.

Consider the case of California's Accessory Dwelling Unit (ADU) policy. ADUs, or granny flats, are small independent housing units added to single-family houses, either within the existing building envelope or alongside it.¹³⁹ They are the gentlest form of densification.¹⁴⁰ In 1982, California passed a landmark law requiring local governments to permit ADUs.¹⁴¹ In 2002, seeing that the 1982 law did not do much, California passed another law, requiring ADUs to be approved on a "ministerial" rather than discretionary basis.¹⁴² What followed? Nothing.¹⁴³ As Margaret Brinig and Nicollet Stelle Garnett showed in a terrific article, local governments around California were able to use their multiple powers to regulate land use to frustrate the building of any ADUs.¹⁴⁴ Cities like San Francisco and San Diego tried to pass the least accommodating ADU laws possible; Santa Cruz barred owners from renting out ADUs, making them less useful; and dozens of cities imposed lot size, parking or street frontage requirements that made ADUs infeasible.¹⁴⁵ Over the past twenty years, the California legislature has been forced to pass a series of laws knocking down

density on other lots. Under the Model Article, however, preemptive state laws that bar local governments from engaging in one type of land use restriction may fail the justification and tailoring requirements, as reducing one and only one type of restriction will often only have a marginal effect on housing prices.

¹³⁷ See Margaret F. Brinig & Nicole Stelle Garnett, *A Room of One's Own? Accessory Dwelling Unit Reforms and Local Parochialism*, 45 URB. LAW. 519, 544–45 (2013).

¹³⁸ See Nisma Gabobe, *California Looks to a Future Beyond Single-Detached House Zoning*, SIGHTLINE INST. (Nov. 22, 2019), <https://www.sightline.org/2019/11/22/california-looks-to-a-future-beyond-single-detached-house-zoning/> [<https://perma.cc/ED8T-B2WZ>] (explaining how localities enact extensive restrictions to limit statewide ADU policies and prevent homeowners from building).

¹³⁹ See Brinig & Garnett, *supra* note 137, at 520.

¹⁴⁰ See Patrick Sisson, *Why Tiny ADUs May Be a Big Answer to the Urban Housing Crisis*, CURBED (Jan. 16, 2018), <https://www.curbed.com/2018/1/16/16897014/adus-devel-opment-us> (on file with the *Ohio State Law Journal*).

¹⁴¹ See Brinig & Garnett, *supra* note 137, at 541.

¹⁴² *Id.* at 523, 541–42. Would this law have been a "general" law? Perhaps not, as it sets out standards for local governmental action, and not just general standards of conduct. The 1982 law may not have passed muster either under the Model Article.

¹⁴³ *Id.* at 520–24.

¹⁴⁴ See *id.*

¹⁴⁵ *Id.* at 547, 549–55.

local resistance to ADUs.¹⁴⁶ Only after 2016 and 2017 reforms have we seen any real growth in ADU construction (and that was slow enough that the legislature needed to pass a new reform in 2019).¹⁴⁷

It is nothing short of remarkable that California has, over the course of the twenty-five years, passed, roughly speaking, the same law over and over again to overcome local resistance to ADUs.¹⁴⁸ In the meantime, California's housing shortage went from a local problem to a national crisis.¹⁴⁹ This type of effort is effectively the only way states could preempt local zoning rules under the Model Article (and it's not clear many of these ADU laws would have been constitutionally acceptable under the Model Article).

The housing crisis is one of the biggest economic and social problems of our day.¹⁵⁰ It is a local government law problem.¹⁵¹ And the Model Article would make efforts to solve it difficult or impossible. The authors of the Report might argue that allowing state override has not led to enough housing production. But there are some useful state interventions, and far more stories of that type than instances where we have seen local governments liberalizing land use policies on their own.¹⁵² Further, the Report proposes slanted versions of preemption in other contexts, and there would be nothing to stop it from suggesting a version that made efforts to stop local exclusion harder while protecting other local laws.¹⁵³

Also, exclusion is not merely about residential zoning. Commercial zoning can be about exclusion, jurisdictions too good for Dollar Stores or Wal-Marts keeping them and their low-priced goods away (and thus excluding the poor and middle-class shoppers).¹⁵⁴ Policing can be about exclusion, as my colleague

¹⁴⁶ See Gabobe, *supra* note 138.

¹⁴⁷ See Josh Cohen, *California ADU Applications Skyrocket After Regulatory Reform*, NEXT CITY (Jan. 4, 2018), <https://nextcity.org/daily/entry/california-adu-applications-skyrocket-after-regulatory-reform> [<https://perma.cc/9HM7-KSNC>] (describing how 2016 and 2017 laws actually led to construction of ADUs); Patrick Sisson, *Will California's New ADU Laws Create a Backyard Building Boom?*, CURBED (Oct. 11, 2019), <https://www.curbed.com/2019/10/11/20909545/adus-development-california-real-estate-housing-shortage> (on file with the *Ohio State Law Journal*) [hereinafter Sisson, *California's New ADU Laws*] (describing 2017 and 2019 laws).

¹⁴⁸ See Brinig & Garnett, *supra* note 137, at 523–24, 541–42; Sisson, *California's New ADU Laws*, *supra* note 147.

¹⁴⁹ See Patrick Sisson, Jeff Andrews, & Alex Bazeley, *The Affordable Housing Crisis, Explained*, CURBED (Mar. 2, 2020), <https://archive.curbed.com/2019/5/15/18617763/affordable-housing-policy-rent-real-estate-apartment> (on file with the *Ohio State Law Journal*).

¹⁵⁰ See *id.*

¹⁵¹ See PRINCIPLES, *supra* note 1, at 15, 18.

¹⁵² See Cohen, *supra* note 147.

¹⁵³ See PRINCIPLES, *supra* note 1, at 16–17.

¹⁵⁴ See Steven Malanga, *Unjust Deserts*, CITY J. (Jan. 3, 2020), <https://www.city-journal.org/banning-dollar-stores> [<https://perma.cc/3W3B-38HT>] (describing effects of bans on dollar stores and retail chains).

