# MISCLASSIFIED WORKERS AND ANTITRUST FEDERALISM: LOCAL PATHWAYS TO UNIONIZATION

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ABSTRACT

*Federal antitrust law currently constrains organizing efforts among workers misclassified as independent contractors—an increasingly large share of the low-wage workforce. While advocates and scholars have called on federal and state governments to intervene, this Article examines an additional means for addressing the problem: the state action doctrine of federal antitrust law gives municipalities a way to let such workers unionize. Yet, as shown by the Ninth Circuit's recent decision blocking Seattle's attempt to authorize Uber and Lyft driver unionization, the doctrine currently treats states and municipalities differently in ways that can limit municipalities' interventions. This Article explains why this differential treatment is fundamentally unjustified and why courts should resolve an ambiguity in the doctrine in favor of municipalities' authority to let misclassified workers unionize.*

*Many commentators have criticized the state action doctrine's differential treatment of municipalities and states in other contexts. This Article builds on that scholarship in two ways. First, although commentators have noted that the doctrine usurps states' role in policing municipal lawmaking, those commentators have not given thorough accounts of why federal courts can trust state legislatures and state courts to adequately police the concerns motivating the doctrine's differential treatment of municipalities. This Article gives such an account.*

*Second, this Article explains why Supreme Court decisions that postdate the seminal commentary criticizing the doctrine's differential treatment of municipalities strengthen the argument that such treatment is unjustified. These decisions include the Court's rulings on anticommandeering and on states' ability to structure their internal governance. They also include the Court's recent state action doctrine decision. The first two sets of decisions highlight how state action doctrine's differential treatment of municipalities is in tension with the Court's federalism jurisprudence, while the latter decision shows how state action doctrine's own logic counsels against one limit on municipal authority that some lower courts have required.*

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## I.
## INTRODUCTION

Leading gig economy companies, such as Uber and Lyft, classify their workforce as independent contractors rather than employees—a classification that strips those workers of an array of legal protections. Independent contractors lack legal rights to basic employment law protections including a minimum wage, overtime pay, freedom from discrimination, and key workplace safety protections.[1] Independent contractors are also excluded from social safety net protections such as workers' compensation and unemployment insurance.[2] And independent contractors face larger tax burdens because they must themselves make the Social Security and Medicare tax contributions that employers make for employees.[3] To make matters worse, independent contractors face significant barriers to collective organizing, impeding their ability to negotiate for better working conditions. Currently, independent contractors cannot be represented by traditional labor unions (defined as labor unions created under the procedures established by the National Labor Relations Act).[4] And government agencies have tended to interpret federal antitrust law to prohibit independent contractors from other forms of collective action—such as striking or forming other worker organizations.[5] Workers classified as independent contractors thus face a double bind: not only does the law fail to entitle them to basic employment and social safety protections, but courts and agencies have also interpreted the law to prevent them from improving their working conditions on their own through collective action.

1. David Weil, *Lots of Employees Get Misclassified as Contractors. Here's Why It Matters*, HARV. BUS. REV. (July 5, 2017), https://hbr.org/2017/07/lots-of-employees-get-misclassified-as-contractors-heres-why-it-matters [https://perma.cc/JWB7-KF26]; *see also* Elizabeth Kennedy, *Freedom from Independence: Collective Bargaining Rights for "Dependent Contractors,"* 26 BERKELEY J. EMP. & LAB. L. 143, 149–51, 152–53 (2005) (noting employment law, labor law, and social security protections denied to misclassified workers).

2. *Id*. For more on how independent contractors bear greater risk arising from or relating to their work than do employees, see V.B. Dubal, *Winning the Battle, Losing the War?: Assessing the Impact of Misclassification Litigation on Workers in the Gig Economy*, 2017 WIS. L. REV. 739, 752 & n.53 (2017) (noting many firms "push all associated costs and risks of business onto workers [classified as independent contractors] . . . Uber and Lyft, for example, require their drivers to purchase (or lease) vehicles, pay for commercial or hybrid personal-commercial insurance, pay for their phones, pay for all the associated car upkeep costs, and pay for gas"); Kenneth G. Dau-Schmidt, *The Impact of Emerging Information Technologies on the Employment Relationship: New Gigs for Labor and Employment Law*, 2017 U. CHI. LEGAL F. 63, 78 (2017) ("The transfer of work from long-term employees to short-term 'independent contractors' using information technology has been accompanied by a decline in employer provided benefits and training, pushing more of the risk of illness, injury, unemployment and obsolescence onto workers.").

3. *See* Weil, *supra* note 1.

4. *See id*.

5. *E.g*., Sanjukta M. Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 LOY. U. CHI. L.J. 969, 979–84 (2016) (describing instances where misclassified workers face potential antitrust liability for their collective action aimed at negotiating wage increases).

Some people argue that, according to the relevant tests[6] for distinguishing between independent contractors and employees, Uber and Lyft workers are employees rather than independent contractors.[7] That is, Uber and Lyft have been accused of worker misclassification.

Worker misclassification pervades many industries, including home health workers, janitors, and port truck workers.[8] And it is not new. As far back as 1984, the IRS estimated that 15% of employers misclassified 3.4 million workers as independent contractors.[9]

But whether or not Uber and Lyft's classifications of their workers are indeed *mis*classifications according to the reigning, often indeterminate,[10] tests for distinguishing independent contractors from employees—a conclusion likely warranted but that this Article does not seek to prove—Uber and Lyft's classifying their workers as independent contractors typifies a burgeoning business model in which companies exploit the distinction between independent contractors and employees to increase profits by depriving low-wage workforces of employment law, social safety net, and labor law protections.[11] This model is not unique to the rideshare industry. Startups in other industries often face pressure from investors to use an independent contractor model[12] and investors have pumped billions of dollars of

6. The exact definitions of "independent contractor" and of "employee" vary state to state and between state laws and federal laws, but generally, independent contractors have more control over their working conditions than do employees, who are subject to their employer's control. For more detail on the distinction between independent contractors and employees under various state and federal laws, see Weil, *supra* note 1; Dau-Schmidt *supra* note 2, at 80–81 & nn. 105–06.

7. *E.g.*, Benjamin Sachs, *Do We Need an 'Independent Worker' Category?*, ONLABOR (Dec. 8, 2015), https://www.onlabor.org/do-we-need-an-independent-worker-category/ [https://perma.cc/Y7L3-SYKW].

8. *See* Weil, *supra* note 1 (noting that, as Administrator of the Department of Labor's Wage and Hour division, the author frequently witnessed misclassification investigations "involving the incorrect classification of all types of workers: janitors, home health aides, drywall workers, cable installers, cooks, port truck drivers, and loading dock workers in distribution centers"); *see also* Dubal, *supra* note 2, at 751 (nail salon workers).

9. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-656, EMPLOYMENT ARRANGEMENTS: IMPROVED OUTREACH COULD HELP ENSURE PROPER WORKER CLASSIFICATION 2 (2006).

10. *See* Dau-Schmidt, *supra* note 2, at 80–81 (noting these tests' frequent "ambiguity").

11. Stripping workers of these protections can increase profits because these protections tend to cost firms money. For instance, complying with safety laws can be expensive, paying a minimum wage costs more than paying less, and labor rights enable workers to organize to compel management to redirect a larger share of profits to workers' pay and benefits. *See, e.g.*, Francoise Carré, *(In)dependent Contractor Misclassification*, ECONOMIC POLICY INSTITUTE (June 8, 2015), https://www.epi.org/publication/independent-contractor-misclassification/ [https://perma.cc/9VNR-6FG5] ("Businesses misclassify workers as independent contractors to avoid several employment-related obligations and thereby save on labor and administration costs and gain advantage over competitors.").

12. *See, e.g.*, Nick Wingfield, *Redfin Shies Away From the Typical Start-Up's Gig Economy*, N.Y. TIMES (July 9, 2016), https://www.nytimes.com/2016/07/10/technology/a-start-up-shies-away-from-the-gig-economy.html [https://perma.cc/2YET-Z2W2] ("[P]rospective venture fund investors [initially] walked away [from an online real estate start-up that refused to use an independent contractor model], saying that betting on full-time employees was a deal killer for them."); Marcela Sapone, *The On-Demand Economy Doesn't Have to Imitate Uber to Win*, QUARTZ (July 10, 2015),

capital into platform startups with such models.[13] Indeed, the recently introduced Uber Works app suggests that other industries may soon adopt similar business models for workforces such as "servers, dishwashers, caterers, warehouse workers and cleaners."[14]

The question that gets to the heart of the matter is not whether a supposed independent contractor in these workforces is *mis*classified according to the reigning tests.[15] After all, if an app allowed restaurants to adjust dishwashers' work conditions just enough to get dishwashers classified as independent contractors according to these tests, should dishwashers suddenly lose their rights under labor and employment law even though their financial conditions and power against the companies they work for have not meaningfully improved?[16] The ultimate question is instead whether a supposed independent contractor ought to have the legal protections that independent contractors currently lack. This Article's title refers to "misclassified workers" rather than to "putative independent contractors" only because the former is a more recognizable expression.

One way to win back labor and employment law protections for putative independent contractors is for federal and state governments to revise the tests that distinguish independent contractors from employees.[17] Scholars have cautioned, however, that this solution is incomplete so long as firms retain the power to restructure their business models to reposition their workers on the independent

https://qz.com/448846/the-on-demand-economy-doesnt-have-to-imitate-uber-to-win/ [https://perma.cc/WP59-RPGN] (noting that startup Hello Alfred's decision to classify its workers as employees "was met with skepticism by the investment community. Would-be investors balked at the added cost and complication . . . .").

13. Dubal, *supra* note 2, at 741–42 & n.4. One recent study found that the share of workforce classified as independent contractors, independent consultants, or freelancers rose from 6.9% in 2005 to 8.4% in 2015. Lawrence F. Katz & Alan B. Krueger, *The Rise and Nature of Alternative Work Arrangements in the United States: 1995–2015* 8–9 (Nat'l Bureau of Econ. Rsch., Working Paper No. 22667, 2016).

14. E. Tammy Kim, *The Gig Economy is Coming for Your Job*, N.Y. TIMES (Jan. 10, 2020), https://www.nytimes.com/2020/01/10/opinion/sunday/gig-economy-unemployment-automation.html [https://perma.cc/C2UK-HZXJ] ("Uber's goal with the project… is to funnel Uber drivers and other underemployed workers toward contract jobs posted by temp agencies.").

15. *See* Dau-Schmidt, *supra* note 2, at 80–81 (noting "[c]omplaints have been made about the irrelevance and ambiguity of these tests for years" and that "[e]xisting doctrine on who is an employee and who is an employer does not seem up to the challenges of the information age"); Veena Dubal & Sanjukta Paul, *Law and the Future of Gig Work in California: Problems and Potentials (Part 1)*, ONLABOR (Sept. 9, 2019), https://www.onlabor.org/law-and-the-future-of-gig-work-in-california-problems-and-potentials-part-1/ [https://perma.cc/DZV2-6PHE] ("[A] policy debate focused solely on words—independent contractor or employee—misses both the conceptual semantics at play and the structural dynamics of gig workers' lives . . . . It's not that Uber drivers don't want to be employees; it's that this question misses the point. They want more protections than the law currently affords them." (emphasis omitted)).

16. FedEx provides an illustrative example. V.B. Dubal details how, after a Court ruled that FedEx misclassified its drivers as independent contractors, FedEx tweaked its business model to render those drivers independent contractors according to the relevant test. Under this new model, the drivers' work lives were even more precarious than they had been before the Court ruled in their favor. Dubal, *supra* note 2, at 790–92, 795.

17. *E.g.*, Dau-Schmidt, *supra* note 2, at 80–82 (canvassing proposals for revising these tests).

contractor side of these revised tests.[18] An alternative approach to securing putative independent contractors' right to organize—one that does not rely on reclassifying those workers as employees—is for federal courts to interpret antitrust law's labor exemption to permit certain putative independent contractors' collective action[19] or to otherwise interpret antitrust law to permit such action.[20]

But municipalities also can address the accelerating trend of firms classifying low-wage workers as independent contractors.[21] Under certain conditions that the Supreme Court ("the Court") has established,[22] a municipality can make it legal for workers classified as independent contractors to collectively bargain with their employer (that is, to unionize) even if federal antitrust law would prohibit those workers from collectively bargaining absent the municipality's approval. Such municipal laws can help combat misclassification, but more broadly can authorize putative independent contractors to unionize regardless[23] of whether those workers are misclassified according to prevailing tests.

Seeking to use this strategy, Seattle recently enacted an ordinance that would have permitted taxi and other for-hire drivers (e.g., Uber and Lyft drivers) classified by their firms as independent contractors to unionize.[24] But the U.S. Chamber of Commerce ("Chamber of Commerce") successfully challenged Seattle's ordinance, arguing it did not meet the conditions required to be lawful.[25] This Article examines why the first of those conditions is a misguided barrier to interventions

18. *See* Marshall Steinbaum, *Antitrust, the Gig Economy, and Labor Market Power*, 82 LAW & CONTEMP. PROBS. 45, 62 (2019) ("Proposals to extend and strengthen labor law tests for statutory employment . . . will be ineffective so long as employers and lead firms retain the strong incentive to push workers outside their protection."); Dubal, *supra* note 2.

19. *See, e.g.*, Marina Lao, *Workers in the "Gig" Economy: The Case for Extending the Antitrust Labor Exemption*, 51 U.C. DAVIS L. REV. 1543 (2018); *see also* Paul, *supra* note 5, at 1020–33 (tracing history, more contingent than principled, by which the Supreme Court gave the distinction between employees and independent contractors primacy in interpreting the labor exemption's scope). *But see* Sanjukta Paul, *Fissuring and the Firm Exemption,* 82 LAW & CONTEMP. PROBS. 65, 85 (2019) ("Attempts to broaden the labor exemption or to create new worker exemptions while retaining or copying its basic structure are unlikely to be sufficient. Fissured business structures show that the firm . . . will continue to change and mutate" to try to avoid workers' newly-recognized rights to organize.).

20. Sanjukta M. Paul, *Uber as for-Profit Hiring Hall: A Price-Fixing Paradox and Its Implications*, 38 BERKELEY J. EMP. & LAB. L. 233, 237 (2017) (arguing that a proper interpretation of price-fixing law would recognize that "even if [ride-share drivers] are *not* employees, they are entitled to collective action rights, so long as Uber or any other firm is permitted to set prices in the services they perform").

21. Although not this paper's focus, state governments also possess this tool.

22. *See infra* Section I.B (describing these conditions).

23. But note that opponents will argue the National Labor Relations Act preempts such laws if there is an open question whether the workers are employees under the test that the National Labor Relations Board uses to distinguish employees from independent contractors. *See* Chamber of Commerce v. City of Seattle, 890 F.3d 769, 790–95 (9th Cir. 2018) (rejecting NLRA preemption argument). A discussion of NLRA preemption of these laws lies beyond this Article's scope.

24. SEATTLE, WASH., ORDINANCE 124968 (2015).

25. *See infra* notes 92–99 and accompanying text.

like Seattle's and why courts should interpret the second of those conditions to be satisfied by such interventions.

### *A. Where Does this Barrier to Seattle's Strategy Come From?*

This Article examines one of the Chamber of Commerce's two basic arguments that the Seattle Ordinance is invalid. The argument is that the Sherman Act[26] ("the Act")—which Congress enacted in 1890—preempts[27] the ordinance.[28]

Congress promulgated the Act chiefly in response to perceived dangers presented by trusts—large private firms that concentrate economic power.[29] But Congress drafted the Act in broad terms that regulate not only trusts, but also other persons. Specifically, Section One prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . ."[30]

The Court has needed to interpret this broad language to decide several questions. These include: which types of actions by which types of persons does Section One prohibit?[31] Does Section One regulate state and local governments' actions? Does it prohibit such governments from authorizing private parties to take actions that Section One would otherwise prohibit?