Monica Bell has shown.¹⁵⁵ Garbage services can be about exclusion.¹⁵⁶ There is nothing in the Model Article that limits local authority to exclude, and lots that make efforts to restrict that authority difficult.¹⁵⁷

Further, the Model Article invites greater local regulation of “private law[s].”¹⁵⁸ Most states, in one way or another, keep cities away from areas like tort, contract, insurance, corporate and domestic relations law.¹⁵⁹ Allowing cities to pass private laws is, in some contexts, very attractive. For instance, Rick Hills and I have argued that the fact that cities cannot regulate nuisance law directly leads them to bar housing from manufacturing zones rather than passing urban equivalents of “right to farm” laws.¹⁶⁰

But this proposal opens the floodgates. Even liberal versions of the private law exception—like New Mexico’s, which allowed local minimum wage laws—only allow local governments to pass private laws in situations when there are not excessive extraterritorial effects.¹⁶¹ Under the Model Article, there would be no limits, absent state laws that make it through the phalanx of the Model Article’s limits on preemption. There would thus be huge new opportunities for local governments to use new private law powers to exclude or to generally muck up the regional economy.

The Report takes these arguments head on, at least, arguing that local regulatory variation is good.¹⁶² Now, local variation can be good. As the Report notes, it can create laboratories of democracy and—as the Report weirdly omits—allows for Tiebout sorting, people voting with their feet for one regulation or another.¹⁶³ But local variation is hardly an unalloyed good. People regularly live in one town, shop in another and work in yet another, passing through many others en route.¹⁶⁴ There are real harms to having different basic

¹⁵⁵ Monica C. Bell, *Anti-Segregation Policing*, 95 N.Y.U. L. REV. 650, 659 (2020) (describing how police practices can generate segregation by making places uncomfortable for some and very comfortable for others).

¹⁵⁶ See, e.g., *Mount Prospect State Bank v. Vill. of Kirkland*, 467 N.E.2d 1142, 1143 (Ill. App. Ct. 1984) (allowing local government to refuse to provide garbage services to mobile homes even though it provides the same service to single-family homes).

¹⁵⁷ See PRINCIPLES, *supra* note 1, at 16–17, 29–30.

¹⁵⁸ *Id.* at 40–41.

¹⁵⁹ *Id.* at 24.

¹⁶⁰ See Roderick M. Hills, Jr. & David Schleicher, *The Steep Costs of Using Noncumulative Zoning to Preserve Land for Urban Manufacturing*, 77 U. CHI. L. REV. 249, 257–60 (2010) (arguing that if manufacturing zones are needed, they should not bar all housing but instead include nuisance law reforms that mimic “right to farm” laws).

¹⁶¹ See *New Mexicans for Free Enter. v. City of Santa Fe*, 126 P.3d 1149, 1160–65 (N.M. Ct. App. 2005).

¹⁶² See PRINCIPLES, *supra* note 1, at 56–60.

¹⁶³ Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418–20 (1956) (presenting a classic argument about benefits of local control that was weirdly not mentioned in the Report).

¹⁶⁴ See Schleicher, *The City as a Law and Economic Subject*, *supra* note 70, at 1533–34 (explaining how people choose a place to live based on what is accessible to them in the surrounding area, not just what is in their town of residence).

rules governing contracts and torts given the increasing regional orientation of our economies and lives.¹⁶⁵ Further, in most metropolitan areas, there are lots and lots of local governments, and an unchecked authority to pass private laws would give them powerful tools to exclude or to reward local incumbents. The results will almost surely be less of a single-market in regions, creating huge compliance costs for individuals and firms. Further, even if local private laws fit local preferences, they will almost inevitably harm agglomeration economies at the metropolitan level.¹⁶⁶

B. *Local Democracy*

The Model Article provides substantial protections for local authority over elections and local governmental form.¹⁶⁷ You'd think from reading the Report that local elections provided extremely effective representation and valuable and fair opportunities of public participation.¹⁶⁸

But, dear reader, can you answer these questions? Do you know who represents you on your city council? What faction she sits with? What issues are currently before the County Board or Commission? What policies are the sheriff or the city treasurer actually responsible for?¹⁶⁹

Ignorance of local affairs is extremely commonplace, especially outside of small towns and for figures other than the mayor.¹⁷⁰ If local elections are partisan, voters will regularly just vote for the same party they vote for President, regardless of what the local government is doing.¹⁷¹ If local elections are non-partisan, voters will cast about for whatever information they can get their hands on, often relying on wholly irrelevant characteristics.¹⁷² Even more commonly, people don't vote at all, reflecting the low information and high

¹⁶⁵ *See id.*

¹⁶⁶ *Cf. id.* at 1511–15 (describing conflict between local control and regional economic growth).

¹⁶⁷ PRINCIPLES, *supra* note 1, at 30, 62–66.

¹⁶⁸ *Id.* at 62.

¹⁶⁹ If not, don't worry—you are not alone! Most of us can't answer these types of questions!

Voter ignorance is not a problem of a benighted 'they,' but rather is a problem for all of us who live in the real world with its competing demands; requirements that we feed ourselves, and the like. If you show me someone who has deeply and truly studied each choice they have to make when voting, I will show you someone who is not all that busy.

David Schleicher, *From Here All-The-Way-Down, or How to Write a Festschrift Piece*, 48 TULSA L. REV. 401, 415 n.112 (2013).

¹⁷⁰ *See* Elmendorf & Schleicher, *supra* note 21, at 365–70; David Schleicher, *Why Is There No Partisan Competition in City Council Elections?: The Role of Election Law*, 23 J.L. & POL. 419, 419–27, 444–55 (2007) [hereinafter Schleicher, *Partisan Competition*].

¹⁷¹ Schleicher, *Partisan Competition*, *supra* note 170, at 457.

¹⁷² *See id.* at 425, 466.

costs of participation.¹⁷³ Turnout in local elections can be shockingly low, especially because local elections—sometimes at the behest of local governments themselves—are held off-cycle, driving down turnout and biasing it towards older, richer, and whiter residents.¹⁷⁴ Off-cycle elections also help interest groups who are able to mobilize voters, like teachers' unions in school board elections, even where those interests are not popular.¹⁷⁵ More generally, local elections are—in Bill Fischel's famous term—dominated by “homevoters,” homeowners who use local elections to choose officials to protect their property values, both by ensuring the quality of local public goods and by excluding anyone who might drive down average values.¹⁷⁶

Ignorance of elected officials is not unique to local politics. As I and others have argued, it is common in and explains state elections as well.¹⁷⁷ But neither is local politics an exception, at least outside of small local governments.¹⁷⁸ And it is getting worse. As local newspapers close and national media dominates, attention on local politics continues falling (with severe consequences for the quality of local governance).¹⁷⁹ Political parties are more and more defined by their national, and not local, characteristics.¹⁸⁰

In this context, does it make sense to fully protect local electoral and governing rules from state override? You could make the argument that local politics is better because, as Fischel claims, homevoters have the right incentives to hawkkey government services, at least in local governments below a certain size.¹⁸¹ But if you did, you would have to respond to arguments that homeowners have incentives to exclude.¹⁸² Or you could, like Eric Oliver, suggest that sorting among local governments has meant that people inside these governments largely agree about what governments should do, making low turnout not a problem.¹⁸³ But if you did, you would not include the other aspects

¹⁷³ See Elmendorf & Schleicher, *supra* note 21, at 386.

¹⁷⁴ See Sarah F. Anzia, *Election Timing and the Electoral Influence of Interest Groups*, 73 J. POL. 412, 412–13 (2011); Hajnal & Lewis, *supra* note 22, at 645–46, 655–57.

¹⁷⁵ See SARAH F. ANZIA, TIMING AND TURNOUT: HOW OFF-CYCLE ELECTIONS FAVOR ORGANIZED GROUPS 128 (2014).

¹⁷⁶ See FISCHEL, THE HOME-VOTER, *supra* note 35, at 1–18.

¹⁷⁷ See DANIEL J. HOPKINS, THE INCREASINGLY UNITED STATES: HOW AND WHY AMERICAN POLITICAL BEHAVIOR NATIONALIZED 2 (2018) (explaining that state voting directly tracks national voting); David Schleicher, *Federalism and State Democracy*, 95 TEX. L. REV. 763, 764–68 (2017).

¹⁷⁸ See Elmendorf & Schleicher, *supra* note 21, at 365.

¹⁷⁹ See Vivien Lee & David Wessel, *How Closures of Local Newspapers Increase Local Government Borrowing Costs*, BROOKINGS INST. (July 16, 2018), <https://www.brookings.edu/blog/up-front/2018/07/16/how-closures-of-local-newspaper-increase-local-government-borrowing-costs/> [<https://perma.cc/2QEK-UW82>].

¹⁸⁰ See HOPKINS, *supra* note 177, at 1–2.

¹⁸¹ See FISCHEL, *supra* note 35, at 1.

¹⁸² Richard Schragger, *Consuming Government*, 101 MICH. L. REV. 1824, 1836–37, 1853 (2003) (book review) (criticizing Fischel for ignoring the problem of exclusion).

¹⁸³ See generally J. ERIC OLIVER, DEMOCRACY IN SUBURBIA (2001).

of the Article, as introducing new powers would upset that balance. And again, the domain in which the argument makes sense is not the full set of local governments.¹⁸⁴

Instead of making either of these arguments, the Report simply ignores the problem, and talks about local democracy as if it were uncomplicatedly representative of local preferences.¹⁸⁵ And the Report ignores the possibility of local faction or entrenchment. But local politics is famously home to a great deal of entrenchment, with local officials even using public policy to encourage the exit of groups that oppose them politically, or annexations to capture racially specific populations to influence voting.¹⁸⁶

Questions of representation have taken a central place in many discussions of local government in recent years. For one classic example, consider Ferguson, Missouri. In the local election before Michael Brown's shooting, 11% of voters turned out.¹⁸⁷ A majority of the electorate was white in a city that is 67% African-American (and racially differential turnouts are not the rule—in Ferguson, voters of all races turned out at roughly the same rate in the previous Presidential election).¹⁸⁸ Claims about the importance of local control are harder to make when local government does not really represent the preferences of local residents.¹⁸⁹

More broadly, the Black Lives Matter movement has turned national attention on how low-information local elections and politics can lead to interest group influence. Many analysts have pointed to the influence of police officers (and police officer unions) in local elections as a reason for a lack of oversight in cases of police abuse.¹⁹⁰ The Black Lives Matter “Campaign Zero” platform

¹⁸⁴ Oliver's book is called *Democracy in Suburbia* for a reason!

¹⁸⁵ Perhaps the Report assumes that a world in which local governments have more power would be a world in which local democracy is more prominent and efficacious. But as Richard Briffault noted many years ago, local governments have lots (and different amounts) of power today and it does not seem to spur greater turnout or attention. Briffault, *Our Localism: Part II*, *supra* note 30, at 397–98, 415.

¹⁸⁶ BAKER ET AL., *supra* note 1, at 233–34 (asking whether a proposed annexation by the city of Jackson, Missouri was made to protect the voting base of a white mayor); Edward L. Glaeser & Andrei Shleifer, *The Curley Effect: The Economics of Shaping the Electorate*, 21 J.L. ECON. & ORG. 1, 2 (2005).

¹⁸⁷ David Schleicher, *Have the Politics of Ferguson Improved? How Can We Tell?*, BALKANIZATION (Aug. 12, 2015), <https://balkin.blogspot.com/2015/08/have-politics-of-ferguson-improved-how.html> [<https://perma.cc/MTK9-8KXV>].