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26. 15 U.S.C. §§ 1–7 (2018).

27. Preemption occurs when a court finds that a law passed at one level of government (law 1) in some way conflicts with a law passed at a higher level of government (law 2) and that the body that enacted law 2 would have intended that law 1 therefore be void.

28. Technically, the Chamber of Commerce argued both that the Act *preempts* the ordinance and that Seattle *violated* the Act by enacting the ordinance. *See* Amended Complaint at ¶¶ 58–72, Chamber of Commerce v. City of Seattle, 890 F.3d 769 (9th Cir. 2018) (No. 17-cv-00370-RSL) [hereinafter Complaint]. Because the Chamber of Commerce's success on either of these claims would lead to the same outcome—an order for Seattle to not enforce its ordinance—I simplify by characterizing the Chamber of Commerce's claim as a claim just that the Act preempts Seattle's Ordinance. *See infra* note 76 and accompanying text (noting municipalities that violate Act face injunctive, but not damages, remedies).

29. Different commentators highlight different threats trusts posed. But commentators generally agree the Act targeted action by these private enterprises, not action by government. *See, e.g.*, John E. Lopatka, *State Action and Municipal Antitrust Immunity: An Economic Approach*, 53 FORDHAM L. REV. 23, 23 (1984) ("[T]he antitrust laws were intended to prevent private firms from restraining competition, so that consumers would not be forced to pay monopoly prices . . . . Whatever harm the state governments might do, it was not the kind of harm against which the antitrust laws were directed."); Paul, *supra* note 5, at 998 ("The republican orientation of the Sherman Act was much less concerned with preserving small, traditional industry and business in the face of the new, large enterprises, than it was with consumer protection, which was likely a minor concern at best. It was even less concerned with abstract ideals of free trade."); Jim Rossi, *Antitrust Process and Vertical Deference: Judicial Review of State Regulatory Inaction*, 93 IOWA L. REV. 185, 199–200 ("Congress was focused on a wide range of broad goals in adopting the Sherman Act, including economic efficiency, protecting consumer welfare, preserving competition, and protecting the political process from dominance by large corporate interests . . . . [T]here is substantial evidence that Congress intended to leave in place a broad range of state regulation . . . .").

30. 15 U.S.C.A. § 1.

31. The Court has noted that this broad language "cannot mean what it says," because this language, if taken at face value, "would outlaw the entire body of private contract law." Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 687–88 (1978). The Court thus must draw lines to decide how the act "appli[es] in concrete situations." *Id.* at 688.

In several cases, the Court has decided Section One prohibits certain types of workers from collectively acting to determine the terms on which they will provide their product or services.[32] But the Chamber of Commerce argued these decisions should be taken to imply that Section One prohibits *any* workers classified as independent contractors from collectively bargaining with an entity that pays them for their services.[33]

Even were it true that Section One prohibits collective bargaining by *any* workers classified as independent contractors—a contested conclusion[34]—that would not answer the question of whether states or municipalities could make it legal for those workers to collectively bargain. The Court first faced the question of whether states can authorize private parties to do things the Act would otherwise prohibit them from doing in *Parker v. Brown*.[35] Specifically, that decision addressed whether the Act preempts California from authorizing a program that restricted competition among raisin producers.[36] The Court unanimously concluded no, reasoning that federalism considerations[37] required the Court to "not lightly . . . attribute[] to Congress" an intent to preempt state law and that "nothing in the language of the Sherman Act or in its history . . . suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature."[38]

It is unsurprising that the Act's language and history display no congressional intention to preempt state laws. Multiple commentators note that the 1890 Congress could not have considered the possibility that the Act *could* preempt state and local laws: In 1890, the Court interpreted Congress's constitutional power to preempt state and local laws differently than it does today.[39] Specifically, "[g]iven the 1890 view of congressional power, any valid state or municipal regulation almost certainly was out of Congress' preemptive reach under the commerce clause. Conversely, almost any local regulation within Congress's reach would have exceeded the power of the state or municipality to regulate."[40]

32. *See, e.g.*, FTC v. Super. Ct. Trial Lawyers Ass'n, 493 U.S. 411, 422–23 (1990) (lawyers); FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 457–59 (1986) (dentists); *Prof'l Eng'rs*, 435 U.S. at 693–95 (engineers).

33. *See* Complaint ¶ 59.

34. *See generally* Brief of Amicus Curiae Professor Samuel Estreicher in Support of Defendants–Appellees, Chamber of Commerce v. City of Seattle, 890 F.3d 769 (9th Cir. 2018) (No. 17-35640) (arguing that antitrust law's labor exemption immunizes misclassified workers' collective bargaining from antitrust liability); *see also* Paul, *supra* note 5, at 1020–33.

35. 317 U.S. 341 (1943).

36. *Id.* at 346–48.

37. That is, concerns about the proper division of power between the federal government and states.

38. *Parker*, 317 U.S. at 350–51.

39. Herbert Hovenkamp & John. A. Mackerron III, *Municipal Regulation and Federal Antitrust Policy*, 32 UCLA L. REV. 719, 727–28 (1985) ("In 1890 Congress did not have the authority under the commerce clause to regulate intracity taxicab fares, land use, sewage disposal, ambulance service, or public utilities." (footnote omitted)).

40. *Id.*

But although *Parker* answered whether the Act preempts *state* laws, it did not answer whether the Act preempts *municipal* laws. Over a series of post-*Parker* cases the Court faced this latter question.[41] The Court has arrived at the answer: sometimes. More specifically, the Court has crafted a test that grants *Parker* immunity[42] to municipal laws that restrain competition in a market only when the state has clearly authorized the municipality to restrain competition in that market.[43] Below I will use the term "state action doctrine" to refer to the rules the Court has crafted to decide when state and municipal laws receive *Parker* immunity.[44] And I will use the term "competitive restraints" to refer to laws restraining competition in a market.

It is important to note that nothing required the Court to condition a municipal law's *Parker* immunity on the state affirmatively approving that law. And nothing required the Court to even treat a municipal government as distinct from the state government. Federal courts treat state governments and local governments as identical in some contexts and distinct in others, with no obvious rule for deciding whether these governments should be treated as identical or distinct in any given context. Federal courts have treated state and local governments as identical when deciding whether amendments in the Bill of Rights apply to state and local governments;[45] interpreting the Fifth Amendment's Double Jeopardy Clause;[46] interpreting the Constitution's Contracts Clause;[47] deciding how the Tenth Amendment

41. *See infra* Section I.B.2.

42. I will use the term '*Parker* immunity' to refer to the immunity of state—and, sometimes, municipal—law from preemption by the Act.

43. For a more nuanced explanation of state action doctrine's rules for determining when municipal regulation receives *Parker* immunity, see *infra* Section I.B.1.

44. Lawyers also use the term "state action doctrine" to describe the set of rules that courts use to determine whether an action by a person or an entity implicates constitutional rights. *See, e.g.*, Justin Desautels-Stein, *A Structuralist Approach to the Two State Action Doctrines*, 7 N.Y.U. J. L. & LIBERTY 254, 256–57 (2013). The state action doctrine that I discuss is a separate body of law from that constitutional state action doctrine, which I do not discuss in this Article.

45. *E.g.*, McDonald v. City of Chicago, 561 U.S. 742, 759 (2010) (Chicago's ability to regulate guns depends on "whether the [Second Amendment] applies to the States[.]").

46. *See* Waller v. Florida, 397 U.S. 387, 393, 395 (1970); *see also infra* Section II.B (elaborating this point).

47. That Clause provides that "No state shall . . . pass any . . . Law impairing the obligation of contracts." U.S. CONST. art. 1, § 10, cl. 1. The Court has treated municipalities as identical to states under this Clause in two ways. First, the Court has held that municipalities cannot bring Contracts Clause claims against their State, because the State created the municipality as an agent to execute state law. *See* City of Trenton v. New Jersey, 262 U.S. 182, 185–86, 192 (1923). Second, the Court—as with the Act—has constructed exceptions to the Contract Clause's absolute language. U.S. Tr. Co. v. New Jersey, 431 U.S. 1, 21, 24–32 (establishing the test for whether a state law violates the Clause). Courts have then applied this test identically to laws enacted by state governments as to laws enacted by municipalities, without requiring that the municipal law be authorized by some state law that independently passes the test. *See* Sanitation and Recycling Indus., Inc. v. City of New York, 107 F.3d 985, 993–94 (2d Cir. 1997).

applies to municipalities;[48] and deciding (in contexts other than state action doctrine) whether federal law preempts municipal law.[49]

But federal courts have treated state and local governments as distinct in other contexts. For instance, the Court has read the Eleventh Amendment's sovereign immunity principle to protect states, but not necessarily municipalities, from suits for money damages for alleged violations of federal law.[50] And in part because of this reading of the Eleventh Amendment, the Court has interpreted the Civil Rights Act of 1871[51] to authorize certain suits against municipalities,[52] but not against states.[53]

Given the absence of any obvious rule to decide when to treat state and local governments identically versus distinctly, what justifies the Court's decision to condition municipalities' *Parker* immunity on affirmative state approval? Three possible justifications emerge from either the Court or scholarship—none satisfactory. These are: (1) the sovereignty argument: municipalities, unlike states, are not sovereign governments, and so the federalism concerns that warrant immunizing state laws do not warrant immunizing municipal laws;[54] (2) the externalities argument: municipal officials are more able than state officials to enact anticompetitive regulations that impose costs on non-residents, to whom those officials are not accountable, and therefore the political accountability considerations that warrant immunizing states do not warrant immunizing municipalities;[55] and, (3) the capture argument: the risk that municipal officials will serve powerful special interests at other constituents' expense warrants conditioning municipal immunity on state authorization.[56]

The subsequent sections set out how each of these rationales fails to justify the limit the Court has imposed on municipalities' *Parker* immunity. Throughout these explanations it is important to remember that the question of whether the Act preempts municipal law is a question of congressional intent:[57] municipalities' lesser *Parker* immunity is justifiable only insofar as we have compelling

48. *See infra* Section II.B.

49. *See infra* Section II.B.

50. N. Ins. Co. v. Chatham Cty., 547 U.S. 189, 193 (2006) ("[O]nly States and arms of the State possess immunity from suits authorized by federal law . . . . Municipalities, unlike States, do not enjoy a constitutionally protected immunity from suit." (quoting Jinks v. Richland Cty., 538 U.S. 456, 466 (2003))).

51. 42 U.S.C. § 1983 (2018).

52. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690–91 (1978).

53. Will v. Mich. Dep't of State Police, 491 U.S. 58, 64, 66 (1989).

54. City of Lafayette v. La. Power & Light Co., 435 U.S. 389, 394, 409–13 (1978).

55. *E.g.*, Einer R. Elhauge, *The Scope of Antitrust Process*, 104 HARV. L. REV. 667, 732 (1991).

56. *E.g.*, John Wiley Jr., *A Capture Theory of Antitrust Federalism,* 99 HARV. L. REV. 713, 769 (1986) (arguing this reasoning animated the Court's state action doctrine decisions).

57. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 413 (5th ed. 2015) ("Courts must decide what is preempted, and this inevitably is an inquiry into congressional intent."); *see also, e.g.*, Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 516 (1992) ("'[T]he purpose of Congress is the ultimate touchstone' of pre-emption analysis.") (citing Malone v. White Motor Corp., 435 U.S. 497, 504 (1978)).

affirmative reasons to suppose that the Congress that enacted the Act intended or would have intended such lesser immunity.

Section II explains how state action doctrine errs by rejecting a presumption against concluding that Congress would have intended such preemption of municipal law. This error is particularly stark with respect to home rule municipalities. Sections III and IV then affirmatively explain why we should not suppose that Congress would have intended to accord municipalities lesser *Parker* immunity in response to the risks of externalities or interest group capture.

The central takeaway is that state action doctrine should remove two unjustified barriers to municipal *Parker* immunity. First, the doctrine's "clear articulation requirement" conditions municipal *Parker* immunity on the municipality's ability to show that state policy authorizes the municipal law. In this Article I argue the clear articulation requirement should be abolished. The doctrine should instead rely on state courts to invalidate, or state legislatures to preempt, municipal laws that buck state policy.

Second, some lower courts have interpreted state action doctrine's "active supervision requirement" to condition certain municipal programs' immunity on the *state* government's supervision of that program.[58] Supervision by the *municipal* government, these courts hold, does not suffice. But, as explained *infra* Section I.B.2(b), supervision by municipal officials fulfills the active supervision requirement's purpose, and therefore municipal supervision of municipal programs ought to suffice, just as state supervision of state programs suffices. Before I turn to these issues in sections II-IV, the following section provides an introductory overview of state action doctrine.

### *B. State Action Doctrine's Current Rules, the Court's Reasons for Developing Them, and the Decisions Lower Courts Face*

#### *1. The Doctrine's Current Rules*

How state action doctrine treats a given municipal competitive restraint depends on whether the municipality gives private parties discretion in shaping or implementing that restraint. If the municipality does not, the regulation is referred to as a unilateral restraint.[59] To receive immunity for a unilateral restraint, the

58. *Compare* Tri-State Rubbish, Inc. v. Waste Mgmt., Inc., 998 F.2d 1073, 1079 (1st Cir. 1993) (holding that municipal supervision of private actors is adequate where authorized by or implicit in the state legislation" and explaining this view is "share[d by] the Eighth and Ninth Circuits, [and] endorsed by the leading antitrust treatise"), *and* Merrick Garland, *Antitrust and State Action: Economic Efficiency and the Political Process*, 96 YALE L.J. 486, 495 n.57 (1987) ("Although *Hallie* states [in dicta] that active 'state' supervision is required" for municipally regulated parties to receive immunity, "the word ['state' there] is best read in its generic sense as contemplating either state or municipal supervision."), *with* Delta Turner, Ltd. v. Grand Rapids—Kent Cty. Convention/Arena Auth., 600 F. Supp. 2d 920, 930 (W.D. Mich. 2009) ("The active supervision requirement can only be met by state supervision; municipal oversight is insufficient."); Chamber of Commerce v. City of Seattle, 890 F.3d 769, 787–90 (9th Cir. 2018) (same).

59. An example of a unilateral restraint would be if a local government that provided sewage

municipality must meet the doctrine's clear articulation requirement, which demands that the municipality prove that the state has clearly articulated a policy favoring competitive restraints in the market in which the restraint operates.[60]

If private parties do help shape or implement the regulation, the regulation is classified as a hybrid restraint. Hybrid restraints must meet two conditions to receive immunity. First (as with unilateral restraints), the municipality must show the state has clearly articulated a policy to restrain competition in the relevant market. Second, the private party must be "actively supervised by the state itself."[61] The Court has not yet squarely addressed the issue of whether the term "state itself" in this second prong refers to the state government or instead to government generally. Consequently, some lower courts have ruled that supervision *by the municipality* of a municipally imposed hybrid restraint satisfies the second prong, while some lower courts have ruled such supervision does not.[62]

### *2. Why the Court Chose These Rules*

#### *a. Clear Articulation Requirement*

The Court first addressed how state action doctrine applies to municipal action in *City of Lafayette v. Louisiana Power & Light Co*.[63] There, the Court had to decide whether local governments receive *Parker* immunity equal to that of states. The Court held that they do not. Local governments receive *Parker* immunity only for regulations that manifest or carry out the state government's policy to restrain competition in a given market.[64] The Court rationalized this holding in two steps. First, the Court argued that municipalities tend to act in ways that benefit their residents at the expense of non-residents. This tendency, the Court continued, counsels against assuming that Congress would have intended to immunize municipalities from preemption, because such parochial municipal actions could create "anticompetitive effects . . . at odds with the comprehensive national policy Congress established."[65] Second, the Court argued that *Parker*'s findings regarding the congressionally intended scope of the Sherman Act do not apply with equal

treatment services tied those services to sewage collection and transportation services.