¹⁸⁸ *Id.* (citation omitted).

¹⁸⁹ In 2020, Ferguson elected its first African-American mayor. Mark Schlinkmann, *Ferguson Picks Ella Jones as First African American and First Woman Mayor*, ST. LOUIS POST-DISPATCH (June 3, 2020), https://www.stltoday.com/news/local/govt-and-politics/ferguson-picks-ella-jones-as-first-african-american-and-first-woman-mayor/article_4fcd-deed-9586-571c-b88a-bbcae3c71f70.html [<https://perma.cc/3JTG-LB5J>].

¹⁹⁰ See, e.g., Emily Alpert Reyes, *L.A. Police Union Spent Big in Local Elections. Some Politicians Now Shun the Money*, L.A. TIMES (June 10, 2020), <https://www.latimes.com/california/story/2020-06-10/lapd-union-political-donations> [<https://perma.cc/X5GB-MGQR>].

calls for all sorts of state laws intruding on local control, including most notably special state prosecutors to remove local control of prosecution of police brutality cases.¹⁹¹

Now, maybe the possibility of state override would not improve these issues or make them worse. State politics is certainly subject to many of the same problems as local politics.¹⁹² Would greater local control over elections and governmental form lead to outcomes that are more representative of local preferences? Greater participation? To make this argument, the Report would have to engage with concerns about the quality of local democracy. But it does not.¹⁹³

Further, as the Model Article includes affirmative demands on the state legislature, there was nothing stopping it from including mandatory governance reforms in its suggestions for new constitutional rules. It could have suggested that state constitutions require anything from the use of neutral districting commissions to on-cycle local elections. It could have included requirements that local elections be governed by rules aimed at generating local party competition.¹⁹⁴ This would not have relied on future decisions of the state legislature, but rather on the text it is proposing being inserted into state constitutions. But the Report's obsession with preserving local power at all costs kept it from doing so.

C. Local Fiscal Powers

The Model Article offers a variety of reforms that would radically change the nature of local fiscal policy. The Model Article suggests removing any state constitutional limits on local taxing powers, freeing local governments to pass income taxes or corporate taxes unless expressly preempted by state law.¹⁹⁵ It seemingly removes barriers to spending local money on non-public purposes, as it embraces the freedom of local governments to spend as they see fit.¹⁹⁶ The Model Article also bans unfunded state mandates and limits the capacity of the state to tie conditions to state funds.¹⁹⁷ Finally, it suggests extending state constitutional educational "adequacy" requirements to all services, although it

¹⁹¹ *Independent Investigations and Prosecutions*, CAMPAIGN ZERO, <https://www.joincampaignzero.org/investigations> [<https://perma.cc/8WGT-ZK83>] (last updated May 28, 2019).

¹⁹² See e.g., Tom Perkins, *Revealed: Police Unions Spend Millions to Influence Policy in Biggest US Cities*, GUARDIAN (June 23, 2020), <https://www.theguardian.com/us-news/2020/jun/23/police-unions-spending-policy-reform-chicago-new-york-la> [<https://perma.cc/32MF-X2QJ>].

¹⁹³ PRINCIPLES, *supra* note 1, at 5.

¹⁹⁴ For some radical electoral reforms, see Elmendorf & Schleicher, *supra* note 21, at 409–11.

¹⁹⁵ See PRINCIPLES, *supra* note 1, at 25, 42, 44.

¹⁹⁶ *Id.* at 25.

¹⁹⁷ *Id.*

provides almost no explanation (less than one page!) of what this requirement would actually mean.¹⁹⁸

Taken together, the Model Article would dramatically increase the budgets and powers of local governments and, unless voters were willing to pay much higher taxes in total, decrease the fiscal authority of states.¹⁹⁹ Given such a radical change, one might expect some discussion of whether local governments are likely to be good stewards of those funds. To help calm the nerves of taxpayers, the Report might also have proposed perhaps some constraints on how local governments can use this huge influx of cash. But the Report offers nothing of the sort.

The Report does not discuss the rampant problem of local pensions and other post-employment benefit (OPEB) underfunding.²⁰⁰ While many governments entered into this recession in decent enough shape, there are a substantial number of local and state governments that did not save enough to fund the benefits they have promised retired public workers.²⁰¹ Underfunding pensions is a way around balanced budget rules, and local governments take advantage of this to provide benefits to workers today without having to pay for them.²⁰² In some cases, local pension crises have been driven by economic decline, but there are also pension crises in fast growing places like Houston²⁰³ and in big cities with lots of revenue sources like Chicago.²⁰⁴ There are thus strong reasons to worry that huge new revenue sources would not necessarily be used wisely.

¹⁹⁸ See *id.*

¹⁹⁹ Given the debt and pension problems of many states, this may be the least likely of any of the suggested reforms to pass.

²⁰⁰ See Alicia H. Munnell & Jean-Pierre Aubry, *An Overview of the Pension/OPEB Landscape* 10–11 (Ctr. for Ret. Research at Bos. Coll., Working Paper No. 2016-11, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2847725 [<https://perma.cc/P4CD-UKRY>] (describing extent of local pension and OPEB underfunding in many cities, school districts, and counties).

²⁰¹ Katie Lobosco, *States Have a \$1.4 Trillion Pension Problem*, CNN: MONEY (Apr. 12, 2018), <https://money.cnn.com/2018/04/12/retirement/state-pension-funds/index.html> [<https://perma.cc/BY8T-HTAV>].

²⁰² Sarah Anzia, *A Silent Pension Crisis is Eating Away Local Government Services. Here's What You Need to Know.*, WASH. POST (Aug. 5, 2019), <https://www.washingtonpost.com/politics/2019/08/05/silent-pension-crisis-is-eating-away-local-government-services-heres-what-you-need-know/> [<https://perma.cc/B5FN-UV88>]; see NAT'L RETIRED TEACHERS' ASS'N & NAT'L INST. ON RET. SEC., *Public Pension Reform*, in NRTA PENSION EDUCATION TOOLKIT I (2014), <https://www.nirsonline.org/wp-content/uploads/2017/07/pensionreform.pdf> [<https://perma.cc/STJ3-RKHP>].