60. City of Lafayette v. La. Power & Light Co., 435 U.S. 389, 413 (1978); Town of Hallie v. City of Eau Claire, 471 U.S. 34, 39 (1985). Over time, state action doctrine cases have refined the standard a municipality must meet to show that its regulation embodies such state policy. Because I argue that state action doctrine errs in according municipalities lesser deference than states *at all*, I will not here explicate or quibble about the precise contours of the clear articulation requirement.

61. *Lafayette*, 435 U.S. at 410.

62. *See supra* text accompanying note 58.

63. 435 U.S. 389 (1978).

64. *Id*. at 413–14.

65. *Id*. at 403–04, 406–08. Some language in *Lafayette* suggests the Court thought Congress would have intended to impose a clear articulation requirement to guard against municipalities' interference with national economic goals in ways other than by imposing externalities on their neighbors. But this argument is weaker than the externalities argument, and my arguments in sections III and IV of this Article apply also to refuting this argument.

force to municipalities.[66] Why not? Because *Parker* premised those findings on the principle that, because state governments are sovereign, courts should adopt a presumption against preemption. The *Lafayette* Court reasoned that, because municipalities are not sovereign, that principle does not help answer whether Congress intended the Act preempt municipal regulations.[67]

But *Lafayette* did not answer whether municipalities that have received home rule[68] from their state should receive *Parker* immunity equal to that of the state. The Court addressed this question in *Community Communications Co. v. City of Boulder*.[69] There, the city argued that its home rule authority—which affirmatively authorized the city to enact any otherwise lawful ordinance regulating "local and municipal matters"—entitled it to *Parker* immunity.[70]

The Court rejected that claim. The Court reasoned that (1) (reiterating *Lafayette*'s logic) since "ours is a dual system of government . . . which has no place for sovereign cities," *Parker*'s federalism principles do not require a presumption against preemption of municipal law, and that (2) Colorado's home rule amendment signaled only state neutrality toward (and not approval of) the local government's regulations.[71] That is, to receive *Parker* immunity, home rule cities must show that some statement of state law other than the constitutional clause or statute conferring home rule clearly authorizes them to restrain competition in a given market.

*Boulder* met rounds of criticism.[72] The decision undermines several objectives states sought to achieve in giving their municipalities home rule authority. These interrelated objectives include: empowering municipalities to address problems impacting their constituents without waiting to get specific state

66. *Id*. at 394, 409–13.

67. *Id*.; *see also infra* Section II (further explaining *Lafayette*'s argument on this point).

68. Home rule refers to the power many municipalities have received from their states to do things that the state government has not specifically pre-authorized. Home rule is perhaps best understood in reference to its conceptual opposite: Dillon's Rule. Dillon's Rule is, essentially, a principle that local governments have no power that cannot "be traced back to a specific delegation [from the state government]: whenever it is uncertain whether a locality possesses a particular power, a court should assume that the locality *lacks* that power." Richard Briffault, *Our Localism Part I—the Structure of Local Government Law*, 90 COLUM. L. REV. 1, 8 (1990) [hereinafter Briffault, *Our Localism*]. To illustrate, if a city in a state adhering to Dillon's Rule wanted to enact rent control, the city must point to a specific state statute that authorizes the city to enact rent control. Depending on how strictly the state courts apply Dillon's Rule, that state would need to say something along the lines of: "the city may regulate rental housing markets"; or, "the city may regulate rental housing markets to assure affordability and stability for tenants"; or perhaps even, "the city may restrict price increases in rental housing markets." Most states have retreated from Dillon's Rule, providing some or all of their municipalities with home rule. The precise boundaries of *what* home rule authorizes a municipality to do vary among states, as explained *infra* Section III.A.1.

69. 455 U.S. 40 (1982).

70. *Id*. at 43.

71. *Id*. at 53.

72. *E.g*., Frank H. Easterbrook, *Antitrust and the Economics of Federalism*, 26 J.L. & ECON. 23, 36 (1983) (deeming *Boulder*'s reasoning "mechanical"); *cf*. Lopatka, *supra* note 29, at 23 (describing "the reaction to" *Lafayette* as "shock").

authorization; freeing up the state legislature to focus on matters of state-wide importance; and reducing the state government's interference in city governance.[73] These objectives serve more general purposes, including establishing effective public policy, ensuring efficient use of government resources, and safeguarding local autonomy as a democratic value.[74]

In *Boulder*'s wake, Congress responded to municipalities' expansive exposure to antitrust liability by enacting the Local Government Antitrust Act of 1984 (LGAA).[75] The LGAA abolished local governments' liability for money damages if they were to lose a Sherman Act suit.[76] But because the LGAA did not change state action doctrines' rules for when the Act *preempts* a local law, the LGAA did not cure the fundamental objection that *Boulder* trammels the system home rule states have designed for local government regulation.[77]

*b. Active Supervision Requirement*

The Court has never addressed whether the active supervision requirement demands that the state government, rather than municipal government, supervise

73. Judith A. Stoll, *Home Rule and the Sherman Act After* Boulder*: Cities Between a Rock and a Hard Place*, 49 BROOK. L. REV. 259, 262 (1983); *see also* Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163, 1192–93 (2018) (noting "the development of home rule in the states was an effort to protect cities—especially big cities—from a legislature that refused to let them govern" even though home rule policies may be "mostly toothless").

74. *E.g.*, John Wiley Jr., *A Capture Theory of Antitrust Federalism,* 99 HARV. L. REV. 713, 733 (1986) (arguing state action doctrine's clear authorization requirement makes governance less efficient and undermines local autonomy); *see also* Einer R. Elhauge, *The Scope of Antitrust Process*, 104 HARV. L. REV. 667, 675–76 (1991) (noting criticism that clear articulation requirement "confounds principles of local autonomy and federalism").

75. 15 U.S.C.A. §§ 34–36 (2018).

76. Rossi, *supra* note 29, at 245. That Congress removed damages liability but not Sherman Act preemption for municipal laws that fail state action doctrine's current test does not constitute congressional ratification of *Lafayette* and *Boulder*'s erroneous interpretations of the Sherman Act. To treat Congress's *failure to enact legislation nixing court-created preemption* of municipal ordinances passed without state authorization as equivalent to an *enactment preempting* such ordinances would:

> ignore [that] . . . the 'complicated check on legislation' erected by our constitution creates an inertia that makes it impossible to assert with any degree of assurance that congressional failure to act represents (1) approval of the status quo, as opposed to (2) inability to agree upon how to alter the status quo . . . [or] (4) indifference to the status quo . . . .

Johnson v. Transp. Agency, 480 U.S. 616, 671–72 (1987) (Scalia, J., dissenting) (citing THE FEDERALIST No. 62, at 378 (James Madison) (Clinton Rossiter ed., 1961)).

77. *See infra* Sections II.B & III.A.1–2 (elaborating on this objection and this system); *see also* Lopatka, *supra* note 29, at 74–75 (arguing that the LGAA is "neither adequate nor theoretically sound" and that, because antitrust litigation is "notoriously expensive," municipalities that do not receive *Parker* immunity for an ordinance will not try to litigate the merits of whether the behavior the ordinance authorizes in fact violates the Sherman Act). The Seattle Ordinance's history bears out Lopatka's insight. After the Ninth Circuit ruled that the ordinance does not receive *Parker* immunity, Seattle did not attempt to litigate a claim that collective bargaining over prices by misclassified workers does not violate the Act. Seattle instead amended the ordinance to no longer authorize these workers' collectively bargaining over wages.

municipal hybrid restraints. But three cases suggest municipal supervision should suffice. These are *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*,[78] where the Court reviewed a *state* statute imposing a *hybrid* restraint; *Town of Hallie v. City of Eau Claire*,[79] where the Court reviewed a *municipal* statute imposing a *unilateral* restraint; and the Court's recent state action decision, *North Carolina Board of Dental Examiners v. FTC*,[80] where the Court reviewed a restraint on competition imposed by a state dental board.

*Midcal* involved a state statute that created a program that authorized private wine producers to determine the prices charged by wholesalers.[81] In *Midcal*, the Court created a two-part test for *Parker* immunity: first, the restraint "must be one clearly articulated and affirmatively expressed as state policy."[82] Second, "the policy must be 'actively supervised' by the State itself."[83] The active supervision requirement ensured that the government genuinely authorized and took ownership of the retail prices coming out of the program, rather than simply handing the wine producers a blank check to run a "private price-fixing" scheme.[84]

Why was it important to make sure that the government take such ownership? Later cases and scholarship explained that the active supervision prong requires the government to take ownership of hybrid restraints because government officials, unlike the private parties participating in the restraints, can be held accountable for those restraints in elections.[85] The first such case was *Hallie. Hallie* held that the state need not actively supervise municipal *unilateral* restraints, because *Midcal*'s active supervision prong seeks to supervise threats from private actors, rather than from electorally accountable municipal officials.[86] Not only do

78. 445 U.S. 97 (1980).

79. 471 U.S. 34 (1985).

80. 135 S. Ct. 1101 (2015).

81. *Midcal*, 445 U.S. at 99, 103.

82. *Id*. at 105 (citing City of Lafayette v. La. Power & Light Co., 435 U.S. 389, 410 (1978)).

83. *Id*. (citing *Lafayette*, 435 U.S. at 410).

84. *See id*. at 105–06 (explaining that states do not satisfy the active supervision prong where "[t]he State simply authorizes price setting and enforces the prices established by private parties . . . [without] review[ing] the reasonableness of the price schedules . . . [or] regulat[ing] the terms of fair trade contracts").

85. *See Dental Examiners*, 135 S. Ct. at 1111 (explaining the active supervision requirement seeks to ensure that "the States accept political accountability for anticompetitive conduct they permit and control"); *see also* Richard Squires, *Antitrust and the Supremacy Clause*, 59 STAN. L. REV. 77, 79–80 (2006) ("[A] state which takes control over market prices incurs costs the state could avoid if its only goal were to confer monopoly profits on producers. These costs are pricing distortions, higher administrative expenses, and constituency protest. A state's willingness to incur these costs thus suggests that the state's regulatory objectives do not clash with federal antitrust policy."); Rebecca Haw Allensworth, *The New Antitrust Federalism*, 102 VA. L. REV. 1387, 1428 (2016) (explaining that the active supervision prong promotes electoral accountability, so that a jurisdiction's voters "genuinely prefer one regulatory mode over another," and thus this regulatory mode serves the federalism concerns that motivate state action doctrine's immunizing state policy).

86. *Hallie* reasoned "we may presume . . . the municipality acts in the public interest" whereas "[a] private party . . . may be presumed to be acting primarily on his or its own behalf." Town of Hallie v. City of Eau Claire, 471 U.S. 34, 45 & n.9 (1985). We may presume a municipality acts in

municipal officials face elections, but they also operate under sunshine laws and disclosure requirements that let voters exercise meaningful checks.[87]

*Dental Examiners* then held that "a state board on which a controlling number of decisionmakers are active participants in the occupation the board regulates must [be actively supervised by other state officials] in order to invoke state-action antitrust immunity."[88] The Court identified two features that distinguished the dental board at issue from municipalities (whose unilateral restraints can be excluded from *Midcal's* active state supervision requirement, per *Hallie*). First, "municipalities are electorally accountable and lack the kind of private incentives characteristic of active participants in the market."[89] Second, "municipalit[ies] . . . exercis[e] a wide range of governmental powers across different economic spheres, substantially reducing the risk that [they] would pursue private interests while regulating any single field."[90] A wide scope of regulatory responsibility reduces that risk because "the interests of one entrepreneurial group are more likely to be offset by those of a different group."[91]

But *Dental Examiners*' explanation of why *Hallie* withheld the active supervision requirement from municipalities' *unilateral* restraints shows that municipal supervision of a municipal *hybrid* restraint should satisfy the active supervision requirement. The features that distinguish municipal officials from dental board members—electoral accountability and scope of regulatory responsibility—are the very features that ensure that state officials are adequately accountable for any hybrid restraints the state government actively supervises. Active supervision of hybrid restraints ensures political accountability regardless of whether the state or the municipality provides that supervision.

#### *3. The Ninth Circuit Read Seattle's Authority Unnecessarily Narrowly*

Against this backdrop, the Ninth Circuit in *Chamber of Commerce v. City of Seattle*[92] blocked the ordinance Seattle had enacted[93] that granted taxi and other for-hire drivers a choice to collectively bargain with the firms they drove for.

the public interest in part because "municipal conduct is invariably more likely to be exposed to public scrutiny than is private conduct. Municipalities in some states are subject to 'sunshine' laws or other mandatory disclosure regulations, and municipal officers, unlike corporate heads, are checked to some degree through the electoral process." *Id*.; *see also* Sina Safvati, *Public-Private Divide in* Parker *State-Action Immunity*, 63 UCLA L. REV. 1110, 1124 n.73 (noting that all states subject municipalities to sunshine laws).

87. Safyati, *supra* note 86, at 1124 n.73.

88. *Dental Examiners*, 135 S. Ct. at 1114.

89. *Id*. at 1112 (citation omitted).

90. *Id*. at 1112–13 (citation omitted).

91. Herbert Hovenkamp, *Rediscovering Capture: Antitrust Federalism and the* North Carolina Dental *Case*, COMPETITION POL'Y INT'L ANTITRUST CHRON., at 12 (Apr. 2015) https://scholarship.law.upenn.edu/faculty_scholarship/1801/ [https://perma.cc/867Q-C4KB].

92. 890 F.3d 769 (9th Cir. 2018).

93. SEATTLE, WASH. CODE § 6.310.735 (2015).

Seattle argued that the ordinance should receive *Parker* immunity. Seattle reasoned that the ordinance met the active supervision requirement because Seattle had established detailed procedures to supervise the drivers' collective bargaining.[94] And the ordinance met the clear articulation requirement because Washington authorized municipalities to regulate taxi and other for-hire transportation services "without liability under federal antitrust law."[95] Under state law, that power to regulate "includes: (1) Regulating entry into the business of providing for hire vehicles . . . (3) Controlling the rates charged for providing for hire vehicle transportation service and the manner in which rates are calculated and collected . . . [and] (6) Any other requirements adopted to ensure safe and reliable for hire vehicle transportation service."[96]

But the Ninth Circuit panel disagreed as to both requirements. Concerning clear articulation, the panel reasoned that the Washington statutes Seattle relied on articulated only a policy to restrain competition in the market between drivers and passengers, not in the market between drivers and firms that hire these drivers.[97] Concerning active supervision, the panel held that municipally created hybrid restraints require active supervision by the *state* government.[98]

Seattle's argument that its ordinance satisfied the clear articulation prong was compelling, and the panel could have reasonably concluded it did.[99] But this close question was no question the doctrine should have even been asking: while lower courts must apply the clear articulation requirement under the doctrine's current rules, this Article's analysis shows that the Court should remove this fundamentally misguided requirement. Lower courts need not, however, await further action from the Court as to the active supervision requirement. Again, the best interpretation of the Court's current test is that supervision by the municipality satisfies that requirement.

94. Defendants-Appellees' Answering Brief at 37–43, *Seattle*, 890 F.3d 769 (No. 17cv-00370).

95. WASH. REV. CODE §§ 81.72.200 (taxicabs) & 46.72.001 (for-hire vehicles).

96. WASH. REV. CODE § 46.72.160. The Ordinance accordingly included factual findings that collective bargaining in transportation industries improves services' safety and reliability. SEATTLE, WASH., ORDINANCE 124968 §§ I-J (2015).

97. The panel noted, "although the [enabling] statute addresses the provision of transportation services, it is silent on the issue of compensation contracts between for-hire drivers and driver coordinators." *Seattle*, 890 F.3d at 784; *see also id*. at 785 ("[T]he sixth enumerated power—a residual power—addresses 'for hire vehicle transportation service[s],' not ride-referral service fees." (citing Wash. Rev. Code § 46.72.160(6) ("Cities, counties, and port districts may license, control, and regulate all for hire vehicles operating within their respective jurisdictions [including] (6) Any other requirements adopted to ensure safe and reliable for hire vehicle transportation service."))). The panel then distinguished between "transportation services [to riders] by for-hire drivers and ride-referral services [to drivers] by companies like Uber and Lyft" and concluded, "[w]e cannot collapse the market for ride-referral services into the market for transportation services[.]" *Id*.

98. *Id*. at 787–90.

99. For more on this argument, see Brief of Law and Business Professors as Amici Curiae in Support of the Defendants-Appellees & in Support of Affirmance at 21–23, *Seattle*, 890 F.3d 769 (No. 17-35640) (arguing that splitting the transportation services market would undermine Seattle's authority and regulatory efficacy).

## II.
## THE DUAL SOVEREIGNTY ARGUMENT

*Lafayette* and *Boulder* explicitly relied on a claim that municipalities are not sovereign to justify conditioning municipal *Parker* immunity on a clearly articulated state policy to restrain competition.[100] The basic premise of this reasoning is that the U.S. Constitution establishes a "dual system" of sovereignty in which the federal government and state governments are both sovereign entities, but municipalities are not.[101] This premise derives from the ways in which the Constitution's treatment of state and local governments differs. The Constitution, in various parts, treats state governments as possessing some amount of sovereignty upon which the federal government may not encroach.[102] But the Constitution provides no explicit protection for local governments; indeed, the Constitution never explicitly mentions local governments at all.[103]

*Lafayette* assumed that municipalities' lack of sovereignty required the Court to conclude that *Parker*'s reasoning does not support immunizing municipal laws from Sherman Act preemption. That is, *Lafayette* essentially reasoned the following about sovereignty's relevance to municipal *Parker* immunity:

(1) *Parker* contended that state sovereignty requires the Court to presume Congress would not have intended the Act to preempt state-authorized competitive restraints.[104]
(2) Municipalities are not sovereign.[105]

Therefore, the Court concluded, there should be no presumption that Congress would not have intended the Act to preempt municipally authorized competitive restraints.[106]

This section makes two points about *Lafayette*'s sovereignty argument. First, that argument, even if accepted as sound, provides no affirmative reason to think Congress did intend or would have intended the Act to preempt municipally authorized restraints. Second, *Lafayette*'s sovereignty argument is not sound: even if we accept *Lafayette*'s two premises,[107] we should presume, absent strong affirmative reasons to think otherwise, that Congress would not have intended the

100. *See supra* Section I.B.2(a).

101. City of Lafayette v. La. Power & Light Co., 435 U.S. 389, 411 (1978).

102. *See*, *e.g.*, U.S. CONST. art. 1, § 8 & amend. X (limiting Congress's powers to those enumerated in the Constitution and "reserv[ing all other powers] to the States . . ., or to the people"); Printz v. United States, 521 U.S. 898, 919 (1997) (citing a few other examples of the Constitution recognizing states' sovereignty).

103. *See* RICHARD BRIFFAULT & LAURIE REYNOLDS, CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW 73 (8th ed. 2016).

104. *See Lafayette*, 435 U.S. at 400, 411-12.

105. *Id*. at 412.

106. *See id*. at 412–13.

107. I do not address the merits of calling states and not municipalities "sovereign."

Act to preempt municipal competitive restraints. And this presumption should be particularly strong with respect to restraints enacted by home rule municipalities.

### *A. The Sovereignty Argument's At-Best-Limited Use*

Because the question whether the Act preempts municipal law is at least formally a question of congressional intent,[108] *Lafayette* justifies its clear articulation requirement only insofar as *Lafayette* offers affirmative reasons to think Congress would have intended the Act to preempt competitive restraints that are merely municipally authorized. *Lafayette*'s dual sovereignty argument provides no such reasons to think so. *Parker* invoked dual sovereignty only to explain why the canon of statutory interpretation whereby courts presume federal statutes do not preempt state law absent strong reasons to infer such preemption required that the *Parker* Court "not lightly . . . attribute[] to Congress" an intention that the Act preempt state-authorized restraints.[109] Specifically, *Parker* reasoned that withholding this presumption against preemption would trench on the State's sovereignty.[110] *Lafayette* then used its claim that municipalities are not sovereign only to support a claim that the Court should not apply this presumption against preemption in determining whether the Act preempts municipally authorized restraints.[111] *Lafayette* did not argue that municipalities' lack of sovereignty indicates that Congress did intend or would have intended the Act to preempt such restraints.

### *B. The Sovereignty Argument's Misuse*

The more interesting point about *Lafayette*'s sovereignty argument is that the two premises, as laid out above, do not support the conclusion. *Lafayette* tries to link these premises to that conclusion by analogizing to the Eleventh Amendment. Specifically, *Lafayette* cites *Lincoln County v. Luning,*[112] which held that, because municipal governments are sufficiently distinct from state governments, municipal governments should not be deemed "integral part[s] of the state" that necessarily share the state government's Eleventh Amendment immunity.[113] *Lafayette* characterized *Luning* as standing for the proposition that "[c]ities are not themselves sovereign; they do not receive all the federal deference of the States that create them."[114] Reasoning from this premise, *Lafayette* concluded that the Court should not adopt a presumption, paralleling *Parker*'s presumption, that Congress

108. *See supra* note 57.

109. *See* Parker v. Brown, 317 U.S. 341, 351 (1943).

110. *See id*. ("In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.").

111. *See Lafayette*, 435 U.S. at 411–13.

112. 133 U.S. 529 (1890).

113. *Id*. at 530.

114. *Lafayette*, 435 U.S. at 412.

would not have intended the Act to preempt municipal competitive restraints.[115] *Lafayette* held that, instead, municipalities receive *Parker* immunity only for laws that are tantamount to laws enacted by the sovereign state, i.e. laws the municipality enacts pursuant to a state policy to restrain competition in a given market.[116]

Yet in other contexts the Court has drawn the opposite conclusion from the premise that local governments are not sovereign. In these contexts, the Court has concluded that local governments' laws should be treated just as though they were the state's laws. The Double Jeopardy Clause provides one example.[117] Although that clause protects someone from being prosecuted more than once for the "same offence," Double Jeopardy jurisprudence permits separate sovereign governments to separately prosecute someone for the same underlying act, if that act violates laws of each sovereign.[118] The idea is that an act violating one sovereign's laws is a separate offense from an act violating the other sovereign's laws.

*Waller v. Florida*[119] addressed whether the Double Jeopardy Clause's separate sovereignty doctrine permits a criminal defendant to be prosecuted separately for the same underlying act (a) in municipal court on a charge that their act violated a municipal ordinance, and (b) in state court on a charge that their act violated a state law.[120] The Court here brushed aside "a 'dual sovereignty' theory [a]s an anachronism."[121] The Court reasoned that "[p]olitical subdivisions of States . . . never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions."[122] This, the Court reasoned, meant that the municipal ordinance enforced in municipal court should be treated just as though it were a law enacted by the state legislature and enforced in state court.[123]

*Waller*'s basic point—that municipal law in an important sense carries out the state's own lawmaking authority—has been affirmed by the Court's post-*Boulder* New Federalism decisions. A hallmark of these decisions, discussed in the following paragraphs, is the Court's reluctance to read federal statutes to interfere with states' chosen structures for internal governance. As those paragraphs will establish, these decisions' logic suggests that *Boulder* misapplied state action doctrine's dual sovereignty rationale when *Boulder* denied *Parker* immunity to home rule cities, because *Boulder* thereby impermissibly infringed the *state*'s sovereignty.

115. *Id*. at 412–13.

116. *See id*. at 413.

117. *Cf*. *id*. at 430 n.7 (Stewart, J., dissenting) (noting that a municipality is equated with a state under the Double Jeopardy Clause, as well as the Fourteenth Amendment and Impairment of Contracts Clause).

118. Puerto Rico v. Sanchez Valle, 136 S. Ct. 1863, 1867 (2016).

119. 397 U.S. 387 (1970).

120. *See id*. at 388–89.

121. *Id*. at 395.

122. *Id*. at 392 (citing Reynolds v. Sims, 377 U.S. 533, 575 (1964)).

123. *Id*. at 392–95.

*Gregory v. Ashcroft*[124] sets the basic framework. That decision held that courts may not interpret a federal statute to displace the "structure of [a state's] government" unless Congress "make[s] its intention to do so unmistakably clear in the language of the statute."[125] The Court set this high bar because "[t]hrough the structure of its government, . . . a state defines itself as a sovereign."[126]

In *Nixon v. Missouri Municipal League*,[127] the Court held that *Gregory* prevents federal courts from reading a federal statute to adjust the amount of authority states have given their local governments unless the federal statute clearly manifests Congress's intent to do so. *Nixon* involved a federal statute that provided, "[n]o State . . . statute . . . may prohibit or have the effect of prohibiting the ability of *any entity* to provide interstate or intrastate telecommunications service."[128] At issue in *Nixon* was whether a subdivision of the state is an "entity" that the statute protects.[129] Municipal plaintiffs alleged that this federal statute prohibited state governments from limiting their provision of telecommunications services.[130] The Court held that, under *Gregory*, "[t]he want of any unmistakably clear" indication that Congress intended "entity" here to cover state subdivisions was "fatal" to plaintiffs' claim.[131] *Gregory* controlled because states create local governments "as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in [the State's] absolute discretion."[132] And thus, to read a federal statute to interfere with the state's decision about how much authority to grant its subdivisions would impermissibly "trench on the States' arrangements for conducting their own governments," unless the statute "unmistakably clear[ly]" demanded that reading.[133]

*Gregory* and *Nixon* thus imply that *Boulder*'s reasoning violated home rule states' sovereignty. *Boulder* reads the Act to limit the authority states chose to give home rule municipalities. And *Boulder* did so although the Act—far from making its application to municipal governments "unmistakably clear"[134]—never mentions municipal governments.[135] *Gregory* and *Nixon* thus give doctrinal weight to

124. 501 U.S. 452 (1991).

125. *Id*. at 460 (citing Will v. Michigan Dep't of State Police, 491 U.S. 58, 65 (1989)).

126. *Id*.

127. 541 U.S. 125 (2004).

128. 47 U.S.C. § 253(a) (2018) (emphasis added).

129. *Nixon*, 541 U.S. at 128–29.

130. *Id*. at 129.

131. *Id*. at 141.

132. *Id*. at 140.

133. *Id*. at 140–41.

134. *Id* at 141.

135. True, the question in *Nixon* was whether a federal statute limited the state's power to *withdraw* authority from a local government, whereas the question in *Boulder* was whether the Sherman Act limits the authority the state has *granted* its local governments. But that distinction was irrelevant to *Nixon*'s *Gregory* analysis. That distinction impacted only an alternative argument for *Nixon*'s result. *See id*. at 133–38, 140–41 (noting *Gregory* "would bring us to the same conclusion" as that alternative argument).

one criticism that *Boulder* immediately received: that *Boulder* disrespects the very state sovereignty values that it and *Lafayette* claim underly state action doctrine.[136]

State action doctrine's current treatment of home rule municipalities is in tension with *Gregory*'s and *Nixon*'s protection of states' chosen structures of governance. The doctrine's treatment of municipalities differently than states is also in tension with the fact that the Court treats municipalities (whether a home rule municipality or not) and states identically in other federalism contexts that are more analogous to state action doctrine than are the Eleventh Amendment precedents *Lafayette* relied on. For instance, when interpreting whether federal law preempts local law (in contexts other than state action doctrine), the Court has treated local law as indistinguishable from state law and applied to municipal regulations the very presumption against preemption that *Lafayette* refused to extend[137]—a point *Boulder*'s dissent noted.[138]

Likewise, the Court has treated local and state governments as identical when assessing how the Tenth Amendment limits Congress's Commerce Clause power in contexts beyond *Gregory* and *Nixon*. The Court has held that the limits the Tenth Amendment places "upon the power of Congress to override state sovereignty" protects local governments from Congress "just as if" these governments were "the state itself," because local governments "derive their authority and power from their respective states."[139]

Indeed, courts have treated state and local governments as interchangeable under the anticommandeering doctrine that the Court developed—primarily as a corollary to the Tenth Amendment[140]—after *Lafayette* and *Boulder*.[141] This doctrine posits in part that Congress cannot order or compel state or local government

136. *See* Wiley Jr., *supra* note 74, at 722–23 (describing *Boulder* and *Lafayette* as "massive and ironic federal intrusions on state sovereignty"); *see also* Cmty. Commc'ns Co. v. City of Boulder, 455 U.S. 40, 70–71 (Rehnquist, J., dissenting) ("It is nothing less than a novel and egregious error when this Court uses the Sherman Act to regulate the relationship between the States and their political subdivisions.").

137. *See* City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 633 (1973) ("We start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless . . . the clear and manifest purpose of Congress [was to preempt state or local law on the matter.]"); Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 443 (1960) (applying to a municipal ordinance the same preemption analysis the Court applies to state legislation, and referring to the ordinance interchangeably as "local" and "state" regulation).

138. Cmty. Commc'ns Co. v. City of Boulder, 455 U.S. 40, 69–70 (1982) (Rehnquist, J., dissenting).

139. Nat'l League of Cities v. Usery, 426 U.S. 833, 842, 855 n.20 (1976), *overruled on other grounds by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985); *see also* City of Lafayette v. La. Power & Light Co., 435 U.S. 389, 430 (1978) (Stewart, J., dissenting) (noting *National League* provides better analogy for state action doctrine than do Eleventh Amendment decisions).

140. Printz v. United States, 521 U.S. 898, 918–19 (1997).

141. *Id*. at 904, 935 (holding anticommandeering doctrine prohibits federal government's requiring local officials to enforce federal law); *see also* City of New York v. United States, 179 F.3d 29, 33–37 (2d Cir. 1999) (interpreting the anticommandeering doctrine to protect both state and local governments). *But see Printz*, 521 U.S. at 955–56 (Stevens, J., dissenting) (criticizing majority's extending to local officials the state's protection from federal commandeering).

officials to enact a law[142] or to administer a federal program.[143] The Court has treated local and state governments as interchangeable under this doctrine although this doctrine, like state action doctrine, grounds in the Constitution's "system of dual sovereignty."[144]

This makes sense. As *Printz* explained: the Constitution set up a system of dual sovereignty in part because the Framers "contemplate[d] that a State's government will represent and remain accountable to its own citizens."[145] A key goal of anticommandeering doctrine is to prevent the federal government from undermining this accountability.[146] Since local governments are electorally accountable to their constituents just as a state government is to its constituents,[147] and since safeguarding a local government's accountability to its constituents serves the same values that safeguarding a state government's accountability to its citizens serves—including, among other things, public policy that is responsive to voters' preferences[148]—we should not be surprised that courts equally protect local and state governments under anticommandeering doctrine.