²⁰³ Kriston Capps, *The Great Texas Pension Fix*, BLOOMBERG CITYLAB (Jan. 18, 2017), <https://www.citylab.com/solutions/2017/01/the-great-texas-pension-fix/512060/> [<https://perma.cc/AXD3-ZG4Z>].

²⁰⁴ John Dizard, *Chicago's Deficit Heralds US Pensions Crisis*, FIN. TIMES (Sept. 6, 2019), <https://www.ft.com/content/1d3fd827-9372-3618-bac7-daf2d96932c1> [<https://perma.cc/5MUN-ZBB7>].

The Model Article could have suggested guardrails on local budgeting governing pensions, but it does not.²⁰⁵ It could have suggested that the state constitution require that local governments budget in accordance with generally accepted accounting principles, as New York City is required to do,²⁰⁶ but it does not. These would be limitations on local power and the Report will accept no such restrictions.²⁰⁷

Following the national contest to host Amazon's "HQ2" and high-profile corporate moves, like General Electric's decision to move to Boston, there has been a huge debate over whether to limit local subsidies to firms to locate their headquarters or offices.²⁰⁸ Similar debates occur over subsidies for sports stadia.²⁰⁹ Both types of subsidies are arguably inefficient globally, as they transfer funds to mobile firms and away from others, even if they are good for individual local governments.²¹⁰ There are also reasons to believe that firm-specific subsidies are not even good for the local governments that offer them, as local politicians favor their ability to get headlines for "saving" or "creating" jobs over the general economic benefits that come from lower taxes and high quality services.²¹¹ State constitutional amendments barring the use of public

²⁰⁵ The grant of authority to local governments in the Model Article states: "This grant of authority to home rule governments includes the authority both to raise and to spend funds, as well as to determine the provision of public goods and services." PRINCIPLES, *supra* note 1, at 34. It is not perfectly clear, but the authors of the Report might mean for this to replace all constitutional debt limits. It would almost certainly override any statutory balanced budget or other budgeting requirements.

²⁰⁶ Dall W. Forsythe, *Cyclical Budget Management in New York City 3* (Apr. 20, 2006) (unpublished manuscript), <https://wagner.nyu.edu/files/faculty/publications/forsytheCyclical.pdf> [<https://perma.cc/TP43-Z7PJ>] (describing New York City's accounting rules).

²⁰⁷ See PRINCIPLES, *supra* note 1, at 25.

²⁰⁸ See Emily Badger, *In the End, Amazon Didn't Win Its Own Subsidy Game*, N.Y. TIMES: THE UPSHOT (Feb. 14, 2019), <https://www.nytimes.com/2019/02/14/upshot/amazon-foxconn-subsidies-critics.html> [<https://perma.cc/3SDG-HM5S>] (discussing subsidy competition to attract Amazon HQ2); Stephen Singer, *Legislators Want Connecticut to Join Multi-State Agreement Ending Subsidies to Lure Businesses Across State Lines*, HARTFORD COURANT (Jan. 28, 2020), <https://www.courant.com/business/hc-biz-economic-development-incentives-20200128-gwutyh4uerazdchgio3avibvmy-story.html> (on file with the *Ohio State Law Journal*) (discussing General Electric's move to Boston).

²⁰⁹ See, e.g., Rick Paulas, *Sports Stadiums Are a Bad Deal for Cities*, ATLANTIC (Nov. 21, 2018), <https://www.theatlantic.com/technology/archive/2018/11/sports-stadiums-can-be-bad-cities/576334/> [<https://perma.cc/NK4X-HBTG>]; Elaine S. Povich, *Why Should Public Money Be Used to Build Sports Stadiums?*, PBS NEWSHOUR (July 13, 2016), <https://www.pbs.org/newshour/nation/public-money-used-build-sports-stadiums> [<https://perma.cc/CZ5W-L28S>].

²¹⁰ See Roger G. Noll & Andrew Zimbalist, *The Economic Impact of Sports Teams and Facilities*, in *SPORTS, JOBS, AND TAXES: THE ECONOMIC IMPACT OF SPORTS TEAMS AND STADIUMS* 64 (Roger G. Noll & Andrew Zimbalist eds., 1997).

²¹¹ See WILSON, *supra* note 25, at 1 (questioning the wisdom of local subsidies); Chirinko & Wilson, *supra* note 25, at 2363 (questioning the same); Andrew Schwartz, *The Realities of Economic Development Subsidies*, CTR. FOR AM. PROGRESS (Nov. 1, 2018),

funds for private purposes once played a role in limiting state and local subsidies, but courts have taken almost all of the teeth out of these clauses.²¹²

Both states and local governments offer subsidies to firms.²¹³ However, there are reasons to be more worried about local subsidies. States (usually) do not offer subsidies to firms to move around inside a state.²¹⁴ Thus their competition for firms is limited in some ways.²¹⁵ In state legislatures today, there are a number of proposals that would limit state and local power to provide subsidies or tax exemptions to specific firms.²¹⁶

Whether or not a particular type of reform of public subsidies for firm location is a good idea is beyond the scope of this essay. But no such reform would work if a state adopted the Model Article. The central legal challenge facing efforts aimed at limiting local subsidies is that local governments can offer many different kinds of subsidies.²¹⁷ Even if a state law successfully preempted direct local subsidies to individual firms, local governments could come up with other mechanisms for providing subsidies, from property tax exemptions for firms in a specific industry (that only happened to apply to one firm) or spending that had no other purpose than improving the location in which a firm had just brought property. Given the Model Article's narrow-tailoring preemption rules,²¹⁸ a state would face huge challenges in designing a mechanism for displacing local subsidies. Flush with new taxing authority and potentially increased state aid, one can bet that these subsidies would come flying if a state adopted the Model Article.