Anticommandeering doctrine thus is a particularly instructive foil to state action doctrine. The Court has grounded both doctrines in the Constitution's system of dual sovereignty. More fundamentally, both doctrines protect sub-federal governments' ability to remain responsive to their constituents.[149] Despite these

142. *Printz*, 521 U.S. at 925.

143. New York v. United States, 505 U.S. 144, 178 (1992).

144. *Printz*, 521 U.S. at 918–19.

145. *Id*. at 920–21 (first citing *New York*, 505 U.S. at 168–69; then citing United States v. Lopez 514 U.S. 549, 576–577 (Kennedy, J., concurring)) ("As Madison expressed it [in THE FEDERALIST NO. 39]: '[T]he local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere.'").

146. *See New York*, 505 U.S. at 169 ("Accountability is . . . diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation."); *see also Printz*, 521 U.S. at 929–30 (similar); Murphy v. NCAA, 138 S. Ct. 1461, 1477 (2018) (similar).

147. *See supra* Section I.B.2(b); *infra* Section IV.A.

148. *See* Allensworth, *supra* note 85, at 1427–28 (explaining that electoral accountability lets us viably conclude that a jurisdiction's voters "genuinely prefer one regulatory mode over another," and thus that this regulatory mode serves the federalism concerns that motivate state action doctrine's immunizing state policy); *see also* Robert P. Inman & Daniel L. Rubinfeld, *Making Sense of the Antitrust State-Action Doctrine: Balancing Political Participation and Economic Efficiency in Regulatory Federalism*, 75 TEX. L. REV. 1203, 1246, 1249, 1253 (1997) (arguing that regulations enacted by officials accountable to "an open, participatory political process" can, on balance, increase economic efficiency within the officials' jurisdiction, and that state action doctrine fosters such regulations).

149. *Id*.; *see also infra* note 152 (citing commentary arguing that state action doctrine's goal is, or should be, to immunize regulations enacted by officials who are sufficiently accountable to those whom the regulation impacts). Anticommandeering doctrine likewise protects municipal officials' ability to enact laws and programs their constituents desire; the doctrine does not protect these officials merely from blame for federally imposed legal requirements. By preventing Congress from shifting to municipalities fiscal costs of implementing federal law, the doctrine safeguards municipal officials' ability to appropriate funds to implement their voters' preferred programs. *See Murphy*, 138 S. Ct. at 1477 ("[T]he anticommandeering principle prevents Congress from shifting the costs

similarities, only state action doctrine reads these accountability concerns to offer more protection to state governments than local governments. State action doctrine should regain stride with anticommandeering doctrine and with the Court's other Tenth Amendment and Supremacy Clause jurisprudence examined above. This can be done by according municipalities and states equal *Parker* immunity.

### *C. The Dual Sovereignty Argument's Inadequacy Summarized*

This section has shown that state action doctrine cannot, by the bare assertion that municipalities are not sovereign, justifiably accord municipalities lesser *Parker* immunity than states. *Lafayette* should have applied to municipal laws the same presumption against preemption that *Parker* applied to state laws. And the Court's New Federalism cases show that the Court should not read the Act to preempt competitive restraints enacted by home rule municipalities unless Congress has unmistakably and clearly stated its intent that the Act do so. Congress has not.

That the Congress that enacted the Act did not consider that this Act *could* preempt municipal competitive restraints[150] does not imply that the Court should require less than a clear statement of congressional intent before concluding the Act preempts such restraints. Surely the reasoning undergirding *Gregory* and *Nixon* would demand the Court wait for Congress to pass legislation clearly preempting such restraints rather than construct the Act to do so.

## III.
## THE EXTERNALITIES ARGUMENT

The most compelling argument for municipalities' lesser *Parker* immunity is that Congress would have intended to guard against competitive restraints that benefit the municipality's electorate but impose externalities on people to whom that municipality's lawmakers are not electorally accountable. This was *Lafayette's* primary affirmative argument in favor of the assumption that Congress would have intended the Act to preempt municipal restraints on competition.[151]

This argument reflects a principle that recent commentators have roughly converged on when describing—and often when prescribing—state action doctrine. That principle is that the Act prohibits restraints on competition generally, except for restraints that constitute public policy created by officials who are politically accountable to the people who would bear (a substantial portion of) the costs imposed by that restraint.[152] Einer Elhauge argues this principle rationalizes

of [funding] regulation to the States.").

150. *See* Hovenkamp & Mackerron, *supra* note 39, at 727–28.

151. *See supra* Section I.B.2(a); *see also* Town of Hallie v. City of Eau Claire, 471 U.S. 34, 39–40 (1985) (noting *Lafayette*'s concern about municipal parochialism in accepting *Lafayette*'s clear articulation requirement).

152. This principle synthesizes much state action doctrine scholarship. *Cf.* Arron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162

lesser *Parker* immunity for municipalities. He argues state action doctrine polices market injuries municipalities inflict outside their borders but not market injuries states inflict outside their borders because the dormant commerce clause and related doctrines independently police the latter injuries, but this clause and these doctrines do not police the former injuries unless those injuries spill outside the state.[153]

But the externalities argument fails to justify municipalities' lesser immunity, even if we accept that Congress would have desired that municipalities not impose undue externalities on their neighbors. True, municipalities sometimes act parochially, but state action doctrine is not a proper vehicle for policing that parochialism. This is because, first, we should assume that Congress would have balanced its desire to guard against undue externalities with a desire to avoid undermining municipal officials' ability to enact policies that constituents desire and that do *not* offload such externalities.[154] Second, for two related reasons, state legislatures and state courts—rather than federal courts through state action doctrine—are the proper institutions to strike this balance. First, independent of state action doctrine, state legislatures and state courts already police intermunicipal externalities. In doing so, the legislature and state courts collaborate to fashion state policy that balances, on the one hand, their interest in enabling municipalities' responsiveness to constituents and, on the other, the goal of preventing undue intermunicipal externalities. This section shows how states have carefully structured their home rule systems to balance these goals.

Second, federal courts are not the proper actors to interpret whether state statutes or state constitutional provisions clearly articulate a state policy of restraining competition in a given market. That federal courts should decide what competitive restraints those statutes or provisions permit is in tension with the well-established principle that—absent circumstances not present here—federal courts should

U. PA. L. REV. 1093, 1136 (2014) (concluding that the various accounts interpreting *Midcal* case law "all agree that self-dealing, unaccountable decisionmakers should face antitrust liability"). To sense the range of scholarship converging on this principle, consider the following three accounts:

Einer Elhauge argues in a leading article that state action doctrine "draws [a distinction] between restraints imposed by financially interested actors and financially disinterested politically accountable actors." Elhauge, *supra* note 74, at 729.

Robert Inman and Daniel Rubinfeld note the doctrine "largely ignore[s] . . . the economic consequences of state regulations . . . provided those regulations were decided by an open, participatory political process . . . ." Inman & Rubinfeld, *supra* note 148, at 1253. These authors argue that "requiring state legislative approval of local regulatory policies . . . makes sense only if the municipal regulation creates intercommunity monopoly spillovers." *Id*. at 1284.

Rebecca Haw Allensworth argues that state action doctrine has matured to an administrative law model that immunizes only regulations that politically accountable processes produce. Allensworth, *supra* note 85, at 1428. This approach conditions immunity for a challenged regulation on "the state['s] full and transparent political accountability" for the regulation. *Id*. at 1408.

153. Elhauge, *supra* note 74, at 732.

154. *See supra* note 137 and accompanying text (noting traditional preemption analysis's baseline presumption is that Congress does not wish to displace sub-federal governments' historic police powers).

defer to state courts' interpretations of state statutes and state constitutional provisions. At bottom, the same question is asked by federal courts reviewing whether a municipal competitive restraint satisfies the clear articulation requirement and state courts reviewing whether a municipality had authority to enact a given law and whether any state law preempts that law. That question is: Does the municipal law conform to state policy? Thus, although state action doctrine's own terms require that municipal laws that conform to state policy receive *Parker* immunity,[155] the doctrine conscripts federal courts to withhold *Parker* immunity from municipalities based on *federal courts'* interpretations of state policy—regardless of whether state courts would have held that the municipal law conforms to state policy.[156]

### *A. States Independently Police Intermunicipal Externalities*

The externalities rationale for municipalities' lesser immunity ignores that even home rule states already enlist their state legislatures and state courts to police intermunicipal externalities. Home rule schemes are designed to give states this role, and states muscularly fulfill it. State legislatures retain expansive power to expressly or impliedly preempt local laws of which they disapprove. And state courts use broad discretion to determine whether a local government has authority to issue a given regulation. State courts exercise this discretion when assessing limits inscribed on the municipality's home rule authority and when assessing whether any state statute impliedly preempts the municipal ordinance.

#### *1. Home Rule Accounts for Intermunicipal Externalities*

To explain how home rule accounts for intermunicipal externalities, it is helpful to conceptualize home rule as taking either of two stylized forms—"*imperio*" and "legislative"—although the home rule system in any given state might not fit neatly into either form.[157]

States that provide municipalities "legislative" home rule authorize those municipalities to regulate any matter that the state itself could lawfully regulate. In these states, however, the state retains authority to preempt any municipal regulation, subject only to limits imposed by the state or federal constitution or by federal statute.

155. Assuming that the active supervision requirement is satisfied, if that requirement applies.

156. This section emphasizes ways that state courts interpret state statutes and provisions in order to determine whether a municipal law's *externalities* conflict with state policy. But the clear articulation requirement's short-circuiting state courts' assessments of state policy is in tension with federal courts' customary deference to state court interpretations of state policy even if that requirement were based on more than Congress's supposed desire to prevent undue intermunicipal externalities.

157. *See, e.g.*, David Schleicher, *The City as a Law and Economic Subject*, 2010 U. ILL. L. REV. 1507, 1555 (2010).

States with *imperio* home rule clauses authorize municipalities to regulate "local" but not "state" matters. These states typically limit the state government's ability to preempt municipal laws on local matters. Courts in these states devise standards for determining what counts as local and state matters. Many states have transitioned from *imperio* to legislative home rule.[158]

It is easy to see why state action doctrine's supervision of municipal laws for externalities is largely superfluous in *imperio* home rule states. State courts frequently interpret language that limits the municipality to regulating "local" matters to invalidate municipal laws that create undue externalities (although externalities are not the only factor courts consider in evaluating *imperio* home rule municipalities' authority).[159]

And the main reasons why many states have transitioned from *imperio* to legislative home rule help show why, even in legislative home rule states, state action doctrine should not be interpreted to police municipalities' externalities. One of those reasons was that, in a world where municipalities are increasingly interconnected, municipal regulation almost always will impose some externalities on other municipalities.[160] A second reason was that *imperio* states' courts, partly due to these inevitable externalities, read "local" so narrowly as to gut municipalities of significant authority.[161] That legislative home rule states responded to these problems by authorizing municipalities to regulate any matter the state would itself have authority to regulate implies that these states affirmatively chose to permit their municipalities to impose some externalities on other municipalities. These states accounted for the possibility of *undue* externalities by retaining authority to preempt any municipal law and by imposing other restraints, discussed below, on municipal authority. That is, legislative home rule states chose to let local governments regulate without further pre-authorization and to trust state legislatures and state courts to police these regulations.[162]

158. *See* David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2326 (2003) [hereinafter Barron, *Home Rule*].

159. *See* Laurie Reynolds, *Home Rule, Extraterritorial Impact, and the Region*, 86 DENV. U. L. REV. 1271, 1274 (2009) ("[T]hough courts may disagree about the circumstances in which they will conclude that home rule regulation [imposes impermissible externalities], many use a finding of [such externalities] as the basis for the conclusion that the home rule ordinance . . . has exceeded the permissible scope of home rule initiative powers."); *see also id*. at 1277–84 (citing cases of courts invalidating municipal laws because those laws create externalities); Lynn A. Baker & Daniel B. Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, 86 DENV. U. L. REV. 1337, 1352 (concluding that the extraterritorial effects of local regulation are an "especially important" factor in courts' assessment of whether a home rule municipality has authority for an action).

160. Barron, *Home Rule*, *supra* note 158.

161. *See* Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 2012 (2018) [hereinafter Briffault, *New Preemption*].

162. *See id*.

### *2. States' Tools to Police Intermunicipal Externalities*

We might hesitate to entrust this oversight role to state legislatures and courts if they were poorly positioned to fulfill it. But as both a theoretical and practical matter, they are not.

Current state action doctrine's own theory suggests that the doctrine should trust state legislatures and state courts to police intermunicipal externalities. Consider first that state action doctrine trusts state legislatures to police their own restraints on competition. True, that trust might not extend to municipal restraints if the trust depends on an assumption that restraints state legislatures impose will always have widespread effects throughout the state. Affected voters might more meaningfully lobby state legislatures against such laws than against municipal laws with geographically narrower impact.[163]

But state action doctrine seemingly does trust state legislatures to police externalities that only one or a group of municipalities imposes. The clear articulation requirement protects municipal competitive restraints authorized by the state legislature. Surely sometimes state legislatures authorize municipal restraints while assuming that only a particular known municipality, or at least a particular known group of municipalities, will likely impose such restraints. The doctrine, then, trusts state legislatures to exercise good judgment when they evaluate whether displacing competition in a given market would impose undue externalities on other jurisdictions.

Any uncertainty as to whether state legislatures and state courts can adequately police municipalities' laws must then turn on an assumption that these state bodies cannot adequately prevent municipal laws that these bodies decide impose undue externalities. Yet states' strong grip on municipalities shows states are amply able, as a practical matter, to prevent such regulations. States preempt local laws either through statutes regulating the relevant subject matter or through general limits on municipalities' home rule authority.[164] David Barron and Gerald Frug have shown that "the scope of state preemption—even in the areas traditionally thought to be squarely within the local domain—is dramatic."[165] The following sections describe the tools state use to police municipalities.

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163. *See, e.g.*, Paul Diller, *Intrastate Preemption*, 87 BOS. U. L. REV. 1113, 1161 (2007) ("[D]ue to logrolling, a legislator can be expected to influence his colleagues to join him in ignoring parochial ordinances from his district in exchange for doing the same for legislators from other districts. By such a 'gentlemen's agreement,' the legislature may take no action in the face of a proliferation of parochial local ordinances."). *But cf.* Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 73 (1978) (reasoning that state citizens who bear costs of externalities imposed by a municipality can lobby the state legislature to intervene).

164. *See* Barron, *Home Rule*, *supra* note 158, at 2347–57 (reviewing ways that home rule clauses limit local authority).

For a basic definition of preemption, see *supra* note 27.

165. David J. Barron & Gerald E. Frug, *Defensive Localism: A View of the Field from the Field*, 21 J.L. & POL. 261, 296 (2005); *see also* David J. Barron, *A Localist Critique of the New Federalism*, 51 DUKE L.J. 377, 390–91 (2001) [hereinafter Barron, *Localist Critique*] (reviewing sources of formal state power over municipalities and concluding "state constitutional law

*a. Express Preemption of Local Law*

States can pass laws that explicitly preempt municipalities from enacting laws governing particular subject matter. Indeed, commentators have canvassed with alarm the breadth of state legislatures' express preemption of local law in recent years.[166] Local governments have so far enjoyed sparse legal recourse against such preemptive statutes.[167] Aggressive state preemption has featured especially prominently in businesses' efforts to resist local ordinances addressing workers' rights.[168]

*b. Implied Preemption of Local Law*

Even when no statute expressly preempts a local law, state courts can check municipal parochialism by reading a statute to impliedly preempt the local law. State courts in 49 states recognize at least some form of implied preemption.[169] Sometimes, state courts aggressively deploy implied preemption to invalidate local law on grounds that the law "permits an act prohibited by a [state] statute or prohibits an act permitted by a [state] statute."[170] Commentators have condemned too-strong applications of this implied preemption test as a judicial resuscitation of Dillon's Rule.[171] But there is evidence that some courts deploy this test

overwhelmingly favors expansive state supremacy over local governments"); Rick Su, *Intrastate Federalism*, 19 U. PA. J. CONST. L., 191, 207–09 (2016) (listing constraints on local power, including locality's dependence on state funding).

166. *See generally, e.g.*, Briffault, *New Preemption*, *supra* note 161, at 1997–98 (describing extent of recent state preemption of local law).

167. *Id.* at 2008–17 ("Existing legal doctrines provide local governments with few protections against state preemption."); *see also* Barron, *Localist Critique*, *supra* note 165, at 392 ("It is the relatively rare state court case that holds the state legislature unable to intervene on a matter over which a local government wishes to exercise control.").

168. *See* Briffault, *New Preemption*, *supra* note 161, at 1999–2000 ("[T]he business community has turned to state legislatures to push back hard against local measures raising minimum wages, providing for paid sick or family leave, or protecting employees from abrupt scheduling changes. Twenty-five states now ban local minimum wage requirements above the federal or state floor, and twenty preempt local paid sick leave rules. Between 2015 and 2017, nine states preempted local predictive scheduling laws, and local ban-the-box laws regulating employer inquiries into the criminal records of prospective employees are at risk as well. Some of these statutes are particularly sweeping. Michigan's so-called Death Star law . . . bars local governments from adopting, enforcing or administering local laws or policies concerning employee background checks, minimum wage, fringe benefits, paid or unpaid leave, work stoppages, fair scheduling, apprenticeships, or remedies for workplace disputes." (footnotes omitted)).

169. Diller, *supra* note 163, at 1156–57 (noting Illinois allows only express preemption, and some states have abolished or limited field preemption).

170. *Id.* at 1142–46.

171. Dillon's Rule is defined *supra* note 68. For commentary criticizing such applications of this implied preemption test, see Diller, *supra* note 163 at 1142–46 (explaining this test's potential breadth); *see also* Goodell v. Humboldt County, 575 N.W.2d 486, 517 (Iowa 1998) (Snell, J. dissenting) (arguing majority has "excavated . . . Dillon['s] Rule . . . from the grave [and] . . . drained the vitality from home rule" in applying this test stringently).

selectively to police excessively parochial municipal legislation[172]—a use that helps quell *Lafayette*'s fears of such legislation.

And implied preemption often discourages municipalities from even trying to enact ordinances they fear might conflict with state policy. That state courts can invalidate a municipal law as impliedly preempted means that "even ambiguous state legislation" generates "a shadow of preemption . . . produc[ing] so much uncertainty that many municipalities refrain from relying on their home rule authority when they want to address a matter of concern to them."[173] Municipalities fear spending the time and resources necessary to draft and enact a measure only to subject themselves to expensive litigation they will likely lose.[174] Municipalities therefore often abandon their effort to address these matters, or sometimes instead lobby the state legislature for express authority.[175] This all means that the threat of implied preemption under state law already advances the goal of the clear articulation requirement: to secure express state pre-authorization for municipal laws.

*c. Other Limits on Home Rule Authority*

State constitutional and statutory limits on municipalities' home rule authority stand ready to invalidate a given municipal law even if the state legislature does not preempt that law through statutes regulating the same subject matter. Again, *imperio* home rule states already expressly withhold from municipalities authority to regulate supra-local matters. Commentators routinely observe that state courts have narrowly construed the scope of that authority.[176]

And both *imperio* and legislative home rule states limit municipalities' home rule authority in additional ways. Some state courts have constructed state law analogues of the dormant commerce clause to preempt municipal exercises of home rule authority that unduly burden intermunicipal commerce.[177] The

172. Diller, *supra* note 163, at 1173–75.

173. DAVID J. BARRON, GERALD E. FRUG & RICK T. SU, DISPELLING THE MYTH OF HOME RULE: LOCAL POWER IN GREATER BOSTON xi, 9 (2004).

174. Barron, *Home Rule*, *supra* note 158, at 2350–51 & n.391 (noting municipalities that pursue "controversial and novel regulatory activities" will especially fear that state courts will rule their authority preempted).

175. BARRON, FRUG & SU, *supra* note 173, at 9–10; *see also id*. at 15 ("Many of the [Massachusetts] town and city officials with whom we spoke stated that the [state's] process [for localities to petition the state legislature for express authority to address a matter] is so difficult that they have often modified their intended course of conduct or dropped their plans altogether in order to avoid having to go through it."); State of Utah v. Hutchinson, 624 P.2d 1116, 1120–22 (Utah 1980) (noting state legislatures often fail to respond to problems of local concern because these problems yield insufficient pressure on the state legislatures and because the Utah state legislature meets only 60 days every two years to discuss matters of general importance).

176. *E.g.*, Briffault, *New Preemption*, *supra* note 161, at 2012; *see also* Reynolds, *supra* note 159, at 1274.

177. Gary T. Schwartz, *The Logic of Home Rule and the Private Law Exception*, 20 UCLA L. REV. 671, 751 & n.369 (1973) ("[S]ome home rule states . . . have initiated development of a home rule exception to cover ordinances which cast an undue burden on intercity (as distinguished from interstate) commerce.").

California Supreme Court, for instance, constructed such an analogue by combining "a number of provisions [in California's Constitution] requiring the uniform application of laws" with the provision in California's Constitution that limits home rule authority to "mak[ing] and enforc[ing] within [the municipality's] limits all such . . . regulations as are not in conflict with general laws."[178] Thus, although California constructed its dormant commerce clause analogue in part from limits on home rule authority typical of *imperio* home rule states, California constructed this clause also from types of state constitutional provisions that many legislative home rule states share.

In *Burlington County NAACP v. Township of Mt. Laurel* (*Mount Laurel I*),[179] the New Jersey Supreme Court read into that state's constitution a requirement that local zoning decisions consider regional welfare and not unduly harm nonresidents.[180] State courts could use *Mount Laurel I*'s reasoning to constrain parochial ordinances in subject matters beyond zoning. Indeed, since courts have traditionally deemed land use a "core power[] of local governance,"[181] *Mount Laurel I*'s reasoning could easily be extended to impose regional welfare requirements on laws regulating subject matters other than zoning.

The leeway state courts enjoy to demand that municipal laws serve, or at least not harm, regional welfare, is further shown by the fact that *Mount Laurel I* grounded its regional welfare requirement in a state constitutional provision that does not obviously dictate such a requirement.[182] In fact, the New Hampshire Supreme Court has shown that state courts can also interpret enabling statutes to contain such demands.[183]

178. City of Los Angeles v. Shell Oil Co., 480 P.2d 953, 959–60, 960 nn.7–8 (Cal. 1971) ("Although the Constitution of this state, unlike that of the United States, contains no provision specifically preventing its constituent political subdivisions from enacting laws affecting commerce among them . . . '[t]he basic policy underlying the [dormant commerce clause] . . . is equally applicable to intercity commerce within the state . . .' [and so] in spite of the absence of a specific 'commerce clause' in the state Constitution, certain other provisions of the state . . . Constitution[] forbid [certain] municipal taxation which . . . operates to place [intercity] businesses at a competitive disadvantage." (quoting Sho Sato, *Municipal Occupation Taxes in California: The Authority to Levy Taxes and the Burden on Intrastate Commerce*, 53 CALIF. L. REV. 801, 818 (1965))).

179. 336 A.2d 713 (N.J. 1975).

180. *Id*. at 724–29.

181. *E.g*., Wallach v. Town of Dryden, 16 N.E.3d 1188, 1193 (N.Y. App. 2014); *see also* BRIFFAULT & REYNOLDS, *supra* note 103, at 152 ("Land use is probably the area in which the local share of power—relative to the federal and state shares—is greatest.").

182. *Mount Laurel I* relied on a constitutional provision that reads: "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness." *Mount Laurel I*, 336 A.2d at 725 n.11.

183. Britton v. Town of Chester, 595 A.2d 492, 495–96 (N.H. 1991) (interpreting state statute that permits municipality to adopt zoning ordinance for "the general welfare of the community" to require the ordinance serve *regional* welfare, reasoning generally that "[a]s subdivisions of the State, [municipalities] do not exist solely to serve their own residents, and their regulations should promote the general welfare, both within and without their boundaries").

*d. Tort*

If municipality *x*'s competitive restraint offloads externalities on municipality *y*, municipality *y* and its residents are not limited to arguing that the restraint exceeds *x*'s home rule authority or is preempted by state statute. *Y* could also argue that *x* committed the tort of unfair competition or tortious interference with trade—torts that many states recognize—by enacting the restraint. Separately, considering the breadth of actions and injuries that courts can recognize as grounds for public nuisance claims,[184] municipalities or their residents may be able to challenge neighboring municipalities' competitive restraints under public nuisance theories.[185]

*e. Special Legislation Clauses Do Not Prevent State Legislatures from Policing Externalities*

The prohibitions against special legislation that some states have adopted will not prevent those states from preempting anticompetitive municipal regulations. Since special legislation clauses limit state legislatures' ability to pass laws that target particular municipalities, one might worry that such clauses could prevent a state legislature from preempting municipalities from restraining competition if the state, in attempting this preemption, were responding to only one or a couple of locally enacted restraints. But these clauses would almost certainly not do so. So long as the state preempted all municipalities from restraining competition in that market, the state's preemptive statute would "operate" on all municipalities and therefore not constitute special legislation as typically defined.[186] And state courts typically interpret special legislation clauses to permit even laws that

184. "A public nuisance consists of an unreasonable interference with . . . [a] right to which every citizen[s] is entitled . . . . [Public nuisance] includes conduct that significantly interferes with public health, safety, peace, comfort, or convenience." Karl Oakes, *Nature of Public Nuisances*, 66 C.J.S. NUISANCES § 8; *see also* RESTATEMENT (SECOND) OF TORTS § 821(b)(1) (AM. LAW INST. 1985) (similar). Public nuisance claims neither need challenge use of real property nor "claim injury to real property." Cincinnati v. Beretta U.S.A. Corp., 768 N.E.2d 1136, 1141–42 (Ohio 2002) (holding plaintiffs stated a claim in alleging that defendants "created and maintained a public nuisance by manufacturing, marketing, distributing, and selling firearms in ways that unreasonably interfere with the public health, welfare, and safety in Cincinnati.").

185. *Cf.* Shelley Ross Saxer, *Local Autonomy or Regionalism?: Sharing the Benefits and Burdens of Suburban Commercial Development*, 30 IND. L. REV. 659, 664–65 (1997) (discussing public nuisance challenge to municipal zoning ordinances).

186. For representative definitions of what constitutes special legislation, see Williams v. Blue Cross Blue Shield of North Carolina, 581 S.E.2d 415, 425–26 (2003) ("A law is deemed [special legislation] where, by force of an inherent limitation, it arbitrarily separates some places from others upon which, but for such limitation, it would operate, where it embraces less than the entire class of places to which such legislation would be necessary or appropriate having regard to the purpose for which the legislation was designed, and where the classification does not rest on circumstances distinguishing the places included from those excluded."); Town of Secaucus v. Hudson County Bd. of Taxation, 628 A.2d 288, 294 (N.J. 1993) (similar). Special legislation clauses seek to promote good policy and fairness—particularly by encouraging legislation based on general principles and by deterring disparate treatment of similarly situated communities, private parties, or corporate interests. *See* Anderson v. Bd. of Comm'rs, 95 P. 583, 584, 586 (Kan. 1908).

operate only on some municipalities as long as those laws either address a matter of statewide concern[187] or reasonably classify which municipalities they operate on.[188]

### *B. Federal Courts are Comparatively Ill-Positioned to Determine Whether Municipal Competitive Restraints Conform with State Policy*

State legislatures and state courts use the above tools to forge state policy and invalidate municipal laws that deviate from it. Yet while state action doctrine purports to immunize municipal laws that conform to state policy, the doctrine enlists *federal* courts to interpret state law to decide what that policy is—a role that federal courts typically avoid and are often less institutionally qualified than state courts to fulfill. In particular, federal courts are often less competent than state courts to determine whether a municipal law that imposes externalities conforms to state policy.

#### *1. State Courts are Often More Institutionally Competent Than Federal Courts to Interpret State Policy*

State courts adjudicate whether local actions and laws conform to state policy across a wide range of regulatory domains. State courts frequently do so in part because state courts often need not wait for a law to be enacted and a lawsuit brought before adjudication; municipal and state governments instead often seek advisory opinions from state courts on these matters.[189] Additionally, state governments often delegate responsibility for administering state programs to local officials, and disputes about this administration require state courts to assess whether local action conforms to state policy.[190]

The foregoing contexts help state courts develop more experience than federal courts in determining whether local law conforms with state policy.[191] Moreover,

187. *E.g.*, Schrader v. Fla. Keys Aqueduct Auth., 840 So.2d 1050, 1056 (Fla. 2003) (upholding state law permitting local governments in only a certain county to pass certain laws, where these local laws would impact "industries of statewide importance" and so the laws' "actual impact" would extend statewide).

188. *E.g.*, *Secaucus*, 628 A.2d at 290–97 ("A statute is not unconstitutional as special legislation merely because its effect is limited to a particular municipality . . . . When a statute has the effect of addressing the needs of a particular community or serving a particular legislative purpose, the Court looks to, inter alia, whether other municipalities could, and from time to time have, come within its scope.").

189. *See* Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1847–49 (2001) (noting that state courts supply advisory opinions on "the division of power between municipalities and states" and citing advisory opinions concerning whether municipal laws conform with state public purpose requirements).

190. *See* Hans A. Linde, *The State and the Federal Courts in Governance:* Vive La Différence*!*, 46 WM. & MARY. L. REV. 1273, 1276–77 (2005).

191. Indeed, many of the foregoing matters are ones that federal courts could not have jurisdiction over. The bar against federal courts' rendering advisory opinions, and the requirement that any suit in federal court involve a basis for jurisdiction set forth in Article III § 2 of the U.S. Constitution, would for many of these matters preclude federal court jurisdiction.

there is strong reason to believe state courts have significantly more experience than federal courts in determining whether a municipal regulation imposes externalities impermissible under state law. State courts routinely assess whether one municipality threatens to impose or has imposed such externalities on non-residents. State courts assess this, for example, when they oversee municipal annexation, incorporation, and secession petitions.[192] Although the role courts play in adjudicating such petitions varies among states, many investigate the regional externalities that granting such petitions would cause.[193] Indeed, the primary reason for courts' reviewing proposed incorporations seems to be to guard against undue externalities.[194]

It is true that federal courts can adjudicate Voting Rights Act, equal protection, or due process claims arising out of a municipal annexation, incorporation, or secession. But federal courts do not, as many state courts do, assess these boundary changes as a matter of course.[195] And whereas state courts evaluate a range of harms that boundary changes could impose on non-residents regardless of whether the persons seeking the boundary change intend those harms,[196] a federal court hearing an equal protection claim would examine those harms only insofar as they help prove that the persons seeking the boundary change intended to discriminate against other persons on the basis of a protected characteristic.[197]

192. Hershkoff, *supra* note 189, at 1837–38 ("[A]ll state courts play an accepted policymaking role in a broad range of complex areas, including disputes related to . . . territorial annexation[] and redistricting." (footnotes omitted)); *id*. at 1850 n.94 (noting state legislatures sometimes request advisory opinions from state courts concerning "validity of reapportionment plans").