The Report could argue that subsidies to Amazon or the Milwaukee Bucks are actually good. Or it could argue that the game of giving local governments fiscal authority is worth the candle, even if local governments engage in socially

<https://www.americanprogress.org/issues/economy/reports/2018/11/01/457771/realities-economic-development-subsidies/> [https://perma.cc/Y7T4-PD7Q].

²¹² Richard Briffault, Foreword, *The Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, 34 RUTGERS L.J. 907, 908–09 (2003).

²¹³ Christian Gonzales, Mike Kerlin, Rachel Schaff, & Sarah Tucker-Ray, *How State and Local Governments Win at Attracting Companies*, MCKINSEY & Co. (Sept. 13, 2019), <https://www.mckinsey.com/industries/public-and-social-sector/our-insights/how-state-and-local-governments-win-at-attracting-companies#> [https://perma.cc/65LF-QX3S].

²¹⁴ Ernest Sternberg, *Why Firm-Specific Business Subsidies Don't Work*, 5 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 347, 350 (1996) (explaining that intraregional moves are “valueless” from a state government perspective).

²¹⁵ See *id.* at 349.

²¹⁶ Liz Farmer, *With Amazon Out of New York, Some Lawmakers Seek Multistate Ban on Corporate Tax Breaks*, GOVERNING (Feb. 14, 2019), <https://www.governing.com/topics/finance/gov-amazon-multistate-effort-ban-tax-breaks.html> [https://perma.cc/4P34-WS92]; Singer, *supra* note 208.

²¹⁷ See generally Louise Story, Tiff Fehr, & Derek Watkins, *Explore the Data*, N.Y. TIMES (2016), <http://archive.nytimes.com/www.nytimes.com/interactive/2012/12/01/us/government-incentives.html> [https://perma.cc/L7KK-S7WK].

²¹⁸ See PRINCIPLES, *supra* note 1, at 25.

harmful competition. But the Report does not do any of these things. Instead, it just assumes local governmental power is always good.²¹⁹

Another example of the Model Article's weird refusal to limit local governments in any way comes in the area of criminal fines and fees. The Report condemns local abuses of their powers to create criminal misdemeanors with financial penalties.²²⁰ "There are, however, legitimate concerns that allowing cities to create misdemeanors may ensnare uninformed persons, especially nonresidents passing through often-imperceptible municipal boundaries."²²¹ Notably, the problem of fine and fee enforcement is a big problem for local governments specifically, as fines and fees provide a mechanism for local governments to get revenue from outsiders who are passing through rather than burdening their own taxpayers (people travel between states far less frequently). The Report also notes that power to create local criminal penalties often furthers "the baleful trend of over-criminalization of conduct that some states and the federal government have begun to attempt to reverse."²²²

But when push comes to shove, the Report cannot bring itself to suggest any limits on local authority, even where the Report itself acknowledges systematic local abuses:

For maximum flexibility and logical consistency, this provision permits home-rule governments the same extent of criminal lawmaking as the state. This language is included in the model Article, however, with awareness of the serious concerns regarding local criminal lawmaking, and policymakers should think carefully about the tradeoffs before enacting the proposed language.²²³

The Model Article not only allows criminal fines and fees, it would remove restrictions on their use.²²⁴ The most prominent in the area of fines and fees has been Missouri's rule that local governments may not rely on fine and fee revenue for more than 20% of local budgets.²²⁵ That provision would likely be barred by the preemption rules in the Model Article.

²¹⁹ *See id.* at 5.

²²⁰ *Id.* at 45–47.

²²¹ *Id.* at 47 (citations omitted).

²²² *Id.* at 48.

²²³ *Id.* at 49.

²²⁴ *See* PRINCIPLES, *supra* note 1, at 46–49.

²²⁵ Rachel Lippmann, *Missouri Supreme Court Tosses out Parts of 2015 Law for Traffic Fines, Fees in St. Louis County*, ST. LOUIS PUB. RADIO (May 16, 2017), <https://news.stlpublicradio.org/post/missouri-supreme-court-tosses-out-parts-2015-law-traffic-fines-fees-st-louis-county#stream/0> [<https://perma.cc/NKX9-WSEM>]. Notably, passed in 2015 in the aftermath of Michael Brown's shooting in Ferguson, the Missouri law initially capped St. Louis County local governments at 12.5%, but the Missouri Supreme Court found that provision unconstitutional and upheld the provisions capping the percentage of local budgets that can come from fines and fees revenue for all local governments. *Id.*

More broadly, the Report lacks any balance. It is like the reversal of the famous line in the first Spider-Man comic.²²⁶ In the Report, with great power comes... absolutely no responsibility or limits.

One last note on the Report's fiscal chapter: the Report notes that its adequacy provision is "perhaps the most innovative" idea.²²⁷ The one important positive right in American constitutional law is the right to a public education found in state constitutions.²²⁸ Over the last forty years or so, there have been several waves of litigation aimed at forcing states to equalize their funding for schools using either broad equal protection arguments or, more commonly, claims under state "adequacy" clauses in education clauses.²²⁹ These cases have broken in many different ways across the country, but have had huge effects in many places, leading to massive flows of money to poorer school districts (and to population flows to them as well).²³⁰ But in many states, legislatures have been unwilling or unable to fully comply with the demands set out by state courts, leading to decades of litigation and huge face-offs between courts and legislatures.²³¹ Further, while the effect of these cases has been to move money from location to location, the standards courts have adopted have often been tied to educational standards and not only tax fairness.²³²

As a result, the Report's suggestion that the logic of educational adequacy requirements be expanded to all local services could mean many different things. The Report offers less than a full page of explanation and virtually no details, other than comparing it to educational adequacy cases generally and saying it should provide local governments with the capacity to provide a minimum level of services.²³³ Would it look like Texas's approach or Kentucky's?²³⁴ Or neither one? What standards would exist for determining

²²⁶ See Stan Lee, Steve Ditko, Stan Goldberg, & Artie Simek, *Spiderman!*, 1 AMAZING FANTASY 15, at 11 (Marvel Comics Aug. 1962) ("[W]ith great power there must also come-great responsibility!").