193. *See, e.g.*, *In re* Enlargement & Extension v. City of Macon, 854 So. 2d 1029, 1034–35 (Miss. 2003) (reviewing annexation petition for reasonability and considering, inter alia: economic or other impact of annexation on residents of area to be annexed; whether residents of area to be annexed have enjoyed economic and social benefits from municipality seeking to annex without paying fair share of taxes; whether natural barriers exist between municipality and the area to be annexed; and potential health hazards from sewage and waste disposal in the annexed area); Harris Tr. & Sav. Bank v. Village of Barrington Hills, 549 N.E.2d 578, 583 (Ill. 1989) (reviewing deannexation petition and considering how petitioners' deannexation from jurisdiction will disrupt that jurisdiction's growth prospects and plan and zoning ordinances); Clayton P. Gillette, *In Partial Praise of Dillon's Rule, or, Can Public Choice Theory Justify Local Government Law*, 67 CHI.-KENT L. REV. 959, 971 n.44 (1991) [hereinafter Gillette, *Partial Praise*] (citing cases where courts reviewed incorporation for externalities including "a reduced tax base for surrounding unincorporated areas . . . physical isolation as new boundary lines divide neighborhoods . . . [or] the omission of areas equally in need of services as those included in the incorporated municipality" (footnotes omitted)).

194. Gillette, *Partial Praise*, *supra* note 193, at 971 n.44 ("Absent concerns about external effects . . . [judicial review] seems unnecessary.").

195. *See* Hershkoff, *supra* note 189, at 1865–66 (2001) (noting that unless an annexation raises a Voting Rights Act question, draws a suspect classification, or infringes fundamental rights, "Article III courts tend to treat annexation questions as nonjusticiable controversies, best left to the plenary power of the states").

196. *See* cases cited *supra* note 193.

197. *See* Washington v. Davis, 426 U.S. 229, 242 (1976) (holding that disparate impact, does not by itself, constitute an equal protection violation); *see also* Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977) (noting that courts may consider disparate impact as one factor indicating discriminatory intent).

State courts additionally evaluate relationships between municipalities while overseeing state redistricting processes[198]—likely thereby generating knowledge useful in assessing whether municipal competitive restraints impose undue externalities. These courts review and sometimes help draw both state legislative and congressional districts.[199]

Granted, plaintiffs may challenge state legislative or congressional districts in either state *or* federal court. But federal courts must "defer consideration of disputes involving redistricting where the State, through its . . . judicial branch, has begun to address that . . . task itself."[200]

And some state courts even evaluate the regional externalities of municipal zoning ordinances.[201] While federal courts might consider relationships between municipalities while reviewing whether municipal zoning ordinances violate due process[202] or equal protection, this review is limited.[203]

### *2. Doctrine Recognizes That State Courts—Not Federal Courts—Should Interpret State Policy*

Federal courts jurisprudence is rife with recognition that state courts are generally more appropriate institutions to interpret state law than are federal courts.[204] That deference owes partly to the belief that, given state courts' greater familiarity with a state's law and the context in which that law has developed, state courts are more likely to accurately interpret that law.[205] Some other pertinent reasons for

198. *See, e.g.*, ALASKA CONST. art. VI, § 6 ("Each house district shall . . . contain[] as nearly as practicable a relatively integrated socio-economic area."); COLO. CONST. art. V, §§ 44.3, 48.1 ("As much as is reasonably possible," districts "must preserve whole communities of interest . . . [t]o facilitate the efficient and effective provision of services[.]"); HAW. CONST. art. IV, § 6(8) ("[S]ubmergence of an area in a larger district wherein substantially different socio-economic interests predominate shall be avoided.").

199. *See, e.g.*, Growe v. Emison, 507 U.S. 25, 28, 34 (1993) (deferring to redistricting plan issued by panel of state court judges); Alexander v. Taylor, 51 P.3d 1204, 1207 (Okla. 2002) (holding state court has jurisdiction to review congressional districts).

200. *Growe*, 507 U.S. at 33.

201. *See supra* notes 179, 183 and accompanying text; Associated Home Builders, Inc. v. Livermore, 557 P.2d 473, 487–89 (Cal. 1976) (requiring courts to assess municipal land use ordinances' impact on region and to weigh competing interests of municipalities in region).

202. *See* Moore v. City of East Cleveland, 431 U.S. 494, 499–500 (1977) (evaluating a single-family zoning ordinance and rejecting the city's asserted interest in "preventing overcrowding, minimizing traffic and parking congestion, and avoiding an undue burden on [city's] school system").

203. *See* cases cited *supra* note 199 and accompanying text.

204. *See, e.g.*, Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211, 1237 n.64 ("Modern Supreme Court decisions take state courts' power to offer definitive interpretations of state law as a settled matter, encouraging federal certification of difficult state law questions to state courts or abstention in favor of state adjudication of state law issues, if certification is not available or is impracticable." (citation omitted)).

205. Guido Calabresi, *Federal and State Courts: Restoring a Workable Balance*, 78 N.Y.U. L. REV. 1293, 1300 (2003) ("[F]ederal courts often get state law wrong because federal judges don't know state law and are not the ultimate decisionmakers on it."); La. Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 30 (1959) ("Informed local courts may find meaning not discernible to the

that deference include: the intuitive principle that "only the courts of the sovereign (and particularly the sovereign's highest court) can render an authoritative interpretation of that sovereign's law;"[206] a desire to minimize federal intrusion into state government processes;[207] and the fact that state courts do not review for error federal courts' interpretations of state law.[208]

Accordingly, federal courts defer to state court interpretations of state law in many settings and avoid interpreting state law unless necessary.[209] Federal courts have viewed themselves as obligated to defer to state courts' interpretations of state statutes even in contexts where, as in state action doctrine,[210] that state statute applies only because the Supreme Court or Congress chose to use state law as the metric for deciding the content of federal law.[211] Such contexts include whether an act by a federal employee is negligent under the Federal Tort Claims Act,[212]

outsider.").

206. Freidman, *supra* note 204, at 1237.

207. RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1179 (5th ed. 2003).

208. Ann Althouse, *How to Build a Separate Sphere: Federal Courts and State Power*, 100 HARV. L. REV. 1485, 1512 & n.140 (1987).

209. Federal courts may defer when determining: (1) how to interpret a state statute while exercising diversity jurisdiction, e.g., Palmer v. Hoffman, 318 U.S. 109, 117–18 (1943); (2) whether a state crime for which someone was convicted is a "violent" crime, triggering a sentencing enhancement under the federal Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(ii) (2018); and (3) whether a state crime for which a person lacking citizenship has been convicted is a crime of moral turpitude, exposing that person to deportation under the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(i) (2018). In determining whether a state crime is "violent" under the Armed Career Criminal Act (ACCA) or a crime of moral turpitude under the Immigration and Nationality Act, federal courts apply a two-step analysis in which federal courts' treatment of state statutes differs among the steps. *See* Descamps v. United States, 570 U.S. 254, 257–58 (2013). For the first step, the federal court is "bound [by the state's highest court's] interpretation of" the state statute. *See* Johnson v. United States, 559 U.S. 133 (2010); *Descamps*, 570 U.S. at 259, 265 (reviewing state court's interpretation of state statute during first step). For the second step, *Descamps* "reserve[d] the question whether" federal courts must "consider not only the [state] statute defining a . . . crime but also any [state court] interpretations of" that statute. *See Descamps*, 570 U.S. at 274–75. Lower courts, after *Descamps*, disagree about whether a federal court should, at this second step, look to how state courts have interpreted the state statute. *See* Almanza-Arenas v. Lynch, 815 F.3d 469, 476–81 (9th Cir. 2016).

210. Congress could constitutionally choose to preempt state and municipal regulations that restrain competition. Were Congress to do so, the question whether a state statute clearly articulates a policy of restraining competition in a market would be irrelevant to determining whether the Sherman Act preempts a municipal regulation restraining competition in that market.

211. *See infra* notes 213–215; *cf.* O'Melveny & Myers v. F.D.I.C., 512 U.S. 79, 85 (1994); F.D.I.C. v. O'Melveny & Myers, 61 F.3d 17, 18 (9th Cir. 1995) (noting importance of deferring to state courts' development of state common law, where federal courts selected state law as rule of decision for deciding federal questions).

212. 28 U.S.C. § 1346(b) (2018) (providing that the United States is liable for the negligent and wrongful acts and omissions of its employees "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred," subject to specified exceptions).

according to standards set by a state safety statute;[213] and what priority a state statutory scheme sets for liens arising from a federal loan program.[214]

Deferring to state courts' interpretations of state statutes in such contexts makes sense. When a federal statute does not clearly instruct whether or not the Court should adopt state law as a metric for the federal law's content, the Court is supposed to consider factors such as whether (1) the federal law at hand requires a uniform standard nationwide; (2) adopting state law as a metric will impede the federal law's objectives; and (3) applying a federal standard that does not depend on state law "would disrupt commercial relationships predicated on state law."[215] The Court's decision to adopt state law as the metric for a federal law therefore presupposes that allowing state courts' interpretations of state law to influence the federal law's operation will unduly threaten neither interests of nationwide uniformity nor the specific substantive interests the federal statute protects.

Furthermore, the act of interpreting whether state law authorizes a given municipal competitive restraint implicates the very features that, according to the Court in *Louisiana Power & Light Co. v. City of Thibodaux*,[216] counsel against federal courts' exercise of jurisdiction over an issue of state law. The Court there declined to exercise diversity jurisdiction to adjudicate whether a state statute had authorized the defendant-municipality's use of eminent domain to acquire the plaintiff's property.[217] The Court noted that the "statute apparently seems to grant such a power. But that statute has never been interpreted, in respect to a situation like that before the judge, by the Louisiana courts . . . ."[218] Exercising jurisdiction therefore would have required the Court to decide the boundaries that the state

213. Carroll v. United States, 87 F. Supp. 721, 725–26, (W.D.S.C. 1949) (explaining court "[is] bound by" state court's interpretation of whether state safety statute provides standards for a negligence per se claim and of what types of acts and entities that statute covers); *see also* DANIEL A. MORRIS, FEDERAL TORT CLAIMS § 2.1 ("A court's obligation to determine state law under the FTCA parallels its obligation to determine state law in an action based on diversity jurisdiction. Although state law applies of its own force in a diversity case and is adopted into federal law in Federal Tort Claims Act actions, in both instances, the federal court is charged with responsibility of ascertaining what the state law is, not what it ought to be.").

214. United States v. Crittenden, 600 F.2d 478, 479–80 (5th Cir. 1979) (reviewing state court decisions for "clear instruction" on how to interpret state law scheme).

215. United States v. Kimbell Foods, 440 U.S. 715, 728–29 (1979) (synthesizing prior Supreme Court decisions into this test); Beazer East, Inc. v. Mead Corp., 34 F.3d 206, 213 (3rd Cir. 1994) (citing *Kimbell Foods'* test as the governing test for this inquiry).

We can assume a rational Congress would consider similar factors when deciding whether to make state law a metric for federal law. But whether Congress does so is less relevant for state action doctrine, in which the Court, not Congress, chose to tie municipalities' *Parker* immunity to state law.

216. 360 U.S. 25 (1959).

217. *Id*. at 29. One might object that the *Thibodaux* court might have been less willing to decline jurisdiction over the state law issue were that issue relevant to deciding a federal question. But my larger point in this section is that, partly due to the concerns *Thibodaux* raises, state action doctrine should never have transformed *into* a federal question the question whether or not a municipal competitive restraint conforms to state policy.

218. *Id*. at 30.

legislature intended to place on local government's authority—a question implicating the state's sovereignty.[219] The states' sovereignty interests, coupled with the state court's comparative expertise to assess the power the state legislature intends to grant municipalities,[220] made the federal court's decision to abstain from jurisdiction here "wise."[221]

State action doctrine flouts this tradition of federal judicial caution by empowering federal courts to withhold *Parker* immunity from municipalities based on these federal courts' interpretations of state policy—regardless of whether state courts would have held that the municipal law conforms to state policy.

One might object that state action doctrine should not defer to state courts' interpretation of state law, because state courts do not ask the question, in interpreting that law, that state action doctrine requires. State courts ask only whether state law *authorizes* the municipal regulation; state action doctrine requires that the state government *affirmatively approves*, or would affirmatively approve, the municipal regulation.

The distinction between affirmative approval and mere authorization is not always apparent when a municipality enacts a competitive restraint pursuant to statutes conferring powers more specific than general home rule authority, such as the statutes Seattle argued authorized its ordinance.[222] A state court interpreting whether those statutes authorized Seattle to enact its ordinance would likely, by asking questions about legislative intent and statutory purpose, conduct an inquiry tantamount to inquiring whether the statute clearly articulates a policy to restrain competition in the relevant market.

But the distinction is appreciable when a local government relies on only its home rule authority to justify a law.[223] Still, federal courts are not justified in wresting review of such laws from state legislatures and courts by the fact that state courts, when reviewing whether municipalities have home rule authority to enact such laws, do not formally ask whether the statute or constitutional provision conferring that authority clearly articulates a policy of restraining competition in a given market. As shown above, state legislatures and state courts have ample

219. *Id*. at 28.

220. *Id*. at 28–30 ("The[se] issues normally turn on legislation with much local variation interpreted in local settings . . . [The federal judge is thus justified in entrusting interpretation of] a disputed state statute [to] the only tribunal empowered to speak definitively—the courts of the State under whose statute eminent domain is sought to be exercised—rather than himself make a dubious and tentative forecast . . . [a state courts' interpreting the statute to authorize the municipalities' action] would not be the first time that the authoritative tribunal has found in a statute less than meets the outsider's eye. Informed local courts may find meaning not discernible to the outsider.").

221. *Id*. at 29.

222. *See supra* Section I.B.3.

223. *See* Cmty. Commc'ns Co. v. City of Boulder, 455 U.S. 40, 55–56 (1982) ("[T]he requirement of 'clear articulation and affirmative expression' is not satisfied when the State's position is one of mere neutrality respecting the municipal actions challenged as anticompetitive . . . . Acceptance of such a proposition—that the general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances—would wholly eviscerate the concepts of 'clear articulation and affirmative expression' . . . ." (emphasis omitted)).

tools with which to invalidate any municipal law that poses the threats policed by state action doctrine (i.e., that imposes undue externalities or otherwise restrains competition in a way that state policy disapproves).

### *C. The Externalities Argument's Failure Summarized*

State action doctrine's clear articulation requirement cannot be justified by the externalities argument. State legislatures and state courts already police intermunicipal externalities. In doing so, these legislatures and courts decide whether municipal laws that impose externalities conflict with state policy. Deploying the clear articulation requirement to guard against intermunicipal externalities thus conflicts with federal courts' typical deference to state courts' interpretations of state law when determining state policy. Indeed, the clear articulation requirement conflicts with this practice even if that requirement were based on concerns other than externalities.

## IV.
## THE CAPTURE ARGUMENT

There is circumstantial reason to believe *Lafayette* and *Boulder* imposed their clear articulation requirement at least in part to guard against the capture of municipal legislatures by interest groups. Multiple commentators have suggested that *Lafayette* and *Boulder* were part of a spree of state action cases in which the Court, operating in an intellectual climate that feared the capture of regulators by interest groups, tightened the scope of state action immunity.[224] These commentators argue not that the Court viewed municipalities as *more* susceptible than state legislatures to capture, but that it feared capture of both municipal and state governments and thus sought to scale back *Parker* immunity anywhere it could. Conditioning municipalities' immunity on clear articulation of state policy was simply one way of doing so.

224. John Shepard Wiley Jr. offers the most detailed account attributing the Court's weakening *Parker* immunity during the 1970's and 1980's to an emerging concern among academics with how interest group capture shapes public regulation. *See* Wiley Jr., *supra* note 74, at 769.

Frank Easterbrook has drawn the same connection as Wiley. *See* Frank H. Easterbrook, *Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 18–19, 51–54 (1984). So has Judge Wisdom, in *Hallie*'s lower court opinion. Town of Hallie v. City of Eau Claire, 700 F.2d 376, 379 n.3 (1983) ("The Court responded to the concern that states and municipalities were sheltering too much conduct that contravened the antitrust laws, such as . . . state action serving as a mask for private cartels, and . . . also the concern that regulated industries control their regulators and that private corporations use the political process to obtain monopoly profits.").

The *Noerr-Pennington* doctrine that emerged between *Parker* and *Lafayette* provides additional circumstantial reason to suspect that capture concerns might have motivated *Lafayette* and *Boulder*. That doctrine immunizes private parties from antitrust liability when they lobby government actors to restrain competition. *See* United Mine Workers v. Pennington, 381 U.S. 657, 669–70 (1965). Plausibly the Court feared this doctrine would unleash private parties to lobby elected officials to enact harmful competitive restraints and weakened *Parker* immunity to correct for this effect.

The capture theory warrants brief address even though the Court has not said that capture concerns motivated its municipal state action cases, and lower courts have not left easily discernible clues that capture concerns motivate their decisions in municipal state action cases.[225] After all, there is a colorable argument that the Sherman Act-enacting Congress, to prevent capture, would have wanted municipalities to face the heightened requirements for *Parker* immunity that state action doctrine currently imposes. A primary motivation for Dillon's Rule[226] was to curtail municipalities' practice of offering subsidies to railroads and other industries. Dillon feared these subsidies wasted tax dollars and reduced industries' overall economic efficiency.[227] Insofar as this 19th-century practice persuaded Congress that the trusts the Act sought to combat could easily influence municipalities to restrain competition, Congress might have wanted to preempt municipal competitive restraints the state did not affirmatively approve and to require state supervision of municipal hybrid restraints.

### *A. The Capture Argument's Theoretical Failure*

We should not assume the 1890 Congress would have intended municipalities' lesser *Parker* immunity, because, by 1890, states had already widely enacted Dillon's Rule regimes that guarded against municipal capture.[228] Congress would not have needed to enact a preemption regime that duplicated Dillon's Rule's protection against municipal capture.[229] Granted, the home rule movement was already underway in the late 19th century.[230] So the 1890 Congress might have worried home rule states would liberate municipalities to enact ill-advised restraints on competition at a trust's behest. But home rule states retain various checks on municipal corruption that counsel against assuming Congress would have intended municipalities' lesser *Parker* immunity. I summarize these checks *infra* IV.B.

225. *Cf.* Garland, *supra* note 58, at 490–93 ("[T]he state action cases have little to do . . . with suspicions that regulatory programs have been captured by special interests.").

226. Dillon's Rule is defined *supra* note 68.

227. *See* David Schleicher, *The City as a Law and Economic Subject*, 2010 U. ILL. L. REV. 1507, 1549–54 (2010) (explaining that Dillon's Rule responded to "subsidy competition" among municipalities that "reduce[d] the efficiency of industry and transportation" and left cities with "enormous tax burdens" when ventures they subsidized failed); *see also* Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1110 (1980) (explaining Dillon's Rule aimed "both to protect government from the threat of domination by private interests and to protect the activities of the private economy from being unfairly influenced by government intervention."); Daniel J. Gifford, *Federalism, Efficiency, the Commerce Clause, and the Sherman Act: Why We Should Follow a Consistent Free-Market Policy*, 44 EMORY L.J. 1227, 1248–49 (1995) ("Commentators have supplied a rationale for Dillon's rule: that probabilities for corruption at the municipal level are often significant.").

228. Briffault, *Our Localism*, *supra* note 68, at 8 ("[S]tates [g]enerally followed [Dillon's Rule] from the late nineteenth century through the middle of this century.").

229. *See* Frug, *supra* note 227; Gifford, *supra* note 227.

230. *See* Barron, *Home Rule*, *supra* note 158, at 2281.

Capture concerns also fail to justify municipalities' lesser *Parker* immunity because capture is probably not a proper concern for a doctrine grounded in federalism. *Parker*'s presumption against preemption is one that courts use to respect states' traditional authority to govern themselves. And this presumption is one the Court has applied to shelter both state and municipal laws from preemption (in contexts outside state action doctrine).[231] It is somewhat empty for federal courts to agree to respect states' and municipalities' role in governing themselves only insofar as federal courts think states and municipalities are governing themselves well.

True, insofar as *Parker* immunity's legitimacy is based on state and municipal officials' accountability to their constituents, one might think state action doctrine should waive deference to a captured government because that government is not truly accountable to those constituents.[232] Yet even were interest group capture a proper concern for state action doctrine, the Court's own state action doctrine cases recognize that municipal officials are meaningfully electorally accountable and unlikely to stand as fronts for private price-fixing schemes. [233]

And it would be strange to grant municipalities lesser immunity than states due to capture concerns when there is no strong reason to think municipalities are more susceptible to capture than states. Interest group theorists present countervailing reasons to think either municipal or state governments are comparatively more susceptible to capture. Arguments that municipalities are more susceptible stress "the relative capacity of large polities to generate a multiplicity of interest groups" that can offset or dampen each other's influence.[234] Arguments that state governments are more susceptible stress that state officials depend on campaign donations more than local officials do.[235] They also stress that transportation costs and more extensive procedural hurdles for state legislation impose costs that impede less-financed groups' ability to effectively gather information and lobby at the state level.[236]

One might object that, even if states and municipalities are equally capturable, capture concerns warrant state action doctrine's subordinating municipalities to the state insofar as this subordination requires interest groups to capture two governments rather than one before effecting a municipal competitive restraint. But whatever accountability benefits this second layer of protection adds are likely

231. *See* cases cited *supra* note 137 (applying this presumption to municipal laws).

232. *But see* Lopatka, *supra* note 29, at 64 (arguing that political process failures are not proper concerns for state action doctrine, because voters can ultimately hold officials' accountable since "the political process is designed to enlighten" voters about officials' decisions that injure them).

233. *See supra* notes 86–90 and accompanying text.

234. Clayton P. Gillette, *Local Redistribution, Living Wage Ordinances, and Judicial Intervention*, 101 NW. U. L. REV. 1057, 1115 (2007) [hereinafter Gillette, *Local Redistribution*].

235. *Id*. at 1115–16 ("It is . . . difficult to generalize about whether local or state legislatures are more susceptible to lobbying by dominant interest groups.").

236. Lopatka, *supra* note 29, at 64.

outweighed by the cost of stymying municipal laws that receive support from constituents outside some narrow interest group that captured local officials.

### *B. The Capture Argument's Practical Failure*

States police even home rule municipalities' laws for capture in various ways, including public purpose requirements, single subject requirements, and private law limits for municipal laws.[237] These tools give state courts substantial discretion to invalidate municipal laws that state courts determine serve impermissibly narrow interests.[238]

#### *1. Single Subject Requirements*

Single subject requirements require that any particular local ordinance address a single subject only. These clauses are common in state constitutions.[239] Their purpose is to prevent narrow interests from using logrolling[240] to achieve ends voters do not broadly support.[241] Because the subject of any given law can be defined at various levels of generality, state courts have substantial discretion to decide whether or not a law violates a single subject clause. Courts sometimes use these clauses as vehicles for invalidating laws courts judge to serve unduly narrow interests.[242]

#### *2. Public Purpose Requirements*

Public purpose requirements require that local laws benefit public welfare generally rather than some narrow private interest.[243] Forty-six states have public purpose requirements in their constitutions and the remaining states impose such requirements through rules their courts have created.[244] State courts frequently

237. Gillette, *Local Redistribution*, *supra* note 234, at 1091 ("The common theme among state constitutional provisions such as public purpose requirements . . . and single-subject requirements is that they all constrain the capacity of state and local governments to enact rent-seeking laws.").

238. *Id*. at 1088, 1091 ("Arguably . . . provisions and the doctrines to which they give rise invite judicial inquiry into legislative processes in ways that would raise significant skepticism if practiced by federal courts.").

239. Diller, *supra* note 163, at 1164.

240. That is, piggybacking a provision that serves narrow interests onto legislation the other provisions of which have broader support.

241. They do so in at least two ways. First, they improve the electorate's knowledge by improving legislators' ability to think through and discuss each separate bill on its merits. In this way single subject requirements enhance the transparency that bolsters the electoral accountability that *North Carolina Bd*. invoked to distinguish municipalities from anticompetitive licensing boards. Second, single subject requirements obviate the need for voters to accept their representatives' serving narrow agendas as a price for enacting policies with broader support.

242. *See, e.g.*, Am. Petroleum Inst. v. S.C. Dep't of Revenue, 382 S.C. 572, 577 (2009).

243. *See, e.g.*, Maready v. City of Winston-Salem, 467 S.E.2d 615, 624 (N.C. 1996).

244. Dale F. Rubin, *Constitutional Aid Limitation Provisions and the Public Purpose Doctrine*, 12 ST. LOUIS U. PUB. L. REV. 143, 143 n.1 (1993); BRIFFAULT & REYNOLDS, *supra* note 103, at 677.

interpret public purpose requirements quite permissively,[245] but do sometimes hold that these requirements invalidate municipal legislation.[246]

*3. Private Law Limits*

Private law limits in state constitutions offer state courts another tool for invalidating local laws the court determines to have arisen out of capture.[247] States typically phrase these limits along the following lines: "This grant of home rule powers shall not include the power to enact private or civil law governing civil relationships except as incident to an exercise of an independent county or city power."[248] Granted, the conventionally understood purpose of private law limits is to prevent intrastate fragmentation of contract, tort, and property law[249]—not to prevent laws that serve narrow interests. But the broad discretion[250] courts retain to interpret these limits allows courts to invalidate laws they disapprove of for capture reasons.[251]

And state courts, as shown below, have used private law limits to invalidate municipal competitive restraints. Capture concerns might not have motivated these courts. But these decisions show that private law limits give state courts another tool for invalidating municipal laws the courts deem inconsistent with state policy, and thus help render state action doctrine's clear articulation requirement superfluous.

Rent control provides one example. *Fisher v. City of Berkeley*[252] rejected the claim that the Act preempted a municipal rent control ordinance.[253] Yet *Fisher* has not prevented state courts from using private law limits to invalidate rent control regulations. Massachusetts' high court held that municipal rent control ordinances—absent a specific state delegation of power—violated the state's private law limit on municipal home rule authority.[254]

245. *See, e.g.*, *Maready*, 467 S.E.2d at 624 (noting trend of broadening scope of what constitutes a public purpose).

246. *E.g.*, City of East Orange v. Bd. of Water Comm'rs, 191 A.2d 749, 752–56 (N.J. Super. Ct. App. Div. 1963).

247. Some states impose constitutional or statutory private law limits on municipalities' home rule authority. Other states judicially construct private law limits. Schwartz, *supra* note 177, at 702 (noting some such states).

248. BRIFFAULT & REYNOLDS, *supra* note 103, at 372.

249. Schwartz, *supra* note 177, at 747.

250. BRIFFAULT & REYNOLDS, *supra* note 103, at 374 ("[I]t is often difficult to distinguish between the 'private' law of contracts, torts, and property, and 'public' health and safety ordinances that indirectly affect tort, contract, and property rights.").

251. *Cf.* Schwartz, *supra* note 177, at 701–02 (providing example of state court leveraging private law exception to invalidate law the court deemed unfair).

252. 475 U.S. 260 (1986).

253. *Id.* at 270.

254. Marshal House, Inc. v. Rent Review & Grievance Bd., 260 N.E.2d 200, 206–07 (Mass. 1970).

Private law limits also let state courts invalidate other laws that allegedly sanction price-fixing, such as municipal ordinances permitting collective bargaining for misclassified workers. At least two Louisiana Supreme Court justices would have invalidated New Orleans' livable wage ordinance as violating the state's private law limit—an issue the majority opinion did not reach. One justice reasoned that the ordinance violated Louisiana's private law limit because the ordinance "impermissibly seeks to 'govern' the private employment relationship because it modifies existing rights and obligations between the parties to the relationships, directly and unavoidably affecting the ability of the parties to negotiate price."[255] Since ordinances letting putative independent contractors collectively bargain affect the ability of such workers to negotiate wages with firms, a state court could possibly use similar reasoning to hold the ordinance violates any private law limit the state imposes on municipal regulation.[256]

### *C. The Capture Argument's Failure Summarized*

We should not assume Congress, to guard against interest group capture, would have intended to condition municipalities' *Parker* immunity on either state action doctrine's clear articulation requirement or on the state government's supervision of municipal hybrid restraints. That assumption would contradict *Hallie* and *North Carolina Board*'s explanations that municipal officials are meaningfully accountable to these officials' electorate. And that assumption is in tension with the federalism concerns that underpin *Parker*'s presumption against preemption.

## V.
## CONCLUSION

Workers whom companies classify as independent contractors face a double bind under current law. First, the law does not entitle these workers to crucial employment law and social safety net protections that workers classified as employees receive. Second, the law creates barriers to these workers' use of collective action (through a union or otherwise) to improve working conditions. Workers' rights advocates have drawn attention to Uber's and Lyft's practices of classifying their workforce as independent contractors in part because Uber and Lyft embody a burgeoning business model that threatens to increasingly strip

255. New Orleans Campaign for a Living Wage v. City of New Orleans, 825 So. 2d 1098, 1118 (2002) (Weimer, J. concurring).

256. But there are strong reasons to think the court would err in so concluding. For at least two reasons, a court should not extend the Louisiana Supreme Court justice's reasoning to deem an ordinance permitting workers to collectively bargain to violate a private law limit. First, workers would jointly negotiate the agreement with the firm. The ordinance would thus not deprive any private parties of their ability to negotiate wages. Second, workers could always vote to deunionize and return to an employment relationship where they individually negotiate with the firm (or, more realistically, accept the wages the firm sets).

workers in low-wage and contingent workforces of employment law protections, social safety net protections, and rights to form labor unions.

Current labor law[257] and antitrust law provides states and municipalities one tool to push back on this business model: state and municipal governments can create collective bargaining structures for workers whom companies classify as independent contractors. That is, these governments can via legislation authorize these workers to unionize. But the rules that federal courts currently use to decide whether the Sherman Act preempts a municipal law unnecessarily limit municipalities' ability to create these collective bargaining structures. Those rules shield municipalities less than states from federal preemption. This impairs municipalities' ability to let these workers unionize when political will to do so exists at only the municipal, not state, level.

There is no good basis for these rules to treat municipalities differently. Three arguments that the Court or commentators have invoked to explain this treatment— arguments based on claims that (1) municipalities are not sovereign, (2) municipal officials are more able than state officials to enact anticompetitive regulations that impose costs on non-residents, to whom these officials are not accountable, and (3) municipal officials are susceptible to serving powerful special interests at other constituents' expense—all fail to justify the rules' distinction between municipalities and states.

257. *But cf*. *supra* note 23.