²²⁷ PRINCIPLES, *supra* note 1, at 72.

²²⁸ See Joshua E. Weishart, *Transcending Equality Versus Adequacy*, 66 STAN. L. REV. 477, 508 (2014) (discussing history of education funding cases).

²²⁹ See *id.* at 504–05, 508.

²³⁰ Zachary D. Liscow, *The Efficiency of Equity in Local Government Finance*, 92 N.Y.U. L. REV. 1828, 1855, 1860–61 (2017) (showing that flows of funds to poorer school districts led to increased residential demand); Weishart, *supra* note 228, at 504–05.

²³¹ See, e.g., Max Bartlett, *McCleary Case: A Short History of a Long and Complicated Washington School Funding Fight*, NW. PUB. BROAD. (June 15, 2018), <https://www.nwpub.org/2018/06/15/mcclary-case-a-short-history-of-a-long-and-complicated-washington-school-funding-fight/> [https://perma.cc/N574-HBS2].

²³² See Weishart, *supra* note 228, at 517.

²³³ See PRINCIPLES, *supra* note 1, at 72–73.

²³⁴ Compare Robert L. Manteuffel, *The Quest for Efficiency: Public School Funding in Texas*, 43 SW. L.J. 1119, 1124–25 (1990) (describing Texas' approach), with Peter Applebome, *Kentucky's Sweeping Overhaul of Education Offers Lessons Both Positive and Negative*, N.Y. TIMES, Mar. 25, 1996, at A0010, <https://www.nytimes.com/1996/03/25/us/kentucky-s-sweeping-overhaul-education-offers-lessons-both-positiveand-negative.html> [https://perma.cc/NVK9-AMYC] (describing Kentucky's approach).

adequacy across multiple types of services? How would money be shared across overlapping local governments providing services in an area?

The failure to put any meat on the bones of this idea suggests the Report does not take it too seriously. I wish it had, as it is, as the Report says, the most innovative idea in the Report.²³⁵

D. Incorporation, Annexation and Secession

The failures of the Report are not only failures of commission, but also of omission. While the Report focuses on giving power to local governments, it almost entirely ignores to whom this power is given. It suggests that the full suite of powers it creates should be available to all home rule general-purpose local governments, but this category includes both very large entities to quite small ones.²³⁶ The Model Article offers no distinctions, suggesting that New York City with 8.6 million residents and a home rule city of ten thousand sitting in the suburbs or exurbs of a metropolitan area should have the same powers.²³⁷ As it proposed a whole new constitutional Article, the Report could have included any sort of change the authors wanted. The report could have suggested changes in how local governments are formed, how they grow and under what circumstances they can split apart, but it did not.

Here is the explanation it offers for ignoring question of incorporation, annexation and secession:

Because the model provisions below primarily set forth a structure to balance state and local authority, they do not address boundary issues directly, although they do specify that the state must have home rule governments. As with charters, state constitutional reform could include modifying how a state approaches boundary questions, and nothing below is meant to suggest that there might not be a substantial interest in any given instance in scaling aspects of governance to the needs of a metropolitan region.²³⁸

This is not much of an explanation; it just states that the Report decided to focus on one thing and not another. The Report notes that the 1950-era AMA report did make recommendations about governmental expansion.²³⁹ The authors of the Report *chose* not to make a similar recommendation.

Further, the Model Article's provisions would clearly influence questions of incorporation, annexation and secession, and would have very different effects depending on how many local governments there are in a given metropolitan area. But the Report provides no guidance or effort to fit its

²³⁵ PRINCIPLES, *supra* note 1, at 72.

²³⁶ *See id.* at 29.

²³⁷ *See id.*

²³⁸ *Id.* at 31.

²³⁹ *Id.*

proposals to the very different types of local governments we see around the country.

It is impossible to understand the benefits and costs of many of the Model Article's provisions without reference to which government will exercise them. For instance, giving a local government like Indianapolis's Unigov (which is the merged government of Indianapolis and Marion County) power over private law would not result in varying types of contract law among residents of the inner-ring of a metropolitan area.²⁴⁰ By contrast, in the Boston area, it is often hard to tell if one is in Cambridge or Sommerville, Boston or Brookline, as the boundaries do not fit much of lived economic or social life.²⁴¹ Giving each of these small local governments power over private law would create huge problems for determining what law governs transactions.²⁴²

The same is true for other provisions. For instance, does it make sense to restrict state preemption of ordinances passed by big and small cities in the same way, given the differential likelihood of externalities? This is particularly a problem with the fiscal aspects of the Report. In places with small, exclusionary local governments (which is every place, although to varying degrees), giving local governments more taxing authority would reduce equality across places, unless one believes that residents will agree to bear higher taxes in total.²⁴³ Further, the new taxing and regulatory powers the Model Article granted to cities would encourage new efforts at incorporation and secession.²⁴⁴ Perhaps the adequacy provision would address this to some degree, but given the paucity of explanation the Report offers, it is hard to be certain. Similarly, the costs of exclusion—which would be far worse under the Model Article—would be felt more dramatically in some places rather than others, given differing levels of housing demand and the number and type of local governments.²⁴⁵

²⁴⁰ See Christopher Rickett, *Richard Lugar and Uni-Gov: 5 Things About the Government Merger that Redrew Indianapolis*, INDYSTAR (Apr. 29, 2019), <https://www.indystar.com/story/news/politics/2019/04/29/richard-lugar-unigov-5-things-about-government-merger-that-redrew-indianapolis/3611406002/> [https://perma.cc/W42P-C3NE]. The Indianapolis metropolitan area includes many local governments, but Unigov at least covers a substantial swath of territory. See Rachel Justis, *The Indianapolis Metro Area*, INCONTEXT, Apr.–May 2005, at 8, 8, <http://www.incontext.indiana.edu/2005/mar-apr/metro.asp> [https://perma.cc/9H98-XAK9].

²⁴¹ Tom Acitelli, *Is It Time to Revisit Annexing Other Cities and Towns to Boston?*, CURBED BOS. (Oct. 5, 2018), <https://boston.curbed.com/2018/10/5/17937666/boston-annexation> (on file with the *Ohio State Law Journal*) (Boston “is dense geographically and demographically, with municipalities bleeding into one another and city limits not necessarily that well-recognized. Hence people saying they’re ‘from Boston’ when they’re really from Quincy or Cambridge or Malden”).

²⁴² See Briffault, *Our Localism: Part II*, *supra* note 30, at 354.

²⁴³ See *id.* at 401–02, 401 n.245.

²⁴⁴ See Erika K. Wilson, *The New School Segregation*, 102 CORNELL L. REV. 139, 143 (2016) (discussing a “wave” of secession among Southern school districts).

²⁴⁵ See Schleicher, *The City as a Law and Economic Subject*, *supra* note 70, at 1512, 1512 n.23.

Annexation and secession have been a major political football in recent years.²⁴⁶ Texas and North Carolina were traditionally states that allowed cities relatively free rein to annex land, but have cut back on these powers substantially.²⁴⁷ In places like Alabama, Georgia, and Louisiana, we have seen a number of efforts at secession from cities and school districts.²⁴⁸ But the Report takes a pass on commenting on it, even though, as Richard Briffault famously argued, the boundaries of local governments are likely more important to their fiscal and political capacities than their formal legal powers.²⁴⁹

The Report could have tied its suggestions to particular governmental forms (suggesting that some provisions only apply to cities above certain size, for instance) or included principles to govern incorporation, annexation and secession. Doing so would have made the rest of the argument more compelling.

V. CONCLUSION: THE FAILURE OF IMAGINATION IN THE NLC REPORT

A casual reader of a high-profile proposal to change local governmental authority might assume that it would have something to say about the central challenges of local governance like the housing crisis, police brutality, segregation, or local pension problems. These issues are in the news. They have been the subject of tons and tons of scholarship, by local government scholars and others.

²⁴⁶ See Adam Harris, *The New Secession*, ATLANTIC (May 20, 2019), <https://www.theatlantic.com/education/archive/2019/05/resegregation-baton-rouge-public-schools/589381/> [<https://perma.cc/B5G3-65EK>]; Press Release, Ball State Univ., When It Comes to Government Consolidation, Economic Development Is Key (July 31, 2020), <https://www.bsu.edu/news/press-center/archives/2020/7/jobs-over-crisis> [<https://perma.cc/K35D-8DZB>].

²⁴⁷ Florian Martin, *New Texas Law May Make It 'Almost Impossible' for Cities to Annex Land*, HOUS. PUB. MEDIA (Dec. 1, 2017), <https://www.houstonpublicmedia.org/articles/news/2017/12/01/254068/new-texas-law-may-make-it-almost-impossible-for-cities-to-annex-land/> [<https://perma.cc/XWK8-BG82>]; see Judith Welch Wegner, *North Carolina's Annexation Wars: Whys, Wherefores, and What Next*, 91 N.C. L. REV. 165, 211–12 (2012).

²⁴⁸ See Alvin Chang, *School Segregation Didn't Go Away. It Just Evolved.*, VOX (July 27, 2017), <https://www.vox.com/policy-and-politics/2017/7/27/16004084/school-segregation-evolution> (on file with the *Ohio State Law Journal*) (discussing secession in Alabama); Margaret Newkirk, *The Wealthy Atlanta Suburb Fighting to Secede from Its City*, BLOOMBERG BUSINESSWEEK (June 21, 2018), <https://www.bloomberg.com/news/articles/2018-06-21/stockbridge-georgia-a-wealthy-neighborhood-fights-to-break-away> [<https://perma.cc/LD8A-Z5KM>] (discussing secession in Georgia); Rick Rojas, *Voters Near Baton Rouge Want Better Schools. First, They Need a New City.*, N.Y. TIMES (Oct. 10, 2019), <https://www.nytimes.com/2019/10/10/us/baton-rouge-st-george.html> [<https://perma.cc/QU9Q-B77S>] (discussing secession in Louisiana).

²⁴⁹ See Briffault, *Our Localism: Part II*, *supra* note 30, at 355, 357, 380 (arguing that classic pro-localism theorists ignored greater importance of boundaries in order to focus excessively on local powers).

It would have taken hard and creative thinking to respond to these problems, rather than simply pushing back on abusively preemptive state laws. But the Report did not pursue a broader agenda and included many provisions that would create unintended consequences. This is a failure of imagination.

I understand why it might have felt imperative to respond to provocations like “super preemption.” It stinks to see local governments adopt reasonable and just policies and then have state legislatures preempt them. In many cases—the fight over HB2 in North Carolina particularly—these preemption fights certainly made me extremely frustrated.²⁵⁰

Some response to the rash of preemption and “super-preemption” laws might have been reasonable. But, as the kids say, “this ain’t it, chief.”²⁵¹ There are other problems out there, and the proposed Model Article would make those problems worse. No state should adopt the NLC’s recommendation.

²⁵⁰ Michael Gordon, Mark S. Price, & Katie Peralta, *Understanding HB2: North Carolina’s Newest Law Solidifies State’s Role in Defining Discrimination*, CHARLOTTE OBSERVER (Mar. 30, 2017), <https://www.charlotteobserver.com/news/politics-government/article68401147.html> (on file with the *Ohio State Law Journal*).

²⁵¹ Stacey Ritzen, *This Ain’t It Chief* is the New Way to Say ‘Nope’ Online, DAILY DOT (Oct. 2, 2018), <https://www.dailydot.com/unclick/this-aint-it-chief-meme/> [<https://perma.cc/BC8M-VDE6>].